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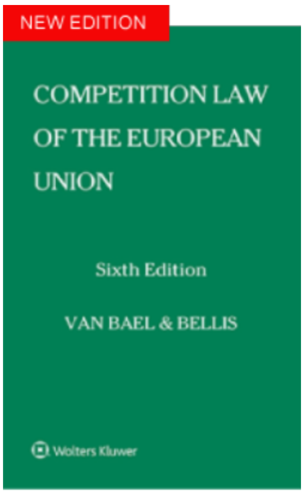

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VBB on Competition Law | Volume 2021, Nº 3

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MERGER CONTROL

– EUROPEAN UNION AND UK LEVEL –

European Commission and CMA announce formation of multilateral pharma merger working group

On 16 March 2021, the European Commission, the UK Competition and Markets Authority ("CMA"), the Canadian Competition Authority and the US competition authorities announced the formation of a trans-Atlantic working group to exchange best practices on pharmaceutical mergers.

Pharmaceutical mergers have fallen under increased scrutiny by both North American and European competition authorities in recent years. Regulators have closely considered how to ensure that competition and innovation are maintained, particularly where a merger threatens the viability of promising drugs still in the development pipeline. Large pharmaceutical deals usually require notifications in multiple countries, and the application of different analytical approaches to this complex sector – including with regard to the scope of any divestments – has sometimes resulted in inconsistent outcomes across jurisdictions. The participating competition authorities hope that the working group will provide a forum to exchange views in order to develop a more coordinated approach to enforcement. AstraZeneca's € 39 billion acquisition of Alexion, announced in December 2020 and expected to require notification in each of the jurisdictions participating in the working group, may provide an early view of how future cooperation between regulators in this area may unfold.

– MEMBER STATE LEVEL –

ITALY

Italian Competition Authority updates merger control thresholds

On 22 March 2021, the Italian Competition Authority ("ICA") published the indexed thresholds triggering the merger notification obligation in Italy. By law, the ICA is required to update these thresholds on a yearly basis. Following an increase in the GDP deflator index, transactions must be notified to the ICA provided that the following cumulative thresholds are met: (i) the aggregate turnover in Italy of all the undertakings concerned exceeds € 511 million and (ii) the aggregate turnover in Italy of each of at least two of the undertakings concerned exceeds € 31 million. The new thresholds are effective as of 22 March 2021.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Court of Justice reduces fine imposed on Pometon in Steel Abrasives cartel case

On 18 March 2021, the European Court of Justice ("ECJ") delivered its judgment in *Pometon SpA v European Commission* (Case C-440/19) in connection with the *Steel Abrasives* cartel case. In its judgment, the ECJ partially upheld the appeal in so far as it found that the General Court had breached the principle of equal treatment in calculating the fine imposed on Pometon SpA. The ECJ considered that the basic amount of the fine had to be reduced by 83% (instead of 75%, as determined by the General Court) and set at € 2.6 million, thus following the opinion issued last year by Advocate General Hogan (see VBB on Competition Law, Volume 2020, No. 10).

In June 2010, the Commission – based on a leniency application made by one producer, Ervin – started an investigation into a suspected cartel in the steel abrasives sector. In April 2014, the Commission issued a decision under its settlement procedure finding that four of the companies under investigation (Ervin, Winoa, Metalltechnik Schmidt (MTS) and Eisenwerk Wrth) had participated in a cartel in breach of Article 101 TFEU and imposing fines totalling € 30 million. Pometon did not settle with the Commission and the Commission's investigation into Pometon therefore continued under the standard (non-settlement) investigation procedure. On 25 May 2016, the Commission issued an infringement decision against Pometon and imposed a fine of € 6.197 million on it. Pometon appealed to the General Court.

In March 2019, the General Court dismissed all of Pometon's pleas as regards the Commission's substantive application of Article 101 TFEU but upheld its plea that the Commission had failed to state reasons when departing from the standard fining methodology by applying point 37 of the Fining Guidelines. The General Court considered that the Commission had not provided Pometon with sufficiently precise information as regards the method of calculation used to determine the fine imposed on it. In exercising its unlimited jurisdiction, the General Court considered the following three factors in determining the reduction of the amount of the fine imposed on Pometon: (i) Pometon's individual liability and the concrete influence of its conduct on price competition; (ii) Pometon's weight in the infringement in light of its value of sales in the EEA and (iii) Pometon's size. On that basis, the General Court applied an exceptional reduction rate of 75% to the basic amount, thus reducing the fine imposed on Pometon from € 6.2 million to € 3.8 million (see VBB on Competition Law, Volume 2019, No. 4).

In its judgment, the ECJ examined the three factors relied upon by the General Court to re-calculate the fine imposed on Pometon described above. According to the ECJ, the General Court had breached the principle of equality by giving Pometon the same exceptional reduction rate of 75% as producers Ervin and Winoa (both of which were found to have had a more active role in the cartel), even though the General Court had considered that the situation of Pometon was more similar to that of MTS in so far as it played a limited role in the cartel (see criteria (ii) above) and its weight in the cartel was low having regard to the value of its specific sales in the EEA (see criteria (iii) above). MTS had received a 90% reduction of the basic amount of the fine. The ECJ noted, however, that the situation of Pometon and MTS differed in the sense that Pometon's total turnover was four times that of MTS. Under these circumstances and as recommended by Advocate General Hogan, the ECJ, in exercising its unlimited jurisdiction, applied a reduction of 83% of the basic amount of the fine, resulting in the fine imposed on Pometon being reduced to €2.6 million. The ECJ's judgment re-emphasises the need for the Commission to ensure equality of treatment between settling and non-settling parties in hybrid cases when setting the level of the fine.

– MEMBER STATE LEVEL –

UNITED KINGDOM

Directors beware? CMA secures five director disqualifications (including the two longest ever) across two investigations

On 10 March 2021 and 18 March 2021 respectively, the UK's Competition and Markets Authority ("CMA") announced that it had secured the disqualification of five company directors, after finding that they had infringed competition law by forming cartels in the construction industry, following two separate CMA investigations into – respectively – roofing materials and pre-cast concrete drainage products. Notably, two of the disqualifications were for 12 years and 11 years respectively, representing the two longest director disqualification periods secured by the CMA to date.

While the CMA has possessed director disqualification powers since 2003, historically such powers were rarely exercised. However, in recent years there has been a dramatic increase in the number, frequency and length of CMA director disqualifications.

In this context, company directors and businesses should already be considering proactive steps to reinforce a strong(er) competition law compliance culture and therefore minimise risk exposure.

<u>What are the CMA's director disqualification powers, and how have they been used?</u>

The CMA's director disqualification powers

In circumstances where: (i) a company has infringed competition law; and (ii) the conduct of a director of that company (including a former or shadow director) makes such director unfit to be involved in the management of a company, the CMA (or another UK sectoral regulator with concurrent competition law powers) can apply to the court for a competition disqualification order ("CDO"). A CDO prohibits an individual from acting as a company director for a period of up to 15 years, with any breach of such disqualification punishable by a fine and/or up to two years' imprisonment. Alternatively, a director can provide the CMA with a voluntary (but legally binding) competition disqualification undertaking ("CDU"), which has the same practical effect as a CDO.

Recent enforcement trends

As noted above, in recent years the CMA's approach to the use of its director disqualification powers has changed beyond all recognition.

Indeed, shortly after publishing its updated Guidance on Competition Disqualification Orders (the "CDO Guidance") in February 2019, the CMA itself stated that it had been "*ramping up how we use our disqualification powers and as a result, the risk of director disqualification to those who break the law has never been higher.*" The CDO Guidance also afforded the CMA greater procedural flexibility and discretion when exercising its director disqualification powers, including: (i) allowing the CMA to pursue CDOs earlier in the investigation process; and (ii) introducing incentives for directors to cooperate with the CMA and offer CDUs sooner. In addition, at around the same time, the CMA indicated that it intended to use its director disqualification powers not only more frequently (such that it now actively considers CDOs in every cartel case that it investigates), but also more broadly (for example, in non-cartel cases such as those relating to abuses of dominance).

Against that background, it is perhaps unsurprising that the CMA's use of these powers has increased significantly in recent years – with the five most recent disqualifications bringing the total number to 25 (22 of which have been secured since 2019). As such, director disqualification now ranks very clearly as the CMA's preferred personal enforcement tool – more so than the relatively under-utilised criminal cartel offence (responsibility for which, following a series of court defeats, the CMA now appears willing to leave to other organisations – such as the Serious Fraud Office).

Comment and key takeaways

Further evidence of the CMA's aggressive pursuit of director disqualifications?

These latest developments are another reminder that the CMA is ever more focused on director disqualification, recognising the value of individual liability as a formidable deterrent mechanism.

The unprecedented length of the CDUs secured from the FPM directors (see further details below) is particularly notable. On one hand, these may simply be a reflection of the seriousness of the infringements and the directors' involvement in them. On the other hand, following the significant recent uptick in the number, frequency and length of director disqualifications, it may also be true that the CMA now considers that it has clearly put company directors "on notice" as to its likely approach to such matters (which perhaps suggests that, in appropriate cases, future disqualification periods will also be towards the upper range of the CMA's statutory limit of 15 years).

Agreeing CDUs at an earlier stage vs. risking (and potentially contesting) CDOs: an impossible choice?

The CMA has previously noted that offering CDUs has ultimately resulted in a shorter period of disqualification than the CMA would otherwise have sought in a CDO process (and the "plea-bargaining" nature of the CDU process may further incentivise directors to accept disqualification more quickly than might otherwise be the case).

However, some commentators have expressed concerns about the CMA's recent practice of making time-limited CDU offers at an earlier stage in the investigation, which could exert undue pressure on company directors (especially in the context of an already long, expensive and reputationally damaging investigation).

While a small number of cases have resulted in contested CDO proceedings (with varying outcomes), the vast majority of CMA director disqualifications have been secured through CDUs. The most recent disqualifications (all of which were secured through CDUs) indicate that this trend appears likely to continue.

Key takeaways for company directors

In light of the above, company directors (even those not involved in day-to-day business activities) should be especially mindful of their competition law compliance responsibilities in their capacity as a director. In particular:

1. company directors should ensure that they have a sufficient understanding of competition law, in order to be able to quickly recognise potential risks and realise when to make further enquiries and/or seek specialist legal advice and

2. as soon as company directors become aware of a potential infringement, they must take all possible steps to prevent the company from implementing the anti-competitive conduct (including, in particular, following up as soon as practicable with the relevant in-house legal/compliance functions).

Key takeaways for businesses

Moreover, given the increasingly interlinked nature of company and director liability in relation to UK competition law infringements, businesses should also be considering with renewed vigour the practical steps that they can take in order to foster a strong(er) competition law compliance culture (particularly at director level).

This could include, for example: undertaking periodic internal audits; introducing mandatory competition law compliance training for all directors; encouraging regular discussion of ethics and compliance issues at board meetings and, perhaps, strengthening the role of non-executive directors as an independent safeguard.

Summary of the latest investigations that led to disqualifications

Roofing materials investigation

This CMA investigation involved two of the UK's largest suppliers of rolled lead (which is mainly used for roofing): (i) Associated Lead Mills Ltd ("ALM") and (ii) H.J. Enthoven Ltd (trading as BLM British Lead) ("BLM").

ALM and BLM, which together account for a significant proportion of UK rolled lead supplies, admitted to forming a cartel by (i) colluding on prices; (ii) sharing the rolled lead market by agreeing not to target certain customers; and (iii) agreeing not to supply a new business because it risked disrupting the firms' existing customer relationships. Each infringement also included exchanges of competitively sensitive information. Following the CMA's infringement decision in November 2020, ALM and BLM were respectively fined £ 1.5m and £ 8m.

Reflecting the seriousness of the infringements and the directors' involvement in such infringements, the CMA has now secured the disqualification of three BLM and ALM directors.

Notably, the BML director also sought to conceal his communications with competitor businesses by using a different mobile phone from his main one, in the period from December 2016 until the launch of the CMA's investigation in July 2017 (a fact which only came to light after the CMA had seized the phone). In addition, one of the AML directors admitted that it suspected that ALM was breaching competition law and that it received competitively sensitive information from BLM, but nevertheless did nothing to stop it.

The BLM director will be disqualified for six-and-a-half years (beginning on 18 March 2021) and the two ALM directors for four years and three years respectively (both beginning on 30 May 2021).

Pre-cast concrete drainage products (civil) investigation

This investigation culminated in a CMA infringement decision in October 2019, which found that FP McCann Ltd ("FPM") -– together with two other suppliers of pre-cast concrete drainage products, Stanton Bonna Concrete Ltd and CPM Group Ltd -– had infringed competition law.

More specifically, the CMA found that – from July 2006 to March 2013 – the suppliers had (i) agreed amongst themselves to fix or coordinate their prices; (ii) shared out the market by allocating customers and (iii) exchanged with each other competitively sensitive information. FPM appealed against this decision, but in December 2020 the CMA's determination was upheld by the Competition Appeal Tribunal (the "CAT") (for further details, see VBB on Competition Law, Volume 2021, No. 1).

Following the CAT's decision – and again reflecting the serious nature of the infringements and the directors' involvement in such infringements – the CMA has now secured the disqualification of the two FPM directors that attended regular cartel meetings on behalf of FPM.

These two directors will be disqualified for 12 years and 11 years respectively, representing the two longest director disqualification periods secured by the CMA to date. The disqualifications will commence on 31 March 2021.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Commission review of the VBER and Vertical Guidelines progresses

The public consultation organised by the Commission in the context of the planned revision of the Vertical Agreements Block Exemption (VBER) and Vertical Guidelines closed on 26 March. This process was principally intended to solicit feedback on the different policy options being considered by the Commission in four main areas: dual distribution, active sales restrictions (including the use of selective and other forms of distribution in different parts of the EU), conditions on online sales and MFN clauses. As a next step, after assessing the results of the consultation, the Commission is expected to issue drafts of a new VBER and Vertical Guidelines for public comment over the summer months, with the final version of the new rules coming into effect by 1 June 2022.

The position paper submitted by Van Bael & Bellis in the context of the recent consultation can be found here. The main recommendations advocated in this paper were the following.

Dual distribution

In our view, the Commission should pursue the option of continuing to permit vertical agreements in dual distribution systems to benefit from the VBER. The fact that dual distribution models have become increasingly common should not be a cause for concern; they benefit consumers and suppliers of branded products alike and do not create structural horizontal competition law concerns that would justify any changes to the current rules. To the extent that specific practices engaged in by undertakings in the context of dual distribution could be considered to raise horizontal concerns, such as blatant price collusion or exchanges of information on future strategic conduct at the retail level going beyond what is legitimately needed to ensure efficient supply, such practices are already considered serious competition law violations. Eliminating or limiting the availability of the VBER for dual distribution systems would be extremely disruptive for existing distribution practices, would create legal uncertainty and drive up costs.

Conditions on online selling

In relation to terms and conditions governing online sale, the Commission should pursue the policy options it has proposed (i) to no longer treat dual pricing between online and brick and mortar ("B&M") sales as a hardcore restriction and (ii) to remove the requirement of equivalence in relation to the criteria applied to online and B&M retail in the context of selective distribution systems. At the time of the adoption of the current VBER and Vertical Guidelines in 2010, e-commerce was still a developing sales channel and the Commission sought to protect against indirect measures introduced by suppliers to hinder or prevent online selling. Since then, however, online retail has experienced explosive growth and is now a very well-established and trusted destination for consumers. At the same time, B&M retail has come under immense pressure due, e.g., to the growth of online retail, changing consumer habits and preferences and the impact of the COVID-19 pandemic. Given these significant changes, we consider that there is no sound reason to treat measures by suppliers that aim to maintain a well-balanced distribution system with differentiated sales channels as a hardcore restriction. In fact, we believe that allowing suppliers to adopt such measures, including compensating traditional brick-and-mortar ("B&M") stores for certain costs and imposing differentiated requirements on different retail channels, will typically be pro-competitive and will benefit consumers.

Active sales restrictions/selective distribution

The Commission should pursue the option of loosening the strict limitations on the use of active sales restrictions which apply under the current VBER – this would compensate, at least to some extent, for the erosion of the protection from free riding caused by the dramatic growth in online (passive) sales. In addition, where selective distribution is used in only part of the EU (the "SDS Area"), the Commission should tackle the unfettered free riding that is permitted under the current rules by no longer permitting (under the new rules) sales to unauthorised resellers in the SDS Area by distributors appointed elsewhere where selective distribution is not used. Finally, in the context of selective distribution, we would favour the option of permitting active sales restrictions at the wholesale level provided they do not apply at the retail level.

MFNs

We would favour the Commission continuing to treat parity clauses as exempt under the VBER, as they typically do not appear to raise competition law concerns where engaged in by firms without market power. The enforcement practice in this area has focused on digital platforms with market power, which does not justify removing the benefit of the VBER for all parity clauses for all undertakings. For greater certainty, the Vertical Guidelines should explicitly confirm this interpretation of the VBER. In addition, market participants would welcome more clarity on the assessment of such clauses when used in agreements that do not benefit from the VBER. The revised Vertical Guidelines should therefore provide meaningful guidance on the criteria that are relevant to assess the effects of parity clauses in practice.

INTELLECTUAL PROPERTY/LICENSING

– EUROPEAN UNION LEVEL –

Court of Justice confirms Lundbeck pay-for-delay infringement decision

On 25 March 2021, the European Court of Justice ("ECJ") dismissed all appeals against the 2016 rulings of the General Court which had upheld the European Commission's ("Commission") decision to fine Lundbeck and four generic pharmaceutical companies (Merck, Alpharma, Arrow and Ranbaxy) for concluding "pay-for-delay" patent settlement agreements in breach of Article 101 Treaty on the Functioning of the European Union ("TFEU") (Cases C-586/16 P, Sun Pharmaceutical Industries and Ranbaxy (UK) v Commission; C-588/16 P, Generics (UK) v Commission; C-591/16 P, Lundbeck v Commission; C-601/16 P, Arrow Group and Arrow Generics v Commission; C-611/16 P, Xellia Pharmaceuticals and Alpharma v Commission; and C-614/16 P, Merck v Commission).

The facts of the case were, in summary, as follows: after the expiry of Lundbeck's compound patent on the active ingredient for its blockbuster anti-depressant, citalopram, several generic producers took steps to prepare for market entry (with Merck actually entering the market, albeit only briefly), despite Lundbeck retaining a number of patents protecting its manufacturing processes. In response, Lundbeck launched or threatened patent infringement proceedings, leading ultimately to six patent settlements with the four generic producers, pursuant to which Lundbeck agreed to make various "transfers of value" to the generic producers and the generic producers agreed to stay out of the market.

In 2013, the Commission concluded that these settlements violated Article 101 TFEU. Following the initial judgment in 2016 by the General Court (see VBB on Competition Law, Volume 2016, No. 9), the ECJ's new judgment provides final confirmation of the Commission's decision.

Lundbeck and the generics were at least potential competitors

An agreement can only violate Article 101 TFEU if there is coordination between independent undertakings which restricts competition that would otherwise have existed – if not actual competition, then at least potential competition.

In the judgment, the ECJ held that, despite Lundbeck's process patents and evidence indicating that the generic producers may have infringed these patents, Lundbeck and the generic producers were at least potential competitors at the time the agreements were concluded. In line with its earlier judgment in Case C-307-18, *GSK (Paroxetine)*, the ECJ held that potential competition exists if the generic producer has a "*firm intention and an inherent ability to enter the market*". In turn, this test is satisfied if the generic producer has "*taken sufficient preparatory steps to enable it to enter the market*", and where the generic producer does not face barriers to entry that are insurmountable. On this latter point, the ECJ confirmed that a process patent does not constitute an insurmountable barrier, and therefore the generic producers, having taken preparatory steps to enter the market, constituted potential competitors.

The agreements at issue constitute "by-object" restrictions of competition

Whilst the ECJ accepted that not all settlement agreements involving reverse payments (that is, payments from an originator to a generic producer) necessarily infringe competition law, it held that such settlements should be classified as restricting competition "by object" where the transfer of value by the originator to the generic producer cannot have any explanation other than the parties' commercial interests not to engage in competition on the merits.

In order to determine whether such a conclusion should be drawn, the ECJ clarified that a case-by-case analysis should be carried out to assess whether the net gain from the reverse payment is sufficient to incentivise the generic producer to stay out of the market. In the present case, the transfers of value from Lundbeck to the generic producers entailed lump sum payments roughly corresponding to the profits the generic producers expected to earn should they have entered the market; in some instances, Lundbeck also agreed to purchase the generic producers' stocks (in order to have them destroyed). On this basis, the ECJ found that it was primarily the size of the value transfers which induced the generic producers to accept the limitations on their ability to enter the market, and therefore characterised the agreements as restricting competition by object.

For further details on this case, please attend our upcoming webinar on 13 April, in which our lawyers who represented one of the parties in this case will discuss the key takeaways for companies considering entering into patent settlement agreements. Registration and further details are available here. The webinar will take place on Tuesday, April 13, 2021 1:00 pm (Brussels, GMT+02:00), and a recording will be available thereafter on our website.

STATE AID

– EUROPEAN UNION LEVEL –

European Court of Justice further relaxes the standards of review of "aid schemes" and annuls the General Court's judgment on Spanish football clubs (*Commission v Fútbol Club Barcelona*, Case C-362/19 P)

On 4 March 2021, the European Court of Justice ("ECJ") delivered another interesting judgment (Case C-362/19 P) in the "Spanish football club saga", which set aside the General Court's ("GC") judgment of 26 February 2019, *Fútbol Club Barcelona v Commission* (Case T-865/16, the "judgment under appeal"), and nonetheless rejected the application for annulment at first instance as unfounded.

The case concerns State aid granted by Spain to certain football clubs as a result of the seventh amendment to its 1990 Law on Sport. This Law required Spanish professional sports clubs to change their legal form into public limited sports companies ("SLCs"). However, it provided an exception for professional sports clubs that had achieved a positive financial balance during the financial years preceding the adoption of that law. Four football clubs, including *Fútbol Club Barcelona*, benefited from that exemption. This exemption had an important side-ef-fect on the fiscal treatment of the football clubs because, as non-profit legal persons, sports clubs enjoy a lower rate of income tax compared to the tax rate applicable to SLCs.

The Commission found that the adoption of the amended 1990 Law on Sport constituted State aid implemented in breach of the prior notification requirement set out under Article 108(3) of the Treaty on the Functioning of the Euro-pean Union ("TFEU"), and that it was incompatible with the internal market. The Commission thus ordered its recovery.

At first instance, the GC annulled the Commission decision. It essentially found that the Commission had failed to demonstrate that the tax treatment resulting from the combination of the fiscal regime applicable to non-profit legal persons and the exemption from the Law on Sport provided an actual advantage to the beneficiaries.

The ECJ overturned the findings of the GC and set aside its judgment. It also considered that the state of the proceedings allowed it to deliver a final judgment on the matter; it thus assessed and rejected all pleas in law raised by the applicant at first instance.

From the perspective of the EU State aid rules, there are two important points to note concerning the judgment of the ECJ.

The first relates to the **classification by the ECJ of an aid measure as an "aid scheme"** within the meaning of Article 1(d) of Regulation 2015/1589.

The ECJ recalled that, in the case of "aid schemes", the Commission is not required to carry out an analysis of the aid granted in individual cases under the scheme. It can limit itself to studying the general characteristics of the scheme, in order to assess whether it is designed in such a way as to grant an advantage to its beneficiaries. In the present case, the ECJ noted that the Law on Sport and the tax rate applicable to non-profit entities constitute an "aid scheme" since: (i) football clubs that can benefit from the preferential tax treatment are defined in a general and abstract manner in the law; (ii) the advantage is granted directly by those rules (i.e., requiring no implementing measures) for an indefinite period of time; and (iii) those provisions are not linked to the realisation of a specific project. Therefore, the Commission could limit itself to studying the general characteristics of the Law on Sport and the fiscal legislation – it was not required to assess the concrete advantage received by the football clubs.

Interestingly, the ECJ added that the fact that the Commission had, in the contested decision, essentially classified the measures at issue both as an "aid scheme" (i.e., the Law on Sport) and as an "individual aid" (i.e., the fiscal treatment granted to the football clubs) was irrelevant.

According to the ECJ, this did not have any implications for the Commission's obligations in respect of proving the existence of an advantage under Article 107(1) TFEU. This approach is particularly interesting as, in the past, the ECJ had conferred particular importance on the classification by the Commission of the type of measures at stake – i.e., "individual aid" and/or "aid scheme" – for the purposes of establishing the standards of review. For instance, in [*Commission v France and IFP Énergies Nouvelles*, (Case C-438/16 P, para. 68)] the ECJ ruled that "*since the Commission decided to analyse the measure at issue as an ad hoc individual aid measure, it is in the light of that sole classification that the General Court is to examine the lawfulness of the contested decision*". In the present case, the ECJ has arguably adopted the opposite approach.

The second point to note concerns the ECJ's characterisation of the **scope of the review** required in the case of "aid schemes".

The ECJ recalled that, as noted above, the examination which the Commission is required to carry out under Article 107(1) TFEU in relation to an "aid scheme" relates exclusively to that scheme and **not** to aid subsequently granted on the basis of it. In assessing whether the "aid scheme" is designed in such a way as to grant an advantage, the ECJ held that the Commission must make this assessment on the basis of an ***ex ante* analysis**, meaning that – contrary to what the GC had held – the Commission is not required to consider the financial situation of the beneficiaries at the time the aid is granted.

With that in mind, the ECJ found that – in order to demonstrate that the aid scheme at issue confers an advantage on its beneficiaries – the Commission was not required to examine the effects of certain tax deductions or deferrals available to SLCs. In particular, it was not required to consider whether the disadvantage resulting from the fact that sports clubs could not make use of those tax deductions or deferrals was such as to offset the advantage resulting from the lower income tax rate (from which sports clubs benefited). According to the ECJ, in the case of a tax aid scheme which applies on an annual basis such as the scheme at issue, the assessment of whether a measure confers an advantage on its beneficiaries cannot be conducted at the time of the adoption of the scheme, as the effects are liable to materialise only at the end of each of the subsequent tax years. It is only **at the stage of the recovery of the aid** granted on the basis of the aid scheme that the Commission is required to determine whether that scheme has **actually conferred** an advantage on its beneficiaries **taken individually**, since the recovery requires the exact amount of aid actually enjoyed by them to be identified.

The ECJ's reasoning concerning this "postponement" of the assessment of the advantage to the recovery stage is difficult to reconcile with the case law and practice of the Commission. In fact, in the case of "aid schemes", the recovery of aid and the identification of the exact amount of the advantage is not generally carried out by the Commission but by national authorities. As the 2019 Recovery Notice notes: "[w]*hilst it is generally not complex to identify the beneficiary of individual aid, the Commission is generally not in the position to identify each and all of the beneficiaries of an incompatible aid scheme, let alone the exact amount of aid received*" (para. 66, fn. 86 of the Notice, OJ C 247, 23.7.2019, pp. 1-23). This is why the case law provides that the Commission is **not required** to spell out in its recovery decision the exact amount to be recovered (Case C-403/10 P, para. 126). The present judgment seems instead to indicate that the Commission is obliged, including in the case of aid schemes, to identify the exact amount of aid actually granted to the recipients at the stage of ordering the recovery. It will be interesting to see whether this will have any implications on future case law concerning recovery.

To conclude, the judgment overall provides an extensive interpretation of the concept of "aid scheme", which will further relax the standards of review by the Commission in cases concerning measures such as the Spanish Law on Sport and the related tax provisions.

European Court of Justice confirms shortcomings of the Commission's State aid investigation into progressive turnover-based taxes adopted by Hungary and Poland (Cases C-596/19 P, *Commission v Hungary* and C-562/19 P, *Commission v Poland*)

On 16 March 2021, the Grand Chamber of the European Court of Justice ("ECJ") rejected the appeals brought by the Commission against the General Court's ("GC)" judgments concerning progressive turnover-based taxes adopted by Hungary (Case C-596/19 P) and Poland (Case C-562/19 P).

The national legislation at stake in the Hungarian case was the 2014 Law on the tax on advertisements – as amended in 2015 (and no longer in force). This law introduced a new special tax, applied progressively by bands, on turnover derived from the broadcasting or publication of advertisements in Hungary (the progressive rates range from 0% below a certain threshold up to 40% for the highest band). The tax was levied in addition to existing business taxes, in particular corporation tax. However, the Hungarian law provided that legal persons whose pre-tax profits for the 2013 financial year were zero or negative could deduct from their 2014 taxable amount 50% of the losses carried forward from earlier financial years.

The national legislation at stake in the Polish case was the 2016 Law on the retail sector tax, which targets the retail sale of goods to consumers (natural persons) in Poland. All retailers are liable to pay that tax, irrespective of their legal status, and the basis of assessment is their monthly turnover. The tax is based on progressive rates, starting from zero for turnover below a certain amount, increasing to 0.8% and 1.4% depending on the turnover bands.

Leaving the specificities of the two cases aside, the contested Commission decisions found that the Hungarian and Polish taxes constituted State aid within the meaning of Article 107(1) TFEU. The most relevant aspects of those decisions concerned the assessment of the selective advantage. The Commission found that the progressive nature of the taxes did not form part of the reference tax systems (i.e., respectively the tax on the retail sector in Poland and the tax on the publication or broadcasting of advertisements in Hungary). According to the Commission, this progressivity instead constituted a derogation from the reference systems, which thus conferred a selective advantage on the undertakings which were liable to pay a lower amount of tax.

In its judgments of 16 March 2021, the ECJ confirmed the findings of the General Court at first instance, which had annulled the contested Commission decisions. The ECJ's judgments provide important guidance on the application of the State aid rules to progressive turnover-based tax measures. Moreover, they are also relevant for assessing the compatibility with the EU State aid rules of the controversial digital taxes that have been adopted by Member States. The most relevant aspects of those judgments are discussed below.

1. *As a general rule, progressive tax rates are part of the reference tax system: the progressivity of such rates does not entail a selective advantage in favour of undertakings whose turnover falls within lower bands*

The first part of the Commission's appeal in the Hungarian and Polish cases was directed against the GC's identification of the reference tax system. The Commission argued, among other things, that the GC wrongly held that the progressivity of the rates was part of the reference tax system, in light of which it was necessary to assess the selectivity of the tax measures at issue. The Commission identified the "selective advantage" as the difference in the average tax rate resulting from the progressive nature of the rates. That difference would favour undertakings with a low turnover by unjustifiably alleviating their tax burden, compared with that borne by other undertakings.

In this regard, the ECJ recalled that a tax advantage resulting from a general measure applicable without distinction to all economic operators is, as a general rule, **not selective** and does not constitute State aid within the meaning of Article 107(1) TFEU. In order to classify such a general tax measure as "selective", the Commission must first identify the reference tax system applicable – that is, the benchmark against which the selectivity must be assessed. As a second step, it must then demonstrate that the tax measure at issue derogates from that reference tax system, meaning that it differentiates between undertakings which, in light of the objective of that system, are in a comparable factual and legal situation.

The ECJ also noted that, outside the areas in which EU tax law has been harmonised, the determination of the constitutive elements of each tax falls within the discretion of the Member States. Member States' fiscal autonomy covers, in particular, the **choice of tax rate** (which may, for instance, be proportional or progressive), as well as the determination of the basis of assessment and taxable event. Member States can, insofar as they otherwise comply with EU law, apply progressive rates and calculate the taxable amount based on turnover – instead of profits. The fact that recourse to progressive taxation is arguably more common in the taxation of natural persons does not mean that Member States are prohibited from using it in order also to take account of the ability to pay of legal persons, in particular undertakings.

With all the above in mind, the ECJ held that, in the present cases, the **progressive rates were part of the constitutive elements of the reference tax system**, against which the selectivity of the measures had to be assessed. Put differently, progressivity is **not** a derogation from the reference tax system – as the Commission argued – but an essential part of that system. Thus, the Commission could not rely on the progressive rates to demonstrate the existence of State aid.

This said, the ECJ added an important *caveat* (discussed below), which is likely to have important repercussions on future case law in this field, and generate a lot of academic debate.

2. *However, a progressive tax system may be incompatible with the State aid rules where it entails a "manifestly discriminatory element"*

Having clarified that progressive rates for turnover-based taxes are, as a matter of principle, compatible with the State aid rules, the ECJ issued an important reminder (or "warning") for Member States: progressivity can be incompatible with Article 107(1) TFEU if the tax rules are designed in such a way as to discriminate between undertakings – in particular, as the ECJ said, where their examination reveals a ***"manifestly discriminatory element"*** (Cases C-596/19 P, para. 48, and C-562/19 P, para. 42). The burden of proving this manifest discrimination rests on the Commission.

As an example of "*manifestly discriminatory*" rules, the ECJ referred to the *Gibraltar* case (Joined Cases C-106/09 P and C-107/09 P), which concerned the reform of the corporate rules of taxation applicable in Gibraltar. The amended tax rules were applicable to all companies established in that territory and consisted of: (i) a payroll tax; (ii) a business property occupation tax; and (iii) a registration fee – however, these rules excluded *a priori* any taxation of offshore companies, since they have no employees and do not occupy business property in Gibraltar. The ECJ found that, even though the rules in question relied on general criteria, the tax base *de facto* discriminated between companies in a comparable situation with regard to the objective of the proposed tax reform, which the legislature in that case identified as the introduction of a general system of taxation for all companies established in Gibraltar. The ECJ stressed that such discrimination was not a "*a random consequence* […] *but the inevitable* [result] *of the fact that the bases of assessment are specifically designed so that offshore companies* […] *have no tax base under the bases of assessment adopted in the proposed tax reform*". (Joined Cases C-106/09 P and C-107/09 P, para. 106).

By contrast, in the present cases, the ECJ found that the Commission did not demonstrate that the Hungarian and Polish legislatures had designed the relevant tax rules in a "*manifestly discriminatory manner,* ***with the aim of circumventing*** *the application of the State aid rules*" (Case C-596/19 P, para. 50, and C-562/19 P, para. 44, emphasis added). The progressivity of the rates was, in the ECJ's view, inherent to the reference tax system and did not deviate from the objective of that system.

This aspect of the judgments of 16 March 2021 sets an important precedent for future cases. The ECJ appears to have narrowed the scope of the *Gibraltar* case law to scenarios in which: (i) the rules are designed in such a way as to manifestly (*de facto* or *de iure*) discriminate against comparable companies; **and** (ii) this discrimination is not accidental, but the result of a deliberate choice of the national legislature. The first condition is not new – it derives from well-established case law according to which advantages granted by discriminatory tax rules are to be considered as State aid, even where there is no derogation from the reference tax system. In those cases, it is the tax system itself that is discriminatory and confers a "selective advantage", as in the *Gibraltar* case.

The second condition, however, appears to introduce a new "subjective" element into the analysis of the selectivity criterion. This requires consideration of whether the legislature designed the tax rules "[…] *with the aim of circumventing the requirements of EU law on State aid*" (Cases C-596/19 P, para. 50, and C-562/19 P, para. 44). The future consequences of this requirement are uncertain, as it is often very difficult to determine the underlying *rationale* of the legislature in adopting a given tax rule. It is even more difficult to demonstrate a hidden intent on the part of the legislature to discriminate between comparable tax-payers. Moreover, this requirement seems to be at odds with well-established case law according to which Article 107(1) TFEU does not distinguish between measures of State intervention in terms of their causes or aims, but defines them in relation to their **effects**, independently of the regulatory techniques used. It is likely that the Court will be asked by national courts to clarify what this new "manifestly discriminatory" test requires.

3. Implications of the judgments for national digital taxes

The judgments on the Hungarian and Polish turnover-based taxes will also be relevant for the purpose of assessing the compatibility with the EU State aid rules of the "digital taxes" adopted by Member States such as Austria, France, Italy and Spain – others are also considering adopting similar taxes. In essence, these "digital taxes" are intended to tax the provision of certain digital services to users located in those Member States, irrespective of whether the provider is established in those jurisdictions or not. Importantly, these taxes are levied only on companies exceeding certain turnover thresholds.

Prior to the rulings on the Hungarian and Polish taxes, those turnover thresholds could arguably have been considered to entail a selective advantage in favour of smaller digital service providers. As a result of those thresholds, smaller undertakings are not caught by the taxes in question, and thus benefit from more favourable tax treatment compared to their larger competitors (mostly based in the USA). However, the judgments under discussion appear to have sent a clear message that those taxes are unlikely to constitute State aid, **unless** it were to be demonstrated that they are designed in a "*manifestly discriminatory manner, with the aim of circumventing the application of the State aid rules*" (see, by analogy, Cases C-596/19 P, para. 50, and C-562/19 P, para. 44, emphasis added). As noted above, this will arguably be very difficult to show in practice. This implies that, at this stage, the digital taxes appear to be "safe" from the Member States' perspective, at least as far as their compatibility with EU State aid rules is concerned.

At the same time, however, the issue whether those digital taxes comply with the international rules on trade and taxation is far from settled. On 26 March 2021, the Office of the United States Trade Representative, for instance, announced the continuation of the investigation into the digital taxes adopted by, *inter alia*, Austria, Italy and Spain, which are considered to be discriminatory against U.S. digital companies. Based on that investigation, the USTR could ultimately decide to impose tariffs against the relevant countries.

European Court of Justice rejects Commission appeal concerning alleged aid granted to *Tercas* bank and clarifies requirements for the "imputability" test in case of private entities (Case C-425/19 P, Commission v Italy and Others)

On 2 March 2021, the Grand Chamber of the Court of Justice ("ECJ") confirmed the judgment of the General Court ("GC") in *Tercas* (19 March 2019, *Italy and Others v Commission*, Joined Cases T-98/16, T-196/16 and T-198/16). The judgments on appeal and at first instance provide important guidance on the concept of "State aid" in the sense of Article 107(1) TFEU and, in particular, on the question whether a measure adopted by a private entity can be "imputable" to a Member State within the meaning of that provision.

The case concerns certain measures adopted by an Italian private consortium of banks called *Fondo interbancario di tutela dei depositi* ("FITD"). The establishment of FITD was authorised by the Italian central bank ("Bank of Italy"), which also approved its statutes. The Bank of Italy participates in FITD's meetings as an observer, but does not have voting rights. In accordance with the relevant Italian banking legislation, the Bank of Italy must also approve the measures adopted by FITD for the benefit of its members. The primary statutory task of FITD is to guarantee the deposits of its members. In its exercise of that task, in 2014 FITD adopted certain measures – authorized by the Bank of Italy – in favour of *Tercas*, a private Italian bank, consisting of: (i) a € 265 million contribution intended to cover Tercas' negative equity; (ii) a € 35 million guarantee intended to cover the credit risk associated with certain exposures of Tercas; and (iii) a € 30 million guarantee intended to cover the costs arising from the tax treatment of the first measure (the "measures at issue").

In its judgment, the GC had annulled the decision of the Commission finding that the measures at issue constituted incompatible and unlawful "State aid". The GC found that the Commission had failed to demonstrate that the measures at issue, even though they had been adopted by a private consortium of banks (and not by national authorities or by a public entity), had to be considered as "imputable" to Italy. (It should be recalled that classification of a measure as "State aid" requires, *inter alia*, that the advantage is granted directly or indirectly through State resources and is **imputable** to the State.)

The ECJ has now confirmed the findings of the GC. The most important aspects of the reasoning are the following.

First, the ECJ recalled the case law concerning the "imputability" of measures adopted by entities distinct from the State authorities of a Member State, which was developed in relation to public undertakings (i.e., "*an undertaking over which the authorities of a Member State may exercise directly or indirectly a dominant influence by virtue of their ownership of it, their financial participation therein, or the rules which govern it*"). This case law provides that, even if the State is in a position to control a public undertaking and to exercise a dominant influence over its operations, the **actual exercise** of that control in a particular case cannot be automatically presumed. In order to demonstrate that a measure is imputable to the State, it is necessary (pursuant to this case law) to examine whether the public authorities have been involved in the adoption of the measure in question. For that purpose, the Commission can rely on a set of general indicators arising from the circumstances of the case and the context in which that measure was taken.

The ECJ then noted that, in the present case (as the GC had rightly found), the case law concerning the standards of review of the imputability of measures adopted by **public undertakings is not applicable**. There are, the ECJ noted, objective differences between a situation where the entity providing the aid is a public undertaking and that in which, as in the present case, that entity is **private**. Those differences concern, in particular, the autonomy of the private entity insofar as the decision-making process is concerned. Unlike a public undertaking, a private entity is autonomous from the State authorities. Therefore, in relation to measures adopted by private entities, the Commission cannot rely on the indicators established by the case law – it must rely on specific and concrete evidence to show that the measure under consideration was adopted under the **actual** influence or control of the public authorities and that, accordingly, it is imputable to the State.

Against that background, the ECJ confirmed that, as the GC had found, the Commission did not provide any such evidence in the present case. As regards the role of the Bank of Italy in relation to the authorization of the measures at issue, the ECJ noted that it did not have any power to influence the content of the measures – it could only check whether they complied with the regulatory framework, for the purposes of prudential supervision.

It is interesting to note that the ECJ rejected a parallel drawn by the Commission between the "imputability" test under Article 107(1) TFEU and the case law concerning the application of provisions set out in Directives to entities other than a Member State. According to that case law, those provisions of a Directive that are unconditional and sufficiently precise may be relied upon by individuals, not only against a Member State, but also against other private or public entities that are an "emanation of the State" – i.e., organisations and bodies which are subject to the authority or control of the State or which possess special powers beyond those which result from the normal rules applicable to relations between individuals. The ECJ noted that the concept of "emanation of the State" was not developed for the purpose of State aid analysis and cannot be applied to assess whether aid measures are imputable to the State.

To conclude, the appeal judgment in *Tercas* has finally clarified the conditions under which the Commission is entitled to consider that a measure adopted by a **private** entity is "imputable" to a Member State. It remains to be seen whether, in the future, it will be possible to demonstrate a sufficient degree of influence or control by the State over a private entity to meet the standards set by this judgment. However, the fact that the ECJ did not rule out that, as a matter of principle, an aid measure granted by a purely private entity could be "imputable" to a Member State (and thus qualify as State aid) is remarkable. This could theoretically lead to the State aid rules being applied to measures adopted by purely private entities – in respect of which the State is a mere minority shareholder or not a shareholder at all – provided that it could be demonstrated that the national authorities had a decisive influence over the decisions taken to adopt the measure (and that all other conditions set out under Article 107(1) TFEU were met).

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– MEMBER STATE LEVEL –

FRANCE

Constitutional Council declares administrative sanctions for obstruction of antitrust investigation unconstitutional

On 26 March 2021, the French *Conseil constitutionnel* (the "Constitutional Council") declared Article L. 464-2, paragraph V-2 of the French Commercial Code unconstitutional on the ground that the provision violated the *ne bis in idem* principle.

Article L. 464-2, paragraph V-2 of the Commercial Code allows the French Competition Authority ("FCA") to impose an administrative fine of up to 1% of a company's worldwide turnover for obstructing an investigation, including by providing incomplete or inaccurate information or documentation.

Based on this provision, the FCA imposed fines on two groups of companies in unrelated proceedings for obstructing FCA investigations. In 2017, it imposed a € 30 million fine on Brenntag AG and Brenntag SA ("Brenntag") for having provided incomplete and imprecise information, and for refusing to provide information and material evidence. In 2019, it imposed a € 900,000 fine on Akka Technologies Group ("Akka") for breaking seals in the context of an inspection and for preventing the receipt of e-mails on a computer being examined by the FCA.

By judgment of 26 May 2020, the Paris Court of Appeal confirmed Akka's fine. Akka appealed this judgment before the *Cour de cassation* (the "Supreme Court"), which decided to refer a priority preliminary question to the Constitutional Council on the consistency of Article L. 464-2, paragraph V-2 of the Commercial Code with the French Constitution. By judgment of 13 January 2021, the Supreme Court granted Brenntag's request to intervene in the proceedings.

The Constitutional Council examined Article L. 464-2, paragraph V-2 of the Commercial Code in light of the constitutional *ne bis in idem* principle (*principe de nécessité des délits et des peines*), which – similar to the prohibition against double jeopardy – prohibits subjecting the same conduct to multiple prosecutions and sanctions under different sets of rules. The Constitutional Council noted that Article L. 450-8 of the Commercial Code already criminally punishes the intentional obstruction of an FCA investigation with imprisonment of up to two years and fines of up to € 300,000. The Constitutional Council thus determined that Article L. 450-8 and Article L. 464-2 of the Commercial Code punish the same kind of conduct and protect the same societal interests with sanctions of the same nature. Accordingly, it concluded that Article L.464-2 of the Commercial Code violated the *ne bis in idem* principle.

In light of the Constitutional Council's decision, the French legislator is expected to modify the legal framework applicable to antitrust enforcement to preclude the cumulation of administrative and criminal sanctions for the same conduct.

ITALY

Italian Competition Authority proposes extensive reform of Italian competition law

On 23 March 2021, the Italian Competition Authority ("ICA") submitted to the Italian Government a set of proposals to modify the Italian Competition Act (the "Proposal"). The Proposal concerns a wide range of areas, including the digital sector, certain network industries (e.g., port services and energy), the health sector, public tenders and environmental sustainability.

The Proposal would notably modify the current rules in relation to merger control, with a view to harmonising Italian rules with the EU Merger Regulation ("EUMR"). In this regard, the ICA recommends replacing the current substantive test, which is still based on the creation or strengthening of a dominant position on the national market, with a test similar to the significant impediment to effective competition ("SIEC") test applicable at EU level. According to the ICA, Italy and Austria are the only EU Member States that have not yet adopted an EUMR-type SIEC test. This may cause inconsistencies among EU Member States in the assessment of multi-jurisdictional transactions as well as in relation to the European Commission's practice.

The Proposal also contains three recommendations, primarily concerning the digital sector.

The first recommendation in relation to merger control is general in nature but would particularly affect the digital sector. The ICA proposes revising the current turnover-based jurisdictional thresholds for merger notifications. It notes that, under the current rules, the acquisition of small (especially digital) start-ups often does not meet the mandatory turnover thresholds – even though such transactions may have significant effects on competition. In this respect, the ICA follows the examples set by other national competition authorities (e.g., Germany, Lithuania and Norway, as well as the United States and Japan) and proposes a system whereby it would be allowed to request, on its own initiative, the undertakings concerned to notify a concentration if the following conditions are met: (i) the transaction has been implemented in the previous six months; (ii) only one of the two currently applicable notification thresholds is met or the global turnover of all the undertakings concerned exceeds € 5 billion; and (iii) there are appreciable risks to competition in the national market or in part thereof. Unlike the current merger control system, the merger review process would entail an ex-post assessment of the transaction.

The second recommendation reflects a general EU trend of enhancing the powers of national regulators to tackle allegedly anti-competitive conduct of digital platforms. The ICA suggests including a provision which very closely resembles Article 19A of the recently amended German Competition Law (see VBB on Competition Law, Volume 2021, No. 1). In particular, this would allow the ICA to qualify, on its own initiative, a company as an "undertaking of par-amount importance for competition on multiple markets." This designation would be based on the ICA's assessment of the importance of the undertaking concerned for the Italian digital market. The assessment would be based, *inter alia*, on the following criteria: (i) the existence of a domi-nant position on one or more markets; (ii) vertical integration and/or presence on neighbouring markets; (iii) access to competitively relevant data; (iv) the importance of the company's activities for the access of third parties to upstream and downstream markets; and (v) influence on the economic activities of unrelated undertakings.

The designation of "undertaking of paramount importance" would be valid for five years. In relation to designated undertakings, the ICA would have the power to ex-ante prohibit a wide variety of conduct unless the designated undertaking can prove that the conduct is objectively justified. The list of conduct potentially subject to a prohibition decision includes:

- certain self-preferencing practices;
- hindering other companies' activities in either upstream or downstream markets, where the activities of the undertaking of paramount importance are relevant to entering such markets;
- hindering other companies' activities on markets on which the undertaking of paramount importance, though not having a dominant position, could rapidly expand its position, notably through bundling and tying practices;
- strategic use of data to raise entry barriers for other undertakings;
- hindering either the interoperability of goods or services or data portability;
- supplying insufficient information to other companies on the services provided by the designated undertaking; and
- applying conditions to third parties which are disproportionate to the service provided (e.g., by requesting the transfer of unnecessary data or rights or by conditioning the quality of the service to the completion of such a transfer).

As well as the power to prohibit or limit the above-mentioned conduct, the Proposal would also grant the ICA the power to impose fines and to impose behavioural and structural remedies.

Interestingly, by envisaging a case-by-case assessment and the possibility for a designated undertaking to demonstrate that its conduct is objectively justified before certain conduct can be prohibited, the Proposal deviates from the approach in the proposed EU Digital Markets Act ("DMA") where certain types of conduct would automatically be considered unlawful (see [VBB on Competition Law, Volume 2020, No. 12](#)).

The third recommendation, which also appears to be inspired by German competition law, is related to the prohibition on the abuse of economic dependency, in the light of the growing power of digital platforms. The ICA suggests establishing a rebuttable presumption of economic dependency between an undertaking and a digital platform, when the latter plays a pivotal role in the intermediation between suppliers and consumers of the said undertaking, e.g., in terms of network effects and data collection.

Finally, the Proposal envisages the introduction of a settlement procedure in antitrust proceedings, as well as the strengthening of the ICA's powers to request information in the context of investigations.

Overall, the Proposal is far-reaching and would significantly enhance the ICA's enforcement powers – in the digital sector in particular – in line with the recent trend at EU and Member State levels.

SWEDEN

Swedish Competition Authority publishes report on digital platforms markets

On 26 February 2021, the Swedish Competition Authority ("SCA") published its report '*Competition on Digital Platform Markets in Sweden.*' The report is based on a sector inquiry during which the SCA analysed sixteen Swedish and international platforms operating on five different markets in Sweden, as well as previous competition cases in Sweden concerning digital markets, in order to better understand the competitive conditions in digital platform markets in Sweden. The SCA also sought to assess whether there are obstacles to effective competition on digital platforms, and whether there is a need for additional regulatory powers to complement the SCA's existing competition enforcement powers.

The report concludes that digital markets can be complex, with significant differences between the various platforms within the same market and between platform markets. Accordingly, competition law risks arise because of specific market structures and the potentially problematic types of conduct also vary across markets.

The findings of the SCA are in some cases more nuanced that those in other recent European reports and initiatives. For example, when discussing platforms that allow business users to sell to customers but also sell their own products over the same platform, the SCA acknowledges that a determination of anti-competitive conduct that harms consumers is complex and context specific. The SCA concludes that self-preferencing can be efficient and create value for customers, even though business users might feel marginalized. Platforms could also have legitimate reasons to withhold transactional data from their business customers, although they may also be influenced by economic considerations.

The report concludes that the current competition law framework has several limitations. Even if a particular competition concern could be investigated as a potential infringement, there might be more efficient, quicker, and cost-effective ways to address competition concerns. In contrast to the Digital Markets Act proposed at EU level, which envisages an extensive and detailed list of automatically prohibited conduct, the SCA suggests that there is a need for a flexible supplementary legal framework in Sweden. Such a framework, which could be similar to the UK CMA's market investigation powers, should enable the SCA to investigate and remedy competition concerns on platform markets in specific cases. This could be complemented with rules on merger control which would create a duty to submit information about certain planned mergers in designated sectors. Interestingly, the SCA suggests that a supplementary legal framework should not be limited to digital platforms, but should empower the SCA to investigate and remedy competition problems in other sectors of the economy as well.

PRIVATE ENFORCEMENT

– MEMBER STATE LEVEL –

GERMANY

Regional Court of Hannover grants preliminary injunction for access to non-redacted version of a Commission cartel infringement decision in preparation of a follow-on damages claim

On 17 December 2020, the Regional Court of Hannover granted a German waste disposal company access to the confidential (non-redacted) version of the European Commission's ("Commission") infringement decision in [Case AT.40018 – *Car battery recycling*], in preparation of a follow-on damages claim. In that decision, the Commission had found that, between 2009 and 2012, car battery recyclers agreed to fix purchase prices for scrap lead-acid automotive batteries in Belgium, France, Germany and the Netherlands and imposed a total fine of € 68 million.

The claimant in the case before the Regional Court of Hannover based its claim on a specific provision in the German Act against Restraints of Competition introduced in 2017. Under this provision, any party that has been found in a binding decision of a competition authority to have infringed Article 101 or 102 TFEU can be ordered by way of preliminary injunction to disclose this decision. The claimant successfully argued that it needed the non-redacted version of the Commission decision to be able to quantify the damage it had allegedly incurred.

The Regional Court of Hannover did, however, ringfence the disclosure of the decision by: (i) limiting access to the confidential parts (redacted by the Commission) to the claimant, the claimant's lawyers and economic experts dealing with the case; and (ii) requiring the claimant not to reveal any of the redacted parts or information contained therein to third parties, including other companies of the claimant's group that were not party to the proceedings. The breach of this confidentiality obligation is subject to a potential fine of up to € 250,000 or imprisonment of up to six months.

THE NETHERLANDS

Dutch courts have jurisdiction over damages claim resulting from an abuse of dominance on the Greek beer market

On 16 February 2021, the Amsterdam Court of Appeal overturned the Amsterdam District Court's ruling declining jurisdiction over the damages claim brought by Macedonian Thrace Brewery ("MTB") against Heineken's subsidiary Athenian Breweries ("AB").

In 2014, the Hellenic Competition Commission ("HCC") launched an ex officio investigation into the commercial practices of AB and concluded that AB had abused its dominant position on the Greek beer market. The HCC found in its decision that there was insufficient evidence and no overriding reason (based on the principles of deterrence or of 'effet utile') to justify carrying out an investigation into the liability of AB's parent company Heineken.

In 2017, AB's competitor MTB sued both Heineken and AB before the Amsterdam District Court, claiming that it suffered damage resulting from the abuse of dominance on the Greek beer market. The Amsterdam District Court held that, as Heineken is domiciled in the Netherlands, it had jurisdiction over the claim against Heineken under Article 4 of Regulation 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "Brussels Ibis Regulation"). However, the Amsterdam District Court declined jurisdiction over the damages claim against AB on the grounds that AB was not domiciled in the Netherlands and the claims against Heineken and AB were not closely connected within the meaning of Article 8(1) of the Brussels Ibis Regulation with the consequence that Heineken could not serve as an "anchor defendant" in the Dutch proceedings. (Article 8(1) provides that, in cases concerning several defendants, jurisdiction may be established with respect to a defendant in the place of domicile of any of the other defendants provided that "*the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*").

MTB appealed the judgment, arguing that the claims were closely connected and that there would be a risk of irreconcilability if separate proceedings in Greece were required for the damages claim against AB. The Amsterdam Court of Appeal followed MTB's argumentation and established jurisdiction under Article 8(1) of the Brussels Ibis Regulation. In particular, the Amsterdam Court of Appeal held that the claims against AB and Heineken were closely connected because they were based on the same facts. Thus, in order to decide on the damage claim against Heineken as the parent of AB, the Dutch court would need to assess AB's conduct on the Greek market and the decision of the HHC. Likewise, should a Greek court have to rule on MTB's claim against AB, it would also have to assess the same conduct of AB and the same decision of the HHC. In the view of the Amsterdam Court of Appeal, this meant there was a risk of irreconcilable judgments as it could not be ruled out that the Greek and Dutch courts would make different assessments of the same facts.

Furthermore, the Amsterdam Court of Appeal found no indication that MTB had abused its procedural rights by initiating proceedings in the Netherlands against AB using Heineken as the anchor defendant. This is because, according to the Court of Appeal, it could not be ruled out from the outset that the claim against Heineken (which was not an addressee of the HCC decision) would be rejected. The Court of Appeal found moreover that it was foreseeable for AB that it could be sued before a Dutch court as AB sells beer in Greece under the Heineken brand and is part of the Heineken group.

The Court of Appeal referred the case back to the District Court to decide on the claim against AB.

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