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Client feedback
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VBB on Competition Law

Highlights

Jurisdictions covered in this issue

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ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

FRANCE

French Competition Authority fines Google for favouring its own services in the online advertising services supply chain

In a decision of 7 June 2021, the French Competition Authority ("FCA") accepted a proposed settlement by Google LLC and Google Ireland Ltd ("Google") with respect to certain online advertising practices. The decision also imposed a € 220 million fine on Google as it concluded that Google's self-preferencing practices with regard to online display advertising infringed Article 102 Treaty on the Functioning of the European Union ("TFEU") and Article L.420-2 of the French Commercial Code. In particular, the FCA found that two of Google's service platforms in the online display advertising supply chain had granted each other preferential treatment to the detriment of their respective competitors and of publishers. The FCA considered that Google's self-preferencing practices were particularly harmful in view of several factors, including the plummeting revenues of news publishers in the context of declining sales from printed press subscriptions.

Google's role in the online display advertising supply chain

A significant, and increasing, share of online display advertising (i.e., advertising not linked to a search by a user) is based on an automated process whereby publishers auction off ad space on their websites and mobile applications . The auction process involves a complex chain of intermediation services between the publishers selling ad space and the advertisers that seek to purchase ad space. Through several service offerings, Google has a strong presence at all levels of the supply chain.

The FCA case focused on services offered by Google and its competitors on the supply side of online advertising. At this end of the supply chain, publishers use a publisher ad server that chooses among offers placed by advertisers for a given ad space on the basis of chosen criteria (e.g., relevance to the audience, price offer, opportunity costs). Most publishers will typically pay for the use of a third-party ad server, such as Google's ad server called DoubleClick for Publishers ("DFP"). Online ad servers organise auctions for available ad space by sending requests for offers to online advertising supply-side platforms ("SSPs"), such as Google's DoubleClick Ad Exchange ("AdX"). SSPs enter their advertising inventory into the auction, and the ad server allocates the ad space to the highest bidder that meets the publisher's criteria. The winning SSP retains a percentage of the fee paid by the advertiser to the publisher. Ad servers and SSPs are offered as standalone services and/or as integrated services. For example, Google Ad Manager combines AdX and DFP and offers publishers reduced lag times. Google's integration of these two services was at the heart of the FCA's investigation.

Infringing practices

The FCA found that Google's DFP ad server interacted with Google's AdX SSP on a preferential basis, compared to the ad server's interactions with rival SSPs. Specifically, it considered that Google had allowed AdX to be aware of the offers submitted by rival SSPs and to adjust its offers. The FCA considered that this conduct resulted in a number of competitive advantages for AdX. These included the right of 'last look', which enabled AdX to win auctions by only outbidding the best rival bid by a minimal amount (€ 0.01). This mechanism deprived rival SSPs of a significant volume of transactions. In addition, the FCA found that AdX was granted the ability to adjust its revenue share dynamically, according to the competitive pressure exerted by rival SSPs. AdX could therefore reduce its own fee to win auctions when competitive pressure from rival SSPs was high, and, conversely, could increase its fee when competitive pressure was low. These self-preferencing features made it more difficult for third-party SSPs to compete and allowed AdX to charge inflated fees.

The FCA also found that Google's AdX SSP favoured Google's DFP ad server, by offering publishers using Google's ad server more advantageous technical and contractual conditions than publishers using competing ad servers, especially real-time access to AdX's offers. Consequently, the FCA considered that Google's SSP services were only partially interoperable with ad servers offered by Google's competitors, and that Google's SSP customers (which typically did not use rival SSPs) had strong incentives to use Google's ad server. The FCA noted that the limited interoperability with third-party ad servers was specific to AdX, as most rival SSPs offered equal, real-time interaction with multiple ad servers. At the same time, the FCA assumed that the lack of interoperability could reduce AdX's revenues since AdX users were less likely to bid on ad spaces offered by publishers using rival ad servers. According to the FCA, this strategy would not have been rational absent DFP's dominant position on the ad server market, which guaranteed AdX customers significant bidding opportunities.

The FCA concluded that these self-preferencing practices constituted an abuse of Google's dominant position on the EEA market for online ad servers and its "at least prominent" position on the market for SSPs. According to the FCA, these practices restricted the ability of competing ad servers and SSPs to expand on the market and deprived publishers from obtaining the best offers from SSPs, in particular from AdX.

Remedies

Google did not challenge the FCA's findings. It requested the application of the settlement procedure and proposed remedies whereby it would: (i) offer third-party SSPs improved interoperability with its ad server, enabling competition on the merits between its own SSP and third-party SSPs; and (ii) amend existing settings to allow publishers using third-party ad servers to access AdX offers in real time. The FCA accepted these proposed remedies and made them binding for a period of three years. In addition, it imposed a € 220 million fine on Google.

Conclusion

The FCA's decision illustrates the growing interest of competition authorities worldwide in Google's overall conduct in the online ad tech sector. It follows the report published last year by the UK's Competition and Markets Authority on the online advertising market which already indicated that there may be a need for regulatory oversight. Moreover, earlier this month the European Commission initiated an investigation into different aspects of Google's activities in the ad tech sector.

Google's integrated business model and its integration of several service levels can provide clear benefits to market participants. However, considering the currently prevailing suspicion toward digital platforms, Google's online ad business model will remain under close scrutiny and may see additional remedial action in the future.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Court of Justice clarifies conditions for grant of partial immunity under 2006 Leniency Notice

In a judgment delivered on 3 June 2021, the European Court of Justice (the "ECJ") dismissed the appeal brought by Recylex against the judgment of the General Court which had upheld the European Commission's ("Commission") decision finding it and three other companies to have infringed Article 101 Treaty on the Functioning of the European Union ("TFEU") (Case C-563/19 P).

On 8 February 2017, the Commission imposed fines on car battery recyclers Eco-Bat, Recylex and Campine for taking part in a cartel to fix the purchase prices of scrap lead-acid automotive batteries in Belgium, France, Germany and the Netherlands (see VBB on Competition Law, Volume 2017, No. 2). The leniency applicant, Johnson Controls, obtained immunity, while Eco-Bat and Recylex received fine reductions of 50% and 30%, respectively, for their cooperation under the Leniency Notice.

By judgment of 23 May 2019, the General Court rejected the appeal brought by Recylex seeking to obtain a further reduction of the amount of the fine (see VBB on Competition Law, Volume 2019, No. 5). The General Court ruled, inter alia, that the Commission had not made an error in its application of the Leniency Notice when it refused to grant partial immunity to Recylex since: (i) the Commission was already aware of the facts to which the information provided by that undertaking related; and (ii) the undertaking which provided evidence second cannot take the place of the first undertaking if the cooperation of that first undertaking does not meet the requirements of the Leniency Notice.

In its recent judgment, the ECJ found that the General Court did not commit any errors of law, a result that was consistent with the opinion issued by Advocate General Giovanni Pitruzzella.

Rejecting Recylex's arguments on the grant of partial immunity under the third paragraph of point 26 of the 2006 Leniency Notice, the ECJ ruled that such immunity may be granted if an undertaking which has taken part in a cartel provides compelling evidence to the Commission, enabling it to establish new facts relating to the gravity or duration of the infringement. Cases in which that company has merely provided information which strengthens the evidence relating to the existence of the infringement are excluded from this partial immunity. Indeed, the ECJ considered that this partial immunity must be reserved for undertakings that adduce evidence concerning new facts previously unknown to the Commission. By contrast, if the Commission has already become aware of certain facts, a submission of evidence which represents "significant added value" may give rise to a reduction of the amount of the fine, in accordance with the first paragraph of point 26 of the 2006 Leniency Notice.

In the present case, the ECJ held that the General Court had not committed any errors of law when concluding that partial immunity under the third paragraph of point 26 of the 2006 Leniency Notice could not be granted to Recylex, since the Commission was already aware of the existence of the so-called "Windhagen meeting", and of the territorial scope of the cartel before Recylex filed its application for partial immunity.

Finally, the ECJ ruled that the General Court was right to conclude that Recylex could not claim the highest fine reduction band in accordance with the first paragraph of point 26 of the 2006 Leniency Notice, since it was the second undertaking to have provided evidence of "significant added value" for the purposes of the second indent of this paragraph (other than the leniency applicant). According to the ECJ, no provision of the 2006 Leniency Notice gives the second undertaking in the ranking, namely Recylex, the right to replace the first undertaking in that ranking, namely Eco-Bat, if it transpires that the latter's cooperation did not meet the requirements of the Leniency Notice.

VERTICAL AGREEMENTS

– UK LEVEL –

Brexit means… sensible divergence? CMA consults on proposals for a UK vertical agreements block exemption order (UK VABEO)

Introduction

On 17 June 2021, the UK's Competition and Markets Authority ("CMA") published an eagerly anticipated consultation document outlining its proposed recommendations to the Secretary of State (i.e., the relevant government minister) on the future of the retained vertical agreements block exemption regulation ("retained VBER"). Interested parties have until 5pm on 22 July 2021 to respond to the CMA's consultation document (after which the CMA will prepare its final recommendation to the Secretary of State).

Following Brexit, the EU block exemption regulations which were in force at the end of the transition period (i.e., on 31 December 2020) 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. As the retained VBER expires on 31 May 2022, after that date it is up to the Secretary of State (in consultation with the CMA) to decide whether to extend, vary or revoke the retained VBER.

Against that background, the CMA has developed its proposed recommendation following a review of the retained VBER and its effect on UK markets, which has included: (i) drawing on relevant evidence from the recent European Commission ("Commission") evaluation of the EU VBER and related Guidelines on Vertical Restraints (to which the CMA and UK stakeholders contributed actively, since the EU VBER was fully applicable in the UK during the period under review); and (ii) supplementing this with additional evidence relating specifically to the application of the retained VBER in the UK, in particular, by holding roundtables and bilateral meetings with interested parties (including businesses with UK operations that rely on the retained VBER, law firms, economists, and industry associations). As a law firm that regularly advises businesses on the application of competition law to vertical agreements in the UK (as well as in the EU), the London office of Van Bael & Bellis was invited to participate in this process. For further details in relation to the earlier stages of the CMA's consultation process concerning its approach to the retained VBER, please refer to VBB on Competition Law, Volume 2021, No.2.

Whilst it is reassuring that the CMA has drawn on relevant evidence from the Commission's EU VBER review in order to prepare its recommendations, it is nevertheless interesting that the CMA has decided not to wait for the publication of the Commission's own proposals before doing so (and it is therefore unclear, at this stage, precisely how much divergence there could potentially be between the respective future UK and EU regimes). In that context, many will be hoping that – as currently expected – the Commission publishes its draft new VBER and Guidelines texts in advance of 22 July, so that respondents can consider those documents when participating in the CMA's consultation.

In short (and acknowledging the value of a block exemption), the CMA's proposed recommendation is to replace the retained VBER with a UK Vertical Agreements Block Exemption Order ("UK VABEO") – together with associated guidance. In addition to proposing a one-year transition period from 1 June 2022 (during which agreements protected by the retained VBER will continue to benefit from such protection, even if incompatible with the new regime), the CMA also recommends that the UK VABEO should expire after six years. Whilst this period is relatively short (and considerably shorter than the – so far – 10-year periodic review under the EU regime), the CMA considers it appropriate to review the market in light of evolving factors such as the growth in online sales, the UK's withdrawal from the EU, and the ongoing impact of the COVID-19 pandemic.

Overall, the CMA's proposals are likely to be viewed positively by businesses, as – if ultimately adopted – they should provide welcome clarity on the applicable law, as well as increased flexibility to determine online distribution arrangements. Moreover, businesses currently relying on the retained VBER for agreements affecting the UK market will be encouraged by the consistency of approach indicated by the CMA's proposals. In any event, the proposed one-year transition period may be especially welcome, as it would afford businesses some time to review their existing agreements and ensure that they are compatible with – as well as benefit from potential additional opportunities provided by – the new UK regime (which may be particularly important, given the possibility of divergence from the new EU regime).

Key recommendations

Whilst the CMA has decided that fundamental changes to the retained VBER are not appropriate (including because this would create additional compliance costs for businesses), it is nevertheless proposing a number of important amendments. In this context, the most notable initial proposed reforms relate to updates reflecting both: (i) the latest market developments (including in relation to the increase in online distribution channels); and (ii) the fact that there is no longer any need for market integration (since the UK market is already sufficiently integrated).

More specifically, the CMA has recommended the following notable changes to the retained VBER:

- a new hardcore restriction for wide parity/"most favoured nation" obligations (i.e., restrictions imposed by a platform on the ability of a seller using the platform to offer products on other platforms at more favourable prices or terms);

- a (slightly) more permissive treatment of so-called "dual distribution" (i.e., distribution systems where parties at different levels of the supply chain compete downstream), protecting agreements between retailers and either wholesalers or importers that also sell directly to consumers – as distinct from the retained VBER, which only protects such agreements between retailers and manufacturers that sell directly to consumers. In many respects, this development is consistent with the overarching rationale of the regime and is perhaps more relevant post-Brexit (since more products will now be supplied in the UK by wholesalers of manufacturers established in the EU). However, it is also important that the CMA recognises the value (to businesses) of dual distribution systems, and, in particular, does not push for a lower exemption threshold for certain forms of dual distribution (which is one of the more radical reform proposals currently being suggested by the Commission).

- a more permissive approach to both: (i) dual pricing (i.e., where a distributor is charged a different price for products intended to be sold online than for products intended to be sold offline), which would no longer be listed as a hardcore restriction; and (ii) setting selective distribution criteria for online sales, under which such criteria will no longer have to be overall equivalent to criteria for brick-and-mortar sales; and

- new guidance regarding: (i) the definition of – and difference between – active and passive sales (particularly in the online context, and perhaps in part to avoid characterising by default most online sales as passive sales); (ii) the treatment of agency agreements (including issues relating to online platforms that do not fit squarely within the "genuine agency" model); and (iii) analysis of environmental sustainability considerations in vertical agreements.

However, the CMA also recommends that the UK VABEO should continue to include the following central aspects of the retained VBER:

- a block exemption for all vertical agreements, using the same core definitions as the retained VBER and applying a market share threshold of 30% (which both parties must not exceed for the exemption to apply);

- resale price maintenance and territorial/customer restrictions continue to be viewed as hardcore restrictions;

- a separate list of excluded restrictions (including the five-year limit on non-compete obligations), that are not protected by the block exemption but are not presumptively unlawful; and

- flexibility to withdraw the benefit of the block exemption from specific agreements that raise concerns.

Comment

- Although the CMA consultation document identifies a number of recommended updates to the retained VBER, the CMA's proposals appear to be mindful of (and to some extent follow, but perhaps without the pressure of the EU single market imperative) the direction of travel of the EU's own proposed changes to the EU VBER (which will take effect upon expiry of the current VBER in May 2022, and which is intended to reflect market and legal developments since its last update in 2010). For further details regarding the proposed reform of the EU VBER, please refer to: (i) VBB on Competition Law, Volume 2020, No.10; and (ii) VBB on Competition Law, Volume 2021, No.3.

- A level of alignment is a welcome development, as it should reduce the potential for material divergence between the two regimes, which would in turn: (i) bolster legal certainty (for business and legal practitioners alike); and (ii) reduce additional costs and complexity for businesses trading in both the EU and the UK. That said, if certain of the more radical reform options – such as the potential introduction of a new (and lower) market share threshold for certain forms of dual distribution – were to be adopted by the Commission in its (as yet unpublished) new VBER and Guidelines, there could be greater divergence between the respective EU and UK regimes than is currently anticipated.

- In this context, it would be even more welcome if the UK regime was ultimately more permissive than the EU regime – and in this context it may be hoped that the CMA's recommendation might to some extent influence certain of the Commission's more radical reform proposals (such that these may ultimately be softened, in order to align with the CMA's position). Either way, it appears likely that businesses will be faced with the unenviable choice of either: (i) creating separate EU and UK distribution systems; or (ii) ensuring compliance with whichever is ultimately the stricter regime.

- In addition, the consultation document notably does not include any discussion of the CMA's future treatment of restrictions on sales into the UK (and, in particular, whether such restrictions will be viewed by the CMA as an infringement of UK competition law). This issue will hopefully be addressed: (i) in the CMA's accompanying main guidance document to the proposed UK VABEO, a draft of which will be published in due course (alongside a separate consultation); and/or (ii) as part of the UK Intellectual Property Office's recently-launched consultation into the UK's future regime for the exhaustion of intellectual property rights (closing at 11.45pm on 31 August 2021), which will underpin the future UK rules governing parallel imports into the UK.

INTELLECTUAL PROPERTY/LICENSING

– MEMBER STATE LEVEL –

GERMANY

Standard Essential Patent licensing negotiations in Germany – "FRAND-Einwand II" and other recent case-law

More than a year has passed since the German Federal Court of Justice (*Bundesgerichtshof* – the "FCJ") ruled on the obligations of parties in Standard Essential Patent ("SEP") licensing negotiations and the circumstances under which an action for injunction, recall and destruction by an SEP holder that had committed to offer licensing terms that are fair, reasonable and non-discriminatory ("FRAND") might constitute an abuse of its dominant position pursuant to Article 102 TFEU (see VBB on Competition Law, Volume 2020, No. 5 and 7, *Sisvel v. Haier*). This was the first time the FCJ had issued a judgment following the landmark judgment of the Court of Justice of the European Union ("ECJ") in *Huawei v. ZTE* (see VBB on Competition Law, Volume 2015, No. 7).

Since then, numerous judgments of German lower courts, an additional judgment of the FCJ ("FRAND-Einwand II") and a request for a preliminary ruling of the Higher Regional Court of Düsseldorf requesting new guidance from the ECJ have emerged.

Focus of the German courts on the willingness of the implementer to take out a licence

In these cases, German courts have focused on the willingness of the implementer to take out a licence. Following a case-by-case assessment, most courts reached the conclusion that the implementer had not shown a willingness to take out a licence. These conclusions were based on: (1) the reaction of the implementer; and (2) the time lapse between the offer of the SEP holder and the implementer's reaction. Other issues, such as what is FRAND and whether the licence offer of the SEP holders had been FRAND, were mostly left open.

In keeping with this case-law, the FCJ maintained its SEP holder friendly approach in "FRAND-Einwand II", a judgment of 24 November 2020.

The FCJ confirmed that the willingness of the implementer to take out a licence must be expressed clearly and unequivocally and that a conditional licence request is insufficient. Overall, negotiations should be driven by a constructive exchange and a mutual willingness to enter into a licence agreement. The FCJ specified that the willingness of the implementer is a requirement that is not limited in time. The continuous willingness to take out a licence is a necessary condition for successful negotiations and therefore also for a successful claim of an abuse of dominance should the negotiations fail.

The FCJ clarified that it is not considered an abuse if the initial licence offer of the SEP holder is not FRAND, as this forms only the starting point of a negotiation process in which both parties discuss their interests. An abuse would only occur if the SEP holder declined to grant a licence outright or if, at the end of the negotiations, the licence terms are still not FRAND.

The standard that the parties' conduct has to meet depends on their previous conduct. The benchmark relied upon by the courts is the conduct of a reasonable party interested in a successful contract conclusion. Therefore, if a party did not sufficiently contribute to the contract conclusion, it has to compensate for this shortcoming. For example, if the implementer failed to express its willingness to take out a licence for a significant period of time, it subsequently has to make extra efforts to ensure that a licence agreement materialises as soon as possible. As a result, it is considered a delaying tactic if, after the infringement alert, the implementer does not react in a reasonable time or if it rejects the offer and fails to make a concrete counteroffer on FRAND terms within a short delay.

On many occasions, the question arose whether specific steps set out by the ECJ in *Huawei v ZTE* could still be carried out after the out-of-court negotiations failed and the parties tried to enforce their rights in court.

The FCJ held that the assessment of whether an action for injunction, recall or destruction is abusive, will be different depending on the point in time at which that claim is made or further pursued. If the implementer is not willing to take a licence when the action is brought, then the conditions offered by the SEP holder do not require further assessment.

Even if bringing the action was not at first considered to be abusive, it may become an abuse to pursue the action further or to defend a positive first instance ruling on appeal. Generally, the implementer has the right to take out a licence. This means that, even if initially the implementer was unwilling to take a licence, it is still allowed to request it subsequently. However, and this shows the factual intricacies of a licensing dispute in this context, it does not necessarily mean that the implementer will be able to rely on its alleged willingness to take out a licence as a FRAND defence. This is because the longer the implementer waits to request a licence, the higher the burden on the implementer will be to demonstrate that it made a contribution to the conclusion of the licence agreement on FRAND terms.

Recent case-law strongly focuses on the behaviour of the implementer / alleged infringer.

Higher Regional Court of Karlsruhe, 9 December 2020

In its judgment of 9 December 2020 (6 U 103/19), the Higher Regional Court of Karlsruhe took the view that the alleged infringer's obligation to submit a FRAND counteroffer to the SEP holder is already triggered if: (1) the SEP holder's licensing offer was not "clearly and evidently" non-FRAND; and (2) the SEP holder provided sufficient information which enabled the alleged infringer to formulate its counteroffer. Even below the threshold of being obliged to make a counteroffer, the infringer generally has a duty to participate in licence negotiations with the purpose of concluding a licence agreement. If the infringer violates this obligation, he cannot successfully counter the claims of the SEP holder with a FRAND defence.

According to the Karlsruhe court, it is not yet settled whether there are cooperation obligations on the licence seeker below the threshold of the submission of a counteroffer, the non-observance of which would prevent the licence seeker from successfully invoking a FRAND defence and which would exist even if the SEP holder submitted an offer that does not comply with FRAND conditions.

Higher Regional Court of Karlsruhe, 12 February 2021

In its judgment of 12 February 2021, the Higher Regional Court of Karlsruhe (6 U 130/20) held that an alleged infringer which makes an offer which leaves the determination of the licence fee to the discretion of the SEP holder, but subject to court review, expresses its willingness to conclude a licence agreement that complies with FRAND terms and conditions. Such an offer can still be made during the appeal proceedings, unless it is shown that the offer forms part of general delaying tactics.

Regional Court of Mannheim, 2 March 2021

In its judgment of 2 March 2021, the Regional Court of Mannheim (2 O 131/19) held that a counteroffer from the alleged infringer that leaves open whether part of the patents are exhausted is not sufficiently concrete if that question has a significant impact on the amount of the licence fee The Mannheim court therefore concluded that the alleged infringer had not been willing to take out a licence and rejected the FRAND defence.

The judgment which the ECJ is expected to deliver in response to the request for a preliminary ruling of the Regional Court of Düsseldorf of 26 November 2020 in *Nokia v. Daimler* (see VBB on Competition Law, Volume 2020, No. 11), may touch on some of the issues which the FCJ and the lower German courts decided in the above judgments. However, the FCJ considered a reference to the ECJ was not necessary, specifying that national courts are competent to decide on the fine balancing of interests required in individual cases. Similarly, the Higher Regional Court of Karlsruhe (6 U 103/19) declined to suspend the proceedings in view of the request for a preliminary ruling by the Higher Regional Court of Düsseldorf, as it did not expect the ECJ to establish criteria by which SEP-based court actions against implementers engaging in delaying tactics would amount to an abuse.

While the judgment of the FCJ in *Sisvel v. Haier* is final, it will be interesting to see whether the ECJ will approve of the patent holder-friendly approach of the FCJ and the lower German courts generally.

SEPs incorporated in components that are used in more valuable end-products

The proceedings between SEP holders in the telecommunications sector and parties in the automotive industry that use components implementing SEPs also gave rise to interesting questions such as: (i) who in the value creation chain is entitled to take a licence: the manufacturer of the end-product or its suppliers that use the technology for input products / components?; (ii) can the SEP holder refuse to grant a licence to a component manufacturer willing to take such a licence; and (iii) on what basis will the licence fee be calculated: the value of the component or the value of the end-product?

The Regional Court of Mannheim in *Nokia v. Daimler* (2 O 34/19, see VBB on Competition Law, Volume 2020, No. 8), the Regional Court of Munich in *Sharp v Daimler* (7 O 8818/19, see VBB on Competition Law, Volume 2020, No. 9) and again the *Regional Court of Munich in Conversant Wireless v Daimler* (21 O 11384/19, see VBB on Competition Law, Volume 2020, No. 10) each found Daimler to be unwilling to take out a licence.

The courts of Mannheim and Munich answered most of the above questions in favour of the SEP holder. They considered the request of the manufacturer of the end-product that the SEP holder should grant a licence to component manufacturers to be indicative of a lack of willingness on the part of the manufacturer of the end-product to take out a licence, unless the end-product manufacturer had actively engaged in licence negotiations. The courts also maintained that the SEP holder should generally decide freely at which level of the value creation chain to enforce its patents and grant licences. Furthermore, the courts held that the licence fee should reflect the value of the vehicle, i.e., the marketable end-product, rather than the value of the component.

Here also, the judgment which the ECJ will deliver in response to the request for a preliminary ruling from the Regional Court of Düsseldorf of 26 November 2020 (see VBB on Competition Law, Volume 2020, No. 11) should offer some of the answers.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Joint National Competition Authorities Paper highlights fault lines in Digital Markets Act discussion

On 23 June 2021, the heads of the national competition authorities ("NCAs") published a joint position paper entitled *How national competition authorities can strengthen the DMA* ("NCA Paper"). The NCA Paper argues that NCAs are well placed to assist the European Commission ("Commission") – and specifically, as the NCA Paper suggests, the Directorate-General for Competition ("DG COMP") – with the enforcement of the Digital Markets Act ("DMA"). As the DMA is going through the legislative process and is currently under review by the European Parliament, there is a clear risk that its enforcement could end up centralised in the hands of the Commission. This policy line would leave little to no responsibilities to NCAs. As its title suggests, the NCA Paper advocates for a more favourable outcome for national enforcers.

The NCA Paper develops three reasons for greater NCA involvement in DMA enforcement: (i) NCA experience in the digital sector; (ii) the close relationship between competition law and the DMA; and (iii) the existing cooperation and coordination mechanism within the European Competition Network ("ECN").

The NCA Paper first summarises a number of market studies on and national enforcement decisions against digital platforms to illustrate the effective use of competition law enforcement to address allegedly anticompetitive conduct by digital platforms and also the broad experience of NCAs in the digital space.

The NCA Paper then addresses the complementary relationship between competition law enforcement and the DMA. To support the point that there is a competition law-DMA continuum, the NCA Paper points to the *ex ante* regulatory tools for digital platforms that some of the NCAs can already use and that some additional Member States are considering to introduce. The NCA Paper also emphasises that the principles of the DMA build on competition cases and the experience of DG COMP and NCAs. It argues that there are clear benefits to the expansion of the toolbox of competition law enforcers, as this allows for faster and more effective intervention that builds on the experience gathered in competition cases. Assigning enforcement of the DMA – the NCA Paper acknowledges that even so-called self-executing provisions of the DMA would require investigation and enforcement action – to competition law enforcers would also contribute to consistency between competition law and the DMA enforcement, and to coordination between these two areas of the law.

The NCA Paper concludes that NCAs should have a proactive role in the enforcement of the DMA, and retain at least some enforcement powers to complement those of the Commission, and of DG COMP in particular. Competition law enforcers could also rely on the ECN cooperation and coordination mechanism in the DMA enforcement context.

It would be difficult to take issue with most of the arguments raised in the NCA Paper. Despite the curious statement by the Commissioner in charge of competition that the DMA should not be considered a competition law instrument, this is exactly what the DMA is. Clearly, the DMA builds on competition law concepts and its provisions reflect specific experiences in competition law cases. Also, the *ex post* and *ex ante* enforcement tools in the digital space would address the same conduct of digital platforms and reflect the same concerns.

DMA enforcement alongside competition law enforcement will almost inevitably result in inconsistencies and increase legal uncertainty, and could also undermine incentives to innovate. But these risks would multiply if the DMA were to create a separate enforcement silo and subject the most dynamic and innovative sector of the economy to the regulatory oversight of an industrial policy directorate-general without any investigative and enforcement experience, assisted by national utility regulators. This would, in all likelihood, further harm the ability of digital platforms to com-

pete and innovate, to the ultimate detriment of consumers. Therefore, combining enforcement powers in the hands of competition law enforcers would be the obvious choice, as the NCA Paper suggests.

The NCA Paper is less persuasive when it argues in favour of shared enforcement powers for DG COMP and the NCAs. The NCA Paper suggests that NCAs will be in a good position to act against a potential infringement of the DMA when the effect is limited to a few Member States. Similarly, in a joint statement issued on 27 May 2021 ("*Friends of an Effective Digital Markets Act*"), the French, German and Dutch governments had gone as far as to assert that the DMA had to leave sufficient leeway for national rules on gatekeepers, because "*a number of constellations may bear national peculiarities*". However, the practices of digital platforms will rarely affect one Member State in isolation and, therefore, the case for intervention at Member State level and for a multiplication of DMA enforcement powers is far from obvious. The NCA Paper also argues that decentralised enforcement powers would result in more resources and more cases. But, as could already be observed in digital competition law cases, more enforcement is not necessarily better enforcement.

At its core, the NCA Paper revolves around institutional powers. Clearly, the NCAs do not want to see DMA enforcement powers entirely centralised in the hands of the European Commission, which would relegate NCAs to an advisory role, including those NCAs that have recently received, or expect to receive, their own, national *ex ante* regulatory powers. But the NCA Paper is also about institutional powers at Member State level. If DMA enforcement were to lie in the hands of an industrial policy directorate-general assisted by national utility regulators, NCAs would be left with competition law cases, which could then raise the question whether there would be any justification for national *ex ante* enforcement tools against digital platforms in the hands of NCAs, given the role of national utility regulators in DMA enforcement.

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