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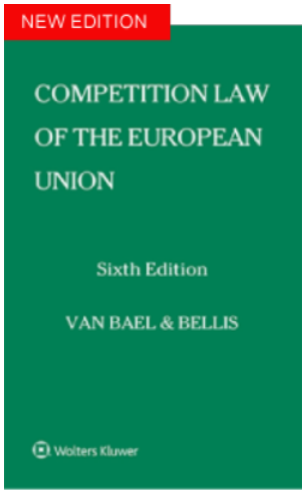
Legal 500 (2020)

December 2021

VBB on Competition Law

Highlights



Jurisdictions covered in this issue

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FOREIGN DIRECT INVESTMENT

– NATIONAL LEVEL –

UNITED KINGDOM

The new UK Foreign Investment regime – "the biggest shake-up in 20 years"

What is new?

On 20 December 2021, the UK government published an open letter to businesses providing more clarity on its upcoming national security and investment regime. The new legal framework, which the UK government calls "the biggest shake-up in 20 years of the UK's system for screening investments", came into force on 4 January 2022. Nevertheless, the UK government's letter also reassures investors that the UK continues to welcome foreign investment and states that the regime is aimed to block "only a small minority of acquisitions" that pose a potential risk to the UK.

This follows a previous update from 15 November 2021 providing a new set of guidance, which complements draft statutory instruments and guidance notes published earlier this year, and consists of: (i) guidance on notifiable acquisitions which provides further clarity on the economic sectors covered by the regime; and (ii) practical information on how to prepare for the new rules and guidance on the notification and review processes. The entire collection of relevant guidance documents is available here.

What is covered?

The new regime which is established by the National Security and Investment Act 2021 (the "NSI Act") provides the UK government with wide powers to scrutinise transactions that may pose a risk to the UK's national security.

The new regime focuses on the impact of transactions in 17 key sectors of the UK economy which include industries not traditionally subject to heavy FDI scrutiny, ranging from artificial intelligence and data infrastructure to communications and transport.

Enforcement powers

The NSI Act focuses on acquisitions and consolidations of "control" where the threshold is set as low as 25%. Moreover, the UK government will also be able to call-in acquisitions of shareholdings below this threshold if the acquirer obtains "material influence" over the target (similar to material influence under the UK merger control regime). It should be noted that there are no *de minimis* thresholds in relation to the value of the transaction, so the expectation is that the new regime will not only cover high-profile or high-value deals.

If the transaction falls within any of the 17 sectors, a mandatory notification may be needed. Parties will also have to consider voluntary notifications for certain acquisitions given that the UK government will have "call-in" powers to scrutinise deals outside the 17 key sectors identified.

Notifications under the new regime will be reviewed by the recently established Investment Security Unit ("ISU") within the Department for Business, Energy & Industrial Strategy ("BEIS"). The ultimate decision maker will be the Secretary of State for BEIS. The ISU is already operational and can be contacted for informal consultation at investment.screening@beis.gov.uk.

Having reviewed the transaction, the UK government will be able to block it (or approve it subject to conditions) if it believes that it poses a risk to national security. If the transaction has already been completed, the NSI Act provides for the option to unwind it.

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How long is it going to take?

Each notification made to the ISU will be reviewed within 30 working days. If, following that initial review, the transaction is called in for a more detailed national security assessment, the ISU will have another 30 working days to complete the assessment (which could be extended by another 45 working days in certain circumstances). However, dealmakers should also account for "pre-notification" discussions, which could vary significantly depending on the nature of the transaction and the parties involved.

When is it starting?

Although the NSI Act came into force on 4 January 2022, the UK government's call-in power extends to any deal which has closed since 12 November 2020 and may give rise to national security concerns. The call-in power is subject to certain time limits: either up to six months after the commencement of the NSI Act, or up to six months after the date on which the UK government becomes aware of the transaction (whichever is later). The latter period has a "longstop" date, namely it is limited to five years after completion of the transaction.

Implications and outlook

The introduction of the NSI Act in the UK is part of a global trend towards tighter control of foreign investment (as is the case in other jurisdictions, such as the US and across Europe). The UK regime is expected to be quite robust and similar in effectiveness to the US CFIUS review framework.

The sanctions for non-compliance with the NSI Act include financial penalties of up to 5% of annual worldwide turnover (or up to £10 million, whichever is greater) and also criminal liability (imprisonment of up to 5 years). With that in mind, companies and investors, even those with a limited UK presence, will need to be aware of the new rules and factor them into their acquisition strategies.

Dealmakers should already be taking account of the new UK regime in any current negotiations and should be carrying out the necessary analysis to determine whether their transaction could be potentially caught by the NSI Act. As of 4 January 2022, when the NSI Act came into force, investors should be prepared to make a mandatory notification (if required), consider a voluntary notification, or consider the risks under the UK government's call-in powers, and account for the review process in the overall timeline of their transaction.

In cases triggering the mandatory notification requirement, completion of the deal will be subject to obtaining clearance and approaching the ISU at an early stage would be highly recommended.

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ABUSE OF DOMINANT POSITION

– NATIONAL LEVEL –

ITALY

Italian Competition Authority imposes record-breaking fine on Amazon for "self-preferencing" its own logistical services

On 9 December 2021, the Italian Competition Authority ("ICA") adopted a decision finding that the Amazon group ("Amazon") had violated Article 102 TFEU and harmed competing providers of e-commerce logistics services by tying the right of retailers on the Amazon marketplace to participate in Amazon's Prime programme to the retailers' agreement to use Amazon's own logistical service (so-called "Fulfilment by Amazon" or "FBA"). The ICA imposed a fine of over € 1.1 billion on Amazon in respect of this infringement.

Interestingly, although it would have been sufficient to characterise Amazon's conduct as a standard tying strategy, the ICA applied the reasoning developed by the European Commission ("Commission") in *Google Shopping* and framed its case around a self-preferencing theory of harm. The ICA followed this approach even though elements that were key to the Commission's self-preferencing analysis in *Google Shopping* were not present in the ICA's *Amazon* case. This only highlights the concerns expressed after *Google Shopping* that self-preferencing is a loose theory of harm that lacks a clear conceptual framework and provides no objective standards to distinguish lawful self-preferencing strategies of dominant firms from those that raise concerns under Article 102 TFEU (see VBB on Competition Law, Volume 2021, No. 11 on *Google Shopping*).

From a procedural perspective, it is interesting to note that the Commission also opened a probe into Amazon regarding "BuyBox" and Prime last year but excluded Italy from the geographical scope of its investigation to allow the ICA to pursue its investigation. In October 2021, the European General Court dismissed Amazon's action seeking to combine the Commission's and ICA's investigations. As the parallel investigations were permitted to go forward, it will be interesting to see whether the Commission will follow the ICA's use of a self-preferencing framework or adopt a different approach to assess the effects of Amazon's conduct.

The relevant markets and Amazon's dominance

The ICA found that Amazon holds a (super) dominant position in the national market for intermediation services on marketplaces. Consistently with other recent cases (see VBB on Competition Law, Volume 2021, No. 11 on *Apple/Amazon*), the ICA adopted a very narrow – yet convenient – market definition, and excluded the offline sales channel as well as proprietary web-shops, price comparison websites, comparison-shopping engines and social media, from the relevant product market. Amazon's conduct was found to have effects on both the national market for e-commerce logistics services and that for intermediation services on marketplaces.

Amazon's self-preferencing practices constitute an abuse

The ICA established that only retailers who agreed to use Amazon's own logistical service (so-called "Fulfilment by Amazon" or "FBA") had the right to participate in Amazon's Prime programme. Prime was considered particularly important to retailers as it provided important benefits, including: (i) a higher probability to be included in the "Buy-Box" (i.e., the box displaying the offer that is considered by Amazon to be the most suitable for the user); (ii) the possibility of participating in Amazon's exclusive events (e.g., Amazon Prime Days, Black Friday etc.); and (iii) a suspension of the metric system used to evaluate retailer performance on Amazon's Italian marketplace (*Amazon.it*), where a low performance score could lead to exclusion from the marketplace.

The ICA also considered that a third-party seller that was equally effective as those that had signed up for FBA would not get access to the Prime benefits if it decided to use a third-party logistics provider. It thus concluded that Amazon treated third party retailers differently and in a way which was not based on either their performance or other objective criteria. In this context, the ICA noted that – until recently – Amazon had not evaluated (using clear, pre-de-

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termined and non-discriminatory criteria) whether logistic services provided by Amazon's competitors would be equivalent to Amazon's FBA services.

The ICA corroborated its findings by referring to internal documents showing that inducing retailers to use the FBA services constituted a crucial part in Amazon's business model. The ICA considered such documents as evidence of Amazon's abusive intent.

From a legal perspective, it is noteworthy that the ICA qualified the conduct as self-preferencing, referring to the Commission's decision in *Google Shopping*. Amazon's abusive self-preferencing behaviour consisted in having tied the use of its own logistical service to the access to Prime's indispensable functionalities for success on Amazon's Italian marketplace.

Yet, the ICA also found that Amazon had engaged in a tying strategy by making access to Prime conditional on the use of its FBA service without credible business or technical reasons, or any efficiency justification.

This of course raises the question whether the ICA's use of the "self-preferencing" label adds anything meaningful to the analysis: any tie includes a self-preferencing aspect – the supplier will self-preference its tied product as only customers accepting the tying product will also get the supplier's tied product, whereas other customers will not. But whether there is harm to competition does not depend on the use of the term "self-preferencing": rather, it will depend on whether competitors on the tied product market are foreclosed.

Last, the ICA rejected Amazon's argument that the FBA's "objective superiority" in terms of quality (speed and reliability of the deliveries) could justify the conduct as there would be no imposition of dissimilar conditions in similar situations as would be required under Article 102(c) TFEU. The ICA found that Amazon had failed to prove that FBA was superior to all other logistics service providers. In this context, the ICA pointed out that in 2021 Amazon introduced a system to evaluate the quality performance of competing logistics service providers. In light of the results of this evaluation, the ICA concluded that the fact that a limited use of competing logistics service providers was not an indication of their lower quality standards, but a consequence of Amazon's abusive conduct.

Therefore, the ICA concluded that the different treatment of third party service logistics providers by the dominant undertaking in the absence of any valid justification ran contrary to competition on the merits.

The assessment of the effects

The ICA also analysed the effects of Amazon's conduct on a number of markets.

First, it found that Amazon's tying practice had reduced the third-party sellers' freedom to choose the logistics services appropriate to their own needs. Limiting a customer's freedom of choice is, of course, inherent in tying arrangements and most other contractual arrangements, and cannot be equated with harm to competition.

Moreover, the ICA found that the conduct also enabled Amazon to extend its power on the market for e-commerce logistics services by preventing the emergence of more efficient logistics operators. In this context, the ICA relied on the finding that Amazon had more than doubled its share of e-commerce package deliveries in three years and that FBA deliveries accounted for 60-70% of all such deliveries in 2019. While these data show that Amazon successfully leveraged its marketplace success into logistics services, it provides little support for the conclusion that Amazon harmed the ability of equally or more efficient rivals to compete in the market overall.

The most interesting, and probably most coherent, theory of harm focused on the effects on competing marketplaces offering intermediation services. In this respect, the ICA found that Amazon's tying practices would reinforce its dominant position on the market for intermediation services offered by marketplaces. This would be so because retailers would be disincentivised to sell through multiple platforms as multi-homing would *de facto* increase their logistics costs.

Fine and remedies

Based on the above, the ICA concluded that Amazon's conduct constituted a serious violation of the competition rules: the gravity of the infringement was increased by the absence of effective (actual or potential) competition on the market for intermediation services on marketplaces and by the conduct's capability to discourage (if not, elim-

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inate) competition in the relevant markets for intermediation services on marketplaces and e-commerce logistics services. Consequently, the ICA imposed a record-breaking fine of € 1.1 billion. In the calculation, the ICA referred to the turnover in both relevant markets for intermediation services on marketplaces and e-commerce logistics services. Absent any mitigating circumstances, the amount was further increased by 50% to ensure that the fine would have deterrent effects.

Finally, it should be noted that the ICA has also imposed a series of obligations on Amazon. Among others, it obliged the dominant group to introduce fair and non-discriminatory standards for third-party sellers to qualify for Prime. These standards would enable third-party sellers to use logistics services provided by Amazon's competitors in order to meet the standards required to qualify for Prime.

Observations

As highlighted, the ICA's decision will reinforce concerns that a self-preferencing theory of harm lacks clear boundaries and may result in increased legal uncertainty and unpredictability. As the General Court noted in *Google Shopping*, "self-preferencing" is a general label that encompasses a variety of strategies, including those that should be properly analysed under more established analytical frameworks. The General Court also noted that leveraging into adjacent markets, even by dominant firms, is not unlawful in the absence of evidence of harmful effects. Thus, self-preferencing should not be used by competition authorities to get around more demanding evidentiary requirements that come with more established analytical frameworks. In Amazon's case, for example, if the dominant firm's conduct consists of a tying strategy, a finding of an Article 102 infringement should be based primarily on robust evidence of harmful effects in the tied product market. If rivals can continue to compete in that market (which apparently they did), there is no harm to competition. The self-preferencing label does not add anything to this – necessary – analysis.

Amazon has already announced it will appeal as it is in "profound disagreement" with the ICA's decision and, in particular, considers that the fine and remedies "*are unjustified and disproportionate*". It remains to be seen whether the assessment included in the decision will be upheld by the national courts.

UNITED KINGDOM

Excessive pricing in the pharmaceutical sector: the *Advanz Pharma* case on thyroid tablets

On 15 December 2021, the UK Competition and Markets Authority ("CMA") published the non-confidential version of its decision in *Advanz Pharma*, which provides further insight into its approach to dealing with excessive pricing. As reported earlier (see VBB News, July 2021), on 29 July 2021, the CMA imposed fines totalling more than £101 million on Advanz Pharma and the previous owners of the business, Cinven and HgCapital, for charging excessive prices for liothyronine tablets – a treatment for hypothyroidism.

This most recent decision reflects the CMA's focus in recent years on high prices in the pharmaceutical sector, with the leading case being *Flynn/Pfizer*.

The two-pronged test for excessive pricing

As a preliminary observation, the CMA recalled that "*there is no single method or 'way' in which an unfair pricing abuse can be established*". That said, it used the standard two-limb test first established in *United Brands* as the basis of its analysis.

In *United Brands*, the European Court of Justice stated that the excessive nature of a price could be determined "*inter alia*" based on the following two-limb test:

1. the difference between the costs actually incurred and the price actually charged is excessive ("Excessive Limb"); and

2. a price has been imposed which is either unfair in itself or when compared to competing products ("Unfair Limb").

In the present case, the CMA applied this test to find that Advanz's prices were excessive and unfair.

Excessive Limb: The CMA rejected Advanz's argument that the assessment of the excessiveness should be done on a portfolio basis, i.e., costs, prices, and benefits should be assessed not on the basis of an individual product – in this case liothyronine tablets – but on the basis of a portfolio of

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medicines because, according to Advanz, the pharmaceutical industry allocates costs and sets prices on the basis of portfolios rather than individual products. Instead, the CMA used a cost-plus analysis, comparing Advanz's costs and the prices it charged. As recalled by the CMA, the UK Competition Appeal Tribunal ("CAT") held in *Napp* that "*it is not appropriate, when deciding whether an undertaking has abused a dominant position by charging excessive prices in a particular market, to take into account the reasonableness or otherwise of its profits in other, unspecified, markets comprised in some wider but undefined "portfolio" unrelated to the market in which dominance exists.*"

More specifically, the CMA compared the selling price to the cost of production plus a "*reasonable*" rate of return (together, referred to as "*cost-plus*"), noting that there is not one particular approach to the determination of the "*plus*" part of the cost-plus calculation. The CMA noted that, in 2009, the average selling price of the liothyronine tablets was £20.80 and the cost was £2.08, so that the differential (i.e., the difference between prices charged and cost plus) was £18.72 (900%); while, in 2017, the average selling price of the liothyronine tablets was £247.77 and the cost was £9.78, so the differential was £237.99 (2434%).

The CMA also explained that, even when applying alternative approaches regarding the allocation of common costs, the valuation and amortisation of product rights and a higher rate of return, the differential has consistently remained significant.

Unfair Limb: The CMA then found that Advanz's prices were not only excessive in relation to its costs, but also unfair. According to the UK Competition Appeal Tribunal ("CAT") in its *Flynn/Pfizer* judgment, there are two alternatives that can be used in applying the Unfair Limb of the test, either: (i) determining the prices to be unfair in themselves; or (ii) finding the prices to be unfair relative to competing products (see VBB News, June 2018).

In the present case, the CMA decided to use the first alternative, i.e., to determine whether the price was unfair in itself. The CMA considered that "*given the alternative nature of the Unfair Limb*" it did not have to assess whether Advanz's prices were unfair when compared to competing products, but the CMA recognised that it had a duty to evaluate fairly any comparators put forward by the parties. Therefore, Advanz put forward several comparators, including post-entry prices (which represent actual prices paid by customers after the entry of Morningside and Teva in August and September 2017, respectively). The CMA recognised that such prices may "*provide a* prima facie *valid comparator*". On one hand, the liothyronine tablets manufactured by Morningside and Teva are identical to those manufactured by Advanz and customers do not appear to distinguish between them. On the other hand, the CMA observed that post-entry prices were charged only after the period under investigation (from at least 1 January 2009 to 31 July 2017) and thus were not in competition with Advanz's prices during the period under investigation.

Nonetheless, the CMA explained in a second step that it was necessary to establish whether the post-entry prices constitute a "*meaningful comparator*". It concluded that the prevailing post entry-prices remained contaminated by Advanz's abusive exercise of market power in that the competitors took into account Advanz's excessive prices in setting their own prices. For instance, in February 2021, the CMA observed that the prevailing post-entry price had not reached the effectively competitive price level that would be expected in a mature market for the supply of a generic medicine (i.e., in a market where the effect of the market power held by the original incumbent before the entry of competing manufacturers has been eliminated through the process of competition and in which effectively competitive prices prevail).

To reach the conclusion that Advanz's prices were unfair in themselves, the CMA looked at: (i) the substantial disparity between Advanz's prices and the economic value of the liothyronine tablets; (ii) the absence of alternative liothyronine tablet suppliers, lack of regulatory constraint, high demand inelasticity and high barriers to entry, which enabled Advanz to sustain prices that bore no relationship to the economic value of liothyronine tablets; (iii) the commercial purpose of Advanz's pricing strategy; (iv) the absence of material increase in production costs and the absence of meaningful innovation; (v) the significant adverse impact that Advanz's price increases had on the NHS and patients; and (vi) the lack of any independent or objective justification.

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On 14 October 2021, the parties lodged an appeal before the CAT (see here). Both the CMA's application of the Excessive Limb and Unfair Limb tests are being challenged, notably it is considered that the CMA failed to take into account post-entry prices as a relevant comparator. This appeal will provide yet another opportunity to see how excessive pricing tests should be applied.

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CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission fines ethanol producer € 20 million under the cartel settlement procedure

On 10 December 2021, the European Commission issued a press release in which it reported that it had fined Spanish ethanol producer, Abengoa S.A. and its subsidiary Abengoa Bionenergía S.A. (together, "Agengoa"), € 20 million for participating in a cartel concerning the wholesale price formation mechanism in the EU ethanol market between 6 September 2011 and 16 May 2014. The decision was adopted under the settlement procedure.

The product concerned is ethanol, an alcohol made from biomass that can be used as a biofuel for motor vehicles when mixed with gasoline. The Commission's investigation began with unannounced inspections at the premises of several ethanol producers in May 2013, October 2014 and March 2015 before a formal investigation was opened in December 2015. Statements of Objections were sent to Abengoa and Alcogroup in July 2018.

The Commission's investigation was centred around the activity of S&P Global Platts ("Platts"), a company that provides price assessments for different commodity markets, including bioethanol. Platts established ethanol benchmark prices, which are used as reference prices by the industry, on the basis of the trading activity at the port of Rotterdam and the Amsterdam-Rotterdam-Antwerp barge market – the most important trading locations in Europe. The benchmark prices were set by Platts based on a price assessment process during the so-called "Market on Close (MOC)" window, which is the period between 16:00 and 16:30 London time.

According to the Commission, Abengoa artificially increased and maintained the levels of Platts' ethanol benchmarks. Abengoa also allegedly limited the supply of ethanol delivered to the Rotterdam area to reduce the volumes available for delivery in the MOC window. Finally, the Commission found that Abengoa's ethanol traders had illegal contacts with individuals at other companies, typically through chats, in order to coordinate ethanol trading activities with them before, during and after the MOC window.

When setting the amount of the fine, the Commission took account of the value of sales achieved by Abengoa in the EEA of certain physical fuel-grade ethanol referenced to Platt's ethanol benchmarks, the serious nature of the infringement, its geographic scope and its duration. The Commission granted Abengoa a fine reduction following a claim for inability to pay under point 35 of the Fining Guidelines and a 10% fine reduction under the Settlement Notice.

The other company targeted by the investigation, Alcogroup, decided not to settle with the Commission, but to pursue the standard infringement procedure.

– NATIONAL LEVEL –

FRANCE

Paris Court of Appeal overturns decision and ends French "cheque" saga proceedings

On 2 December 2021, the Paris Court of Appeal overturned the 2010 decision of the French Competition Authority ("FCA") fining eleven banks a total of € 384.9 million for agreeing on interbank fees during the transition to a new digital cheque processing system.

As the Paris Court of Appeal noted in its judgment, to date, no other competition authority has ruled on a fee of the type at issue in these proceedings.

The context

At the time of the switch to the Euro in 2000, banks decided to modernise the cheque system and computerise their exchanges to reduce the time and costs allocated to man-

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ually process cheques. In this context, the FCA found that the main French banks had met and colluded to agree on the functioning of the new system. In particular, the FCA found that the banks agreed in February 2000 ("2000 Agreement") to establish a fee of € 0.043 per cheque paid by the remitting bank to the drawee bank, known as the Exchanges Cheque-Image Fee (ECIF), as well as eight other fees for related services. The ECIF was intended to compensate the drawee bank for its cash loss insofar as drawee banks were debited earlier due to the new system and therefore could not invest the money of their clients' cheques for the same duration as they could under the previous regime. Fees for related services were intended to pay for new services rendered by one category of banks to another and to compensate for cost transfers resulting from the computerisation of the cheque exchange system. In 2010, the FCA adopted its infringement decision in relation to the 2000 Agreement.

In a 2017 judgment, the Paris Court of Appeal confirmed the FCA's decision but reduced the fines imposed on certain banks. However, in January 2020, the French Supreme Court annulled the judgment of the Paris Court of Appeal for having adopted an extensive interpretation of the concept of restriction of competition by object. In its judgment, the Supreme Court relied on the case law of the European Courts framing the concept of restriction by object, including *Cartes Bancaires* (Case C-67/13 P) and *Maxima Latvija* (Case C-345/14), as well as the opinion of Advocate General Bobek in *Budapest Bank* (Case C-228/18). According to that case law, the concept of restriction of competition "by object" had to be interpreted restrictively. The Supreme Court remanded the case to the Paris Court of Appeal.

There was no agreement having a sufficient degree of harmfulness to competition

In its recent judgment on remand, the Paris Court of Appeal examined whether the agreement could be considered as a restriction by object. Not surprisingly, following the Supreme Court's judgment, the Paris Court of Appeal noted that the concept of restriction by object had to be interpreted restrictively and that it could only be applied to certain types of coordination between undertakings that reveal a sufficient degree of harm to competition – in which case an examination of their effects is not necessary.

The Court observed that the establishment of the ECIF was linked to the reduction of the interbank settlement period for cheques – these two elements being interdependent. A shorter interbank settlement period had to be associated with a fixed commission to be paid by the remitting banker. Conversely, maintaining the interbank settlement period under the previous regime, which avoided any risk of disrupting the existing cash flow balances between banks, precluded the fixing of such a commission.

The Court then noted that the 2000 Agreement did not contain any clause requiring the banks to pass on the commission to their customers. Although, during the negotiations with a working group, such passing-on had been envisaged, it was only an option and not an obligation. The banks were thus free to determine, in the context of their commercial relationships with their customers, whether and to what extent to pass on the fee.

In addition, the Court observed that the 2000 Agreement did not prohibit the banks from negotiating the principle of the bilateral commissions and their amount. Therefore, the banks remained free to determine, within the framework of a bilateral relationship, other interbank conditions than those provided for in the 2000 Agreement. Moreover, according to the Court, the legal and economic context was not such as to affect the lack of an anti-competitive objective of the commissions at issue (e.g., the introduction of the Euro in 2002).

The Court concluded that the introduction of a multilateral interbank commission aimed at compensating, on a transitional basis, a cash flow imbalance caused by the dematerialisation of an interbank clearing system, does not fall within the scope of any agreement or practice whose harmful nature is proven and easily detectable in the light of the decision-making practice of competition authorities based on the principles set down in the European Court of Justice's case law.

As regards the other fees for related services, the Court also rejected a restriction by object approach.

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There was no agreement having the effect of preventing, restricting or distorting competition

The Paris Court of Appeal then assessed whether the 2000 Agreement was restrictive of competition by virtue of its effects. It was recalled that competition should be assessed within the actual context in which it would occur in the absence of the agreement in dispute.

First, the Court established a link between faster interbank settlement and the ECIF: the banks chose to set up the ECIF to address the consequences of having computerised their cheque exchange which brought forward the interbank settlement date. As a result, the counterfactual could not be limited to the play of competition that would have existed in the absence of the ECIF alone, as the FCA had held, but should have been what would have existed in the absence of the 2000 Agreement, insofar as the banks decided not to introduce the ECIF and to reduce the interbank settlement time.

Second, the Court explained that the effects of the 2000 Agreement had to be assessed not only in light of the ECIF, but also in light of moving forward the interbank settlement date decided by the 2000 Agreement and the passing on of this acceleration to remitting customers.

To analyse the effects of the ECIF on prices, the Court followed the method used by the FCA, namely, to make a distinction based on the categories of remitters (i.e., the Treasury, companies remitting a very large volume of cheques, and in particular companies in the retail sector, but also companies that are not billed directly for a cheque remittance service, and lastly private individuals).

After analysing each category of remitters, the Court found that it had not been established that the ECIF had any real effect on the prices of the cheque remittance service and, therefore, that it had effectively constrained the banks in their pricing policy.

As to the real effect of the ECIF in terms of a reduction in the offer on the cheque remittance market, the Paris Court of Appeal held that the evidence set out by the FCA did not establish that the ECIF had significantly reduced supply on the remittance market and, consequently, competition on that market.

Therefore, the Court concluded that it had not been established that the ECIF had the effect of distorting, restricting, or preventing normal competition between the banks.

Finally, as regards the effects of the other charges for related services, the Paris Court was very brief and considered that the unlawful nature of these charges could not be inferred from their potential effects on the price of the services concerned, since the agreement introducing them had been implemented and these charges were still applied.

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VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Court of Justice offers abstract guidance in Visma on customer priority clause in software distribution contract

On 18 November 2021, the European Court of Justice ("ECJ" or "Court") issued a preliminary ruling in a case referred by a Latvian court concerning the interpretation of Article 101(1) and (3) of the Treaty on the Functioning of the European Union ("TFEU") in relation to a clause in a software distribution contract (Case C-306/20, *Visma Enterprise SIA v Konkurences padome*).

The clause in question was included in contracts for the distribution of accounting software concluded by Visma Enterprise, formerly FMS Software and FMS ("Visma"). The clause required distributors to register potential sales transactions on a database maintained by Visma. The first distributor to register a contact with a potential customer was granted priority in completing a sale to that customer for a period of six months, provided the customer did not object. The Latvian Competition Authority ("LCA") had found this to amount to a customer sharing arrangement, which limited competition between distributors, and a restriction by object in violation of the provision of Latvian law equivalent to Article 101 TFEU. The LCA had imposed a fine (of around € 64,000) on Visma, but it did not hold the other parties to the agreements (i.e., the distributors) liable for the infringement, assessing that the infringement was committed at the initiative of Visma and noting the limited market power of the distributors in their relations with Visma. Visma appealed the decision of the LCA disputing its overly restrictive interpretation of the clause in question and advancing efficiency claims in its favour. After a series of intermediate rulings including by the administrative division of the Latvian Supreme Court, the Regional Administrative Court referred a series of questions to the ECJ concerning the interpretation of EU competition law.

While the matter had been decided by the LCA under Latvian national competition law and did not affect trade between Member States, the ECJ found jurisdiction in so far as the questions raised by the Latvian court related to the interpretation of Articles 101(1) and 101(3) TFEU and the underlying case concerned equivalent provisions of Latvian law. The ECJ, however, rejected jurisdiction in respect of questions related to the interpretation of the Vertical Agreements Block Exemption Regulation as there was no equivalent instrument under Latvian law.

Most of the substantive part of the ruling concerns the circumstances in which an agreement should be considered to restrict competition either "by object" or "by effect" under Article 101(1) TFEU. However, the Court did not provide an analysis of the clause at issue in the case, as it considered that both its meaning and its objectives were still in dispute. It therefore chose to leave it to the national court to resolve how the clause should be interpreted and limited itself to providing only general guidance on the factors that the national court would need to take into account in assessing whether a restriction amounts to either a by object or a by effect restriction. In so doing, the Court restated its recent case law, referring especially to its ruling in *Budapest Bank* (see VBB on Competition Law, Volume 2020, No. 4). The Court confirmed that, although the concept of a by object restriction must be interpreted narrowly and vertical agreements are often less harmful to competition than horizontal agreements, a vertical agreement can in certain circumstances amount to a by object restriction but only where, in the light of its wording, its objectives and its context, it can be regarded as posing a sufficient degree of harm to competition. The ECJ also confirmed that, in the context of a vertical agreement, a restriction on intra-brand competition is in principle only problematic when inter-brand competition is limited (referring, by analogy, to its 1977 ruling in *Metro I*). In this respect, the Court noted that Visma's market share was less than 30%. Similar confirmation of the key importance of inter-brand competition in assessing whether restrictions of intra-brand competition can infringe Article 101(1) TFEU is contained in the Commission's Guidelines on Vertical Restraints, thereby supporting the general proposition that vertical restraints should only be considered to restrict competition in limited circumstances.

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The Court also considered whether an agreement can be found to infringe Article 101(1) TFEU in circumstances where – as in the case at hand – the relevant competition authority attributed liability differently among the parties to the agreement (as noted above, only Visma was held liable and fined in the case at hand). The Court affirmed that this difference in treatment did not itself prevent the agreement from constituting an infringement, noting that the question whether or not an agreement infringes Article 101(1) TFEU is distinct from the derivative question of the attribution of liability and the imposition of penalties for such an infringement (which itself presumes that the conditions for finding an infringement have been established). The Court further distinguished the question of whether an agreement infringes Article 101(1) TFEU (in circumstances where liability is not attributed to all parties) from the question of whether an authority may hold only one party liable for an agreement which infringes Article 101(1) TFEU. The Court did not address this (important) second question in its ruling as it had not been asked to do so by the national court.

In conclusion, it is somewhat disappointing that this reference did not provide the ECJ with an opportunity to provide specific guidance on customer restrictions in vertical agreements (by, for example, considering alternative interpretations of the clause at issue), as there is little guidance on these restrictions under existing case law (other than in the narrow context of selective distribution). The ruling nonetheless provides important confirmation of the extent to which inter-brand competition may prevent vertical restraints from infringing Article 101(1) TFEU.

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INTELLECTUAL PROPERTY/ LICENSING

– NATIONAL LEVEL –

UNITED KINGDOM

UK Intellectual Property Office launches call for views on standard essential patents

On 7 December 2021, the UK's Intellectual Property Office ("IPO") launched a call for views on Standard Essential Patents ("SEPs") in order to better understand whether the current SEPs framework: (i) is functioning efficiently; (ii) supports innovation (particularly in light of the UK government's Innovation Strategy and Diversification Strategy); and (iii) strikes the right balance for all entities involved.

More specifically, the call for views will gather a wide range of evidence, including in relation to:

1. The relationship between SEPs, innovation and competition (including how these elements interrelate with one another);

2. The functioning of the SEPs ecosystem, and whether the current ecosystem strikes the right balance between the actors within it (for example, between licensors and licensees);

3. Transparency in the SEPs ecosystem (particularly concerning the declaration of patents essential to the standard, and the pricing of SEPs); and

4. The way in which legal and regulatory frameworks interact with users of the SEPs ecosystem (including, for example, the efficiency of SEPs licensing, the functioning of the patent framework and the effectiveness of FRAND litigation).

The call for views closes at 11.45pm (UK time) on 1 March 2022, and interested stakeholders should complete the prescribed response form and submit this to SEPcallforviews@ipo.gov.uk.

Once the call for views closes, the UK government will assess the responses it has received and publish a summary of these. The information obtained during the call for views will then – in due course – inform the UK government's decision as to any next steps on potential intervention that may be required.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

EU Parliament and Council adopt amendments to Commission's proposal for Digital Markets Act

On 15 December 2021, the European Parliament ("Parliament") adopted its position for negotiating the final text of the so-called Digital Markets Act (Regulation on contestable and fair markets in the digital sector)("DMA"), shortly after the Council of the European Union ("Council") had adopted its negotiating position on 25 November 2021. While both institutions are supportive of the proposed DMA and of the regulation of large digital platforms it envisages, important differences remain between their respective positions. To complicate things further, certain Member States adopted separate statements when the Council adopted its (supposedly common) position, signalling that on some issues they will support more far-reaching regulation than is reflected in the Council's position. The stage is now set for the inter-institutional negotiations which are scheduled to start between the Commission, the Parliament and the Council in early 2022.

Last year, the European Commission ("Commission") presented a proposal for a Digital Markets Act(see VBB on Competition Law, Volume 2020, No. 12). Since then, the Commission's text has been the subject of a wide debate in Europe, particularly concerning the scope of the DMA and the obligations it would impose on large digital platforms, but also the level of involvement of national competition authorities ("NCAs") in its enforcement (see VBB on Competition Law, Volume 2021, No. 6 and Volume 2021, No. 8 & 9). These issues also took centre stage when the Parliament and the Council discussed revisions and amendments to the Commission's proposal.

Gatekeeper designation

Whether the DMA should apply solely to the very largest platforms or also to so-called "runners-up" – such as EU-based Booking.com and Zalando – is one of the core questions that remains to be debated in the "trilogues" between the Parliament, the Council and the Commission. While the Council supports the Commission in targeting platforms with € 6.5 billion in annual EEA turnover and € 65 billion in market capitalisation, the Parliament proposed raising these thresholds to € 8 billion in annual EEA turnover and € 80 billion in market capitalisation in an explicit effort to only capture the so-called GAFAM, i.e., the US-based digital service providers Google (Alphabet), Apple, Facebook, Amazon, and Microsoft. Yet, even after the Council's vote, several governments – including Germany and the Netherlands, where Zalando and Booking.com are respectively headquartered – have insisted that the DMA should only target the largest platforms.

The initial positions also differ with respect to the criteria against which a platform service is considered an "important gateway" between business and end users: the Commission, with the Council's backing, considers that only *active* end and business users needed to be taken into account for this determination. The Parliament passed an amendment broadening the criterion to end users and business users generally. At the same time, the Parliament does not consider that merely visiting an online intermediation service platform makes the visitor in question an "end user." This said, MEP and lead rapporteur Andreas Schwab has expressed support for referring to active users, which points to a possible compromise on this point in final negotiations.

The Parliament also voted to include web browsers, virtual assistants and connected TV to those activities which constitute core platform services. Although the Council did not make any such addition to the list of core platform services, certain governments would support an extension to web browsers and virtual assistants. In light of these internal divisions among Member States, the balance could tilt in favour of the Parliament's position in the trilogues.

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Additional gatekeeper obligations

Compared with the Commission's proposal, the Parliament adds obligations for gatekeepers. For example, gatekeepers would have to show end users, upon their first use of a pre-installed core platform service on an operating system, a list of the *main* third-party services available and enable them to change the default settings. Moreover, gatekeepers would be prohibited from combining personal data across different services with a view to delivering targeted or micro-targeted advertising, except where an adult end user has provided clear, explicit, renewed and informed consent. In contrast, gatekeepers would be altogether prohibited from processing personal data of minors for any commercial purpose, including marketing, profiling and behaviourally targeted advertising. Gatekeepers would also be obliged to ensure interconnection between their own services and those of third-party independent interpersonal communications services and providers of social networks. With this obligation, the Parliament hopes to protect end users' ability to switch between social networks without the need to reconstruct social connections and networks.

The Council, for its part, proposes a prohibition on gatekeepers from imposing disproportionate conditions to terminate a subscription to one of their core platform services. On the contrary, gatekeepers should ensure that users can unsubscribe from a service without difficulty. The Council also agrees with the Parliament that users should be allowed to change default settings when installing third-party apps or app stores.

The main point of disagreement appears to be the extent of interoperability obligations. Whereas the Commission and the Council would see gatekeepers ensure interoperability between their operating systems, on the one hand, and apps and app stores of third parties, on the other hand, the Parliament would extend this obligation to social networks and messaging services. Additionally, the Commission's Proposal would oblige gatekeepers to grant business users fair and non-discriminatory access to its app stores. Once again, the Parliament wishes to broaden this principle to all of the gatekeeper's core platform services. In this respect, the governments of Denmark, Italy, Portugal and Spain have jointly supported an extension of this principle to search engines and social network services.

Complaints mechanism, compulsory compliance function, protection for whistle-blowers and collective actions

The Parliament proposes a mechanism whereby any business user, competitor, end user or person with a legitimate interest may submit a complaint to a competent NCA about any gatekeeper practice or behaviour falling within the scope of the DMA. After assessing the complaint, the NCA would have to report its findings to the Commission. It would then fall on the Commission to examine whether it is appropriate to open a market investigation or proceedings.

The Parliament also would impose an obligation on gatekeepers to create a compliance function within their organisations, which should be independent from operational functions and dedicated to monitoring compliance and cooperating with the Commission for the purposes of the DMA. Additionally, to facilitate the detection of infringements and empower end users to enforce their rights under the DMA, the Parliament protects whistle-blowers reporting breaches of the DMA and allows collective actions by consumers for breaches of the DMA.

NCA involvement

The Parliament confirms the Commission as the sole enforcer of the DMA and circumscribes the supporting role of NCAs. As mentioned above, NCAs would be competent to conduct preliminary reviews under the DMA complaint mechanism and refer their findings to the Commission.

To avoid conflicting decisions, the Parliament proposes that, where an NCA intends to launch an investigation on a gatekeeper on the basis of Articles 101 or 102 TFEU, the EU Merger Regulation or equivalent national rules, it should have to inform the Commission of the first investigative measure. Similarly, if it envisages imposing measures on a platform subject to the DMA based on existing instruments of competition law, it should communicate any draft measure to the Commission.

The Council also endorses the Commission as the central enforcer of the DMA. However, in contrast to the Parliament, it foresees the possibility for Member States to empower their respective NCAs to investigate possible non-compliance with the DMA. In this context, the NCA would have to inform the Commission before initiating any formal investigative measure. Upon the conclusion of an investigation,

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the NCA would have to transmit its findings to the Commission. The opening of proceedings by the Commission would relieve the NCA of the possibility of initiating any such investigation itself or would end it if any such investigation is pending.

On the other hand, the Parliament offers a compromise on NCA involvement by proposing to involve national authorities through the creation of a European High-Level Group of Digital Regulators ("Group"). This Group would be composed of experts representing the Commission, relevant EU bodies, NCAs and relevant national regulatory authorities, including national authorities responsible for data protection, electronic communications and consumer protection. It would provide advice and expertise to the Commission in the performance of several of its responsibilities under the DMA, including with respect to the need to conduct market investigations and the possibility of updating gatekeepers' obligations under the DMA, as well as in the preparation of legislative proposals and policy initiatives.

Despite the Parliament and Council's apparent agreement on the Commission's role as central DMA enforcer, certain governments appear dissatisfied with the agreed level of involvement of NCAs. Germany, in particular, will not support any possibility for the Commission to stop proceedings launched by NCAs under national competition laws. Austria and Belgium have also emphasised that the DMA should not affect Member States' freedom to regulate at national level and to continue applying national regulations to gatekeepers, such as bans on narrow MFNs imposed by booking platforms. In stark contrast, Luxembourg has insisted on the importance of avoiding "gold-plating", a reference to the practice of Member States to transpose EU legislation beyond what is required as a matter of EU law. "Gold-plating" is often criticised for imposing transaction costs and inefficiencies that EU legislation was, in principle, designed to avoid.

Sanctions for non-compliance

The Parliament would impose a twelve-month limit for the Commission to adopt a non-compliance decision from the opening of proceedings and would replace the proposed level of fines from 10% of total turnover to a minimum of 4% and a maximum of 20% of total worldwide turnover.

Where a gatekeeper has engaged in systematic non-compliance with its obligations under the DMA, the Parliament added to the Commission's option to impose behavioural or structural remedies the possibility of preventing gatekeepers from making acquisitions in digital and data-related sectors. While the Council has not addressed this issue in its amendments, certain governments such as Germany appear willing to endorse a specific and differentiated merger regime for so-called "killer acquisitions" in the digital sector, possibly characterised by different evidentiary requirements and standard of review.

Key takeaways

There is indisputably a broad consensus amongst EU institutions on the perceived urgency to rein in "Big Tech". The Parliament and at least a group of Member States want to see even more far-reaching regulation of large digital platforms than that envisaged in the Commission's proposal, with apparently little regard to the impact of their proposals on innovation and the availability of services that consumers in the EU expect. Negotiators still have a lot of controversial ground to cover. In particular, certain Member States have expressed their dissatisfaction with certain aspects of the Parliament and Council's general approaches – occasionally holding diametrically opposed views. A great deal of lobbying can also be expected from all sides, for example by certain platforms that will want to avoid being captured in the net of the DMA. Nonetheless, debates could progress rapidly in light of the political will and the apparent agreement on the direction of revisions of the Proposal. Under a Parliament amendment, the DMA could become enforceable as soon as two months after its entry into force.

Commission publishes Draft Guidelines on application of EU competition law to collective agreements regarding working conditions of solo self-employed persons

On 9 December 2021, the European Commission ("Commission") approved a draft communication containing guidelines on the application of EU competition law to collective agreements regarding the working conditions of solo self-employed persons ("Draft Guidelines").

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The Draft Guidelines reflect the concerns raised both within the Commission, but also at Member State level, that with the rise of "platform work", but also the growing role of sub-contracting and outsourcing in the current EU labour market, self-employed individuals may face challenging working conditions, notably in terms of pay, job security and lack of representation. Encouraging collective bargaining by self-employed individuals is seen by some as the right way forward. Yet, self-employed individuals are in principle undertakings within the meaning of Article 101 TFEU. As such, they are subject to the prohibition against anti-competitive agreements, and collective bargaining would normally be considered cartel-type coordination. Since the competition rules are enshrined in the Treaty, they cannot be adapted to political preferences by way of EU regulation or Member State legislation.

Against this backdrop, in January 2021, the Commission sought feedback on the scope of application of EU competition rules to collective agreements for self-employed persons (see, VBB on Competition Law, Volume 2021, No. 1). In the Draft Guidelines, the Commission has now laid out in greater detail how current political preferences could be reconciled with the limitations imposed by EU competition law and how opportunities for collective bargaining solutions could be increased not only for workers in the so-called "gig economy", but also for a wider range of self-employed individuals. Comments on the Draft Guidelines can be submitted until late February 2022, and the final Guidelines are expected to be adopted in the first half of 2022.

Scope of the Draft Guidelines

The Draft Guidelines would cover only collective agreements (including preparatory arrangements among the self-employed) between self-employed individuals and their "counterparties," i.e., firms to which they seek to supply their services, that they relate to the working conditions of those self-employed individuals. Working conditions pertain to matters such as remuneration, working time and patterns, holiday and other kinds of leave, work premises, health and safety, insurance and social security, as well as termination conditions.

On the other hand, the Draft Guidelines assume that negotiations or agreements that determine the prices at services are supplied by self-employed individuals to the counterparty or by the counterparty to consumers, coordinate behaviour among the counterparties, and/or limit the freedom of employers to hire labour do not fall outside Article 101 TFEU. The same applies to agreements under which self-employed individuals agree not to provide services to particular counterparties. Such agreements would require an individual assessment under Article 101 TFEU as they may restrict the supply of labour and thereby raise competition concerns.

Moreover, the Draft Guidelines would only apply to self-employed persons who provide services relying primarily on their own personal labour. Tools used by self-employed individuals to provide a service, in the way a professional musician would play music on his own instrument, are considered ancillary means to provide a final service through personal labour. In contrast, self-employed individuals exploiting assets and reselling goods are not considered as providing their personal labour. Thus, by way of illustration, individuals renting apartments would not benefit from the Draft Guidelines when negotiating and/or concluding collective agreements with a platform such as Airbnb.

Collective agreements falling outside the scope of Article 101 TFEU

The Draft Guidelines use as a starting point case law of the European Court of Justice ("ECJ") that has clarified that collective bargaining by workers and by so-called "false self-employed" falls outside the scope of Article 101 TFEU. The concept of "false self-employed" is narrowly defined, and applies only where formally self-employed persons are fully integrated in the employer's organisation.

The Draft Guidelines then seek to extend these principles to situations where self-employed individuals in a similar situation of economic dependence collectively bargain with their counterparties. This would be the case, for example, where self-employed persons derive at least 50% of their annual work-related income from a single counterparty. Self-employed individuals working "side-by-side" with employed workers for the same counterparty would also benefit from this exemption, regardless of whether their status has been reclassified by a national authority or court as an employment relationship.

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Finally, according to the Draft Guidelines, collective agreements concluded by self-employed individuals providing their services through so-called "digital labour platforms" would fall outside the scope of Article 101 TFEU. For the purpose of the Draft Guidelines, digital labour platforms are those providing commercial services at least in part at a distance through electronic means, at the request of a recipient of the service, and involving as a necessary and essential component the organisation of work performed by individuals, irrespective of whether that work is performed online or in a certain location. The Commission considers that digital labour platforms are overwhelmingly in a position to unilaterally impose terms and conditions without prior information or consultation of self-employed persons.

Collective agreements falling outside the Commission's enforcement priorities

The Draft Guidelines go on to address situations that cannot be brought within the framework for collective agreements established by the ECJ. In these cases, collective agreements may well fall within the scope of Article 101 TFEU, but the Draft Guidelines explain that the Commission will not intervene against them. This "no action" commitment would apply, first, to situations where self-employed individuals negotiate and/or conclude collective agreements with counterparties of a certain economic strength. This would be the case if the counterparty or counterparties represent the whole sector or industry or, alternatively, if a counterparty's individual annual aggregate turnover exceeds € 2 million or staff headcount is at least 10 persons. Second, the Commission would not intervene where the national legislator has explicitly granted self-employed individuals to right to collective bargaining or has excluded collective agreements concluded by self-employed individuals active in certain professions from the scope of national competition law.

Conclusion

This initiative, which resulted in the Draft Guidelines, has primarily been motivated by concerns surrounding digital platforms such as Uber and Deliveroo and what is viewed as their excessive bargaining power. It has to been seen in light of the proposed Directive on improving working conditions in platform work, which seeks to improve the working conditions of persons performing platform work by ensuring correct determination of their employment status, by promoting transparency, fairness and accountability in algorithmic management in platform work and by improving transparency in platform work.

Yet, as the Draft Guidelines – as well as the illustrative examples included in them, which cover automotive maintenance and repairs services, journalists, musicians, and architects – demonstrate, the Commission intends to use this opportunity to create a competition law "safe harbour" for the self-employed far beyond the digital economy. The breadth of this initiative, which would essentially allow cartel-type arrangements that could potentially drive up costs for the economy and may discourage innovative new business models in Europe, is remarkable. The Commission has promised to publish an impact assessment in the course of first half of the next year, which will hopefully address these concerns and try to explain how the European economy will be better off if the Draft Guidelines are followed.

In its effort to balance various, competing interests, the Commission also had to walk a very fine line. For example, Article 101 TFEU does not apply to collective bargaining by workers which will of course include negotiations on wages. Yet, for workers in the gig economy, which the Commission asserts are in a very similar situation of economic dependence as workers, the Draft Guidelines envisages that the exemption from Article 101 TFEU would apply only to non-price negotiations.

The breadth of the Draft Guidelines may also undermine their practical usefulness. The Draft Guidelines encompass situations where even the Commission has to accept that collective bargaining is likely to fall under Article 101 TFEU. The Commission may commit not to take enforcement action, but this would provide little legal certainty in light of possible actions especially before national courts which do not have the option to abstain from competition law enforcement on policy grounds. And, ultimately, it may be difficult to rely on the Draft Guidelines, especially when they acknowledge that certain collective bargaining situations do create concerns under Article 101 TFEU, unless their principles have been upheld by the ECJ.

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