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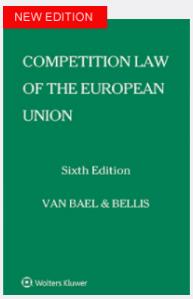
VBB on Competition Law

Issue Highlights



Jurisdictions covered in this issue

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Table of contents

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MERGER CONTROL

National level

FRANCE

French Competition Authority applies "failing firm defence" for the first time to authorise merger

Background

In 2020, Mobilux, the parent company of the BUT group, a French home goods company notified its intention to acquire Conforama France, another French home goods retailer, to the European Commission ("Commission").

In June 2020, following a request for referral from the parties, the Commission referred the merger to the French Competition Authority ("FCA") (Case M.9894, Mobilux/Conforama France, 26 June 2020), and the parties notified the transaction to the FCA on 17 July 2020.

Six days later, the FCA granted a derogation from the suspensive effect of its merger control regime, allowing the parties to complete the acquisition without waiting for the outcome of the FCA's competitive analysis (FCA, decision n°22-DCC-78, 28 April 2022). Surprisingly, the FCA issued this derogation, despite its assessment that the transaction would give rise to three main categories of risks: (i) the risk of creating or increasing purchasing power that could place suppliers of bedding products in a state of economic dependence, (ii) the risk of a deterioration in the contractual conditions of the franchisees present in the French overseas territories, and (iii) risks associated with overlapping activities in the various downstream markets for the retail distribution of furniture products.

To approve the acquisition in light of these competitive risks, the FCA applied the so-called "failing firm defence", a defence derived from US antitrust legislation. Under this defence, a concentration may not be regarded as raising a significant competitive concern (because it neither creates a dominant position nor strengthens it), if certain conditions regarding the target's viability, discussed below, are met.

The application of the "failing firm defence"

Parties who notify a merger in France are subject to a standstill obligation, just as they are at the EU level, meaning they cannot normally close a transaction until the FCA has granted approval. Nonetheless, the FCA may grant a derogation from the suspension period and allow the parties to close the transaction without waiting for approval.

The failing firm defence provides one basis for granting such derogation. The FCA's guidance on the application of this defence is based on the Court of Justice of the European Union ("ECJ") judgment in *French Republic vs Commission* (1998). According to this judgment, the takeover of a failing company by a competitor may be authorized without the need for remedies—even if the transaction would otherwise raise competitive concerns—if it appears that the competitive effects of the merger would not be more unfavourable than those that would result from the target's disappearance from the market, absent the merger.

Although it is the first time that the FCA has applied the failing firm defence, it is not the first time that this defence has been applied in France. In 2002, the Ministry of the Economy, which was tasked with merger control prior to 2009, authorised the takeover of Moulinex by Seb by applying this defence. This merger authorisation was subsequently appealed to the French Supreme Administrative Court (Conseil d'État) which, in 2004, reiterated the three criteria necessary to rely on this defence, as set out in the ECJ judgment of 1998: (i) in the near future, the acquired undertaking would be forced out of the market if it were not acquired by another undertaking; (ii) there are no credible alternative buyers for the target, which would otherwise result in a more competitive outcome, and (iii) the

MERGER CONTROL

National level

disappearance of the failing company would not be less damaging to consumers than the planned takeover. These conditions are interpreted strictly and, according to the French Merger Guidelines, "*must be analysed in a logical sequence and are intended, in the end, to establish that the deterioration of the competitive situation would have occurred even in the absence of the merger.*"

In the present case, the FCA decided that the acquisition met the three criteria. First, the target, Conforama, was facing "significant financial difficulties" and it appeared certain that Conforama's assets would disappear. Second, following a broad consultation with all the market players, the FCA considered that, in the absence of any other interest in acquiring Conforama, there was no alternative to Mobilux's offer that would be less harmful to competition. Third, the FCA compared the effects of Conforama's assets disappearing to those of Mobilux's takeover in terms of each of the competitive risks identified. It considered that the effects of this disappearance would not be less harmful than the acquisition by Mobilux, as this takeover would continue to maintain the diversity of the market offering.

Takeaway

While the COVID-19 pandemic increased some companies' hopes that the failing firm defence might be applied more liberally, competition authorities remain cautious in using this defence. For instance, when the CMA analysed the Amazon/Deliveroo merger in 2020, it initially considered applying this defence before ultimately deciding to set aside the defence, as it no longer considered Deliveroo an "exiting firm."

At the EU level, the Commission's Horizontal Merger Guidelines also allow for the use of the failing firm defence. The defence, however, has been applied on only few occasions, for instance, in 2013, in *Aegean/Olympic II*. More recently the Commission rejected its application, for instance, in *General Electric/Alstom* (2015); *Hutchison 3G Italy/Wind/JV* (2016) and; *T-Mobile NL/Tele2 NL* (2018). During the COVID-19 pandemic, the Commission also announced that it did not intend to relax the high standards as set out by the ECJ when considering this defence.

Consequently, companies should not expect to be able to apply this defence more broadly to their transactions.

FOREIGN DIRECT INVESTMENT

National level

GERMANY

Germany prohibits sale of medical ventilator producer Heyer Medical to Chinese Aeonmed

On 27 April 2022, the German Federal Ministry for Economic Affairs and Climate Action ("the Ministry") prohibited the acquisition of German medical ventilator producer Heyer Medical by Beijing-based medical device maker Aeonmed. The deal had been closed in March 2020, without being notified (or requiring notification) to the Ministry. However, for acquisitions that do not require notification, the Ministry may initiate a review at its own discretion for up to five years after the conclusion of the foreign direct investment ("FDI") contract.

According to press reports, the acquisition raised concerns of risks for security and public order, particularly public health. When determining whether FDI may affect security or public order, the EU FDI Screening Regulation (Regulation 2019/452) provides for consideration of whether a foreign investor is controlled directly or indirectly by the government of a third country, for example through significant funding, including subsidies. Aeonmed has reportedly been found to operate in Germany and benefit from Chinese subsidies.

In the aftermath of the COVID-19 pandemic, this prohibition decision illustrates the German government's desire to maintain local production capacities and capabilities. In an effort to ensure a continuous supply of essential healthcare products, Germany adopted an amendment to its FDI legislation against the backdrop of the COVID-19 pandemic in May 2020. This amendment added the manufacture of medical devices intended for the treatment or alleviation of life-threatening and highly contagious infectious diseases, such as medical ventilators, to the scope of deals that are now under a notification obligation. Other jurisdictions, such as the UK, also amended their respective FDI regimes to include public health/pandemic responses post-COVID.

ABUSE OF DOMINANT POSITION

European level

The European Court of Justice provides guidance concerning non-pricing practices that constitute an abuse of a dominant position

Background

This preliminary reference to the Court of Justice of the European Union ("ECJ") concerns Enel, a vertically integrated company with a monopoly in electricity generation in Italy, also active in the distribution of electricity. Enel underwent an unbundling process whereby energy generation, the operation of transmission networks, and distribution and sales activities were all separated into three companies: Enel Energia (the supplier of electricity on the deregulated market), Servizio Elettrico Nazionale ("SEN") (the supplier of the enhanced protection service) and E-Distribuzione (responsible for electricity distribution activities).

In 2018, the Italian Competition Authority ("ICA") imposed a fine on the three companies in respect of an exclusionary strategy designed to facilitate transfer of SEN's customer base to Enel Energia, and thereby reduce the risk that such customers would instead transfer to new competitors entering the market. The companies challenged the decision before the Italian administrative court ("TAR Lazio"), which confirmed that an abuse of dominance had been committed. TAR Lazio nevertheless partially upheld the actions brought by two of the three companies and reduced the amount of the fine. The companies appealed the judgment to the Administrative Supreme Court ("CS"), which referred several questions pertaining to the concept of "abuse" within the meaning of Article 102 TFEU to the ECJ.

The interests protected by Article 102 TFEU

One of the questions referred to the ECJ concerned the scope of the evidence required for an exclusionary practice to be classified as an abuse.

First, the ECJ recalled that Article 102 TFEU aims at achieving the general objectives of Article 3(1)(b) TFEU, namely the establishment of the competition rules necessary for the functioning of the internal market. It reiterated its case law, explaining that Article 102 TFEU covers not only an abuse which may directly harm consumers, but also an abuse which indirectly harms consumers by impairing the competitive structure. Endorsing the opinion of the Advocate General, the Court highlighted that the ultimate purpose of competition law – which ultimately justifies intervention in matters involving exclusionary practices – is the protection of the consumer's well-being.

In light of these general principles, the Court explained that a competition authority satisfies the burden of proof if it demonstrates that the practice undermines an effective competitive structure without having to prove that it caused direct harm to consumers. To escape its liability, the dominant company must prove that the exclusionary effects of the practice can be counterbalanced and outweighed by advantages (for example, lower prices, innovation, choice, or quality) that benefit consumers.

The application of the as-efficient competitor test to non-pricing practice

The central question raised by the CS was how to draw a clear line between practices that fall under the scope of "normal" competition and those that do not.

First, the ECJ recalled that the abusive nature of the practices at issue required that they had the capacity to produce the exclusionary effects on which the

ABUSE OF DOMINANT POSITION

European level

contested decision is based. Referring to its case law, particularly to *Post Denmark*, the Court held that it is sufficient to demonstrate that an anticompetitive effect exists which may potentially lead to the exclusion of competitors who are at least as efficient as the dominant company.

The ECJ acknowledged that dominant companies may defend themselves against their competitors, regardless of the reasons for their dominant position, but they may do so solely through "normal" competition, that is, competition on the merits. The ECJ recalled that any practice in which a dominant company has no economic interest other than that of eliminating competitors in order to raise its prices by taking advantage of its dominant position must be regarded as constituting a means other than competition on the merits. The ECJ indicated that a practice does not constitute competition on the merits if it cannot be engaged in by a hypothetical competitor who, while equally effective, does not hold a dominant position on the relevant market, because that practice is based on the exploitation of resources or means unique to the dominant company.

Returning to the "competition on the merits" concept, the ECJ stated that it refers, in general, to a situation of competition where consumers benefit from lower prices, better quality, and a wider selection of new or better performing goods and services. Thus, examples of competition on the merits include conduct that broadens consumer choice by putting new goods on the market or increases the quantity or quality of the goods already on offer.

The ECJ found when a company loses its legal monopoly, it must refrain from using means available to it due to its former monopoly that are not available to its competitors for the purposes of maintaining a dominant position on the newly liberalised market at issue. However, such a practice can avoid the prohibition imposed by Article 102 TFEU if the dominant company demonstrates that the practice was either objectively justified by circumstances external to the company and is proportionate to that justification, or is counterbalanced or even outweighed by efficiency benefits that also benefit consumers.

In the present case, the dominant company's ability to contact customers in the "protected market" was a clear economic advantage as it sought to protect its position on the deregulated market. As a result, SEN was required to offer the competitors of Enel Energia access to that customer information on the same terms that it offered the information to Enel Energia. The Court noted that competitors were enabled to access this information because they did not have a structure capable of providing, in such large numbers, the contact data of the customers.

ABUSE OF DOMINANT POSITION

National level

FRANCE

Paris Court of Appeal confirms decision of the French Competition Authority concerning Google's practices in the advertising market

In a judgment published on 2 May 2022, the Paris Court of Appeal (the "Court") largely upheld a 2019 decision of the French Competition Authority ("FCA"), which found that Google abused its dominant position in the search advertising market by applying non-objective, non-transparent and discriminatory conditions in contracts with advertisers, and imposed a €150 million fine.

Background

In 2019, the FCA found that Google had abused its dominant position by imposing unfair trading conditions on its advertising customers, as the operating rules for Google Ads (the "Rules") included non-objective, non-transparent and discriminatory terms and conditions. In addition to imposing a fine, the FCA issued three injunctions requiring Google to clarify the Rules and the procedures for suspending advertisers' accounts, and to set up procedures for detecting and preventing violations of the Rules. Google filed an appeal, challenging both the findings of the FCA and the injunctions.

The imposition of unfair trading conditions as an abuse of dominant position

Google argued on appeal that an exploitative abuse required a finding that the dominant firm benefitted from the allegedly unlawful conduct, which the FCA had failed to establish. The Court, however, rejected this argument. It held that the FCA was justified characterizing Google's trading conditions as exploitative without the need to demonstrate that Google benefitted from the allegedly anticompetitive practices. The Court also observed that Google obtained significant advertising revenue from promoting sites on its platform which had engaged in practices similar to those Google had designated as non-compliant.

The most extensive section of the judgement relates to the alleged unfairness of the Rules and their enforcement. Google claimed that using more precise terms and conditions would make it easier for malicious advertisers to circumvent the Rules and place misleading advertisements. Moreover, Google claimed that the FCA had failed to identify a threshold to distinguish between reasonable and unlawful terms and conditions, which would be necessary to enable Google to comply with Article 102(a) TFEU.

Rejecting these arguments, the Court pointed out that it was not FCA's responsibility to determine what Google's policy should be on the relevant market. Rather, the FCA only had to establish that the disputed terms and conditions could be objectively qualified as unfair. On this point, the Court considered that the Rules were written in a generic way, without illustrating which behaviour could be considered a violation. All this made them unclear and unintelligible for advertising customers. Additionally, the Court noted that Google changed the Rules unilaterally and, on several occasions, used insufficient methods to inform the advertisers about pending changes. Advertisers therefore did not have sufficiently complete and reliable information to comply with the Rules.

The generic nature of the Rules also had an impact on the procedure applicable in case of violation. The Court considered that the unclear terms and conditions provided Google a margin of discretion which led to unjustified differences in the treatment of alleged violations. The Court found that Google had interpreted the Rules inconsistently, depending on the advertisers' sites and circumstances, even though the advertisers

ABUSE OF DOMINANT POSITION

National level

were in comparable situations. As a result of Google's inconsistent decisions, all advertisers, including those acting in good faith, were unable to anticipate whether the ads they displayed complied with the Rules. Finally, the Court concluded that the legitimate goal of protecting Internet users from misleading advertising did not justify the manner in which Google applied the Rules in specific cases.

Regarding the effects of the practice, the Court held that the FCA had sufficiently demonstrated the effects of the practices on the market for online advertising linked to searches, and on related markets. The Court agreed that Google's practices resulted in the random suspension for certain advertisers' accounts while non-compliant advertisers continued to be active. In addition to those effects, this situation had the effect, at least potentially, of disrupting the functioning of competition in the downstream markets in which advertisers operate.

The injunctions ordered by the FCA

Google argued that the injunctions disproportionately interfered with Google's contractual and commercial freedom. In rejecting this argument, the Court first pointed out that the first two injunctions (requiring clarification of the rules and enforcement procedures) do not require Google to substantially amend the Rules in a specific manner, but only to clarify them. Furthermore, the Court observed that Google retains the right to suspend an advertiser's account if it detects a serious violation of the Rules.

The Court did, however, uphold Google's appeal against the third injunction. With this injunction, the FCA had required Google to enable consumers to report violations of the Rules by advertisers and to communicate relevant information to the FCA. The Court considered this requirement unjustified and disproportionate as it was not directly related to Google's allegedly anticompetitive practices and its relationship with advertisers.

Google has filed an appeal before the French Supreme Court.

Observations

The judgment is a good illustration of the excessively vague standards applicable to allegedly abusive, "unfair" terms and conditions. It confirms that competition authorities have almost unlimited discretion when establishing this type of exploitative abuse, without any need to establish that the conduct appreciably harmed consumers. It is particularly regrettable that the Court rejected Google's – legitimate – argument that a competition authority ought to define some threshold to distinguish between lawful conduct and conduct considered exploitative. Without such criteria, it remains nearly impossible for a dominant firm to anticipate whether its conduct legitimately protects its commercial interests (and, in Google's case, the integrity of its products) or violates Article 102(a) TFEU because they are found to be "unfair." Complaints by customers about perceived "unfairness" become a sufficient basis for an infringement decision, even though these concerns would be better dealt with as a matter of contract law, rather than competition law.

VERTICAL AGREEMENTS

European level

The European Commission adopts the new Vertical Block Exemption Regulation (VBER) alongside new Guidelines on Vertical Restraints (VGL)

On 10 May 2022, the European Commission ("Commission") adopted and published the new Vertical Block Exemption Regulation (Regulation 2022/720) (the "new VBER" or "VBER") and the accompanying Guidelines on Vertical Restraints ("the new VGL" or "VGL"). The new VBER replaces the former Vertical Block Exemption Regulation (Regulation 330/2010: the "former VBER"), which expired on 31 May 2022, along with the former version of the Vertical Guidelines.

The VBER concerns the application of Article 101 of the Treaty on the Functioning of the European Union ("TFEU") to vertical agreements, namely agreements that relate to the supply and distribution of goods and services. The VBER provides a legal safe harbour as agreements which meet the requirements of the VBER are exempt from the application of Article 101(1). The VGL provide guidance on how to interpret and apply the VBER, as well as on the assessment under Article 101(1) and Article 101(3) TFEU of vertical agreements that fall outside the VBER.

The new VBER is the result of an evaluation and consultation process started in 2018. Following a public consultation on policy options, the Commission published a draft proposal for a new VBER and VGL in July 2021, inviting comments from interested parties. In February 2022, the Commission published a draft new section of the VGL dealing with information exchange in dual distribution systems. The versions of the VBER and VGL eventually adopted largely follow the previous drafts, but with some significant modifications in response to industry and other feedback.

The new VBER largely retains the structure of the former VBER.

- Article 2(1) VBER declares that Article 101(1) TFEU shall not apply to vertical agreements to the extent that such agreements contain vertical restraints. The scope of this exemption is limited in the case of vertical agreements containing IP provisions, as well as in relation to vertical agreements concluded between competitors and, by virtue of a new provision, concluded by hybrid platforms.

- Article 3(1) subjects the application of the exemption to a 30% market share threshold: for the exemption to apply, the respective market shares of the supplier (on the market for the sale of the goods or services) and of the buyer (on the market for the purchase of the goods or services) should not exceed 30%.

- Article 4 provides a list of hardcore restrictions, i.e., vertical restraints which are normally considered sufficiently injurious to competition to prevent the benefit of the block exemption from applying to a vertical agreement in which they are included.

- Article 5 excludes certain obligations contained in vertical agreements from the benefit of the block exemption, without, however, removing the benefit of the exemption for the remainder of the vertical agreement (as such excluded obligations are considered less harmful than hardcore restrictions).

- Articles 6 and 7 provide for the possibility of the withdrawal, or disapplication, of the benefit of the block exemption by the Commission or, in certain circumstances, by the national competition authorities.

Pursuant to the transitional provision contained in Article 10 VBER, vertical agreements in force on 31 May 2022 which benefited from the exemption under the former VBER – but do not meet the conditions for the application of the new VBER – shall continue to enjoy the benefit of the exemption until 31 May 2023. The new VBER will remain in force until 31 May 2034.

VERTICAL AGREEMENTS

European level

The remainder of this article will focus on the main areas where the new VBER and VGL introduce significant changes to the assessment of vertical restraints. In general, the changes create certain new opportunities for suppliers of goods in terms of the restrictions they may impose on their distributors and other customers, whilst on the other hand severely restricting the ability of online platforms to benefit from the VBER.

1. Dual distribution systems/information exchange

Dual distribution refers to a scenario where a supplier sells goods or services to independent distributors but also itself operates downstream at the same level of trade as the independent distributors, thereby competing with the independent distributors. This would be the case where, for example, a supplier sells its products to independent retailers but also operates its own online or physical retail stores. Although the VBER does not apply to agreements between competing undertakings, Article 2(4) of the new VBER makes a now broader exception to this rule in the case of vertical agreements concluded between undertakings which are only considered to compete because the supplier engages in dual distribution. Under this exception, which applies whether the supplier is a manufacturer, an importer or a wholesaler, non-reciprocal agreements concluded in the context of dual distribution can benefit from the VBER provided that the distributor does not compete with the supplier at the upstream level at which it buys the goods or services. This means that the VBER applies not only where, a *manufacturer* supplies goods to, and competes downstream with, an independent distributor (provided the distributor does not also manufacture competing goods), as under the former VBER, but also where an *importer* or *wholesaler* supplies goods to, and competes downstream with, as the case may be, an independent wholesaler or retailer (provided that the independent wholesaler or retailer does not manufacture, or as the case may be, import or wholesale competing goods).

A topic that was the subject of intense debate in the review of the former VBER was the treatment of information exchange in dual distribution, and the extent to which it should – or should not – be subjected to the normal strict approach to information exchange in a horizontal context. The previous rules provided for no limitation on the application of the VBER to information exchange in the context of dual distribution. Pursuant to Article 2(5) new VBER, exchanges of information between the parties to a vertical agreement concluded in the context of dual distribution system are now block exempted provided two conditions are met: such exchanges must be (i) directly related to the implementation of the vertical agreement, and (ii) necessary to improve production or distribution of the contract goods or services. Contrary to the much stricter position advocated in the Commission's 2021 drafts, the exemption of information exchange does not depend on the parties' market share in the retail market respecting a low 10% threshold; instead, the only relevant market share threshold remains the 30% threshold applicable to the parties' individual positions in the relevant sale and purchase markets (Article 3 VBER).

The new VGL provide a non-exhaustive list of examples of information the exchange of which, "depending on the particular circumstances", may be considered to be directly related to the implementation of the agreement and necessary to improve production and distribution (thus meeting the conditions of Article 2(5) VBER). The scope of the information that may usually be exchanged is to some extent broader than was provided for under the draft published earlier this year. In general, the same approach is taken whether the information is provided by the supplier or by the buyer. In brief, this list includes (subject to certain specific limitations, including not to use the information to impose hardcore restrictions such as RPM and territorial restrictions):

VERTICAL AGREEMENTS

European level

- technical information;
- logistical information, including inventory, stocks, sales volumes and returns (excluding, subject to exceptions, in relation to identified end users);
- information on customer purchases, preferences and feedback (excluding, subject to exceptions, in relation to identified end users);
- pricing information, including:
  - the supplier's supply price to the buyer;
  - the supplier's recommended or maximum resale prices;
  - the current or past resale prices of the buyer;
  - information on promotional campaigns and marketing information;
- performance-related (benchmarking) information, including:
  - aggregated and anonymised information provided to a buyer relating to the marketing and sales activities of other buyers;
  - information relating to the buyer's sales of the contract goods or services relative to its sales of competing goods or services.

In contrast, the three categories of information that are said generally to not meet the dual requirements of Article 2(5) are the following:

- future downstream sales prices of the supplier or buyer;
- information related to identified end users unless such information is necessary to
  - enable the supplier or buyer to satisfy the requirement of a particular end user (e.g., grant it special conditions under a loyalty scheme); and
  - enable otherwise valid customer restrictions to be implemented/monitored.
- information relating to a buyer's sales of own-brand goods provided to a manufacturer of competing branded goods, unless the manufacturer is also the producer of those own-brand goods.

The new VGL outline several precautions the parties can take to minimise the risk that the information exchanged will raise horizontal concerns where their vertical agreement does not benefit from the block exemption. These include limiting the exchange to aggregated sales information or using an appropriate delay between the generation of the information and its exchange. A further precaution would be the use of administrative or technical measures, such as firewalls, that ensure that information provided by the buyer is only available to the personnel of the supplier responsible for its upstream activities (e.g., its relations with independent distributors) and not personnel responsible for the supplier's downstream direct sales activity (e.g., its own retail business). Otherwise, an assessment should be made under the Horizontal Guidelines as to whether information exchanged outside of the safe harbour of the VBER raises material concerns. Unfortunately, the Commission's draft new Horizontal Guidelines, at least for now, contain no guidance on how to assess information exchange in a vertical relationship.

VERTICAL AGREEMENTS

European level

2. Providers of online intermediation services

In general, the new VBER and VGL provide little comfort for providers of online intermediation services, in particular marketplace platforms, which were not the object of specific treatment under the former VGL and VBER. Within the analytical framework of the VBER and VGL, these platforms are categorised as suppliers, whereas undertakings offering and selling goods and services over such platforms are classified as buyers in respect of the online intermediation services provided to them (Article 1(1)(e) VBER and para. 67 VGL). Therefore, for the purposes of the VBER, a provider of online intermediation services cannot be considered as a buyer in respect of sales of goods and services which it intermediates.

This categorisation has several consequences for agreements concluded by providers of online intermediation services.

- First, the market share threshold set out in Article 3(1) VBER must be calculated on the market for the supply (and purchase) of online intermediation services, rather than the market(s) for the intermediated goods and services, making it less likely that leading platforms will benefit from the VBER.

- Second, restrictions imposed by providers of online intermediation services on the buyers of those services may constitute hardcore restrictions within the meaning of Article 4 VBER, for example a requirement to charge a fixed or minimum price for the goods sold over the platform or not to sell the goods in certain territories or to certain customers. In contrast, restrictions on suppliers are, with one rather limited exception, not treated as hardcore restrictions under Article 4, with the consequence that companies selling their products over a platform can prevent the platform from lowering the effective price of the products sold there, even at the platform's own expense (even in a way that would not reduce the amount received by the seller).

- Third, across-platform retail parity obligations imposed by providers of online intermediation services on buyers of those services are excluded from the benefit of the VBER under Article 5(1)(d), whereas all other parity clauses benefit from the block exemption.

- Fourth, providers of online intermediation services that have a hybrid function (i.e., where the provider of intermediation services is also a competing undertaking downstream on the market for the sale of the intermediated goods or services where it sells on its own account) cannot benefit from the dual distribution exception in Article 2(4) VBER with respect to the agreements they conclude as a supplier of such services. These agreements instead fall outside of the VBER altogether and have to be assessed under the Commission's Horizontal Guidelines as regards possible collusive effects and by reference to the VGL as regards any vertical restraints, creating significant legal uncertainty.

- Finally, online intermediation platforms cannot qualify as genuine agents in respect of the distribution of goods and services. In support of this conclusion, the VGL note that these platforms (i) act for a very large number of other sellers preventing them from being an effective part of the same undertaking as any of them, (ii) may benefit from a significant imbalance in their favour in the commercial relationship with buyers of their services owing to strong network effects and (iii) make significant market-specific investments. However, the significance of this conclusion in the VGL, in practice, is not clear because, as noted above, the buyer of intermediation services can in any event prevent the provider from discounting the sale of the buyer's products or otherwise determine where and to whom sales take place over the platform.

VERTICAL AGREEMENTS

European level

The above seems to underscore an underlying concern that vertical restraints imposed by marketplace platforms are generally liable to be harmful to competition, to a large extent regardless of whether market power can be proven. The VGL suggest that restraints (other than object restrictions) imposed by hybrid platforms may not be an enforcement priority for the Commission absent market power, but this does not compensate for the considerable legal uncertainty created by the cumulative limitations on the ability of such platforms to benefit from the conventional regime applicable to vertical restraints.

3. Resale price maintenance

The long-standing hostile approach to resale price maintenance ("RPM") remains rather firmly in place under the new VBER and VGL. As a result, agreements restricting a buyer's ability to set resale prices below a certain level, whether directly or indirectly, remain hardcore restrictions (Article 4(a) VBER). Nonetheless, a number of points in the guidance merit closer attention, including the following.

Minimum Advertised Prices. The VGL do not adopt the unintended softening of approach seemingly suggested by the 2021 draft of the VGL in respect of minimum advertised prices ("MAPs"), indicating instead that the practice will indeed be treated as an indirect means of enforcing RPM. Although MAPs leave the distributor free, in principle, to sell at a lower price than that advertised, they are treated as hardcore restrictions on the grounds that they disincentivize the distributor from setting a lower sale price by restricting its ability to inform potential customers about available discounts (VGL para. 189).

Fulfilment contracts. The VGL confirm the circumstances in which pricing restrictions in fulfilment contracts can avoid qualifying as RPM, somewhat broadening the scope of the arrangements that are able to benefit from this exception by comparison to the 2021 draft of the VGL. A fulfilment contract is defined as an arrangement whereby a supplier uses a third-party buyer to fulfil a supply agreement previously concluded by the supplier with a customer (by, e.g., delivering the product, taking care of invoicing, receiving payment, etc). Where the supplier selects the third-party buyer providing the fulfilment service, the imposition of a resale price by the supplier does not constitute RPM. By contrast, where the undertaking that will provide the fulfilment services is selected by the supplier's customer, the imposition of a resale price by the supplier on the buyer providing that service may restrict competition for the provision of the fulfilment services. In that case, the imposition of a resale price may amount to RPM (VGL para. 193).

This approach suggests that the supplier can dictate the price paid by the ultimate customer even where the provider of fulfilment services takes title to the goods and does not fulfil the conditions to qualify as a genuine agent, provided that the supplier has previously reached agreement with the ultimate customer. If, on the other hand, the service provider does not buy the goods from the supplier but instead only provides services to the supplier, the VGL would not apply (although a pricing restriction imposed by the supplier of goods on the fulfilment services provider would, in these circumstances, not be a hardcore restriction as only restrictions on the pricing of buyers qualify as hardcore restrictions).

Efficiency justifications. As before, the VGL emphasise that the characterisation of RPM as a hardcore and by-object restriction of competition does not render the practice a *per se* infringement, and efficiency justifications must be considered under Article 101(3) TFEU (with the supplier bearing the burden of proof). In this respect, the VGL provide examples of justifications, closely following those provided in the former VGL. As previously, these include (subject to demanding conditions): (i) facilitating the launch of new products, (ii) conducting short-term (two to six weeks) price campaigns, and (iii) avoiding free-riding between retailers on pre-sale services in the case of complex products. Notably, the new VGL give an additional example of possible justification, not

VERTICAL AGREEMENTS

European level

included in the 2021 Draft VGL: a minimum resale price or MAP can be used to prevent a particular distributor from using the product of the supplier as a loss leader (VGL para. 197(c)). The Commission signals that it is willing to accept that a distributor regularly selling a product below the wholesale price can have damaging effects on the brand image of a product and can reduce demand and investment incentives over time. Therefore, it can be, on balance, pro-competitive for a supplier to prevent a distributor from selling below the wholesale price.

All in all, it seems unlikely that the new rules will give suppliers sufficient confidence to risk imposing restrictions on discounting, though the opportunity to prevent loss leading and control pricing in fulfilment contracts may be of practical significance.

4. Territorial and customer restrictions in exclusive, selective, and free distribution systems

The new VBER reorganises the list of hardcore restrictions in order to distinguish exclusive distribution systems (Article 4(b) VBER), selective distribution systems (Article 4(c) VBER), and distribution systems that are neither exclusive nor selective (so-called "free distribution") (Article 4(d) VBER). Although this restructuring does not in itself imply any change to the prior rules applicable to resale restrictions, the new VBER broadens the scope of the resale restrictions that are, by way of exception, not considered hardcore in the case of each of these three types of distribution systems. These changes provide greater scope for, in particular, (i) imposing active (but not passive) sales restrictions on distributors in order to incentivise investments on the part of distributors thereby protected from active selling by competing distributors, and (ii) protecting the integrity of selective distribution systems used in part of the EU/EEA where different distribution systems are applied in other parts of the EU/EEA.

Exclusive distribution. As regards exclusive distribution, the new VBER introduces the possibility of shared exclusivity, whereby a supplier may appoint up to a maximum of 5 distributors per exclusive territory or customer group and prevent active selling into that territory or customer group by distributors outside of that territory or not appointed to supply that customer group (regardless of whether the latter are themselves part of an exclusive or a free distribution system). In contrast, under the former VBER, active sales could not be restricted into territories or customer groups where more than one distributor was appointed by the supplier. In addition, a supplier may now oblige its distributors to pass on the restriction on active sales to their immediate buyers (although not further down the distribution chain).

Selective distribution. As regards selective distribution, Article 4(c)(i) VBER allows suppliers to restrict buyers and their customers from making active or passive sales to unauthorised distributors located in any territory where the supplier operates a selective distribution system. This applies regardless of whether those buyers or customers are themselves located inside or outside the territory where selective distribution is used, meaning that – unlike under the former VBER – a supplier can prevent a distributor in an area where either exclusive or free distribution is used, as well as that distributor's customers, from selling to unauthorised resellers in the area where the selective distribution system is operated. Restrictions on cross-supply between members of the selective distribution system, as well as territorial and customer restrictions in the area where selective distribution is used, remain hardcore restrictions.

Despite consideration having been given to relaxing the former position, the VGL confirm that the combination of selective distribution with exclusive distribution in the same territory cannot benefit from the block exemption (e.g., where a supplier operates an exclusive

VERTICAL AGREEMENTS

European level

system at the wholesale level and a selective system at retail level). As under the former rules, it will only be in exceptional cases outside of the safe harbour provided by the VBER that a supplier will be able to impose active sales restrictions on authorised wholesalers (where this is the only way to protect the investments which wholesalers in other territories need to make) (VGL, para. 183). As under the former regime, the supplier will nonetheless be able to commit to limit the number of authorized distributors it appoints in an area where the selective distribution system is operated (under a quantitative system), as well as commit not to make any direct sales in that territory itself. This limited protection for authorised distributors appointed in such a territory may be supplemented by imposing a location clause on authorised distributors appointed elsewhere.

5. Active and passive sales

Article 4 of the new VBER continues to distinguish between restrictions of active sales and restrictions of passive sales: whereas active sales may be restricted into territories or customer groups exclusively allocated by the supplier to up to five distributors or reserved exclusively to the supplier, passive sales may not be restricted in these circumstances without losing the benefit of the VBER. According to Article 1(1)(l) of the VBER, active sales consist of actively targeting customers by means of direct communication or through targeted advertising and promotion, whether online or offline. By contrast, passive sales are sales made to customers in response to unsolicited requests. In line with the position under the former VGL, setting up an online store or maintaining a website is regarded as a form of passive selling, since it allows potential customers to reach the seller, notwithstanding that the operation of an online store may have effects beyond the seller's physical trading area. The same is considered true of search engine optimisation or offering an app in an app store. By contrast, the new VGL generally consider that offering a language option in an online store differing from the languages commonly used in the seller's territory is a form of active selling into the territories where those other languages are used, which represents a change in approach compared to the former VGL. However, the VGL state that offering an English language option cannot be regarded as a form of active selling into English-speaking territories given that English is widely understood throughout the EU.

The VGL characterise participation in public procurement as being a form of passive selling, irrespective of the type of public procurement procedure. As a result, a vertical agreement which restricts the buyer's ability to participate in public procurement is a hardcore restriction. Similarly, responding to invitations to tender issued by non-public entities is also considered a

6. Online sale restrictions

By virtue of Article 4(e) VBER, any restriction which prevents "the effective use of the internet" by the buyer or its customers to sell the contract goods or services qualifies as a hardcore territorial restriction. In contrast, Article 4(e) also provides that suppliers may impose on buyers (i) other restrictions of online sales or (ii) restrictions on online advertising that do not have the object of preventing the use of an entire online advertising channel.

Consequently, restrictions which *prohibit* the buyer from selling over the internet, whether expressly or *de facto*, clearly fall within the scope of Article 4(e) VBER, and various examples are given in the VGL of restrictions of this nature. Whilst this is not controversial, extending the scope of the hardcore restriction to obligations which, whilst not prohibiting the use of the internet, prevent the *effective use* of the internet serve to blur the limits of the hardcore restriction. This, in turn, generates considerable legal uncertainty, whilst also causing various debatable distinctions to be made when the VGL attempt to provide examples of what would, and would not, cross this wavering line.

VERTICAL AGREEMENTS

European level

As a starting point, the VGL state that this line will be crossed where the restrictions significantly diminish either (i) the aggregate volume of the contract goods sold online, or (ii) the possibility for end users to purchase the goods online. This could be read to suggest that a restriction applied to only one distributor may not in itself be sufficient for it to be considered hardcore and that, instead, an overall assessment of the cumulative effect of the restrictions applied across a supplier's distribution network would be needed before concluding that any of them qualify as hardcore; this, however, does not seem consistent with the wording of Article 4(e) VBER, according to which any restriction on the ability of *the buyer* (i.e., a single buyer) to effectively use the internet to make sales prevents the application of the block exemption. The VGL go on to state that the assessment of whether an obligation amounts to a restriction of the effective use of the internet to make sales cannot depend on either (i) market-specific circumstances (presumably making it irrelevant whether, for example, marketplaces are a more significant route to market for retailers in Germany than in France) or (ii) the individual characteristics of the parties to the agreement (an example of which could presumably be their individual cost structures, suggesting it should not be relevant in making such an assessment that an obligation may be harder for certain less profitable retailers to meet).

These underlying principles may be useful, to some extent, in arguing for a more liberal interpretation of the scope of the hardcore restriction, but in practice the more specific guidance provided by the VGL of various types of obligations is more important. Extrapolating, on the basis of the ruling in *Coty*, the VGL establish the general rule that restrictions related to the manner in which goods are sold online will generally not be considered to prevent the effective use of the internet (to make sales) where two conditions are met: (i) the buyer remains free to operate its online store, and (ii) the buyer remains free to advertise online (VGL, para. 208). For the most part, these two conditions underlie the fairly detailed analysis, included in the VGL, of which specific restrictions are covered by the block exemption and which fall foul of Article 4(e).

Sales criteria. In a welcome departure from the previous strict block exemption regime which required all online sales criteria to be equivalent to the supplier's criteria for off-line sales, a supplier can now benefit from the block exemption where it applies online sales criteria that are not equivalent to, and could be seen as stricter than, those imposed for sales by its distributors in brick-and-mortar shops. These may relate to, for example, the appearance of the online store, the way goods are displayed online, a requirement to cover the cost of customer returns of products sold online or an obligation to provide an online help-desk. Although typically important in the context of selective distribution systems, these types of obligations can be imposed in any type of distribution system. As under the previous regime, a supplier may also make admission to a distribution system conditional on the distributor operating a certain number of brick-and-mortar shops, thereby potentially excluding pure player online retailers. Nonetheless, where the supplier requires a buyer to make a minimum level of sales through offline channels, the VGL maintain the current requirement that the level must be set in terms of a minimum absolute amount (in value or volume) but not as a proportion of the buyer's total sales (as that could limit the amount of online sales).

Online marketplace bans. Based on *Coty,* the VGL confirm that online marketplace bans can benefit from the block exemption, provided the buyer is able to use its own online store and advertise online. Putting to rest concerns in relation to the July 2021 draft of the new VBER, this confirmation seems unqualified.

Where the VBER is not applicable and the marketplace restriction falls to be assessed under Article 101 TFEU, the VGL provide for an effects-based assessment: the restriction should not be considered to infringe Article 101(1) TFEU where its restrictive effects on the level of competition in the market are unlikely to be appreciable. This will be the case where (i) inter-brand competition is strong at the supplier and distributor levels (which should, in itself, be sufficient to exclude an infringement of Article 101(1) as emphasised by the ECJ recently

VERTICAL AGREEMENTS

European level

in Visma), (ii) where the scope of the ban is limited, or (iii) where the relative importance of the restricted marketplace as a sales channel in the relevant market is low (a factor that, in contrast, should not be taken into account in assessing whether a restriction is exempted by the VBER).

Even if a restriction does not escape Article 101 TFEU based on an effects assessment, the VGL suggest that the restriction stands a good chance of withstanding challenge on quality-related grounds where the supplier operates a selective distribution system and does not have an existing contractual relationship with the marketplace. The supplier must nonetheless act consistently. Importantly, any quality-related justification relied on by a supplier will not meet the conditions of Article 101(1) TFEU, or, if relevant Article 101(3) TFEU, where (i) the supplier itself uses the marketplace that the buyer is prevented from using, (ii) the ban is not uniformly applied to all the supplier's distributors, or (iii) the operator of the marketplace is itself an authorised member of the supplier's selective distribution system.

Online advertising restrictions. As regards online advertising restrictions, they can benefit from the block exemption, provided they do not have the object of preventing the use of an entire advertising channel by the buyer. As price comparison services and search engine advertising are each considered a separate advertising channel, a prohibition on a buyer from using all price comparison services or all search engine advertising is treated as a hardcore restriction. Less extensive restrictions, however, are block exempted. For example, the supplier can impose certain quality or content standards in relation to the advertising or the provider of the advertising services, or require the buyer to refrain from using the supplier's brand name in the domain name of its online store. A more detailed analysis of the treatment of restrictions on price comparison services and search engine advertising, both within and outside of the scope of VBER, is provided below.

Price comparison services: As the services provided by price comparison sites, unlike online marketplaces, are considered to be an online advertising channel, as noted above, an outright prohibition on a distributor from using their services to promote its own online store is treated as a hardcore restriction. However, a partial restriction which does not apply to the entire channel may escape being characterised as a hardcore restriction: more specifically, a prohibition on the use of one, or only some, price comparison services will be block exempted unless they are the most widely used services and the remaining services are not *de facto* able to attract customers to the buyer's online store. Applying this rather imprecise test in practice will require a very case specific assessment of whether a prohibition on the use of some, but not other, service providers is likely to remain within the safe harbour of the VBER, which arguably is more appropriate for a self-assessment under Article 101 TFEU than to determine the applicability of a block exemption. Subjecting the use of price comparison services to quality criteria will also benefit from the VBER.

Where the VBER is not applicable and the restriction on the use of price comparison services falls to be assessed under Article 101 TFEU, it appears from the VGL that – even where the restriction amounts to a hardcore restriction – an effects assessment is required to determine if the restriction is liable to have an appreciable restrictive effect on competition (by, for example, increasing consumer search costs and softening retail price competition or limiting the ability of distributors to reach potential customers and, as a result, leading to market partitioning). The factors relevant to making this effects assessment overlap with those applicable in the case of marketplace restrictions (e.g., the strength on the market of the supplier and its competitors, as well as the extent of the use of such restrictions), but other factors, less obviously related to effects, seem to creep into the analysis under the VGL, perhaps reflecting the fact that – unlike a marketplace ban – a price comparison ban is a hardcore restriction.

VERTICAL AGREEMENTS

European level

Where effects are to be assumed, the VGL seem to set a higher bar in terms of potential justifications than in relation to marketplace bans, given that price comparison services – in contrast to marketplaces – re-direct potential customers to the online store of the authorised distributor, meaning that the supplier is more able to protect quality by imposing requirements directly on the distributor's own store where any sale takes place.

Search engine advertising: As the services provided by search engines are also considered to be an online advertising channel, the application of the VBER to restrictions on their use is analysed in the same way as in respect of restrictions on price comparison services. Thus, an outright prohibition on a distributor from using these search engine services to promote its own online store is treated as a hardcore restriction (as it would prevent the use of an entire advertising channel), but a partial restriction – depending on its extent – may well not. It is noteworthy, in line with the very strict approach applied by the Commission in *Guess*, that a prohibition on the use of the supplier's brand name in bidding to be referenced in search engines is treated as equivalent to an outright ban. Interestingly, the VGL provide no guidance on how to assess restrictions on search engine advertising included in agreements falling outside the scope of the VBER. Perhaps this is related to the fact that, in *Guess*, the Commission held that the restriction in question was a 'by object' restriction, which would, in principle, exclude the possibility of an effects assessment. There would nonetheless seem to be no basis for subjecting restrictions on search engine advertising services to a stricter standard than restrictions of the use of price comparison services.

Dual pricing. The treatment of dual pricing – a requirement that the buyer pays a different wholesale price for products resold online compared to products resold offline – is much more liberal under the new rules than under the previous block exemption regime where it was considered a hardcore restriction. While it is tempting to consider that dual pricing is now generally block exempted, the VGL provide caveats: in particular, this practice may be considered to prevent the effective use of the internet to make sales where the extent of the price difference makes online sales "unprofitable" or "financially unsustainable", which is contrasted with the scenario where the price difference is reasonably related to the difference in costs incurred by the buyer in selling on and off-line, which is block exempted. Arguably, this sits uncomfortably with the suggestion made by the VGL, referred to above, that the assessment of whether a restriction qualifies as hardcore should not depend on the individual characteristics of the buyer. Interestingly, however, the Commission's Explanatory Note indicates that it will not be necessary to carry out complex cost calculations or share detailed cost calculations in order to demonstrate that dual pricing is block exempted, which suggests that the Commission at least may not be minded to second-guess the pricing differential applied by suppliers, save in rather egregious cases.

7. Non-compete obligations

The new VBER continues to make specific provision for the treatment of non-compete obligations in vertical agreements, i.e., any obligation on the buyer not to manufacture, buy or sell goods or services that compete with the contract goods or services or any obligation on the buyer to purchase more than 80% of its total demand for the contract goods or services and their substitutes from one supplier. As under the former VBER, the new VBER provides that non-competes whose term is not indefinite or does not exceed five years will benefit from the block exemption's safe harbour. Where the term of a non-compete exceeds five years or is indefinite, it will continue to be excluded from the safe harbour and fall to be individually assessed under Article 101 TFEU. The inclusion of a non-compete that does not benefit from the VBER will not prevent the remainder of the vertical agreement benefiting from the safe harbour.

VERTICAL AGREEMENTS

European level

In a change from the position under the former VBER and VGL, the new VGL clarify that non-compete obligations that are tacitly renewable beyond a period of five years can still benefit from the block exemption where the buyer can effectively renegotiate or terminate the agreement with a reasonable period of notice and at a reasonable cost, thus allowing the buyer to effectively switch its supplier after the expiry of the 5-year period (VGL para. 248). This move away from the mechanical application of the five-year time limit applicable under the former VBER will give parties more flexibility in the inclusion of non-compete clauses in their agreements.

8. Parity obligations

Parity obligations, sometimes called Most Favoured Nation clauses ("MFNs") require a seller of goods or services to offer the goods or services to another party on conditions that are no less favourable than the conditions offered by the seller to certain other parties. While such provisions have long been used across all sectors of the economy without attracting significant attention from competition law enforcers, the imposition of such obligations by online intermediation service providers has, in recent years, become the focus of concern and extensive scrutiny by competition authorities (such as in the case of hotel booking sites and other online platforms). Online intermediation service providers commonly impose such parity obligations on the buyers of their services, which require the buyer not to offer more favourable conditions to customers over the buyer's own website (so-called "narrow" parity obligations) or go further and require the buyer not to offer more favourable conditions to customers via any competing online intermediation service provider (so-called "across-platform" or "wide" parity obligations).

Article 5(d) of the new VBER now excludes "across-platform" parity obligations imposed by online intermediation service providers from the benefit of the block exemption, meaning that such obligations will be subject to individual self-assessment of their compatibility with Article 101 TFEU. The new VGL provide new guidance for this purpose. All other types of parity obligations in vertical agreements continue to benefit from the block exemption, including "narrow" parity obligations imposed by online intermediation service providers and parity obligations imposed outside the context of online intermediation services.

In excluding "across-platform" parity obligations from the VBER, the Commission reasons that this type of parity obligation is more likely to produce anticompetitive effects, such as facilitating collusion between providers of online intermediation services or foreclosing entry or expansion of competing providers. By contrast, while "narrow" online parity obligations eliminate the competitive constraint of the buyer's direct sales channels, this is regarded as addressing the "free-rider" problem facing online intermediation service providers without reducing competition between such providers. However, it should be noted that Article 6 of the new VBER specifically provides that the benefit of the block exemption may be withdrawn in concentrated platform markets where the cumulative use of "narrow" parity obligations by online intermediation service providers restricts competition between them.

9. Agency

The new VGL maintain the general position that, in order for restrictions on the sale of the principal's goods or services to fall outside the scope of Article 101(1) TFEU (for example, restrictions related to the prices, territories or customers at, or to which, they are sold), the agent should bear no significant financial or commercial risks in relation to the contracts concluded on behalf of the principal. However, by comparison to the former VGL which stated expressly that whether or not the agent bears (not insignificant) risk is the only factor in determining whether the agent is such a 'genuine agent', the new VGL inject a potentially important (and, consequently, unwelcome) dose of

VERTICAL AGREEMENTS

European level

uncertainty by providing that an agency agreement is "less likely" to escape Article 101(1) TFEU where the agent represents a "large number of principals" apparently even if the agent does not bear risk.

In addition to the guidance carried over from the former VGL, the new VGL provide guidance on the method of reimbursement for an agent's costs to ensure that the agent does not bear risk. In essence, the VGL do not prescribe a particular method as long as the principal ensures that the agent does not bear any significant degree of the relevant risks. Whichever method is used, it should allow the agent to easily distinguish between the amounts intended to cover the relevant risks and other payments, such as remuneration for agency services. Furthermore, it may be necessary for the principal to provide a simple method for the agent to declare and request a top-up where actual costs incurred by the agent end up exceeding the initially agreed payments.

The new VGL contain important new guidance on "dual role" agents, i.e., undertakings that act as both agent and reseller for the same principal/supplier in relation to products belonging to the same product market. A distributor-agent can qualify as a 'genuine' agent where:

1. the activities and risks covered by the agency relationship can be effectively delineated (for example, because it relates to products that are sufficiently differentiated form those sold under the distributor relationship); and

2. the agency – or, as the case may be, the distributor – relationship is not forced upon the agent (for example, where the agency relationship is not de facto imposed by the principal through a threat to terminate the distribution relation).

If these conditions are fulfilled, a dual role agent may be able to qualify as a genuine agent where all costs directly or indirectly relevant to the agency relationship are paid by the principal. These are defined broadly so as to include costs also benefiting the distributor activity, even if previously incurred, with the sole exception of costs that were exclusively incurred to sell differentiated products. All in all, the very strict conditions applicable to dual agency, and the potentially very serious consequences of misapplying the guidance, may make this option of limited value in practice.

STATE AID

European level

The TAROM and Condor airlines cases: the General Court provides further guidance on rescuing and restructuring aid for non-financial undertakings in difficulty

On 4 May and 18 May 2022, the General Court of the European Union (the "Court") delivered judgments in Case T-718/20 *Wizz Air Hungary v Commission* (the "TAROM case") and Case T-577/20 *Ryanair v Commission* (the "Condor case"). In these rulings, the Court dismissed the annulment actions lodged by Wizz Air Hungary Zrt ("Wizz Air") and Ryanair DAC ("Ryanair"), respectively. Further, the Court provided interesting clarifications regarding the Guidelines on state aid for rescuing and restructuring non-financial undertakings in difficulty (the "Guidelines"), as discussed below.

The Condor case: factual background

On 25 September 2019, the airline Condor Flugdienst GmbH ("Condor") filed for insolvency following the liquidation of its owner, Thomas Cook Group plc. On the same day, Germany notified the European Commission of a rescue aid measure in favour of Condor in the form of a loan and a guarantee. On 14 October 2019, without conducting a formal investigation, the Commission decided that the aid was compatible with the internal market under Article 107(3)(c) TFEU and the Guidelines. As a result, Ryanair brought an action for annulment against the Commission decision, alleging that the Commission erred in law in deciding not to initiate a formal investigation procedure despite the doubts concerning the compatibility of the notified aid with the internal market.

The TAROM case: factual background

On 19 February 2020, Romania notified the Commission of a project to grant rescue aid – in form of a loan – to the national airline TAROM, which was in financial difficulty at the time. Similarly, without conducting a formal investigation, on 24 February 2020, the Commission decided not to raise any objections, finding that the aid was compatible with the internal market under Article 107(3)(c) TFEU and the Guidelines. Wizz Air challenged the Commission decision under Article 263 TFEU, claiming that the Commission erred in law by deciding not to initiate a formal investigation and failed to consider the incompatibility of the notified aid with the internal market.

Findings of the General Court

In its judgments of 4 May and 18 May 2022, the Court dismissed annulment actions and, in doing so, provided novel clarifications and interpretations on certain aspects of the Guidelines.

The "one time, last time" principle

Outlined in points 70 and 71 of the Guidelines, the "one time, last time" principle sets forth that aid under the Guidelines ought to be granted, in principle, to undertakings in difficulty in respect of only one restructuring operation. This principle is tempered by point 71 of the Guidelines, which stipulates that, when an undertaking has already received rescue or restructuring aid, the Commission can only allow additional aid if at least 10 years have lapsed since (i) the earlier aid was granted, (ii) the earlier restructuring period came to an end, or (iii) the implementation of the earlier restructuring plan was halted.

The applicant in the TAROM case contended that, because TAROM had received restructuring aid in the form of a loan and several guarantees until 2019, the notified aid ought to have raised doubts as to the compliance with the conditions of point 71 of the Guidelines. Significantly, the Court dismissed this claim by observing that the actual transfer of the resources is not decisive in determining the date on which the aid was granted. Although TAROM had received

STATE AID

European level

restructuring aid until 2019, such aid had been granted between 1997 and 2003, hence, more than 10 years before the new aid was approved in 2020.

The Court also made several interesting remarks regarding the other two conditions under point 71 of the Guidelines. First, the Court found that the concept of "restructuring period" refers to the period during which restructuring measures (i.e., measures listed in point 45 of the Guidelines) are taken, which is separate from the period in which the relevant restructuring aid is implemented. Second, the Court clarified that, although the restructuring aid and the "restructuring plan" are related, the former is not part of the latter. This interpretation is indeed supported by the fact that a "restructuring plan" is a condition for the approval of the restructuring aid. Considering these differences and because the burden of proof falls on the applicant, the Court held that the applicant in the TAROM case failed to demonstrate that the Commission should have had doubts regarding the compliance of the notified aid with the "one time, last time" principle (TAROM case, paras. 77-110). As a result, the applicant's claim was rejected.

Pursuing an objective of common interest

In a second interesting observation, the Court further clarified the conditions that Member States must meet to justify their rescue and restructuring aid to undertakings in financial difficulty.

Points 43 and 44 of the Guidelines stipulate that, to be declared compatible with the internal market, the aid must contribute to an objective of common interest, such as preventing social hardship or addressing a market failure. Point 44 lists circumstances that the Commission would consider the failure of the beneficiary would likely result in serious social hardship or severe market failure. Among these, point 44(b) mentions the risk of disruption to an important service that is hard to replicate and would be difficult for a competitor to provide.

Regarding this point, the Court dismissed the applicants' arguments that the services provided by the rescued airlines could not be considered "important". Although the Guidelines do not define "important service", the Court did not find a requirement that the services of the undertaking must play an important systemic role for the Member State's economy or be a service of general economic interest (SGEI). These two situations are specifically covered by point 44(c) and (d) of the Guidelines. In addition, the Court observed that the Guidelines do not require the service to be important at the national level (Condor case, para. 76) or the size of the market to be particularly significant. In fact, a service provided in a relatively limited market can still be considered "important" within the meaning of the Guidelines (TAROM case, para. 51).

As regards the proof of the objective of common interest, the Court moreover noted that the Member State is not required to demonstrate that, in the absence of the aid, "*certain negative consequences would necessarily arise as a result of the aid beneficiary's failure, but only that such consequences might arise*" (TAROM case, para 40).

According to the Court, because the requirements of points 43 and 44 of the Guidelines had been met in both cases, the applicants did not submit evidence demonstrating that the Commission should have had doubts as to the compatibility of the aid measure with the internal market justifying the initiation of a formal investigation.

Rescuing a company that forms part of a group

A third interesting observation of the Court concerns point 22 of the Guidelines, which stipulates that a company belonging to a group is not normally eligible for aid under the Guidelines, "*except where it can be demonstrated that the company's difficulties are intrinsic and are not the result of an arbitrary allocation of costs within the group, and that the difficulties are too serious to be dealt with by the group itself*".

STATE AID

European level

The Court held that the purpose of point 22 is to prevent a group of undertakings from offloading its costs, debts or liabilities onto a company of the group, and making it therefore eligible for rescue aid. As such, the Guidelines avoid the potential circumvention of the State aid legislation by corporate groups. On the contrary, the Court emphasised that point 22 is not meant to exclude a company belonging to a group from the scope of the Guidelines solely because "*its difficulties originate in the difficulties faced by the rest of the group or by another company in the group, in so far as those difficulties have not been created artificially or allocated arbitrarily within that group*" (Condor case, para. 46).

In light of this and the factual elements of the case, the claims put forward by the applicant were rejected. The Court concluded that the applicant failed to rebut the Commission's findings that Condor's difficulties were mainly the result of the liquidation of the Thomas Cook group, and not due to an arbitrary allocation of costs within the group (notwithstanding the cash-pooling system set up by the companies of the group).

Conclusions

Although the two judgments at issue provide interesting clarifications and novel interpretations of the Guidelines, questions remain. The judgments illustrate the relatively wide margin of discretion enjoyed by the Member States in cases of rescuing and restructuring aid for non-financial undertakings. It remains to be seen whether the Court of Justice will be called upon to rule on this matter in the future.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European level

EU institutions reach agreement on DMA

On 24 March 2022, the European Commission ("Commission"), European Parliament ("Parliament") and EU Council ("Council") reached a compromise on the Digital Markets Act ("DMA"). Compared with the initial Commission proposal (see VBB on Competition Law, Volume 2020, No. 12), key changes reflected in a close-to-final text published on 11 May 2022 include the addition of voice assistants and web browsers to the list of relevant core platform services and a refinement and expansion of gatekeeper obligations.

The aim of the DMA is to regulate the largest tech platforms "in real time" and prevent allegedly anti-competitive conduct more effectively than traditional antitrust law enforcement. Decisions issued against large tech platforms under Article 102 TFEU have been known to require protracted and resource-intensive investigations. And, at the time of a decision, the platform may already have moved on from the investigated practices or market structures may have changed on a lasting basis. To address these concerns, the DMA will impose on certain platforms a large number of detailed and far-reaching obligations that are expected to apply, in most cases, without much room for debate. Of course, the DMA's inflexible, one-size-fits-all approach also means that there will be very little room to consider case-specific circumstances and justifications, which means that the DMA will almost certainly prohibit conduct that would actually benefit consumers.

The scope of the DMA – core platform services and designated gatekeepers

The DMA will apply to large providers of "core platform services" ("CPS") that have been designated as "gatekeepers."

The list of CPS is extensive. It includes online intermediation services, search engines, social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, cloud computing services, and, following the latest amendments, web browsers and virtual assistants. Online advertising services (including advertising networks, ad exchanges and ad intermediation services) by a CPS provider also qualify as CPS.

The Commission may designate as "gatekeepers" CPS providers that meet either the quantitative or the qualitative dimensions of each of the following three criteria:

- *A significant impact on the market*: An undertaking will be presumed to meet this criterion if it has an annual EEA turnover exceeding € 7.5 billion in each of the last three financial years or an average market capitalisation (or equivalent fair market value) in the last financial year exceeding € 75 billion, and provides the same core platform service in at least three Member States.

- *A gateway position between a large end user base and a large number of businesses*: An undertaking will be presumed to satisfy this criterion if it operates a CPS with more than 45 million monthly active end users established or located in the EU and at least 10,000 yearly active business users established in the EU.

- *An entrenched and durable position in its operations*: An undertaking that has met the second criteria in each of the last three financial years will be presumed to satisfy this criterion. Additionally, a subset of rules will apply to undertakings which may be foreseen to enjoy such an entrenched and durable position in the near future.

Any CPS provider which meets the quantitative dimensions of each of these three criteria will have to notify the Commission. The Commission will then have to decide whether the provider should be designated as a gatekeeper. In addition, the Commission may, after

LEGISLATIVE, PROCEDUAL AND POLICY DEVELOPMENTS

European level

a market investigation, designate CPS providers as gatekeeper when they meet the qualitative dimensions of the three criteria without meeting the quantitative dimension.

Under this mechanism, it is expected that the "GAMAM" - Google, Amazon, Meta, Apple and Microsoft – will be designated as gatekeepers. From the outset, these large U.S.-based platforms have been the principal targets of the DMA initiative. But it may well be that a few European platforms, such as Booking.com or Zalando, may be designated as gatekeepers as well.

The DMA's extensive do's and don'ts – gatekeeper obligations

Once designated, gatekeepers will have to comply with a long list of far-reaching obligations set out in Articles 5 to 7 of the DMA. Only in exceptional circumstances will a gatekeeper be able to apply for an exemption justified on public health or public security grounds. Efficiency justifications, on the other hand, will be irrelevant: clearly, a major weakness of the DMA.

The DMA's do's and don'ts can broadly be categorised across six themes:

Data protection, data access and data bundling

- Article 5: Absent the end user's express consent, a gatekeeper may not process personal data provided through the use of third-party services that rely on relevant CPS to provide online advertising services. Additionally, a gatekeeper may not combine or cross-use personal data across different CPS and other services provided by the gatekeeper, or sign in users to other services for the purpose of combining personal data.

- Article 6: A gatekeeper may not use, in competition with business users, non-public data generated by business users in their use of relevant CPS ("data silos"). Additionally, a gatekeeper must provide end users with effective portability of data generated in the use of the relevant CPS and provide business users access to data (including personal data, subject to the end user's consent) generated by those business users' services interacting with relevant CPS.

Ranking neutrality

- Article 6: A gatekeeper may not engage in self-preferencing conduct and must apply transparent, fair and non-discriminatory conditions to rankings, indexing and crawling.

Device neutrality and interoperability

- Article 6: A gatekeeper controlling an operating system must allow end users to easily un-install apps and to install interoperable third-party apps and app stores, and allow third-party providers to interoperate with its OS and virtual assistant. Moreover, a gatekeeper may not restrict the ability of end users to switch between and subscribe to different apps and services accessed using relevant CPS. A noteworthy addition that emerged during interinstitutional negotiations is the obligation to enable end users to change default settings on their OS, virtual assistant and web browser that steer end users to products or services provided by the gatekeeper. When using one of these three CPS for the first time, end users will have to be prompted to choose from a list of alternative service providers. There should have to be an opportunity, for example, to select the search engine to which the gatekeeper's virtual assistant or web browser will direct the user by default.

- Article 7: Another late addition to the DMA is a gatekeeper's obligation to enable the basic functionalities (the scope of which will increase over time) of its number-independent messaging service to interoperate with those of competing providers.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European level

Transparency in online advertising

- Article 5: A gatekeeper must provide advertisers and ad publishers with the price and fees paid by the advertiser, the remuneration received by the publisher, the metrics for calculating prices, fees and remunerations.

- Article 6: A gatekeeper must grant advertisers and publishers access to performance measuring tools and data necessary to assess the performance of the relevant CPS.

Intermediation and distribution neutrality:

- Article 5: A gatekeeper may not conclude wide or narrow most-favoured-nation (MFN) clauses, steer end users towards the conclusion of transactions with business users using their CPS, tie access to services offered by business users to the use of certain of the gatekeeper's services or tie access to access to any of the gatekeeper's CPS to registration with further CPS.

- Article 6: A gatekeeper must offer fair access to app stores, search engines and social networks as well as fair terms of termination.

Complaints to enforcers

- Article 5: A gatekeeper may not prevent users from bringing allegations of illegal conduct on the part of gatekeepers to the attention of public authorities.

As indicated in this overview, the DMA differentiates between Article 5 obligations and those included in Articles 6 and 7. Article 5 obligations (for example, the prohibition against retail MFNs) are supposedly so clear that gatekeepers are expected to comply with them without further fact-finding or guidance in a particular case. Gatekeepers must comply with obligations in Articles 6 and 7 as well, but these are "susceptible of being further specified" by the Commission after a dialogue with the gatekeeper concerned. Examples of such obligations include the prohibition against self-preferencing and the obligation to ensure the interoperability with other messaging services. Yet, the Commission will not be required to engage in a dialogue and provide guidance. This is a curious policy choice – if liability standards are unclear and enforcement must appear random, what incentives would large platforms have to engage in compliance efforts in the first place?

This distinction between Article 5 obligations and Articles 6/7 obligations rests on the – likely unrealistic – assumption that the DMA contains certain rules which are unambiguous, and will not and cannot be subject to diverging, good-faith interpretations. In reality, one can reasonably expect that in the highly dynamic and innovative digital sector with frequent experiments regarding new technologies, product design, and business models, even seemingly clear legal norms will raise difficult questions of interpretation and application. The experience of the Dutch competition authority in its ongoing third-party payment options case against Apple, and the struggles to design a suitable remedy after a "clear" infringement decision, clearly illustrate that even supposedly clear norms can be interpreted differently and raise complex and contentious compliance questions (see VBB on Competition Law, Volume 2022, No. 1). Another illustration is the widely diverging views on the implementation of suitable remedies following the Commission's *Google Shopping* self-preferencing decision.

Thus, many, if not all, obligations in the DMA can be expected to raise difficult and contentious compliance questions. Gatekeepers and third-party complainants will have widely different views, and the Commission inevitably will have to engage in discussions with gatekeepers and provide guidance. Where no consensus emerges, litigation will be unavoidable.

If it turns out that this already very extensive list is still not sufficient, the Commission may determine additional obligations after identifying additional practices that it perceives as unfair or undermining market contestability.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European level

Enforcement and interaction with national regimes

Non-compliance

Fines will be the principal sanction in the Commission's toolbox to ensure DMA compliance. More aggressive remedies, including a prohibition against acquisitions and a break-up of a gatekeeper, will be available only in exceptional circumstances and therefore can be expected to have only very limited impact.

The Commission may issue a non-compliance decision and impose fines of up to 10% of the gatekeeper's total worldwide turnover for a failure to comply with key obligations under the DMA, and fines of up to 1% of the gatekeeper's total worldwide turnover for minor violations. Where the gatekeeper has committed the same or a similar infringement of an obligation included in Articles 5 to 7 in relation to the same CPS in the last eight years, the Commission may impose of fine of up to 20% of the gatekeeper's total worldwide turnover.

Only where a gatekeeper is found to have engaged in systematic non-compliance, which is defined as receiving at least three non-compliance decisions of the gatekeeper's key obligations in relation to any CPS in the last eight years, the Commission may also impose any necessary and proportionate behavioural or structural remedies to ensure compliance with the DMA. Such remedies may also include a prohibition against acquiring, for a given time period, other providers of CPS, of other services provided in the digital sector, and of services enabling the collection of data.

NCA involvement

One of the hottest topics during the debate of the DMA has been the role of Member States and national competition authorities ("NCAs") in the enforcement of the DMA, as certain NCAs were deeply worried about seeing their powers to bring cases against large digital platforms being curtailed.

The DMA makes the Commission the sole decisionmaker with the exclusive right to open an investigation and adopt infringement decisions. It thus endorses – for very good reasons – a largely centralised, uniform enforcement model. NCAs may investigate possible infringements of the DMA and report their findings to the Commission, but will have to inform the Commission before taking their first investigative measures. Additionally, NCAs must closely cooperate with the Commission when applying national competition rules against gatekeepers.

NCAs will be involved in DMA enforcement in an advisory capacity through their membership in the High-level Group for the Digital Markets Act, a body which will also comprise relevant national sectoral regulators and consumer protection agencies.

The road ahead – many open questions and challenges remain

Getting prepared for DMA compliance and enforcement

The publication of the final text of the DMA is expected in October this year. As a result, it will enter into force in the fall of 2022 and apply as of early 2023, which is when the Commission will have to be ready to review the first notifications of gatekeeper status. The Commission will have 45 working days to determine whether the notifying undertaking should be designated as a gatekeeper. And, as noted above, once designated as a gatekeeper, the undertaking will have six months to comply with its obligations. Under this timeline, designated gatekeepers would be required to comply with their DMA obligations by February 2024.

Although this means that it will take nearly two years before concerns about non-compliance could be investigated, this gives the Commission little time to create an effective DMA compliance and enforcement unit where staff has the necessary expertise, start engaging with gatekeepers on compliance questions, create notification forms, and publish necessary guidance.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European level

Experience also suggests that the Commission will be inundated with numerous complaints from (or before) day one. Prioritising cases, rejecting unfounded complaints, and watching out for NCA actions in the digital space while dealing with complex compliance questions and litigating contentious issues under the DMA (which are certain to arise) will undoubtedly be a substantial challenge.

The impact of the DMA

Substantial uncertainty remains about how DMA enforcement will unfold. Among the many open questions, the following key issues stand out: the DMA's interaction with other enforcement instruments; the impact the DMA will have on gatekeepers, other market participants, and perhaps most importantly on consumers; and, in the end, whether there will be a basis to conclude that the DMA has been a "success."

EU Competition Law Enforcement: It remains to be seen to what extent the Commission will continue to rely on traditional competition law enforcement with respect to conduct of the gatekeeper that is regulated by the DMA, including whether any pending competition case will be "folded" into DMA enforcement. After all, the DMA specifies that it is "without prejudice" to the application of Articles 101 and 102 TFEU, and the recent *bpost* judgment confirmed that parallel investigation under two separate regimes may be permissible under certain circumstances (Case C-117/20, *bpost*) (see, VBB on Competition Law, Volume 2022, No. 3).

Member State competition law enforcement: Of potentially much greater significance is the potential impact of the DMA (and *bpost*) on Member State enforcement of (EU and national) competition laws and similar member state regimes targeting digital platforms. The DMA will to some extent protect gatekeepers against additional enforcement action at Member State level – an important feature as certain NCAs have been all too keen to position themselves as leading enforcers in the digital space.

The DMA provides that Member States may not impose obligations on gatekeepers for the purpose of ensuring contestable and fair markets that go beyond the obligations included in the DMA. Member States may regulate the conduct of CPS providers for matters falling outside the scope of the DMA, but only if national obligations do not result "*from the fact that the relevant undertakings have gatekeeper status within the meaning of* [the DMA]" (Article 1(5)).

Under these provisions, there is a legitimate question to what extent the German Federal Cartel Office will be able to continue applying the recently adopted Section 19a ARC. Under this provision, Federal Cartel Office can designate undertakings as being of "paramount importance for competition across markets" (a designation already applied to Google and Meta) and subsequently prohibit various types of conduct that it deems to be harmful to competition, some of which clearly overlap with the DMA (see, VBB on Competition Law, Volume 2021, No. 1). And, to the extent the Federal Cartel Office has already imposed such obligations by the time the DMA enters into force, there will be the question of whether German obligations overlapping with the DMA can be maintained.

Private enforcement in national courts: The DMA does not – and, as a matter of EU law, cannot – prohibit private complainants from litigating alleged violations of the DMA by gatekeepers before national courts. This feature is unfortunate, as it threatens to undermine the central and uniform enforcement structure envisaged by the DMA, makes the DMA less predictable, and imposes a serious burden on gatekeepers. To some extent, this concern is alleviated by Article 39 of the DMA, which allows national courts to consult the Commission on issues related to the DMA, and the Commission to intervene of its own initiative before national courts. Nevertheless, the risk of divergent case outcomes remains, especially if the Commission does not have the resources to address all questions that are already litigated in national courts.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European level

Merger control: Contrary to what some stakeholders had demanded, the DMA does not change the substantive rules applicable in the review of mergers involving gatekeepers. It does, however, require gatekeepers to inform the Commission of any intended acquisition of digital or data-related companies. Assuming such acquisitions currently go unnoticed (which probably is rarely the case) the mandatory reporting requirement would strengthen the Commission's ability to review acquisitions of nascent rivals and early acquisitions, as it would complement the Commission's new approach of encouraging referrals under Article 22 of the EU Merger Regulation of small deals that fail to meet EU and Member State turnover thresholds (see, VBB on Competition Law, Volume 2021, No. 4).

Privacy: Concerns have also been raised about how the DMA's rule on the combination of personal data could allow gatekeepers to escape important obligations under the EU's General Data Protection Regulation. In addition, some worry that certain interoperability obligations – notably with respect to messaging services – could create vulnerable entry points for third-party service providers, as the DMA leaves it to the gatekeeper to define the technical aspects and general terms and conditions of interoperability with its own messaging services.

Gatekeepers, other market participants, and consumers: Clearly, the DMA will require gatekeepers to adjust and adapt their products, business models, and strategies related to the CPS they provide. This is unlikely to materially weaken their market position in their respective core business areas, but DMA compliance will be costly and burdensome. It can only be hoped that the DMA will not affect the gatekeepers' ability to innovate and develop new products and services to better serve consumers. And, while some market participants may expect the DMA to provide them with greater opportunities to compete in the marketplace, other market participants may be negatively affected as they may find that their business relations with gatekeepers may have to be adjusted to ensure DMA compliance.

Little attention has been paid to the likely effects of the DMA on consumers. Some may welcome a greater availability of alternative services, but many may find that the products and services they have come to rely on become less secure, less convenient, and less smooth to operate. And, if the DMA were to reduce the ability of gatekeepers to continue to innovate, all consumers would pay a high price.

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