"Van Bael & Bellis is one of the most experienced law firms with regard to European antitrust issues."

Chambers Global 2016

February 2021

VBB on Competition Law

Highlights

Global Competition Review 2017 Law Firm of the Year – Europe

GCR Awards 2017

Jurisdictions covered in this issue

vbb@vbb.com
www.vbb.com

Table of contents

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

Table of contents

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission imposes final measures in Novelis/Aleris merger after delay in divestiture

On 18 February 2021, the Commission imposed final measures on aluminium manufacturer Novelis related to the belated divestment of a production plant required as a condition of the Commission's clearance of the Novelis/Aleris merger in 2019.

Novelis had obtained conditional clearance to acquire rival Aleris on 1 October 2019 (see VBB on Competition Law, Volume 2019, No. 10). The Commission's decision required the divestment of Aleris' entire aluminium automotive body sheet business in Europe, including a manufacturing plant in Duffel, Belgium. Novelis concluded an agreement to sell this plant to Liberty House, which in turn formally notified its acquisition of the plant to the Commission and obtained merger clearance on 20 January 2020. On 7 April 2020, the Commission also approved Liberty House as a suitable purchaser of the divested plant under the process foreseen by the commitments that Novelis had offered when acquiring Aleris.

However, despite securing all necessary Commission approvals, Novelis and Liberty House failed to close on the transfer of the Duffel plant for nearly 6 months. After several extensions, the commitment deadline for Novelis to complete the divestiture of the Duffel plant expired on 1 September 2020. The Commission then ordered interim measures to preserve competition until the transfer was ultimately made on 30 September 2020.

When Novelis failed to meet the divestiture deadline specified in its commitments, the Commission's decision clearing the already completed Novelis/Aleris merger, as well as the commitments themselves, became inapplicable. As a result, the Commission needed to take additional measures under Art. 8(4)(b) of the EU Merger Regulation to replicate the effects of its decision and the commitments. The Commission's measures, among other things, forbid Novelis from re-acquiring the Duffel plant, impose certain non-solicitation conditions on Novelis regarding personnel and customers, and provide for transitional services and investments in the plant. The measures also impose daily penalties on Novelis should it fail to comply.

Normally, merging parties complete their divestiture obligations within the required time period. It is therefore unusual for a clearance decision and related commitments to be rendered invalid due to a delay in closing the divestiture sale to an already approved buyer, and for the Commission to need to step in to remedy the competitive situation through the use of such additional measures.

Commission conditionally clears Siemens' acquisition of Varian

On 19 February 2021, the Commission conditionally cleared the acquisition of Varian by Siemens' subsidiary Siemens Healthineers. Varian is a leading US supplier of radiotherapy solutions used to plan and deliver radiotherapy treatment, while German-based Siemens Healthineers is a leading supplier of the medical diagnostic imagery equipment used in radiotherapy solutions.

According to the Commission, the combination of these two major players in the radiotherapy field gave rise to competition concerns. As the provision of radiotherapy treatment requires images and data to be exchanged between medical imaging equipment and radiotherapy solutions, it is critical that these systems remain interoperable with one another. The Commission expressed concerns that the combination of the market leader in diagnostic imaging solutions and the market leader in radiotherapy solutions could result in a degradation of interoperability, leading to foreclosure of other competitors in both markets. Specifically, the Commission noted that the acquisition could lead the combined entity to reduce interoperability between services offered by Siemens Healthineers' imaging solutions and those of third parties or Varian's radiotherapy solutions and those of third parties.

In order to address such foreclosure concerns, Siemens Healthineers committed to ensure ongoing interoperability by agreeing to abide by the de facto interoperability standard governing radiotherapy and imaging solutions (DICOM). It also agreed to provide technical support and information to third parties in order to help ensure interoperability. These commitments will run for 10 years, but can be extended by an additional 5 years if the Commission deems it necessary. As the merger was formally notified before the expiration of the Brexit Transitional Period, the Commission's clearance decision and the obligations Siemens undertook in its commitments apply both in the EEA and in the UK.

– MEMBER STATE LEVEL –

UNITED KINGDOM

CMA orders viagogo to divest StubHub's international arm

On 2 February 2021, the UK Competition and Markets Authority ("CMA") published its final report following a Phase 2 investigation of the completed acquisition by the ticket reseller viagogo of competitor StubHub (previously part of eBay Inc.). The $4.1 billion (£3.1 billion) transaction was completed in February 2020. A year later, the CMA concluded that the acquisition raised competition concerns, as it would lead to a substantial lessening of competition in the secondary ticketing market in the UK, and required viagogo to divest StubHub's business outside North America.

StubHub operates a ticketing business in various locations, including the UK and several countries in Europe, North and South America and Asia. StubHub and viagogo are the two main players on the UK market for secondary ticketing platforms, as there are no other significant direct competitors in the UK. As the Parties' combined market share was estimated to be more than 90%, the deal was effectively considered to be a 2-to-1 merger. The CMA considered the competitive influence of alternative ticketing distribution channels and websites, such as social media platforms, but ultimately concluded that these would not be able to exercise a sufficient competitive constraint over the merged business.

In reaching its decision, the CMA also considered the serious impact of COVID on the entertainment industry as a whole and on live events in particular. However, the evidence suggested that the Parties were likely to remain the two main competitors once the events industry resumed its normal activity. Notably, COVID was the main reason that the CMA extended its statutory Phase 2 deadline by 8 weeks to allow sufficient time to complete the investigation.

As a result, viagogo is now required to partially unwind its completed acquisition and to sell StubHub's business outside of North America. The CMA initially considered whether a full divestment of the entire StubHub business (including North America) would be required, but the parties convinced the CMA that such a far-reaching remedy would be disproportionate. The CMA nonetheless required the divestment not only of StubHub's UK operations, but also of its entire international business, which covers Europe, Asia and South America. Therefore, parties in future deals of this kind should bear in mind that a UK-wide structural remedy may not be sufficient to resolve the CMA's competition concerns and should be prepared to potentially offer remedies involving operations outside the UK, especially when is difficult to establish clear blue water between the UK and European operations.

The CMA will have to approve the new purchaser in advance and determine the main conditions of the sale process. In the interim, StubHub must continue to be managed independently in accordance with the "hold-separate" arrangements put in place for the duration of the CMA's investigation. As this is a completed deal, the CMA had imposed an initial enforcement order ("IEO") at the start of its Phase 1 investigation, which was soon followed by the appointment of a monitoring trustee. These arrangements will remain in place until the divestment remedy is fully implemented, i.e. until the conclusion of the sale process. As in previous cases of completed acquisitions, this highlights how expensive, time consuming and resource-intensive the IEO process can be for all parties involved.

Finally, the CMA's decision is perhaps not that surprising given the authority's increasingly strict approach to acquisitions in the digital sector and the mergers it has recently blocked at Phase 2, such as *FNZ/GBST* (see VBB on Competition Law, Volume 2020, No. 11) and *Sabre/Farelogix* (see VBB on Competition Law, Volume 2020, No. 4), both of

which have been appealed. There are also on-going CMA investigations of deals in this sector, for example *Facebook/Giphy* and *Uber/Autocab*.

The CMA has been very active in setting out and pursuing its digital agenda in light of its new role as a global competition regulator since the end of the Brexit transition period. In particular, the CMA's newly established Digital Markets Unit, dedicated to scrutinising the behaviour of tech giants and their market power, is expected to begin activity in April this year. New enhanced merger review procedures are also expected in this sector, including mandatory notifications preventing the completion of a deal until the CMA has concluded its investigation. One of the main reasons for introducing these changes is a widely voiced concern about historic under-enforcement when it comes to mergers involving digital platforms.

ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Commission accepts Aspen's commitments in excessive pricing case

On 10 February 2021, the Commission announced that it had accepted a series of pricing and supply commitments from Aspen, thereby bringing an end to its investigation into whether Aspen had infringed Article 102 TFEU by charging excessive prices for six off-patent cancer medicines.

Having acquired the cancer medicines from another company, Aspen had sought to progressively increase the price of the medicines, often by several hundred percent. The Commission's investigation demonstrated that Aspen had consistently earned very high profits from the sale of the cancer medicines (both in absolute terms and when compared with the profit levels of similar companies in the industry) and that its prices exceeded its costs by almost 300%. In the Commission's opinion, such high profit levels could not be justified. The drugs in question had been off-patent for over 50 years so there could be no argument of a need to recoup R&D costs The Commission also expressed concerns about the fact that Aspen had threatened to withdraw its products when faced with attempts by national authorities to resist its price increases.

To alleviate the Commission's concerns, Aspen has committed to:

- reduce the price of the six cancer medicines by an average of 73%, thereby taking the average price below that charged in 2012;
- to adhere to the reduced prices for a ten-year period; and
- to guarantee the supply of the medicines for five years, and, for the five years that follow, to either continue supplying the medicines itself or to make the relevant marketing authorisations available to third-party suppliers.

Aspen's commitments apply across Europe, with the exception of Italy where a different regime applies in accordance with an earlier decision of the Italian competition authority in which it found Aspen to have infringed Article 102 (and the Italian law equivalent) with respect to essentially the same fact pattern.

These commitments represent a seemingly positive outcome for the Commission insofar as it has managed to secure substantial savings for European health systems. On the other hand, however, by accepting the commitments, the Commission has not had to provide regulators and industry with much anticipated guidance on what actually constitutes an excessive price.

– MEMBER STATE LEVEL –

LATVIA

Latvian competition authority imposes fine of € 5.69 million on state-owned freight carrier for abuse of dominant position

On 3 February 2021, the Latvian Competition Council ("LCC") announced that it had fined the state-owed rail freight company, LDZ Cargo, €5.69 million for committing two abuses of its dominant position on the Latvian rail freight market (on which it held a market share of between 70% and 80% between 2017 and 2018).

Firstly, the LCC found that LDZ Cargo had abused its super dominant position in the Latvian border region. Freight crossing the border from Latvia to Russia and Belarus needs to pass through certain stations in border towns. However, the acceptance and official transfer of this freight takes place in specialised stations which are located at a large distance from the border. Since 2007, LDZ Cargo has been the only freight carrier between the borders and

those stations, making it an "inevitable cooperation partner" for customers who intended to send or receive freight in Latvia. The LCC found that LDZ Cargo incentivised customers to make use of its services for the full route rather than only for the border area by offering discounts and other beneficial conditions. Moreover, the company would, if a customer wanted to switch to a (private) competitor, terminate the previously beneficial transport agreement and apply higher costs for transport in the border region.

Secondly, the LCC found that LDZ Cargo also unjustifiably imposed a charge for downtime on privately-owned wagons on common use railways. Under Latvian law, railway freight carriers such as LDZ Cargo can impose a downtime charge if wagons are unused, thereby promoting the continuous circulation of wagons. However, LDZ Cargo was the only carrier imposing such a charge, and only on wagons owned by private persons as opposed to being imposed on so-called "inventory wagons" (meaning wagons which were previously owned by former USSR states).

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Court of Justice confirms rebuttable presumption of decisive influence for parent companies controlling 100% of voting rights in subsidiary

On 27 January 2021, the Court of Justice dismissed in its entirety an appeal by the Goldman Sachs Group ("Goldman Sachs") against a General Court judgment upholding a European Commission's decision finding Goldman Sachs jointly and severally liable for the conduct of its subsidiary, Prysmian SpA ("Prysmian"), in the 2014 *Power Cables* cartel case.

Between 29 July 2005 and 28 January 2009, Goldman Sachs was the indirect parent company of Prysmian, through its subsidiary GS Capital Partners V Funds ("GSCPVF") and various other intermediate companies. Although GSCPVF's shareholding in Prysmian was initially 100%, this decreased following two divestments made in September 2005 and July 2006, initially to 91.1% and then to 84.4% (the "pre-IPO period")). In the post-IPO period (as of the end of 2007), GSCPVF's shareholding further decreased to 31.69%.

On 2 April 2014, the Commission found that – during the period from 29 July 2005 to 28 January 2009 inclusive – Prysmian and several other undertakings participated in a single and continuous infringement of Article 101 TFEU in the market for high-voltage underground and/or submarine power cables. The Commission imposed a fine of €104.6 million on Prysmian; Goldman Sachs was also fined € 37.3 million after it was held jointly and severally liable for the conduct of its subsidiary by virtue of its decisive influence over Prysmian, in particular as a result of (i) the level of its shareholding and (ii) various factors demonstrating economic, organisational and legal links between the two companies.

In its appeal before the General Court, Goldman Sachs contended that the Commission had (i) improperly applied the presumption of actual exercise of decisive influence to the pre-IPO period; and (ii) incorrectly considered that it had, in fact, exercised decisive influence over Prysmian for the entire period, by improperly assessing the factual evidence of control, and by failing to consider Goldman Sachs exempt from parental liability as a "*pure financial investor*" (i.e. one which holds shares in a company in order to make a profit, but which refrains from any involvement in its management and in its control). However, the General Court disagreed, affirming (i) the Commission's application of the presumption of the actual exercise of decisive influence to Goldman Sachs' ownership of all voting rights in Prysmian and (ii) the Commission's finding that Goldman Sachs did indeed exercise decisive influence over Prysmian for the entire period that it owned shares in the company (see VBB on Competition Law, Volume 2018, No. 7). Goldman Sachs subsequently appealed to the Court of Justice.

First, Goldman Sachs contended that the General Court was wrong to hold it liable in respect of the pre-IPO period, as the presumption that it actually exercised decisive influence over Prysmian during this period was not applicable because GSCPVF did not hold all of Prysmian's capital. In response to this argument, the Court of Justice reiterated that the relevant case-law recognises that, where a parent company holds (directly or indirectly) all or virtually all of the capital in a subsidiary which has committed an infringement, the parent is capable to exercise decisive influence over that subsidiary's conduct and there is a rebuttable presumption that the parent does in fact actually exercise such influence. That said, because the relevant test was one of decisive influence (for which ownership of share capital is an indicative factor), the Court of Justice considered that a parent company which holds all of the voting rights in a subsidiary is in a similar position of decisive influence to that of a parent company holding all (or virtually all) of the share capital of the subsidiary. As such, the parent company is able to determine the subsidiary's economic and commercial strategy. Accordingly,

the Court of Justice held that there is a rebuttable presumption that a parent company holding all of the voting rights associated with a subsidiary's shares is able to exercise decisive influence over the conduct of that subsidiary, *irrespective of whether the parent owns all of the capital stock* (and further held that the burden of rebutting such presumption falls on the parent company).

Second, Goldman Sachs claimed that, regarding the post-IPO period, the General Court had erred in law by relying on factors relevant for the pre-IPO period and by merely asserting that the IPO had not changed anything. The Court of Justice rejected this argument and endorsed the factors taken into account by the General Court in finding that GSCPVF held decisive influence over Prysmian. In particular, the Court of Justice confirmed that, in determining whether a parent company is able to exercise decisive influence over the market conduct of a subsidiary, the General Court can rely on elements relating to a prior period. The Court of Justice also held that the General Court had in fact carefully taken into account the elements relied on by the Commission, in particular by drawing a clear distinction between its assessment of the pre-IPO period and the post-IPO period. Among the relevant elements in respect of the entire infringement period, the General Court examined GSCPVF's powers (i) to appoint members of the various boards of directors of Prysmian; (ii) to call shareholders' meetings; and (iii) to propose the removal of directors or the entire board(s) of directors.

Third, Goldman Sachs asserted that the General Court was wrong to find that GSCPVF had the requisite level of representation on Prysmian's board of directors to influence Prysmian's market conduct. The Court of Justice disagreed with that assertion, finding instead that the General Court had sufficiently identified the existence and relevance of links between GSCPVF and the members of Prysmian's board of directors (and could therefore regard such links to be one of the elements on which the Commission could rely to demonstrate GSCPVF's decisive influence over Prysmian's market conduct). The Court of Justice also confirmed that the existence of an economic entity formed by the parent and its subsidiary can be demonstrated not only by a formal relationship, but also by informal relationships.

Comment

The Court of Justice's judgment both underlines and supports the particularly expansive approach that the Commission sometimes adopts in respect of financial/private equity investors' parental liability for the conduct of their portfolio companies. Nonetheless, it remains to be seen whether this will prompt the Commission to include more financial investors within the scope of its future fining decisions relating to conduct committed by portfolio companies.

That said, for any financial investor holding all of the voting rights associated with a portfolio company's shares, as a result of this judgment, it will now very difficult to successfully rebut the presumption of decisive influence and escape parental liability for anticompetitive conduct perpetrated by such a portfolio company.

In this context, the Court of Justice's judgment is a timely reminder that all financial investors – including in particular private equity companies with wide-ranging portfolios – should take careful compliance steps in order to mitigate the antitrust risk of their investments (including, for example, by conducting rigorous due diligence processes to detect potential competition law infringements, and ensuring that transaction agreements contain robust indemnity language in this regard).

– MEMBER STATE LEVEL –

FRANCE

French Supreme Court rules on public distancing in packaged flour cartel case

On 10 February 2021, the French Supreme Court (*Cour de cassation*) ruled that an undertaking continues to be involved in a cartel if it keeps receiving invitations to participate without clearly distancing itself and when other participants interpret that this undertaking shares their objectives.

On 13 March 2012, the French Competition Authority ("FCA") imposed fines totalling € 242.2 million on French and German companies for having operated several

anti-competitive agreements in the packaged flour sector. Evidence showed that these undertakings (i) concluded a non-compete agreement aiming at limiting imports of flour between France and Germany and maintaining exports of packaged flour at a predetermined level and (ii) aimed at fixing prices and foreclosing the market through joint ventures. The FCA concluded that the non-compete agreement lasted from 2002 to 2008, during which twelve meetings were organised.

The Paris Court of Appeal reduced the cartel fines in 2014. This judgment was reversed in 2016 by the French Supreme Court, which required the Paris Court of Appeal to reassess the duration of VK-Mühlen's (now Goodmills Deutschland) participation. In 2019, the Paris Court of Appeal reduced the € 17.1 million fine imposed on Goodmills to € 5.7 million because it found that the duration of the infringement was actually shorter. According to the Court, Goodmills' participation started at the sixth meeting, where it was informed of the object of the agreement, had access to insider information and when other participants believed that Goodmills had agreed with this practice and would comply with it. Goodmills only took part in the sixth meeting and received invitations for the seventh and tenth meetings. However, the Court of Appeal noted an absence of a clear public distancing by Goodmills and considered that its participation ended when it was no longer invited (i.e., the date on which the invitations for the eleventh meeting were sent to other cartelists but not Goodmills).

Goodmills appealed against this judgment before the French Supreme Court, arguing that failure to distance itself should not be the only element required to establish its continuous participation in the cartel. Goodmills also argued that the Paris Court of Appeal had not taken into consideration the discontinuity of the invitations, proving that its participation in the infringement could not last until the organisation of the eleventh meeting.

The French Supreme Court rejected Goodmills' appeal. The Court considered that the subsequent meeting invitations that Goodmills received were sufficiently precise to allow it to understand that they concerned the same infringement as discussed during the sixth meeting. Moreover, the French Supreme Court also confirmed the finding of the Court of Appeal with regards to the other cartelists' perception, ruling that Goodmills' receipt of those invitations without distancing allowed other cartelists to consider that Goodmills shared the same anticompetitive objectives. In the Court's view, Goodmills could have distanced itself from the cartel but did not do so until the eleventh meeting, even though it had not received an invitation for that meeting. Therefore, the French Supreme Court considered that the Paris Court of Appeal had sufficiently established the continuity of Goodmills' participation in the cartel.

GERMANY

German Federal Cartel Office fines steel forgers for illegal exchange of information

According to a press release issued on 4 February 2021, the German Federal Cartel Office ("FCO") fined three steel forging companies and two responsible individuals a total amount of approximately € 35 million for anti-competitive information exchange between October 2002 and December 2018. Leading automotive manufacturers and suppliers were among the key customers of the steel forging companies.

The companies involved in the infringement are the former CDP Bharat Forge (now Bharat Forge Global Holding), Bharat Forge CDP, and the former Johann Hay Automobiltechnik (now Musashi Bockenau). Company executives were found to have met at least 44 times to exchange information among each other and with other forging companies from France, Spain, Italy, Sweden and Turkey. In particular, they exchanged information regarding pricing strategies, the passing-on of cost increases to customers and concrete negotiations with suppliers and customers. The FCO did not initiate proceedings against the non-German entities.

The exchanges took place up to three times a year at side meetings during meetings of the umbrella organisation of the European national associations for the forging industry, Euroforge, (which was found not to be involved in the infringement) and at additional bilateral and multilateral meetings.

The investigation was initiated following a leniency application of Hirschvogel Umformtechnik, which benefited from immunity. The other companies settled, which resulted in a reduction of their fines.

Like the recent decision of 23 December 2020 imposing fines on aluminium forging companies (see VBB on Competition Law Vol. 2021, No. 1), this decision is likely to lead to follow-on damages claims by the automotive industry against the cartelists.

HUNGARY

Hungarian Competition Authority imposes HUF 1 billion fine on Hungarian HR consulting agencies

By decision of 18 December 2020, published on 1 February 2021, the Hungarian Competition Authority ("GVH") imposed a fine of HUF 1 billion (approximately € 2.8 million) on the Association of Hungarian HR Consulting Agencies ("SZTMSZ") for a series of anti-competitive practices. The members of SZTMSZ were held jointly and severally liable for the payment of the fine in proportion of their global turnover. Two of the members obtained fine reductions for their cooperation with the GVH.

The investigation targeted 23 companies, including Adecco (liable for about 42% of the total fine), Manpower (liable for about 34% of the total fine) and Randstad (liable for about 8% of the total fine) as well as a number of smaller local companies. According to the GVH, SZTMSZ was liable in particular for the following anti-competitive practices:

- The fixing of minimum fees and other conditions with respect to the labour-hire and recruitment services provided by members between 2011 and 2018;
- Preventing members from poaching the employees of fellow members and from recruiting employees who had previously worked for another member (so-called "no-poaching" clause);
- Preventing members from proposing new assignments to workforce that has been placed by one of the members (so-called "no touch" clause);
- Limiting members in using the data and the CVs of workforce working for other members when submitting tenders in the context of public procurement procedures concerning labour-hire arrangements.

The GVH found that the market share of SZTMSZ members, which gradually declined between 2011 and 2018, remained above 10% on a fragmented market, where SZTMSZ counted the largest market players among its members.

The GVH's decision is under appeal.

SPAIN

Spanish Competition Authority fines colluding suppliers of radiopharmaceuticals

The Spanish Competition Authority, the Comisión Nacional de los Mercados y la Competencia ("CNMC"), imposed total fines of € 5,76 million on Novartis Groupe France and its Spanish subsidiary Advanced Accelerator Applications Ibérica, SLU ("AAA"), Glo Holdco and its Spanish subsidiary Curium Pharma Spain ("Curium"), as well as two executives for engaging in anticompetitive collusive practices, namelya market-sharing arrangement in relation to the supply of the radiopharmaceutical fluorodeoxyglucose (18-FDG), a positron emitting radiopharmaceutical used for diagnostic purposes in conjunction with Positron Emission Tomography to assist in the assessment of cancer, coronary artery disease and epileptic seizures.

According to the CNMC, AAA and Curium were the only parties capable of supplying 18-FDG to hospitals across Spain. According to the CNMC, they adopted a joint plan to share a large part of the customers for radiopharmaceuticals (both public and private hospitals) in various regions of Spain. The CNMC noted that the joint plan, which lasted from June 2014 to November 2018, was two-pronged and involved both subcontracting agreements and the exclusive allocation of customers.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission clarifies stance on dual role agents

On 5 February 2021, the European Commission ("Commission") published an important working paper outlining its preliminary views on the application of Article 101 TFEU to distributors that also act as agents for the same supplier (the "Working Paper"), available here. As brand owners are showing an increasing interest in such hybrid arrangements, the guidance provided will be of practical importance in navigating the considerable compliance challenges which they can generate. In brief, the Working Paper suggests that the agency aspect of such a dual relationship may, in certain limited circumstances, escape the application of Article 101(1) without the need for the supplier/principal to reimburse many of the costs incurred by the dual role agent when it acts as a distributor. However, the proposed complex methodological framework will be far from easy to apply in practice. The guidance on cost allocation and reimbursement provided by the Working Paper will be of broader relevance in assessing agency arrangements in general. The Working Paper expressly avoids the contentious issue of whether agency agreements with online platforms can fall outside the scope of Article 101(1).

Context of the guidance

The Working Paper is published in the context of the Commission's ongoing review of the Vertical Block Exemption Regulation ("VBER") and the Vertical Guidelines (the "VBER Review) and, as such, expresses provisional views that do not bind the Commission. In explaining why it has published the Working Paper, the Commission notes that concerns have been expressed by stakeholders during the VBER Review that there is a lack of clarity under the current rules regarding whether an undertaking [active on a downstream market] can act both as a 'genuine' agent (largely outside of the scope of Article 101) and as an independent distributor (subject to Article 101(1)) for different products of the same supplier. The Commission notes that this combination of the roles of distributor and agent (giving rise to so-called "dual role" agents) is becoming more common in consumer goods markets, though until now in respect of products belonging to *different product markets* (probably as a consequence of the limitations suggested by the existing competition law guidance). However, the Commission has been made aware of situations where suppliers have considered appointing their existing distributors as agents for a limited range of higher quality or novel products whilst continuing to sell their other products belonging to the *same product market* under the pre-existing distributorship relationship. Reflecting this specific experience, the purpose of the Working Paper is to provide guidance concerning the use of dual agency in markets for differentiated products that allow the products, subject to agency and to distribution respectively, to be objectively distinguished. This limitation of scope makes it clear that it will be (even) more difficult to justify dual role agency where it is applied in respect of undifferentiated products.

Legal background: dual role agency largely excluded

According to the well-established case law related to agency, restrictions on the sale of a supplier's goods (or services) fall outside Article 101(1) where the agent bears no more than insignificant risks in the sale of the supplier's goods (in which case the agent is referred to as a 'genuine' agent). Where this no-risk requirement is met, the supplier is able to fix, in particular, the price paid by the consumer for goods sold through the genuine agent. What has been less clear is whether risks typically borne by a dual role agent when it resells other goods of the same supplier as a distributor, mean that it cannot be considered to be a genuine agent when selling the goods subject to the agency arrangement, in particular when those products belong to the same market.

The case law has treated dual role agents with considerable suspicion, viewing them (at least potentially) as an artificial device used by suppliers to fix the price or other sales conditions of what are essentially distributors, in an attempt to avoid the constraints of competition law. According to the Working Paper, there is a risk that the

(mandatory) pricing policy of the principal in sales through the agency relationship could influence the incentives of the dual role agent to independently price the products it sells as an independent distributor. Reflecting these types of concerns, the Vertical Guidelines (paragraph 16(g)) provide that, where a supplier requires an agent to also act as a distributor in respect of products belonging to the same market as those sold under the agency relationship, the agency relationship can only escape Article 101(1) where the distribution activities "are fully reimbursed" by the supplier. This, in effect, suggests that a dual agent should not bear risk when it acts as a distributor. Such a strict requirement would make the concept of dual role agency of very limited practical value to a supplier, as – in the context of the distribution aspect of the relationship – the supplier would have [all] the cost disadvantages of agency with none of the benefits (in terms of being able to set the price and all other conditions of sale).

As recognised by the Working Paper, under this strict standard, dual agency would be feasible only where the distribution activities are marginal relative to the agency activities (limiting the incremental costs that must be reimbursed). In an important clarification (or revision), the Working Paper states that requirement under paragraph 16(g)) of the Vertical Guidelines was in fact only intended to apply to scenarios where a dual agent's distribution activities are marginal relative to its agency activities for a supplier in the same market. By limiting the scope of the existing guidance, the Commission is able to endorse through the Working Paper a more nuanced test applicable in (certain) other more common scenarios.

New test: distribution-specific costs do not have to be reimbursed

Addressing what is now seen as a gap in the existing guidance, the Working Paper identifies the conditions under which the agency aspect of a dual agency relationship (in respect of differentiated products belonging to the same product market) may escape Article 101(1) where the agency activities are not the primary activities (and the agency role supplements an existing distribution relationship).

The two main requirements for Article 101(1) not to apply are that:

- the distributor must be able to freely choose whether or not to enter into the agency agreement and should, therefore, not face threats of termination or less favourable terms should it decide to remain only as a distributor; and
- the principal should cover all relevant risks (i.e., costs) linked to the sale of goods under the agency arrangement.

The Working Paper stresses that a clear delineation between the activities and risks associated with the agency and distribution relationships respectively is needed to ensure that the dual agent's incentives are not adversely affected when acting as an independent distributor.

It follows from the above that, in order for the agency relationship to fall outside of Article 101(1), the principal does not need to cover the risks/costs specifically related to the sale by the dual role agent of other of the principal's products (even when they belong to the same product market) when it acts as an independent distributor. On the face of it, this is a major departure from paragraph 16(g) of the Vertical Guidelines and appears to make dual agency a much more viable concept.

However, in practice the bar is still high owing to the strict approach that the Working Paper applies to so-called market investments.

Market investments generally need to be reimbursed

Market investments are those, usually sunk, which the agent needs to make specifically to sell the principal's products, and may include the cost of furnishing premises, training staff, presenting and advertising products off- and on-line, etc. Where products covered by a dual role arrangement belong to the same market, such market-specific investments may (by definition) be common to the dual role agent's activities as agent and distributor. If the agency relationship is to escape Article 101(1), the Working Paper establishes the general principle that all such costs must be fully reimbursed (allowing for depreciation) by the supplier, even if they have been incurred before the agency relationship was created (at a time when the dual role agent acted only as an independent distributor of the supplier's goods).

The only market investments that do not need to be reimbursed are those that are exclusively related to the products sold under the distribution arrangement and which are not necessary to sell the products sold under the agency relationship (which might include product-specific staff training, or highly product-specific advertising). However, even these costs must be reimbursed where it is not viable to operate on the market selling only the products subject to the agency arrangement (presumably because, in those circumstances, the costs associated with selling those other products might be said to enable the sales under the agency arrangement).

General investments needed to provide agency services: partial reimbursement may be needed

The Working Paper repeats the existing guidance that investments related to the provision of agency services in general (i.e., made by the agent to enable it to offer agency services to different principals, regardless of the product markets to which those principal's products belong) do not have to be reimbursed by the principal. Examples include rent for a shop and staff salaries, provided these assets can be used in selling other products unrelated to the agency agreement (and presumably unrelated to products sold by the dual role agent acting as independent distributor). However, the Working Paper imposes what appear to be strict limits to this concept by identifying types of investments which are likely to be considered partly common to the provision of agency services in general, but also partly specifically required for the agent to sell the principal's products, and which therefore will have to be partly reimbursed. These include investments in general advertising for a shop (as opposed to advertising specifically for the principal's brand or specific products, which will have to be fully reimbursed). The costs of the agent's website or online store may also have to be partly reimbursed, in particular those costs specifically incurred to sell or advertise online products belonging to the same market as the principal's products – in contrast, the costs related to the general design of the website do not need to be reimbursed.

Method of reimbursement

The Working Paper notes that any method can be chosen to reimburse the costs or risks undertaken by the agent, including lump sum payments or a percentage of the sales price, as long as in practice the agent is reimbursed (including, if needed, by top-up payments) for all the relevant costs actually incurred. The method used should, for example, adequately reflect any cost variation existing between genuine agents in different Member States, or between agents operating under different business models (e.g., brick and mortar versus potentially lower cost pure online retailers).

CMA launches consultation on the future of the UK competition rules applicable to vertical agreements

On 10 February 2021, the UK's Competition and Markets Authority ("CMA") launched a consultation on the future of the UK competition rules applicable to vertical agreements.

Following Brexit, the EU block exemption regulations which were in force at the end of the transition period (i.e., on 31 December 2020) under EU law were retained in UK law when the transition period ended. As such, agreements between businesses that meet the conditions of any of the retained block exemption regulations are presumed to be lawful under UK competition law. Going forwards, the CMA has a role in advising the Secretary of State for Business, Energy and Industrial Strategy (the "Secretary of State") on varying or revoking retained block exemption regulations, or replacing them with UK legislation when they expire.

Against this background, the CMA recently announced that it would be reviewing the retained Vertical Block Exemption Regulation (the "retained VBER") for the purposes of making a recommendation to the Secretary of State regarding whether to replace the retained VBER when it expires on 31 May 2022. Subject to input that it receives from stakeholders during the course of the review, the CMA's current view is that "*the retained VBER largely delivers what it was intended to deliver, but it should be examined rigorously to ensure that it takes account of any specific features of the UK economy so that it serves the interests of UK businesses and consumers*". The CMA plans to consult on its proposed recommendation in Summer 2021, before making a final recommendation to the Secretary of State in Autumn 2021.

On a related note, the Commission has recently completed its initial evaluation of the existing EU VBER and the accompanying EU Guidelines on Vertical Restraints, concluding that both are relevant and useful tools that help businesses self-assess vertical agreements (for further details, see VBB on Competition Law, Volume 2020, No. 10). Unsurprisingly, the CMA has stated that it will draw on relevant evidence from the Commission's evaluation as part of its review. To supplement this evidence, the CMA has now opened a consultation with relevant stakeholders on considerations relating to the application of the retained VBER in the UK, and in this regard the CMA plans to hold roundtables in Spring 2021 to enable interested parties to share their views (in particular, on any UK-specific issues relating to the retained VBER and the related EU Guidelines on Vertical Restraints). The CMA welcomes expressions of interest in participating in a roundtable, including in particular from businesses with operations in the UK that rely on the retained VBER. The consultation closes on 6 July 2021, and interested stakeholders are invited to contact vberreview@cma.gov.uk.

At this early stage, it is very difficult to accurately predict the outcome of the CMA's review. However, if the CMA ultimately decides to adopt a different approach and/or more prescriptive guidance than the Commission, this would be one of the first major signs of post-Brexit divergence between the respective competition policies of the UK and the EU.

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority accepts Lego price discount system commitments intended to protect pure players

On 27 January 2021, the French Competition Authority ("FCA") accepted the commitments offered by Lego France ("Lego") after an investigation into the alleged bias towards brick-and-mortar stores resulting from Lego's functional discount scheme. In order to resolve the case, the toy manufacturer pledged to amend a number of the conditions that distributors needed to meet in order to qualify for certain discount rates available under the scheme, which were judged by the FCA to create disproportionate and unjustified obstacles to the competitiveness of, in particular, distributors which only sell online (so-called 'pure players').

By way of background, in 2013 Lego increased the price of its products by 15%, while establishing a functional discount scheme based on qualitative criteria under which discounts of up to 13% could be earned. In 2016, Lego changed these criteria after an investigation launched by the German Competition Authority considered that the company's discount system discriminated between sales channels, as several criteria could only be met by brick-and-mortar traders thereby causing pure players to receive lower discounts than traders that only sold offline.

Acting on a complaint that Lego's revised discount scheme still discriminated against online sellers, particularly pure players, the FCA found that the revised scheme incorporated certain discount criteria which de facto could not be met by pure players. According to the FCA, pure players as a result systematically obtained much lower average discounts compared to other distributors: the maximum discount rate they could earn was 6%, whereas other distributors' discounts could reach up to 13 %.

For instance, pure players had difficulties in satisfying the criterion related to the ease and speed of making the product available, as certain specified delivery options (e.g., delivery within 3 hours or delivery on the day of purchase) would require them to have their own logistics system, which only Amazon had in practice. Another criterion related to the consistency of the 'omnichannel' shopping experience provided by distributors, which by definition could not be met by distributors that only sell in one channel (online).

The FCA took the preliminary view that this practice of charging different prices to distributors depending on whether they sold in physical stores disadvantaged online distributors and would reduce the competitive pressure they exerted on other sellers. The FCA acknowledged that this practice did not amount to "dual pricing", which concerns the application of different prices to the same distributor according to the channel (online or offline) through which the goods are resold, and which amounts to a restriction by object. Nonetheless, the FCA considered that the practice could have significant adverse effects on competition taking into account the level of the price differences resulting from the discount scheme. In addi-

tion, the FCA did not consider that Lego had provided evidence that could objectively justify the scheme by showing that it would be indispensable and proportionate to the objectives it was said to pursue (such as, familiarising children with the brand, ensuring the availability of the products, or improving the quality of the customer's buying experience).

Lego proposed commitments that sufficiently addressed the FCA's concerns. For a period of five years, Lego committed in particular to (i) modify the award criteria under its functional discount scheme by making them more accessible to all distributors, and (ii) make its discount system more transparent.

The decision represents a very strict approach in the field of pricing. At European level, the generally accepted view is that a supplier is free to charge different prices to different customers at least in the absence a dominant position. Furthermore, a supplier is generally free to decide simply not to supply pure online players, even in the context of a selective distribution system. The requirement suggested by this case that a supplier should not grant appreciable price advantages to brick and mortar or hybrid retailers, as compared to pure players, in exchange for meeting specific obligations in relation to offline selling is fundamentally at odds with these principles. This is a further example of the inconsistent application of competition law in the field of vertical agreements at national level, which it is hoped will be addressed in the European Commission's current review of the Vertical Agreements Block Exemption (in which, it seems, the Commission may be considering taking a more liberal approach even to the practice of dual pricing, that is charging different prices to the same retailer depending on whether it sells off- or online.

GERMANY

Regional Court of Munich I enjoins Google and the German Federal Ministry of Health from collaborating on the provision of health care information

On 20 January 2021, the Regional Court of Munich I (the "Court") issued two preliminary injunctions against Google Ireland Ltd. ("Google") and the Federal Republic of Germany, represented by the German Federal Ministry of Health ("the Ministry"), at the request of health platform NetDoktor.de ("NetDoktor"). According to the preliminary injunctions, (i) Google will be prohibited from displaying healthcare information from the Ministry's website in so-called "knowledge panels" if such display is based on an agreement between Google and the Ministry to exclusively show the Ministry's content in the knowledge panels; and (ii) the Ministry will be prohibited from supplying the relevant information to Google, and from allowing the use of this information in knowledge panels exclusively reserved for the Ministry.

The Court found that Google has a share of more than 90% on the internet search market in Germany. NetDoktor, the operator of an advertisement-financed online health portal, is the leading health portal in Germany by site visits. It has high visibility in general Google search results, and appears within the first search results for many relevant health-related keywords. On average, between 88% to 90% of the health portal's traffic is generated through Google's search results.

In November 2020, Google and the Ministry announced a cooperation agreement according to which Google would display information boxes – so called "knowledge panels" – on its search result pages for diseases which would be exclusively populated with information provided by the Ministry, combined with a link to the Ministry operated website "gesund.bund.de." The content and open interface on the website were created by the Ministry specifically for instant retrieval by search engines and were also available to other search engines free of charge. NetDoktor argued that its click rates had decreased since the cooperation had started because the knowledge panels diverted user traffic from standard search results.

The Court ruled that the cooperation agreement between Google and the Ministry had the effect of restricting competition on the market for health portals and therefore infringed Article 101(1) TFEU (and the German equivalent).

The Court qualified the Ministry as an undertaking and its activities as economic activities since such activities are usually provided by commercial operators. In the view of the Court, the Ministry did not merely fulfil a public function in health care, as public demand for information on health has in the past been met by private companies that generally operate ad-financed portals.

According to the Court, the cooperation agreement considerably affected NetDoktor because it exclusively reserved the best possible position on the Google search results outside the Google algorithm, namely position "0" in the knowledge panel, for content from the Ministry's website. Since 88-90% of users access health portals via Google, an impeded visibility on the Google search page would lead to a decrease of user traffic and reduce the advertising income of commercial operators. Although the parties disagreed on this issue, the Court accepted NetDoktor 's argument that the cooperation agreement risked reducing click rates of NetDoktor.

The Court also considered that the agreement did not meet the Article 101(3) TFEU exemption criteria. Increasing the visibility of health information through knowledge panels was not considered an efficiency gain under Article 101(3) TFEU as it was found to simply enhance the attractiveness of the product of one market participant to the detriment of another market participant. The more attractive design of an individual supplier's product for consumers could not outweigh the disadvantages caused by the restriction of competition for all other market players. The Court further considered that the agreement interfered with the plurality of the media and opinion which was not outweighed by any benefits.

The Court also rejected as insufficiently substantiated the Ministry's argument that the agreement was aimed at bringing more reliable health content to consumers and improving the health education of the public. Such a benefit would in any case not justify the risk of market foreclosure for other reputable health information providers. On the contrary, it would risk limiting diversity of high-quality health portals.

The Court dismissed a claim for an injunction against the Ministry to tolerate Google's use of the content of the Ministry's health website. According to the Court, tolerating such use does not constitute an agreement subject to Article 101 TFEU. Furthermore, insofar as the Ministry's content was not copyright protected, it would be impossible for the Ministry to prevent third parties from using the content.

In the judgment against Google, the Court did not assess whether Google abused its dominant position pursuant to Article 102 TFEU as the initial claim merely sought to enjoin the display of the Ministry's content based on the agreement between the Ministry and Google. An amended claim was rejected as too vague and hence inadmissible.

According to a press release of the Court dated 10 February 2021, the judgments were not yet final, and there were no main proceedings on the merits pending.

The judgment demonstrates how challenging it has become for large digital platforms to adapt their conduct to various, and often unpredictable, competition law demands. Large digital platforms are increasingly confronted with demands to align their business conduct with various public interest goals, including the fight against misinformation on the Internet. In this case, Google appears to have responded to a clearly articulated desire by the German government to help ensure that its citizens would have immediate access to objective and unbiased health care information. The Court record showed that the vast majority of people considered health care information provided by the government to be more reliable than information provided by an advertisement-financed portal, such as NetDoktor. In fact, the majority of NetDoktor users considered information on the portal to be unreliable. The Court, however, appears to have considered these public interest concerns irrelevant as a matter of competition law, and focused instead on harm to commercial health portal operators.

STATE AID

– EUROPEAN UNION LEVEL –

General Court rejects Ryanair actions for annulment against Commission's decisions on Covid-19 aid schemes in the aviation sector (T-238/20 *Ryanair v Commission*, and T-259/20 *Ryanair v Commission*)

On 17 February 2021, the General Court delivered two important judgments concerning State aid granted by Sweden (T-238/20) and France (T-259/20), respectively, on the basis of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (the "Covid-19 Temporary Framework").

In particular, the first judgment (T-238/20) concerns a Swedish aid scheme granting airlines a State guarantee to ensure that they have sufficient liquidity to preserve their viability during and after the Covid-19 crisis (the "Swedish aid scheme"). This aid scheme benefited all airlines which, on 1 January 2020, held a Swedish operating licence to conduct commercial activities in aviation under Article 3 of Regulation (EC) No 1008/2008 (OJ 2008 L 293, p. 3, ("Regulation 1008") – except for airlines which have non-scheduled passenger air services as their main activity. The Swedish aid scheme was limited in time (until 31 December 2020) and amount (SEK 5 billion).

The second judgment (T-259/20) concerns a separate – but similar – aid scheme adopted by France (the "French aid scheme"). This aid scheme is aimed at ensuring that airlines holding an operating licence issued in France – pursuant to Article 3 of Regulation 1008 – maintain sufficient liquidity until the Covid-19 travel restrictions are lifted. The aid scheme deferred the payment of aviation taxes until 1 January 2021, and then spread payments over a period of 24 months, until 31 December 2022. The French aid scheme is limited to a certain amount of taxes per airline, calculated on a monthly basis.

By two separate decisions of 31 March (France) and 11 April 2020 (Sweden), the Commission approved the French and Swedish aid schemes. While the French aid scheme was approved on the basis of Article 107(2)(b) TFEU (i.e., "*aid to make good the damage caused by natural disasters or exceptional occurrences*"), the Swedish aid scheme was authorized based on Article 107(3)(b) TFEU (i.e., "*aid to* [...] *remedy a serious disturbance in the economy of a Member State*") and on the Covid-19 Temporary Framework.

The judgments of the General Court of 17 February 2021 rejected two separate actions for annulments brought by Ryanair against the above-mentioned decisions of the Commission on the basis of Article 263 TFEU. Below we outline the most interesting aspects of the reasoning followed by the General Court in the two judgments, which concern, in both cases, the first plea in law raised by the Applicant.

The first plea in law raised by Ryanair in support of its actions for annulment alleged a violation of the fundamental principles of non-discrimination on grounds of nationality set out in Article 18 TFEU, and of the EU rules on freedom to provide services. In short, Ryanair argued that the French and Swedish aid schemes discriminate between airlines on grounds of nationality, and that this discrimination is neither necessary nor proportionate to achieve the aims of the aid schemes. Moreover, the aid schemes would restrict the freedom to provide services, without any valid justification.

As a preliminary remark, the General Court noted that the eligibility criteria of the aid schemes – in particular, the requirement to hold a French/Swedish licence – require that the recipient has its principal place of business in the relevant Member State. This criterion results in a difference in treatment between, on the one hand, airlines which operate in France/Sweden and have their principal place of business in France/Sweden, and, on the other hand, airlines which operate in France/Sweden but have their principal place of business in another Member State (e.g., in the case of Ryanair, Ireland).

In this regard, the General Court recalled that, in light of the case law, the Commission cannot declare State aid which provides conditions contrary to the provisions and general principles of the Treaty – such as the principle of equal treatment – compatible with the internal market. However, the General Court clarified that the difference in treatment must not be assessed – as the applicant argued – on the basis of Article 18 TFEU, which sets out the general prohibition on discrimination on the ground of nationality. In fact, that prohibition is only applicable insofar as no more specific provision contained in the EU Treaties applies. In the present case, the applicable specific provisions are Article 107(2)(b) and (3)(b) TFEU, namely the legal basis of the decisions of the Commission challenged before the General Court. The compatibility of the aid schemes with EU law must hence be assessed in light of those provisions – meaning that it must be considered whether, first, the objectives of the aid schemes at issue satisfy the requirements of those provisions and, second, the conditions for granting the aid do not go beyond what is necessary to achieve that objective.

First, as regards the objective of the aid schemes at issue, the General Court found that the French and Swedish aid schemes are essentially aimed at remedying the economic damages caused to airlines as a result of the Covid-19 outbreak. In this sense, they pursue objectives that are compatible with Article 107(2)(b) and (3)(b) TFEU. With respect to the French aid schemes, it is interesting to note that the Court confirmed that the Covid-19 pandemic constitutes an "exceptional occurrence" within the meaning of Article 107(2)(b). Specifically, the pandemic and the measures taken by the French authorities to deal with it can be considered as a whole as being an "exceptional occurrence" for the purposes of that provision.

Second, the General Court found that the French and Swedish aid schemes are appropriate and proportionate to achieve the objective set out in Articles 107(2)(b) and 107(3)(b) TFEU, respectively.

In particular, with regard to the French aid schemes, the General Court noted, *inter alia*, that the temporary tax deferral granted to airlines which hold a French licence is appropriate to address the economic damages resulting from Covid-19. The compensation does not take the nationality of the "victims" of the damage as the chief factor for allocation as such, but requires an "institutional link" with the place where the damage caused by the travel restrictions and lockdown arose, namely the principal place of business of the airline concerned. This criterion ensures that the recipient airlines have a "stable presence" in France and will maintain such a presence in the future. This implies that, when the time will come to pay the deferred taxes, the airlines will be in the French territory and the authorities will be able to ensure that the taxes are effectively paid. Moreover, the authorities are also able to control the manner in which that aid is used by the recipients – which would not have been the case if it would have been granted to airlines established in another Member State.

The General Court followed the same reasoning with regard to the Swedish aid schemes. It found that granting the State guarantee only to airlines holding a Swedish licence, in so far as it requires the principal place of business of the undertakings to be on the Swedish territory, ensures the stability of the presence of the airlines. This stability is necessary for the Swedish authorities to be able to control the manner in which that aid is used.

Third, the General Court rejected the arguments of the applicant concerning the existence of alternative means to achieve the objectives sought by the French and Swedish aid schemes, without discriminating against airlines having their principal place of business in other Member States. In particular, according to the applicant, the aid schemes could have relied on eligibility criteria such as the market shares in France/Sweden, or the number of passengers carried or the routes.

In this regard, the Court noted that in the context of its analysis of the proportionality of the aid, the Commission is not required to consider every possible alternative measure that could have been adopted by the Member State to achieve the same results. For its part, the Member State is also not required to prove that no other conceivable measure – which by definition would be hypothetical – could better achieve the intended objective. Moreover, and in any event, the alternatives suggested by the applicant would not have been appropriate to pursue the objective of the aid schemes, since they would not have allowed to ensure the necessary stability in France/Sweden and the consequent control of the French/Swedish authorities over the aid recipients.

Fourth, with regard to the allegation that the aid schemes would have infringed the applicant's freedom to provide services, the General Court stressed that Article 56 TFEU does not apply to services in the transport sector. The freedom to provide services is regulated, in the transport sector, by the rules set out in Title IV of the TFEU, and by the acts adopted pursuant to Article 100(2) TFEU – namely, in the present case, Regulation 1008. However, the applicant did not invoke any arguments to support the view that the aid schemes would be incompatible with that Regulation.

In any event, according to the General Court, the restrictive effects deriving from the choice of the principal place of business as the relevant criterion to define eligible airlines do not go beyond the effects which trigger the prohibition in Article 107(1) TFEU. In other words, those effects justify the application of the State aid rules – but, for the reasons set out above, they are appropriate and proportionate to achieve the objectives required by Articles 107(2)(b) and 107(3)(b) TFEU.

To conclude, it is evident that the two Ryanair judgments of 17 February 2021 should be carefully read by all those interested in understanding the scope and purpose of the Covid-19 Temporary Framework, and related State aid measures in the aviation sector. The guidance provided by the General Court in those judgments is likely to have far reaching consequences, even beyond the realm of the State aid rules – especially insofar as the intersections with the freedom to provide services is concerned.

Moreover, it should also be noted that Ryanair has already brought several other actions for annulment before the General Court, against State aid adopted by various Member States in support of their airline sectors on the basis of the Covid-19 Temporary Framework (e.g., cases T-769/20 Recapitalisation and subsidised interest loan for Nordica, T-737/20 Recapitalisation of airBaltic, T-677/20 Aid to Austrian Airlines, T-665/20 Aid to Condor Flugdienst GmbH, T-657/20 Recapitalisation of Finnair, and many more). With that in mind, and even though each case must be assessed in light of its own specific circumstances, the judgments of 17 February 2021 are likely to set a (dangerous) precedent for Ryanair's actions.

– MEMBER STATE LEVEL –

UNITED KINGDOM

UK launches consultation on new domestic regime for subsidy control following the conclusion of the UK-EU Trade and Cooperation Agreement

On 3 February 2021, the UK Government started a consultation process regarding the UK's future subsidy regime, which will be entirely separate from the existing EU state aid framework.

Following the conclusion of the UK-EU Trade and Cooperation Agreement (the "TCA") and the end of the Brexit transition period on 31 December 2020, the UK is now able to design its own subsidy control mechanism as it is no longer subject to EU rules on State aid (with some limited exceptions).

However, the UK is bound by its commitments in the TCA to maintain a "level playing field" for open and fair competition, including subsidies, in order to prevent distortion in trade and investment between the UK and the EU. The TCA also provides for a set of common principles to ensure a minimum standard which both UK and EU subsidy control systems must adhere to.

According to the consultation document (available here) published by the UK Department for Business, Energy and Industrial Strategy ("BEIS"), which is in charge of the consultation, the UK Government is determined to design a "bespoke" regime which "reflects our strategic interests and particular national circumstances". In particular, BEIS has underlined the need to support the recovery of the UK's economy from the impact of COVID-19 and to ensure UK subsidies are provided in accordance with the country's international commitments, including the TCA and the WTO.

With that in mind, BEIS is currently seeking views on how the new domestic regime should work, what powers the future subsidy regulator should have and which sectors should be exempt from subsidy regulation. Therefore, this is a good opportunity for businesses and other stakeholders to participate in shaping the future regulatory frame-

work for UK subsidies, especially in the present context of significant economic uncertainty at global level.

The deadline for interested parties to submit their responses to the consultation is 31 March 2021.

– OTHER DEVELOPMENTS –

EUROPEAN UNION: **Commission opens consultation on the revision of State aid rules on Important Projects of Common European Interest**. On 23 February 2021, the Commission launched a public consultation inviting all interested parties to comment on a proposed targeted revision of the Communication on State aid rules for Important Projects of Common European Interest. Interested parties may submit their comments until 20 April 2021.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

DENMARK

Reform of the Danish Competition Law Enforcement System

On 9 February 2021, as a part of the implementation of the ECN+ Directive, the Danish Parliament approved extensive amendments to the Danish Competition Act. Most importantly, the amendments allow the Danish Competition and Consumer Authority's ("DCCA") to request courts to impose civil fines on undertakings.

Under the previous enforcement system, all competition cases would first be investigated by the DCCA and, if applicable, referred to the State Prosecutor. Additionally, certain investigatory powers, such as the power to search private homes, were only vested in the State Prosecutor. Upon completion of the investigation, the State Prosecutor could then bring an action to have a court impose a criminal fine on an undertaking or an individual.

Under the new enforcement system, the DCCA will be entirely responsible for investigating suspected competition law infringements by undertakings. The DCCA can also obtain a court order to inspect, in certain cases, the homes of individuals. Upon completion of a substantive investigation, the DCCA may bring the case before the courts to claim civil fines on the undertaking. To avoid court proceedings, the undertaking in question may admit to the infringement and accept to pay a fine.

The State Prosecutor retains the power to criminally prosecute individuals for competition law violations in accordance with criminal law principles contained in the Danish Administration of Justice Act.

THE NETHERLANDS

ACM identifies competition risks in relation to paid ranking

On 2 February 2021, the Dutch Authority of Consumers and Markets ("ACM") published a study on paid ranking. Paid ranking is a practice whereby businesses pay online platforms for a better position in search results. The ACM found that paid ranking creates risks for consumers and may even restrict competition, but that risks associated with this practice could potentially be limited through increased transparency.

Many internet platforms, such as Bol.com and Booking.com, allow businesses to improve their ranking in search results in exchange for an extra fee, which can range from 15% to 40% of the base fee. Although the role of paid ranking still remains limited, the ACM found that, on certain platforms, a significant portion of the businesses showcased in the top positions have paid for these rankings. In those cases, paid ranking may negatively affect competition and consumers by reducing quality and competition. Since businesses are likely to pass on the costs of paid ranking to their customers, paid ranking may also result in higher prices for consumers.

On the other hand, paid ranking may be beneficial for consumers, for example by sending a signal of quality or increasing demand, which in turn improves the efficiency in production. However, the ACM found online platforms have alternative means of achieving most of those benefits. By way of illustration, hospitality and food delivery businesses commonly lower prices to boost demand. Besides, paid ranking generally only benefits consumers as long as online platforms are transparent in identifying those rankings which have been paid for by businesses and prevent consumers from unknowingly clicking on paid search results. However, according to the ACM, it remains difficult for consumers to detect paid rankings in practice.

The ACM is currently conducting a study on the role of transparency in mitigating the risks of paid ranking identified in the study.

UNITED KINGDOM

John Penrose MP publishes independent report containing proposals to strengthen the UK competition and consumer law regime

Introduction

On 16 February 2021, Conservative member of Parliament ("MP") John Penrose published his much-anticipated independent report on how the UK's competition regime can evolve and improve, within the context of economic recovery from Covid-19 and the end of the Brexit transition period.

The report (entitled "*Power to the People*") extends to nearly 70 pages, and its recommendations are both ambitious and wide-ranging: in the long term, Penrose argues for a new Competition Act that updates and modernises the UK institutions responsible for enforcing competition and consumer law; in the shorter term, Penrose identifies various proposals that do not, in his view, require legislation (and can therefore be implemented more quickly).

Proposals regarding the CMA's role and powers

The report considers that "*at the moment there is no strong, independent institution responsible for the overall progress of competition, consumer rights, supply-side reforms and productivity improvements*", which is an "'*important gap*' *in our current regime*". Penrose therefore recommends that the UK's Competition and Markets Authority ("CMA") bridges this gap and becomes "*a micro-economic sibling for the Bank of England's well-established public macro-economic role*" by, amongst other things:

- receiving enhanced powers to impose tougher penalties for non-compliance with its investigations (e.g., a turnover-based fining regime, in line with competition regulators in other jurisdictions);
- being afforded the flexibility to accept legally binding commitments at any stage of a market study, market investigation, or Phase 1 or 2 merger investigation;
- updating its civil consumer enforcement powers, in order to align them with the CMA's existing competition enforcement toolkit; and
- publishing an annual "*State of Competition and Consumer Detriment*" report, which measures and analyses progress and issues in both areas (across all sectors of the economy, and all parts of the country).

More broadly, the report also recommends that the government forms a diverse taskforce to undertake a comprehensive "*end-to-end review and re-design of procedures and case management*" within both the CMA and the Competition Appeal Tribunal (the UK's specialist competition court) - with the challenging aim of improving the simplicity and efficiency of the decision-making process, whilst maintaining its fairness and robustness.

Other proposals

In addition, the report notes the following:

- whilst it supports the government's recently-announced intention to establish a new digital markets unit within the CMA ("DMU"), dedicated to regulating technology companies with significant market power (for further details, see VBB on Competition Law, Volume 2020, No. 12) , the report nevertheless (i) cautions that the DMU's "*extra-strong upfront powers*" must be "*ring-fenced tightly*" in order to guard against "*regulatory creep*"; and (ii) therefore identifies a number of proposed checks and balances in this regard;
- although the UK now has "*full sovereign control*" to decide whether to subsidise certain industries, it should in general elect not to do so (in order to keep the economy competitive and avoid potential distortions of competition). By contrast, the report does suggest that "*Ministers should develop new options on how to prevent fast-growing UK-based firms in fast-growing sectors… from being poached offshore for non-commercial reasons, without damaging our attractiveness for FDI by creating disproportionate political risks at the same time*", which is perhaps a reference to the potentially very extensive new UK foreign direct investment screening regime envisaged by the UK's government's proposed National Security and Investment Bill (for further details, see VBB on Competition Law, Volume 2020, No. 11); and

- sector regulators should share the same mandate as the DMU to "*erode the power and strength*" of a small number of core network monopolies, "*by making pro-competitive interventions, for example by encouraging more data sharing, or reducing barriers to new entrants*". In this context, Penrose considers that sector regulators' primary legal duty should be to achieve "*competition for the benefit of consumers first, regulation as a last resort*", whilst gradually ceding greater responsibility for their respective sector(s) to the CMA.

Comment

Whilst a number of Penrose's recommendations – especially those aimed at deregulation and simplification – should attract support from businesses, as with any independent report such recommendations are not government policy and therefore have no binding effect on the UK government (which is expected to respond substantively in due course).

That said, the report has already been welcomed by certain high-profile members of the UK government (including the Chancellor and the Business Secretary) and the CMA (which noted that it shares Penrose's ambition for the UK regime), and it is also true that many of the report's findings are broadly consistent with those of other recent reports (including some prepared by the CMA itself).

Against this background, some degree of reform appears likely – although, at this early stage, its precise nature, scope and timing remains unclear.

In the centre of Europe with a global reach

VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com