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Highlights

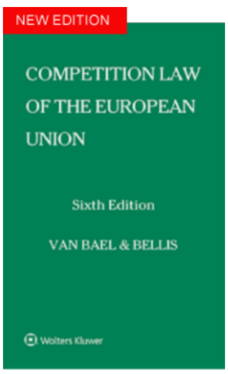
UKRAINE CONFLICT
Russian invasion of Ukraine prompts ECN guidance on application of EU competition rules and European Commission’s adoption of State aid crisis framework
Page 3

MERGER CONTROL
ECJ rules that an undertaking active in a market affected by a merger can intervene in the appeal of a merger clearance decision
Page 5

FOREIGN DIRECT INVESTMENT
FDI review and strict scrutiny in the semiconductor sector: the Siltronic/GlobalWafers deal collapses
Page 7

CARTELS AND HORIZONTAL AGREEMENTS
European Commission publishes draft revisions to the Horizontal Block Exemption Regulations and Horizontal Guidelines
Page 10

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS
EU’s *ne bis in idem* principle provides only limited protection against competition law sanctions following investigations of the same conduct under sectoral regulation or competition rules
Page 19



Jurisdictions covered in this issue

vbb@vbb.com
www.vbb.com

Table of contents

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

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

vbb@vbb.com
www.vbb.com

UKRAINE CONFLICT

– EUROPEAN UNION LEVEL –

Russian invasion of Ukraine prompts ECN guidance on application of EU competition rules and European Commission's adoption of State aid crisis framework

The Russian invasion of Ukraine on 24 February 2022 has prompted European competition enforcers to reassess the application of the EU competition rules in light of the geopolitical crisis and serious economic shocks it has generated, e.g., through disruptions to global supply chains and the effect of sanctions on international trade. This has resulted in the recent publication by European competition enforcers of two guidance measures: (i) the adoption by the European Competition Network ("ECN"), the body bringing together the European Commission ("Commission"), the national competition authorities of the EU Member States and the EFTA Surveillance Authority, of a statement providing guidance on the application of EU competition law in the context of the crisis and (ii) the adoption by the Commission of a Temporary Crisis Framework for State aid measures.

ECN statement on the application of competition law in the context of the Russian invasion of Ukraine

On 21 March 2022, the ECN published a statement on the application of competition law in the context of the ongoing crisis, in which the ECN acknowledges that companies will be compelled to address severe disruptions caused by the impact of the war and sanctions measures on the European single market.

In particular, according to the ECN, companies may need to cooperate to ensure "the purchase, supply and fair distribution of scarce products and inputs" or to mitigate severe economic effects of sanctions. Significantly, the ECN indicates that such cooperation will likely not amount to a restriction of competition within the meaning of Article 101(1) TFEU or will, in any case, generate efficiencies that would likely outweigh any such restriction for the purposes of Article 101(3) TFEU. The ECN indicates that, in any event, its members will not intervene against "strictly necessary and temporary measures" specifically targeted at avoiding or mitigating the severe economic disruption resulting from the war or from sanctions measures. Companies that have doubts as to the compatibility of measures they intend to adopt are invited to contact the appropriate ECN member authority for informal guidance.

At the same time, the ECN stresses the importance of ensuring that essential products remain available at competitive prices and that the crisis is not misused by companies to undermine competition. In particular, the ECN warns that its members will not hesitate to take action against companies tempted to use the crisis to enter into cartels or to abuse their dominant position.

As many companies struggle to cope with, for example, shortages in raw materials caused by the war and seek to cooperate with others to secure adequate supply, the ECN's statement is to be welcomed. It appears that cooperation that is genuinely intended to mitigate the economic consequences of the conflict will generally benefit from a favourable assessment by the authorities, and this will provide significant comfort to companies in evaluating what steps they may take together to deal with the unprecedented challenges the war is causing.

Commission adoption of temporary crisis framework for State aid measures

On 23 March 2022, the European Commission adopted a Temporary Crisis Framework for State aid measures (the "Temporary Crisis Framework") to enable EU Member States to ensure liquidity and access to finance for companies, in the context of Russia's invasion of Ukraine and the geopolitical crisis that it has generated.

The Commission acknowledges the impact that the current crisis is having and will continue to have on the European economy in the coming months. Therefore, the Temporary Crisis Framework aims at mitigating the economic distress caused by the war and the sanctions imposed by the EU and its Member States, as well as supporting the companies and sectors most severely affected. The Temporary Crisis Framework will do that by using the flexibility envisaged under State aid rules, namely the possibility "to remedy a serious disturbance in the economy of a Member State" enshrined in Article 107(3)(b) TFEU.

Against this background, the Commission sets out in the Temporary Crisis Framework a number of criteria for the assessment of aid granted by Member States to remedy the current serious disturbance in their economies. More specifically, the Temporary Crisis Framework envisages the following three types of compatible temporary aid measures, which will be available until 31 December 2022.

1. Limited amounts of aid

Under this form of aid, Member States can set up schemes to grant up to € 400,000 per company affected by the crisis, provided that certain conditions are met. For companies active in the agriculture, fishery and aquaculture sectors, however, the maximum aid amount per company is instead capped at € 35,000 (also in this case, the aid is subject to certain conditions). Significantly, this temporary measure can be granted in any form, including direct grants.

2. Liquidity support in form of State guarantees and subsidised loans

Under the Temporary Crisis Framework, the Commission will consider the following measures as compatible with the internal market in order to ensure access to loans and liquidity to undertakings affected by the current crisis: (i) public guarantees of bank loans and (ii) subsidised interest rates for public and private loans. Again, the aid is subject to certain conditions.

Public guarantees and subsidised interest rates may not be cumulated for the same loan. They may be, however, cumulated for different loans, provided that the total aid does not exceed the relevant maximum amounts. These are based on the operating needs of the company, taking into account elements such as turnover, energy costs or specific liquidity needs.

3. Aid to compensate for high energy prices

The last temporary measure included in the Temporary Crisis Framework directly addresses the effects of the war on the gas and electricity markets in the EU. Under this form of aid, Member States will be able to compensate companies for the steep cost increases in energy prices.

The Temporary Crisis Framework clarifies that the aid can be granted in any form, including direct grants, but it will have to be based on a scheme with an estimated budget. In addition, the maximum aid per undertaking may not exceed € 2 million or 30% of the eligible costs - calculated on the basis of the increase in natural gas and electricity costs. In addition, Member States may set up schemes to support only specific economic sectors, but such limits need to be designed broadly and not lead to an artificial limitation of potential beneficiaries.

In case of "energy-intensive" companies that may need further support to ensure the continuation of their economic activity, the Temporary Crisis Framework envisages the possibility to grant additional aid. Provided that certain conditions are met, Member States will be able to grant up to € 25 million for energy-intensive users, and up to € 50 million for companies active in specific sectors, such as production of aluminum and other metals, glass fibers, pulp, fertiliser or hydrogen and certain chemicals.

Similarly to other pieces of legislation that have been recently adopted by the EU (e.g., the COVID-19 Temporary Framework of 19 March 2020), the Temporary Crisis Framework will provide the Member States with a powerful and flexible tool to design measures in line with the existing EU State aid rules but, at the same time, capable of supporting companies in coping with this unprecedented crisis.

MERGER CONTROL

– EUROPEAN UNION LEVEL –

ECJ rules that an undertaking active in a market affected by a merger can intervene in the appeal of a merger clearance decision

On 22 February 2022, the European Court of Justice ("ECJ") granted telecoms operator Fastweb SpA leave to intervene in Case T-692/20 in support of Iliad Italia (Case C-649/21 P(I), *Fastweb v Iliad Italia*).

In 2020, telecoms operators Vodafone Europe and Telecom Italia (the "parties") filed a merger notification with the European Commission ("Commission") to combine their respective mobile tower businesses in Italy in a newly created joint venture ("INWIT"). The Commission identified competition concerns and only authorized the transaction subject to additional commitments by the parties – namely to grant competitors access to around 4,000 sites in areas with more than 35,000 inhabitants (Case M.9674 – *Vodafone ITALIA/TIM/INWIT JV*) ("Contested Decision").

Iliad, a competing Italian telecoms company, brought an action for annulment against the Contested Decision before the General Court, arguing that the parties' commitments were not sufficiently defined and could potentially allow them to grant competitors access to inappropriate sites (Case T-692/20, *Iliad Italia v Commission*). In 2021, Fastweb applied for leave to intervene in support of Iliad. However, the General Court dismissed Fastweb's application due to a lack of direct and existing interest in the result of the case ("Order under Appeal"). Fastweb subsequently challenged the Order under Appeal before the EU's top court.

In the Order under Appeal, the General Court noted that Fastweb relied on operators other than the parties for hosting services. It considered that, in order to demonstrate that it had a direct and existing interest in the result of the case, Fastweb should have brought evidence that it had a current or future need to access INWIT's mobile tower infrastructure and accordingly must or should in fact subscribe to INWIT's hosting services. Fastweb challenged this finding, stressing that the absence of alternatives to the sites controlled by INWIT would deprive it of its bargaining power vis-à-vis its current partners and limit competition on the market.

The ECJ noted that, in assessing the existence of a direct and existing interest in the result of a case in the field of competition law, it should be borne in mind that relevant provisions of the TFEU enshrine a right not to be subjected to distorted competition. As a result, it found that an undertaking that is active in one or more markets identified by the Commission as liable to be affected by the likely anti-competitive effects of a notified concentration must, in principle, be considered as having a direct and existing interest in the outcome of an appeal against the decision authorising that concentration. This is because, the ECJ explained, it cannot be excluded that the clearance decision and, where relevant, the commitments made binding by that decision, may impact the activities of that undertaking. In particular, the transaction is liable to affect the economic choices available to that undertaking and the bargaining power it has in organising its operations. In its application for leave to intervene, Fastweb had invoked the fact that, as a provider of retail and wholesale mobile and fixed telecommunications services, it purchased hosting services on passive network infrastructure from operators such as INWIT. As a result, the circumstance that Fastweb procures hosting services from an operator other than the parties to the transaction cannot exclude the existence of a direct and existing interest for Fastweb in the outcome of the *Iliad Italia v Commission* case.

In the Order under Appeal, the General Court also found that Fastweb had failed to demonstrate that the parties' commitments produced effects on Fastweb's situation which were different from, or additional to, those which resulted from its partnership and cooperation with other operators. Again, the ECJ disagreed. Insisting that the purpose of an action for annulment against a merger clearance decision is, amongst others, to determine whether the commitments made binding by that decision are sufficient to exclude the occurrence of anti-competitive effects, it ruled that Fastweb could not be expected – at least at the stage of an application to intervene – to show that those commitments were insufficient to avoid such effects.

Therefore, the ECJ set aside the Order under Appeal, making use of its prerogative to give final judgment in the matter, and granted Fastweb leave to intervene in Case T-692/20. Going forward, this judgment paves the way for greater participation in appeals of Commission decisions, which may potentially lead the Commission to be all the more cautious in its merger approval process.

FOREIGN DIRECT INVESTMENT

– EUROPEAN UNION LEVEL –

FDI review and strict scrutiny in the semiconductor sector: the Siltronic/GlobalWafers deal collapses

The Foreign Direct Investment ("FDI") clearance in Germany was not issued on time for the Siltronic and GlobalWafers deal. FDI proceedings continue to create a major risk for non-EU investors, which are looking to acquire companies providing key technologies. The European Commission's proposal for a European Chips Act shortly after the collapse of the Siltronic/GlobalWafers acquisition indicates a major shift in the EU strategy around the semiconductor sector, which will have significant implications on the future investments in the sector.

The proposed acquisition of German silicon wafer producer Siltronic, the only manufacturer of wafers still based in Europe, by Taiwanese semiconductor manufacturer GlobalWafers, failed to obtain the FDI approval by the German government. On 31 January 2022, the deadline set by the parties to obtain the FDI clearance for the public tender offer by GlobalWafers ("long-stop date") expired. The tender offer could not be closed on time without the FDI clearance and thus, the deal collapsed.

The investment was notified to the German Federal Ministry for Economic Affairs and Climate Action ("the Ministry") in December 2020, when the parties applied for a certificate of non-objection in accordance with the Foreign Trade and Payments Ordinance ("FTPO"). The usual duration of Phase I proceedings is 2 months, with an additional 4 months for Phase II. However, these deadlines can be extended (i) by further three months if the case presents factual or legal difficulties and (ii) by another month provided that the acquisition particularly affects the defence interests of Germany. More importantly, the deadlines can be suspended (repeatedly) (i) if the Ministry requests additional information or documents **or** (ii) during any negotiations between the parties for remedies and commitments, which address the concerns of the Ministry.

In the current case, the review of this proposed acquisition was suspended until the parties submitted requested information concerning the clearance decision of the Chinese State Administration for Market Regulation ("SAMR"). The SAMR granted conditional clearance of the transaction on 21 January 2022, which was submitted to the Ministry on 26 January 2022. However, the Ministry did not have sufficient time to review the conditions of the SAMR clearance and decide on the FDI clearance in Germany. Thus, the deal was not cleared prior to the long-stop date and thus, the deal collapsed.

In an effort to save the deal, GlobalWafers applied for interim relief before the Berlin Administrative Court on 18 January 2022, arguing that it should obtain a non-objection certificate clearance pursuant to section 58(2) FTPO. It was the first case of this kind brought to the courts. However, on 27 January 2022, the Berlin Administrative Court rejected the application for interim relief, noting that there are multiple unclear facts, which cannot be determined in the interim proceedings. In proceedings for interim relief, the courts do not assess the full merits of the case but instead must decide whether the private interests of the applicant outweigh the public enforcement interest. Furthermore, the facts that were available to the Berlin Administrative Court at the time of the application indicated that the risks to Germany's public order and security as well as the lack of factual clarity outweighed the interest of the parties to the transaction to an (even provisional) implementation of the acquisition. Finally, the Berlin Administrative Court noted that the parties were not barred from initiating a new takeover procedure, which again was weighted against their interest in obtaining interim relief. On appeal, the Higher Administrative Court of Berlin-Brandenburg upheld the interim decision and further stated even the termination fee of approx. EUR 50 million does not change the legal assessment in the interim proceedings since the sum represents only 2% of the entire planned investment.

Lessons learned from the Siltronic/GlobalWafers deal

The first lesson learned from the Siltronic/GlobalWafers deal is that FDI review proceedings carry significant risks for the parties with respect to the agreed long-stop date. Such risk cannot be excluded even if the requests for necessary regulatory approval have been filed well in advance and in respect of the statutory deadlines. Thus, it may be in the interest of the parties to plan ahead and allow more time for the closing of a transaction. In this respect, the parties to public takeover bids should consider negotiating a longer long-stop date in their tender documents in line with the practice of the German Federal Financial Supervisory Authority ("BaFin"), because an extension of the long-stop date in public takeover bids is extremely difficult.

The level of these risks will depend on the sector involved and the origin of the non-EU investor. In a recent interview after the deal collapsed, the head of the FDI division noted that the semiconductor sector, but also other key technologies (e.g. cloud computing, quantum computing, AI, privacy and security software) will continue to be in the focus of the FDI review process in the upcoming year.

The Commission's publication of its proposal to stimulate the development of the EU chips industry in the next 10 years, only days after the collapse of the Siltronic/GlobalWafers deal, further illustrates the risks for transactions in the semiconductor sector. Apart from aiming to mobilise more than EUR 43 billion of public and private investments to stimulate the development of the EU semiconductor industry, the proposal also suggests a strengthening of the FDI regime with respect to the whole supply chain of semiconductors.

– NATIONAL LEVEL –

ITALY

Italy strengthens its FDI review powers, notably on 5G and cloud technologies, and makes definitive certain exceptional measures adopted in light of the Covid-19 pandemic

Italy recently implemented new legislative measures in the context of the so-called "golden powers" regime (i.e., the national FDI review rules). First, on 31 December 2021, the Italian government decided to extend the Covid-19 temporary "golden powers" regime until 31 December 2022. Second, and most significantly, on 21 March 2022, the Italian government adopted Law Decree 21/2022 (the "Law Decree") which introduces numerous measures to react to the economic and humanitarian effects of the Ukrainian crisis. Among other matters, the Law Decree includes significant amendments to the Italian "golden powers" aiming at better safeguarding national interests in "strategic sectors".

First and foremost, the Law Decree makes definitive certain measures that were introduced provisionally in the wake of the Covid-19 outbreak. Notably, starting 1 January 2023, the acquisition of participation interests in Italian companies operating in certain sectors will be subject to a notification obligation under the national FDI rules, irrespective of the nationality of the buyer. In particular, on the one hand, acquisitions by EU entities (including Italian ones) of a controlling interest in an Italian company operating in the communications, energy, transport, healthcare, agri-food or certain financial sectors will be subject to the notification regime. On the other hand, non-EU entities will have to notify transactions which entail: (a) the acquisition of an interest in an Italian company operating in the communications, energy, transport and the infrastructural sectors if it concerns at least 10% of the voting rights of the target and the total value of the investment exceeds € 1 million or (b) any acquisition in the above mentioned sectors whereby the participation interest exceeds 15%, 20%, 25% and 50% of the corporate capital.

Second, the golden powers regime will now cover transactions relating to the acquisition of goods or services regarding the development, realisation, maintenance or operation of activities in the 5G and cloud sectors, as well as technology-intensive components related to these sectors. Significantly, the exact scope of this provision could be extended even more, by means of secondary legislation, to other activities and technologies relevant for the cybersecurity sector.

In addition, the Law Decree now provides that parties (even if established in the EU) involved in any transaction regarding 5G technology are required to submit a plan (to be updated every year) containing, among others, a detailed description of the transaction. In this framework, the government can impose conditions or exercise its veto within 30 business days from the day of the submission of the said plan, to be extended up to 100 business days in case of complex transactions or where there is a need for further information. Moreover, under certain conditions, the government will also be able to temporarily clear the said plan.

Third, the Law Decree extends the notification obligations to certain acts which previously fell outside the scope of the golden powers in the defence and national security sectors. As a result, the national FDI rules in those sectors now also concern – like in other sectors under the golden powers – resolutions, actions or transactions adopted by the shareholders or the board of directors of an Italian company, provided that they result in the change in: (a) ownership; (b) control; or (c) availability of strategic assets (including by means of the assignment as a security).

Lastly, the Law Decree also intervenes on procedural aspects by: (a) simplifying many aspects of the procedure (including pre-filing) in order to complete those transactions in which the competent authorities decided not to exercise their special powers envisaged under the golden powers rules; (b) introducing, in order to avoid multiple notifications, a joint notification regime which now allows the acquiring company and the target to notify transactions together regarding the acquisition of a participation interest; and (c) by creating new bodies to coordinate, assess and monitor the enforcement of the golden powers.

In conclusion, the Italian government has grasped the opportunity granted by the security concerns in the wake of the outbreak of the war in Ukraine to significantly reinforce its regulatory powers in the context of the foreign direct investment screening. However, it should be noted that the Law Decree, although already in force, will lapse automatically unless converted into law by 20 May 2022. Therefore, it remains to be seen whether the Italian Parliament will confirm (which is usually merely a formality) or further expand the new provisions.

CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission publishes draft revisions to the Horizontal Block Exemption Regulations and Horizontal Guidelines

On 1 March 2022, the European Commission (the "Commission") launched a public consultation on two draft revised horizontal block exemption regulations ("BERs") concerning Research & Development ("R&D") and Specialisation Agreements, as well as on the draft revised guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements ("Horizontal Guidelines").

By way of background, the existing R&D and Specialisation BERs, which – along with the existing Horizontal Guidelines – entered into force in 2011, are due to expire on 31 December 2022. In September 2019, the Commission initiated a review and evaluation process relating to the two BERs and the Horizontal Guidelines. Subsequently, in May 2021, the Commission published a Staff Working Document setting out the results of that review. The evaluation identified areas for improvement in terms of effectiveness, relevance and coherence of the instruments. The recent publication of the draft BERs and Horizontal Guidelines for consultation represents the final step in the Commission's review and evaluation process. The final versions of the revised BERs and Horizontal Guidelines are due to be adopted by the end of 2022 and to enter into effect on 1 January 2023. The deadline for interested parties to submit comments on the proposed revised BERs and Guidelines is 26 April 2022.

In summary, the draft revised R&D BER now published for consultation by the Commission clarifies the scope of certain operative concepts, introduces a new condition for the application of the exemption to R&D agreements to competitors in innovation, modifies the grace period applicable to an agreement where one of the parties exceeds the market share threshold for exemption, and amends the previous methodology for calculating the parties' market shares. In proposing these changes, the Commission states that it is responding, among other things, to its evaluation that the current BER is not sufficiently adapted to agreements for the development of new products, technologies and process and for R&D efforts directed primarily towards specific objectives ("R&D poles"). In relation to the Specialisation BER, the Commission proposes adjusting the equivalent operative provisions and grace period and, most significantly, clarifies the scope of the exemption in relation to unilateral specialisation agreements and horizontal subcontracting agreements. The key innovations proposed to the two BERs are discussed further below.

For its part, the draft revised Horizontal Guidelines represent an important overhaul of the existing Guidelines dating from 2011. In particular, the revised Guidelines provide further guidance to assist undertakings in their self-assessment of horizontal agreements, including, among other things, on the determination of the centre of gravity of horizontal cooperation agreements, the assessment of purchasing agreements (including a more detailed explanation of the distinction between joint purchasing and buyer cartels), the assessment of commercialisation agreements (including guidance on the assessment of bidding consortia, particularly between parties that would be able to bid individually for a tender) and the assessment of mobile infrastructure sharing agreements (with the inclusion of a new section covering such agreements). Most significantly, the draft introduces new detailed guidance on the assessment of sustainability agreements, provides further guidance on the exchange of information between companies and also gives important clarification in relation to the application of Article 101(1) to relations between a joint venture and its parent companies. These points are discussed further below.

Proposed revisions to BERs

Draft revised R&D BER

The most significant change proposed to the R&D BER is to set different conditions if the parties are competitors for existing products/technology or competitors in innovation (i.e., competitors around a specific R&D pole). While R&D agreements between competitors for existing products/technology will remain subject to a 25% market share threshold as under the existing BER, the draft revised BER would make the exemption for an R&D agreement between companies that compete in innovation conditional on the existence, at the time the R&D agreement is entered into, of at least three competing R&D efforts, in addition to and comparable with those of the parties to the R&D agreement in question. Therefore, an R&D agreement which would lead to a situation where less than three other competing R&D efforts remain would no longer qualify for the block exemption. According to the draft BER, the assessment of comparability of R&D efforts is conducted on the basis of reliable information concerning, *inter alia*,

1. the size, stage and timing of the R&D efforts,

2. third parties' (access to) financial and human resources, their intellectual property, know-how or other specialised assets, their previous R&D efforts, and

3. third parties' capability and likelihood to exploit directly or indirectly possible results of their R&D efforts on the internal market.

These new provisions would narrow the application of the BER where competition in innovation is affected. They may also raise questions as to how to apply the conditions in practice where little information is publicly available in relation to competing R&D efforts.

In addition to this important substantive change, the draft revised R&D BER also proposes simplifying the "grace period" applicable where the parties' market shares rise above the exemption threshold, adding new definitions and modifying certain existing ones (e.g., modifying the definition of "potential competitor" by removing the reference to the concept of entry in reaction to a "small but permanent increase in price" appearing in the existing BER) and refining the methodology for the calculation of the market shares. On this final point, whereas the general rule that market shares are calculated on the basis of market sales value or volume in the preceding calendar year remains in place, the revised BER allows for alternative methods of calculation. Where sales data for the preceding year is non-representative of the parties' positions in the market, the draft BER proposes that the calculation may be made based on the average market shares of the parties in the three preceding years. Furthermore, where data pertaining to market sales is unavailable, estimates may be made based on other reliable market information, including expenditure in research and development or research and development capabilities.

Draft revised Specialisation BER

The most significant change proposed to the Specialisation BER is to extend its application to unilateral specialisation agreements between more than two parties. Whereas the present BER defines unilateral specialisation agreements as being agreements between two parties, the revised Specialisation BER expands this definition to include agreements between *more* than two parties and thus aligns the definition in this respect with that of reciprocal specialisation agreements and joint production agreements. In effect, the safe harbour provision in the revised Specialisation BER would apply uniformly to all three types of specialisation agreements, without distinction to the number of parties.

In addition to this substantive change, the draft revised Horizontal Guidelines clarify that horizontal subcontracting agreements falling outside the definition of "specialisation agreement" are nevertheless likely to benefit from the safe harbour of the Specialisation BER. The revised Horizontal Guidelines state that all horizontal subcontracting agreements – not only those concluded with a view to expanding production – are likely to fulfil the conditions of Article 101(3). The revised Guidelines further note that market power is unlikely to arise in the context of such agreements where the parties' combined market shares do not exceed 20%.

In a similar way to the draft revised R&D BER, the draft revised Specialisation BER also proposes simplifying the "grace period" applicable where the parties' market shares rise above the exemption threshold, adding new definitions and modifying certain existing ones (e.g., modifying the definition of "potential competitor" by removing the reference to the concept of entry in reaction to a "small but permanent increase in price" appearing in the existing BER) and refining the methodology for the calculation of the market shares.

Proposed revisions to Horizontal Guidelines

Sustainability agreements

The most significant substantive innovation of the draft revised Guidelines – compared to the 2011 Guidelines – is the inclusion of a dedicated new chapter covering sustainability agreements. The chapter opens by acknowledging that individual production and consumption decisions can generate negative externalities, for example on the environment, which are not sufficiently taken into account by the economic operators or consumers that cause them. According to the draft, cooperation agreements to mitigate these externalities may become necessary if public policies and regulations provide an incomplete response, such that residual market failures persist.

The draft revised Guidelines generally define the term "sustainability agreement" as "*any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, irrespective of the form of cooperation*". The draft Guidelines explicitly give precedence to the guidance provided in the other chapters: it is stated that, where a sustainability agreement concerns a type of cooperation described in any other chapter of the Guidelines, "*its assessment will be governed by the principles and considerations set out in those chapters, while taking into account the specific sustainability objective pursued*".

First, the chapter explains and illustrates how agreements which do not affect parameters of competition, such as price, quantity, quality, choice or innovation, are not capable of raising competition law concerns. Three examples of such agreements are cited:

- agreements between members of an industry to abide by certain standards of corporate conduct,
- agreements on the creation of a database containing information about suppliers that have sustainable value chains, use sustainable production processes and provide sustainable inputs, or distributors selling products in a sustainable manner, without requiring the parties to purchase from those suppliers or to sell to those distributors, and
- agreements between competitors relating to the organisation of industry-wide awareness campaigns or campaigns raising customers' awareness of the environmental footprint of their consumption, without such campaigns amounting to joint advertising of particular products.

Secondly, the chapter explains how sustainability agreements which affect one or more parameters of competition may be assessed under Article 101(1). It is made clear that agreements restricting competition cannot escape the prohibition of Article 101(1) for the sole reason that they are necessary for the pursuit of a sustainability objective. However, the draft Guidelines explain that the objective pursued by the agreement will be relevant at the stage where an agreement is classified as being restrictive of competition by object or by effect. The distinction is important since agreements which do not qualify as restrictions of competition "by object" can infringe Article 101(1) only if they have an appreciable effect on competition.

In this regard, the draft revised Guidelines provide a "soft safe harbour" for sustainability standardisation agreements, meaning that the Commission takes the view that such agreements are unlikely to produce appreciable negative effects on competition where:

- The procedure for developing the sustainability standard is transparent and all interested competitors can participate in the process leading to the selection of the standard.
- The sustainability standard does not impose on undertakings that do not wish to participate in the standard an obligation – either directly or indirectly – to comply with the standard.

- Participating undertakings remain free to adopt for themselves a higher sustainability standard than the one agreed with the other parties to the agreement.

- The parties to the sustainability standard do not exchange commercially sensitive information that is not necessary for the development, the adoption or the modification of the standard.

- Effective and non-discriminatory access to the outcome of the standardisation procedure is ensured.

- The sustainability standard does not lead to a significant increase in price or to a significant reduction in the choice of products available on the market.

- There is a mechanism or a monitoring system in place to ensure that undertakings that adopt the sustainability standard indeed comply with the requirements of the standard.

Thirdly, the chapter discusses the assessment of sustainability agreements under Article 101(3). In short, no special principles apply. The efficiency gains the agreement contributes to must be objective and, understood in broad terms, encompass not only reductions in production and distribution costs but also increases in product variety and quality, improvements in production or distribution processes, and increases in innovation. The restrictions imposed must be indispensable, meaning that they are reasonably necessary for the claimed sustainability benefits to materialise and that there are no other economically practicable and less restrictive means of achieving them. Interestingly, the chapter discusses at length possible benefits that may be passed on to consumers. They are divided between individual use-value benefits (i.e., benefits resulting from the use of the product and directly improve consumers' experience with the product in question), individual non-use value benefits (i.e., benefits resulting from consumers' appreciation of the impact of their sustainable consumption on others) and collective benefits (i.e., benefits occurring irrespective of consumers' individual appreciation of the product and objectively accruing to consumers in the relevant market if the latter are part of the larger group of beneficiaries).

The Netherlands Authority for Consumers and Markets, a pioneer in the sustainability debate in competition policy circles, having published innovative guidelines covering sustainability agreements in 2020, has welcomed the inclusion of the chapter in the proposed Guidelines. The Authority has noted however that "*more leeway is needed to eliminate any reluctance companies have to enter into urgently needed meaningful sustainability initiatives to speed up the energy transition from carbon to renewables*".

Information exchange

As mentioned above, the draft revised Guidelines provide important further guidance on the assessment of the exchange of information in horizontal contexts compared to the 2011 Guidelines.

First, the draft Guidelines note the efficiency gains that can be generated by information exchange. In particular, the draft Guidelines reference the growing importance of data sharing in decision-making processes powered by big data analytics and machine learning techniques. They explain that the sharing of information of the same or of a complimentary nature may enable firms to train algorithms on a broader, more meaningful basis. At the same time, the draft Guidelines note that algorithms can allow competitors to increase market transparency, to detect price deviations in real time and punish undercutting more effectively. However, they suggest that "algorithmic collusion" is only liable to arise where, in addition to the specific design of the algorithms, the market structure is characterised by a high frequency of interactions, limited buyer power and product homogeneity.

Secondly, the revised Guidelines supplement the 2011 Guidelines with a more detailed discussion of the concept of "genuinely public information", the exchange of which is unlikely to run afoul of Article 101(1). The Commission suggests that the cost of acquisition of the information should be regarded as the central criterion to determine its "public" character. The Commission observes that competitors do not normally choose to exchange information that they can collect from the market at equal ease. By contrast, information otherwise regarded as being in the public domain may not be genuinely public if its acquisition costs are capable of deterring other undertakings and customers from collecting the information. For example, while the prices in petrol stations are publicly displayed, one would incur substantial costs in constantly trying to collect the prices advertised on the boards of petrol stations.

Thirdly, drawing on the Court of Justice's case-law and the Commission's decisional practice, the Guidelines discuss in greater depth unilateral communications of commercially sensitive information and the competition concerns they can generate. It is of note that the Commission takes the view that a finding of a concerted practice cannot be excluded where information is publicly communicated, for example, through a website or statement in public. Public announcements may generate efficiencies, in so far as they give customers the ability to make more informed choices. However, citing the reasoning in the *Container Shipping decision* (Case AT.39850), the revised Guidelines note that the potential efficiencies generated by certain announcements, such as announcements of future intentions, are less likely to materialise where such announcements are non-binding. Such announcements can however give important signals concerning an undertaking's intended strategy on the market to its competitors. They may also be indicative of an underlying anti-competitive agreement or concerted practice.

Fourthly, the revised Guidelines address information exchanges which may occur incidentally to other activities. Where the exchange is required for the implementation of another type of horizontal cooperation agreement, it would be necessary to verify whether the exchange can give rise to a collusive outcome with regard to the parties' activities within and outside the cooperation. Any negative effect arising from such exchanges will not be assessed separately but in the light of the overall effects of the horizontal cooperation agreement. If the information exchange does not exceed what is necessary for the legitimate cooperation between competitors, then, the Guidelines note, even if the exchange has restrictive effects on competition within the meaning of Article 101(1), the exchange is more likely to meet the criteria of Article 101(3).

Furthermore, the draft revised Guidelines address information exchange that may stem from regulatory initiatives. Undertakings are directed to limit the extent of the information exchanged to what is required on the basis of the applicable laws, without divulging commercially sensitive information that reveals their market strategy or technical information that goes beyond their legal duty. The Guidelines advise that undertakings put in place precautionary measures – such as a reduction in the frequency of exchange – in order to make the information less commercially sensitive.

Interestingly, the Commission takes the view, tentatively supported by the General Court's judgment in *Altice Europe*, that an information exchange taking place between parties to a merger transaction may also be subject to the EU Merger Regulation. For example, the Guidelines imply that information exchange between an acquirer and a target company could amount to the "implementation" of a concentration within the meaning of Article 4(1) of the Merger Regulation and must be assessed in this light.

Clarification of application of Article 101 to joint venture-parent relations

The draft revised Guidelines provide valuable additional guidance regarding the application of Article 101(1) to the relationship between joint ventures and their parent companies, which has long been an area of uncertainty for companies and their advisors. While past case law of the Court of Justice has suggested that a joint venture can be considered to be part of the same undertaking as its parents in specific contexts (e.g., attribution of liability for infringements), it remained unclear what position the Commission would take on the application of Article 101(1) to the exchange of information and coordination between a joint venture and its parents, a scenario where, in some past cases, the Commission had indicated Article 101 could apply.

The draft revised Guidelines clarify that, in so far as the parent companies of a joint venture exercise decisive influence over the joint venture, the parents and the joint venture form a single undertaking for competition law purposes. Where the existence of such decisive influence is proven, the Commission indicates that it will not typically apply Article 101(1) to agreements and concerted practices between the parent(s) and the joint venture which concern their activity in the relevant market(s) where the joint venture is active. This approach draws on the case law of the Court of Justice relating to the specific contexts outlined above.

At the same time, the draft Guidelines indicate that the Commission will typically apply Article 101(1) to agreements between the parents to create or alter the scope of the joint venture. Furthermore, the fact that a joint venture and its parents are considered to form part of the same undertaking on a certain market does not prevent the parent companies from being independent outside the product and geographic market(s) where the joint venture is present. Where the agreement or coordination in question covers a market(s) other that where the joint venture is active, agreements between parents and the joint venture are within the scope of Article 101(1).

The Commission's clarification on this question is be welcomed and provides important guidance to companies and their advisors in structuring arrangements between a joint venture and its parents.

STATE AID

– NATIONAL LEVEL –

UNITED KINGDOM

UK High Court rules on sugar advance tariff quota

On 24 February 2022, the United Kingdom High Court (the "High Court") rejected British Sugar's contention that the sugar advance tariff quota breached Article 10 of the Protocol on Ireland/Northern Ireland (the "Protocol") on State aid or the subsidy control provisions of the Trade and Cooperation Agreement between the UK and the EU (the "TCA").

Background

Raw cane sugar imports into the United Kingdom after the end of the transition period were subject to an autonomous tariff quota (the "ATQ"). The ATQ allowed 260,000 tonnes of raw cane sugar to be imported duty free into the United Kingdom (in addition to other duty-free imports from some African, Caribbean and Pacific countries, as well as from the European Union) on a first-come first-served basis. After the quota was exhausted, tariffs were £28/100kg, except where free trade agreements apply.

The two main players in the UK-refined white sugar market are British Sugar and Tate & Lyle ("T&L"). Where British Sugar uses UK-grown sugar beet, T&L uses raw cane sugar imported from outside the United Kingdom.

The High Court's Opinion

British Sugar brought the challenge against the Secretary of State for International Trade on two grounds, with T&L as an interested party contending that the ATQ was unlawful. First, it alleged that the ATQ constituted unlawful state aid to T&L, contrary to Article 10(1) of the Protocol. Second, it alleged that ATQ constituted an unlawful subsidy to T&L, contrary to the subsidy control provisions of the TCA. British Sugar's chief complaint with the ATQ was that it benefits T&L almost exclusively since there are no other significant importers of raw cane sugar.

In relation to State aid, British Sugar argued that the ATQ regime granted a selective advantage, and was therefore unlawful. It argued that the intention of the measure was to be selective, referring to certain evidence that the UK government had purposely meant to boost T&L's position. However, this argument fell short against the principle that the selectivity of a measure is to be ascertained by objective features (such as its design) and not by reference to its underlying intent.

The High Court then applied the three stage World Duty Free test to determine if there was selectivity, deciding that under stages one and two the ATQ was not selective. Here, British Sugar was unable to show that there was a difference in treatment of undertakings in a comparable legal and factual position. Since it is not an importer of raw cane sugar, and since any other importer of raw cane sugar would be subject to the same treatment as T&L, the High Court decided there was no selectivity issue. Against this background, the High Court also concluded that Article 10 was not applicable to the ATQ because the measure was not selective and was not to be considered State aid.

In relation to subsidy control, the High Court noted that different treatment between comparable importers could be a subsidy, but also that a general system of preferences would not, and that, in addition, tariff quotas are an established feature of the WTO framework. Similar to State aid, British Sugar's contentions did not succeed chiefly due to the fact that, as a non-importer, it was not comparable to T&L, and instead all (potential) importers were treated the same as T&L.

Overall, the case is interesting because it was the first judicial consideration of such issues by the post-Brexit UK courts. Therefore, the Court's conclusions may provide insight into future litigation relating to State aid and selectivity questions in the United Kingdom.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Gazprom: General Court confirms Commission's commitment decision but annuls a decision based on similar grounds to reject a complaint against Gazprom

On 2 February 2022, the General Court of the European Union (the "Court") issued two judgments which follow the European Commission's (the "Commission") lengthy investigation of some of Gazprom's allegedly anti-competitive practices in the European Union, consisting mainly in partitioning gas markets in Eastern Europe, charging excessive prices and conditioning the supply of gas on obtaining unwarranted commitments from wholesalers concerning gas transport infrastructure.

In the first judgment, the Court confirmed the Commission's wide margin of discretion when settling an investigation and upheld the Commission's controversial commitment decision in this politically charged case which allowed Gazprom to avoid a hefty fine by submitting a number of commitments that was criticised for being extraordinarily light-touch on the Russian gas exporter considering the alleged infringements at hand (Case T-616/18, *Polskie Górnictwo Naftowe i Gazownictwo v Commission (Commitments by Gazprom)*).

The second judgment reversed a Commission decision rejecting a related complaint against Gazprom because the Commission had failed to properly motivate its decision. The Court found that the Commission's explanations, which it had deemed sufficient to support the commitment decision, did not adequately support the Commission's decision to reject a complaint in nearly identical factual circumstances (Case T-399/19, *Polskie Górnictwo Naftowe I Gazownictwo v. Commission (Rejection of a complaint)*).

The Gazprom Commitment Judgment

In April 2015, the Commission sent Gazprom a statement of objections ("SO") (case AT.39816). The SO set out the Commission's preliminary view that Gazprom was abusing its dominant position on the markets for upstream wholesale supply of gas in eight Member States for the purpose of preventing the free flow of gas. In particular, the Commission objected to three types of conduct which in its view were contrary to Article 102 TFEU:

1. first, territorial restrictions imposed in supply contracts concluded with wholesalers and industrial clients;

2. second, a policy of charging unfair prices in five of the countries concerned; and

3. third, conditioning the supply of gas in Bulgaria and Poland on obtaining certain commitments from wholesalers in relation to gas transport infrastructure. One such commitment concerned the acceptance by Polish wholesaler Polskie Górnictwo Naftowe i Gazownictwo ("PGNiG") of Gazprom having increased control over the management of investments regarding the Polish section of the Yamal pipeline, a major gas transit pipeline in Poland ("Yamal objections").

In February 2017, Gazprom submitted formal commitments to the Commission with a view to addressing the Commission's concerns. In May 2018, the Commission accepted and made binding Gazprom's final commitments (the "Commitment Decision"). No specific commitments, however, were adopted in relation to the Yamal objections. As a result, PGNiG brought an action for annulment of the Commitment Decision before the Court, on account of the commitments' incomplete and insufficient nature.

The Commission's wide margin of discretion in the commitment procedure

In its appeal, PGNiG argued that the Commission committed a manifest error of assessment by concluding that the Yamal objections were unfounded and by accepting commitments which "in no way" addressed those objections.

Thus, according to PGNiG, the Commission infringed Article 9 of Regulation 1/2003, read in conjunction with Article 102 TFEU, and the principle of proportionality.

An unusual feature of the present case was the Commission's adoption of a commitment decision after it had formally charged Gazprom in writing by means of a Statement of Objections ("SO") with a view to adopting a prohibition decision. The Court found this practice permissible. It noted that according to paragraph 123 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, commitments can be accepted even though an SO has already been sent to the undertaking concerned. In this situation, the SO fulfils the requirements of a preliminary assessment. Thus, while in some Member States (e.g., France) commitments must be offered before the SO has been sent, the Commission may nevertheless send an SO, which fulfils the requirements of a preliminary assessment, and accept commitments afterwards.

Turning to the general principles governing commitment decisions, the Court confirmed that, although this is not expressly mentioned in Article 9 of Regulation 1/2003, the general proportionality principle of EU law is also relevant in commitment procedures, as held in the *Alrosa* judgment (Case C 441/07 P, *Commission v Alrosa*). The proportionality principle, however, does not imply that all competitive concerns set out in a preliminary assessment, even if contained in an SO, must invariably be addressed in the commitments proposed by the undertakings concerned. Interpreting Article 9 of Regulation 1/2003 and the principle of proportionality in a stricter way would be inconsistent with the nature of the Commission's preliminary assessment, and could, in certain circumstances, render the commitments procedure null and void.

Nevertheless, the Court held that the Commission, as it had not adopted a revised preliminary assessment, was required to justify the absence of commitments addressing the Yamal objections. In the present case, the Court found that the Commission did in fact provide adequate reasons for its decision not to require such commitments. In particular, the Commission had found that the certification decision issued by the Polish Energy Regulator ensured that Gaz-System, an independent TSO of the Polish section of the Yamal pipeline, ultimately had decisive control over the investment decisions relating to the Yamal pipeline and their implementation. Additionally, the Commission noted that the parties' relations were largely governed by intergovernmental agreements between Russa and Poland and concluded that this circumstance could have influenced the parties' conduct.

After examining more closely the two reasons that led to the absence of commitments for the Yamal objections, and pointing out that the Commission enjoys a margin of discretion in accepting commitments under Article 9, the Court decided that the Commission's commitment decision was lawful and did not infringe the principles of good administration, transparency and sincere cooperation.

The judgment concerning the rejection of a complaint against Gazprom

The Court was less lenient with the Commission in its second judgment. Interestingly, although this case involved almost identical facts, the Court held that the Commission's explanations which it had found to adequately support the Commitment Decision were insufficient to support a Commission decision rejecting a complaint.

The second judgment was related to an additional complaint PGNiG lodged in 2017 against Gazprom which alleged abusive practices concerning infrastructure-related conditions. The allegations in this complaint overlapped to a great extent with the concerns expressed by the Commission in the SO issued in case AT.39816. The Commission opened an additional, parallel procedure (case AT.40497), but ultimately rejected PGNiG's complaint (the "Rejection Decision"). The Rejection Decision relied once again on the certification decision and the intergovernmental context created by the agreements between Russia and Poland, which the Commission had also used to justify the scope of its Commitment Decision.

PGNiG again sought the annulment of the Rejection Decision, invoking procedural errors, notably the Commission's failure to properly inform PGNiG.

The Court recalled that under Article 7(1) of Commission Regulation 773/2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 of the TFEU] ("Regulation 773/2004"), the Commission must inform the plaintiff of the reasons why it considers that there are insufficient grounds for acting on the complaint. While the Commission enjoys a margin of discretion as to how it deals with complaints, this discretion is not without limits.

The Court found that the Commission had exceeded its discretion by relying only on the Polish certification decision and the intergovernmental context of relations between Poland and Russia regarding gas in its letter rejecting the complaint. In particular, the Court pointed out that the letter, which preceded the contested decision, did not explicitly mention the application of the State action defence. According to this doctrine, Articles 101 and 102 TFEU do not apply if national legislation compels undertakings to engage in anti-competitive behaviour or creates a legal framework which eliminates any possibility of competitive activity on their part.

Because of the particular nature of the State action defence doctrine, and the fact that case law has not recognised this doctrine where State action is exercised by a third country and not by an EU Member State, the Court found that the Commission should have expressly informed PGNiG that its preliminary assessment of the limited likelihood of establishing an infringement of Article 102 TFEU was based on a possible application of the State action defence doctrine. In that regard, the Court concluded that the Commission violated Article 7(1) of Regulation 773/2004.

Turning to the consequences of this failure to spell out the motivation for its rejection decision, the Court recalled that according to established case law, a procedural irregularity constitutes grounds for the annulment of a decision in whole or in part only if it is shown that in the absence of such irregularity the decision being challenged might have been substantively different. In the present case, the Court found that the Commission decision might have been substantially different had it properly addressed the State action defence. The Court also pointed out that the second ground relied on by the Commission, i.e., the Polish certification decision, could not support the finding that there was limited likelihood of establishing an infringement as against Gazprom in relation to the claims concerning infrastructure-related conditions. Consequently, the General Court annulled the Rejection Decision.

EU's *ne bis in idem* principle provides only limited protection against competition law sanctions following investigations of the same conduct under sectoral regulation or competition rules

On 22 March 2022, the European Court of Justice (the "ECJ") handed down two judgments highlighting that the European Union's *ne bis in idem* principle – the equivalent to the protection against double jeopardy – provides only limited protection in competition law proceedings where the same conduct has already been investigated in another competition law case or under a national regulatory regime (Case C-151/20, *Nordzucker and Others* and Case C-117/20, *bpost*).

Ne bis in idem is considered a fundamental principle of EU law which is also enshrined in Article 50 of the EU Charter of Fundamental Rights. It generally prohibits the duplication both of proceedings and of penalties of a criminal nature against the same person for the same acts the person has committed. In competition law matters, this principle precludes a finding of liability or the initiation of fresh proceedings against an undertaking on the grounds of anti-competitive conduct for which it has already been sanctioned or declared not to be liable by a prior decision that can no longer be challenged.

Nordzucker confirmed, however, that the *ne bis in idem* principle has limited effects in the European Union's enforcement system where national competition authorities can apply Article 101 TFEU for violations that affect their own territories. Accordingly, *ne bis in idem* does not prevent a second national competition authority from finding an infringement where identical conduct has already resulted in an infringement decision in another EU Member State, as long as each decision is limited to the harmful effects in each respective Member State.

Nor does the *ne bis in idem* principle protect an undertaking against parallel investigations of the same conduct under competition law and sectoral regulation, provided that a certain degree of coordination exists in the investigations under the two legal frameworks.

Nordzucker

The German sugar market has traditionally been dominated by three producers, namely Pfeifer & Langen, Nordzucker and Südzucker. In 2004, the accession of new Member States to the European Union raised concerns amongst German sugar producers in anticipation of the added competitive pressure from undertakings established in those new Member States. In this context, Nordzucker and Südzucker essentially agreed not to compete with each other by penetrating each other's traditional sales areas. Nordzucker subsequently filed applications for leniency with the Austrian and German competition authorities.

In 2010, the Austrian competition authority brought proceedings before the Higher Regional Court of Vienna seeking a declaration that Nordzucker and Südzucker had infringed Article 101 TFEU and corresponding provisions of national competition law as well as two fines to be imposed on Südzucker and Agrana, Südzucker's Austrian subsidiary. Amongst other evidence, the evidence produced by the Austrian competition authority included a telephone conversation which took place in 2006 between the sales directors of Nordzucker and Südzucker. During this telephone conversation, Sudzücker essentially informed Nordzucker that Sudzücker's subsidiary Agrana had noticed deliveries of sugar to the Austrian market by a Slovak Nordzucker subsidiary and referred to possible consequences for the German sugar market.

In 2014, the German competition authority found that Nordzucker, Südzucker and Pfeifer & Langen had infringed Article 101 TFEU and corresponding provisions of national competition law by implementing an agreement to respect each other's core sales areas between 2004 and 2008. As a result, it imposed a fine of € 195.5 million on Südzucker. The decision – which has become final – relied on, amongst other matters, the same telephone conversation that the Austrian competition authority had produced before the Higher Regional Court of Vienna.

In 2019, the Higher Regional Court of Vienna dismissed the Austrian competition authority's action on the ground that the telephone conversation in question had already been subject to a penalty imposed by the German competition authority. The Austrian competition authority appealed the judgment of the Higher Regional Court of Vienna before the Austrian Supreme Court. The Austrian Supreme Court called upon the ECJ to clarify the scope of the *ne bis in idem* principle, in particular whether the telephone conversation at issue should be taken into account in the Austrian proceedings even though it was expressly mentioned by the German competition authority's decision.

The Court's assessment

The ECJ ruled that the *ne bis in idem* principle does not protect an undertaking from proceedings by the competition authority of a Member State where those proceedings are based on conduct which a competition authority of another Member State has already addressed in a final decision, as long as each competition authority's decision was limited to finding an anti-competitive object or effect in its own Member State. Only if the first competition authority had already considered the anti-competitive object or effect in the second Member State (which, as a matter of EU law, should not be the case), would the proceedings by the second competition authority infringe the *ne bis in idem* principle. The same principle applies where the undertaking has applied for leniency in one Member State and is investigated in competition law proceedings in another Member State.

bpost

In 2010, bpost – the incumbent provider of postal services in Belgium – established a new tariff system for the distribution of advertising material and administrative mail items where discounts were based on a "per sender" model. Under this model, the quantity discounts granted to postal consolidators were no longer calculated according to the total volume of mail items from all the senders which they had consolidated but rather were based on the volume of mail items of each sender.

In 2011, the Belgian Institute for Postal Services and Telecommunications ("IBPT") found that the per sender model was based on an unjustified difference in treatment between consolidators and direct clients and imposed a fine of € 2.3 million on bpost for infringing the non-discrimination rule in relation to tariffs. The IBPT's decision expressly indicated that it did not address the application of competition law.

In 2012, the Belgian competition authority found that bpost had infringed Article 102 TFEU and the corresponding provision of national competition law. In particular, the Belgian competition authority found that bpost's new tariff system had had an exclusionary effect on consolidators and bpost's potential competitors as well as a loyalty-building effect on its main clients that would in turn increase barriers to entry. As a result, it imposed a fine of € 37.4 million on bpost. The Belgian competition authority's decision expressly indicated that, in calculating the fine, it had taken account of the fine previously imposed by the IBPT.

In March 2016, the Brussels Court of Appeal annulled the IBPT's decision on the ground that the tariff system at issue was not discriminatory, applying an earlier ECJ judgment in the course of the same proceedings that had confirmed this point (Case C-340/13, *bpost*). A few months later, the Brussels Court of Appeal found that the proceedings conducted by the IBPT and those conducted by the Belgian competition authority concerned the same facts, and consequently annulled the Belgian competition authority's decision on the ground that it was contrary to the *ne bis in idem* principle. In 2018, the Belgian Supreme Court set aside the latter judgment and remanded the case to the Brussels Court of Appeal.

The Brussels Court of Appeal noted that the two sets of proceedings were based on different fields of legislation intended to protect different legal interests. While the regulation of postal services aims at ensuring the liberalisation of the sector, including through transparency and non-discrimination rules in relation to tariffs, competition law aims to ensure free competition within the internal market, including by prohibiting the abuse of a dominant position. However, given the uncertainty surrounding the relevance of the identity of legal interest protected, the Brussels Court of Appeal decided to refer two questions for preliminary ruling to the ECJ.

The Court's assessment

The ECJ found that the application of the *ne bis in idem* principle in competition law proceedings is subject to a two-fold condition. First, there must be a prior final decision ("*bis* condition"). Second, that prior decision and the subsequent proceedings or decisions must concern the same conduct ("*idem* condition"). The Court also noted that any limitation on the fundamental rights recognised by the Charter must be provided for by law, respect the principle of proportionality and the essence of those fundamental rights, and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedom of others.

The ECJ found that the *ne bis in idem* principle does not prevent an undertaking from being sanctioned for infringing competition law where, on the same facts, it has already been subject to a final decision finding that the same conduct was compatible with sectoral rules. This is because, in the ECJ's view, sectoral rules and competition law pursue complementary but distinct legitimate objectives of general interest.

However, the ECJ also clarified that parallel proceedings would be compatible with the *ne bis in idem* principle only if: (i) clear and precise rules make it possible to predict which acts or omissions may be subject to a duplication of proceedings and penalties and that there will be coordination between the two competent authorities; (ii) the two sets of proceedings are conducted in a sufficiently coordinated manner within a proximate timeframe; and (iii) the overall penalties imposed on the undertaking correspond to the seriousness of the offences committed.

In respect of these conditions, the ECJ observed the existence of a legal framework for coordination and exchange of information between the IBPT and the Belgian competition authority. It also noted that the two authorities' decisions, though adopted 17 months apart from one another, were characterised by a sufficiently close connection in time.

Key takeaways

It is now for the two referring courts to apply the ECJ's findings to the underlying cases, although the ECJ's references to the facts in each case give the defendants very little hope that the *ne bis in idem* principle will protect them against adverse competition law decisions.

But the rulings could also have far-reaching implications for large digital platforms under the Digital Markets Act ("DMA") which is expected to enter into force in the second half of 2022. Commentators have already expressed concerns regarding the potential for overlap and inconsistency in the enforcement of the DMA, on the one hand, and national competition laws and sectoral regulation targeting the tech sector (such as Germany's Section 19a of the Competition Act), on the other hand, which could mean that large digital platforms could be found liable under both the DMA and competition law for the same conduct, or that the same conduct could be found to comply with the DMA while also being considered a competition law infringement.

As a threshold question, there would appear to be a strong argument that the *ne bis in idem principle* should protect large digital platforms against parallel proceedings under the DMA and competition laws, as both pursue the same objectives of general interest – both are designed to prevent the same, allegedly anti-competitive conduct by large digital platforms, both aim at preserving competition in digital markets, and the obligations and prohibitions that the DMA will impose on large digital platforms are essentially based on competition law enforcement cases. However, in *bpost*, the threshold for finding that regulatory rules and competition law pursue complementary but distinct legitimate objectives of general interest does not set a particularly high bar, suggesting that a similar outcome would be possible with respect to the DMA and competition law.

This would suggest that large digital platforms could not invoke *ne bis in idem* against the concurrent application of competition rules, the DMA, and national DMA-inspired laws to the same conduct. At the very least, large digital platforms would to some extent be protected by *bpost*'s "procedural rule of reason" for parallel investigations, which principle requires predictable rules on: (i) coordination between enforcers; (ii) proceedings that are conducted in a sufficiently coordinated manner within a proximate timeframe; and (iii) overall penalties that correspond to the seriousness of the infringement.

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VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

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

vbb@vbb.com
www.vbb.com