February 2023

VBB on Competition Law

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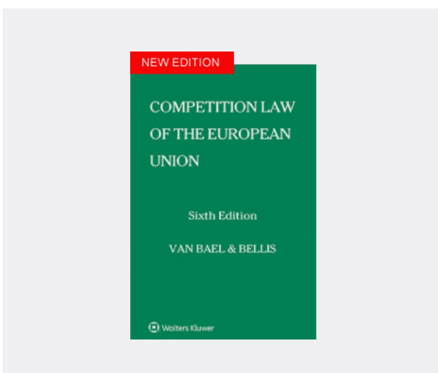

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MERGER CONTROL

National level

NORWAY

Norwegian Supreme Court affirms annulment of the competition authority's merger decision prohibiting the acquisition of a used car sales online portal by online marketplace owner Schibsted

In its judgment of 16 February 2023, the Norwegian Supreme Court (the "Supreme Court") affirmed the annulment of a decision by the Norwegian competition authority ("NCA") which had prohibited Schibsted ASA ("Schibsted") from acquiring a majority stake in the used car sales portal Nettbil AS ("Nettbil"). The Supreme Court found that the parties' services, while both broadly related to used car advertisement services, were clearly different and that NCA had not sufficiently substantiated its position that the transaction would eliminate competition between the parties' services. Nor was there sufficient evidence to support the NCA's view that the transaction would harm innovation as, absent the transaction, Schibsted could have developed a service that competed more directly with Nettbil.

Background

Schibsted, a major Nordic media conglomerate, is the majority owner of Finn AS, the operator of the all-purpose online marketplace and classified advertisement service "Finn.no," which customers can use to sell, among other items, used cars. Toward the end of 2019, Schibsted acquired a majority stake in Nettbil, the operator of the service "Nettbil.no" through which individuals can sell used cars directly to Nettbil at a price determined by sealed-bid auctions, whereafter Nettbil in turn immediately resells the car to the purchaser with the highest bid. In the process, Nettbil assumes the associated credit risk and defect liability vis-à-vis the end customer.

Almost one year later, the NCA adopted a decision ordering Schibsted to divest its shares in Nettbil. It found that the services offered by Finn and Nettbil competed in the same product market – essentially defined as "transactional activities necessary for selling used cars" – and that, as a result of the transaction, prices would increase and service quality would decrease. The NCA dismissed as irrelevant the significant price differences between the services offered by the parties (although the price of Nettbil's service was *ten to 30 times higher* than Finn's). Instead, it relied on internal documents in which the parties referred to each other as competitors, as well as qualitative criteria allegedly showing an overlap between the parties' services. In addition, the NCA advanced a theory of harm pertaining to innovation according to which Nettbil had a high growth potential and that either of Nettbil or Finn would create a service directly competing with the other's absent the acquisition.

The Norwegian Competition Board of Appeal upheld the NCA's decision, but the Court of Appeal reversed it. The Supreme Court has now affirmed the Court of Appeal's ruling and allowed the merger to go ahead.

The Supreme Court's analysis and findings

The Supreme Court found that the NCA had failed to establish to the requisite standard that Finn and Nettbil were part of the same product market and that the acquisition had therefore eliminated competition between them. It held that the NCA had attributed too much weight to the fact that both parties offered used car sales advertisement services, and failed to properly account for the fact that Finn offers *only* an advertisement service, whereas Nettbil's service covers the entire car transaction and assumes the associated credit risk and defect liability. Moreover, the NCA had been wrong when it considered irrelevant the significant price differences between Nettbil's and Finn's services.

MERGER CONTROL

National level

Nor was the Supreme Court persuaded that Schibsted's internal documents supported the NCA's case. One document discussed the effect of Finn losing used car sales to Nettbil, but the Supreme Court considered that the document's status and underlying calculations were uncertain and did not demonstrate that Schibsted believed that Nettbil exerted competitive pressure on Finn. Another document expressed concerns that Nettbil would grow and take share from the person-to-person used car market, weakening Finn's market position. While recognising the ambiguous nature of these statements, the Supreme Court interpreted them in their context and concluded that most evidence suggested that they concerned the risk of losing advertising revenues from the automotive industry rather than Finn's competitiveness vis-à-vis Nettbil.

Finally, the Supreme Court also rejected the NCA's view that the acquisition would harm innovation, which appeared to be similar to a potential competition theory of harm. According to the Supreme Court, evidence showed that Schibsted's business strategy was to acquire a niche platform *complementary* to Finn's service rather than a competing service, and that Schibsted did not consider it an option to develop a service that competed more directly with Nettbil.

Observations

The *Nettbil* judgment is a reminder that mergers in the digital space that do not involve the largest global platforms, but parties with a significant regional presence, can also raise challenging issues that cause them to run into resistance from the competition authorities.

Nettbil demonstrates that in the digital space, where service offers will frequently be differentiated and are subject to continuous change, substantiating with sufficient evidence that parties to a transaction have a direct competitive relationship can be a difficult task for a competition authority. Traditional tools for defining the relevant markets in which the parties operate and measure the intensity of competitive interaction between the parties may be of little direct help. Building a case purely on qualitative parameters will typically not be sufficiently persuasive either as there will often be other qualitative parameters indicating a lack of a direct competitive relationship.

In this situation, internal documents showing competitive interaction between the parties will frequently become the most relevant evidence. On this point, however, the Supreme Court appeared to be – for good reason – quite demanding, rejecting a few ambiguous (although not entirely unproblematic) documents as insufficient to support the competition authority's case. Courts in other jurisdictions might well have been more deferential to the findings of a competition authority in a similar situation.

The Supreme Court – again, for very good reason – also appeared to be quite sceptical about the competition authority's innovation theory of harm. A mere allegation that the parties could, in the absence of the transaction, develop products that would compete more directly, cannot be sufficient to justify blocking a transaction, especially if there was apparently no concrete evidence that either party had considered building a competing service absent the transaction. The Supreme Court therefore appeared to have sound reasons to conclude that this was a genuine add-on acquisition of a complementary service, and not a transaction that credibly threatened potential rivalry between the parties to the transaction. Indeed, the Court of Appeal – whose decision the Supreme Court upheld – found that Nettbil likely would have continued as a niche player still in need of a capital injection, had it not been for the merger.

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FOREIGN DIRECT INVESTMENT

National level

BELGIUM

Federal Chamber of Representatives adopts bill approving cooperation agreement that creates foreign direct investment screening mechanism

On 9 February 2023, the federal Chamber of Representatives adopted a bill (the "Bill") which approves the cooperation agreement of 30 November 2022 (the "Agreement") between the federal government, the regional governments and the communities establishing a foreign direct investment ("FDI") screening mechanism.

The Agreement creates terms and procedures for the screening of FDI and regulates the cooperation between the federal government and the various other governments in the joint exercise of their competencies in the field.

EU Regulation 2019/452

The Agreement is part of the implementation process of EU Regulation 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union (the "FDI Regulation"). The FDI Regulation defines minimum requirements for EU Member States' FDI screening mechanisms, such as that being introduced in Belgium, and establishes a mechanism for coordinating FDI reviews within the EU.

Agreement

Scope

The Agreement applies to FDI by foreign investors that can affect national security, public order or the strategic interests of the regional governments and communities.

- FDI is defined as any investment by a foreign investor aimed at obtaining or maintaining long-term direct relations between the foreign investor and a business, including investments that enable effective participation in the management or control over the business. "Control" is interpreted in accordance with Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EU Merger Regulation").
- Foreign investors are defined as (i) non-EU private individuals (*i.e.,* private individuals with a principal residence outside the EU), (ii) non-EU businesses (*i.e.*, businesses incorporated under the law of a non-EU country or otherwise organised and having their registered office or principal activity in a country outside the EU), and (iii) companies whose ultimate beneficial owners have their principal residence outside the EU. This also includes governments and public institutions.

The Agreement explicitly excludes from its scope of application investments solely aimed at creating new economic activities.

Interfederal Screening Committee

The Agreement provides for the creation of an Interfederal Screening Committee (the "ISC").

The ISC will be responsible for coordinating the application of the FDI screening mechanism. It will be composed of representatives of the federal and regional governments and the communities.

FOREIGN DIRECT INVESTMENT

National level

Notification Thresholds

The Agreement provides that foreign investors must notify FDI to the ISC when they, actively or passively, directly or indirectly, through their FDI acquire:

- at least 10% of voting rights in businesses or entities established in Belgium whose activities relate to defence, including dual use products, energy, cybersecurity, electronic communications or digital infrastructure and whose turnover in the financial year preceding the acquisition amounts to at least €100 million; or
- at least 25% of voting rights in businesses or entities established in Belgium and whose activities relate to:
    - physical or digital critical infrastructure for energy, transport, water, health, electronic communications, digital infrastructure, media, data processing or storage, aerospace and defence, electoral infrastructure, financial infrastructure, and terrain and real estate crucial to these sectors;
    - technology and raw materials of crucial importance to (health) safety, defence, public order, military equipment, dual use products and technology (and related IP rights) of strategic importance (*e.g.,* artificial intelligence, robotics, semi-conductors, cybersecurity, air and space travel, defence, energy storage, quantum and nuclear technology);
    - provision of critical inputs, including energy or raw materials or food security;
    - access to sensitive information, personal data, or the opportunity to control such information;
    - private security;
    - media pluralism; or
    - technology of strategic importance in the biotechnology industry, provided that the turnover of the business in the financial year preceding the acquisition amounted to at least €25 million; or
- control in any of the above sectors.

FDI Screening Mechanism

Foreign investors whose FDI meet the notification threshold are required to notify their investment to the ISC. The notification must take place following the conclusion of the agreement but prior to its implementation (*i.e.*, following signing and prior to closing). Foreign investors also have the possibility to notify near-final draft agreements provided that the relevant parties submit a specific declaration confirming their intention to sign the draft without material changes.

The ISC can also launch an *ex officio* review of FDI should one of its members so request. Such *ex officio* review can be initiated up to two years following the completion of the FDI, or up to five years in case of indications of bad faith.

The screening mechanism consists of two stages:

- *Verification stage*: during this stage, the members of the ISC review the FDI and verify any indications that the FDI may affect public order, national security, or strategic interests. If any member identifies any such indication, the notification will proceed to the second stage of more thorough screening. If no such indication is identified or absent a decision to proceed to the second stage prior to the statutory deadlines, the FDI is approved.

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FOREIGN DIRECT INVESTMENT

National level

- *Screening stage*: The second stage builds on the verification stage. The relevant members of the ISC each prepare a risk analysis and an opinion for their competent minister regarding the final decision. During this stage, the foreign investor can make comments on the draft opinion both in writing and during a hearing before the ISC. In addition, the foreign investor, and the members of the ISC concerned may negotiate remedies to mitigate the expected impact of the FDI with a view to its approval.

The screening mechanism is subject to the deadlines introduced by the FDI Regulation. As a rule, the verification and screening stages will take thirty and twenty-eight days. However, these terms are subject to extension or suspension. Should no decision be notified to the foreign investor within the applicable deadline, the FDI is approved.

Following the screening phase, the members of the ISC may either (i) unconditionally approve the FDI; or (ii) approve the FDI subject to remedies; or (iii) prohibit the FDI.

Administrative Fines

Foreign investors may be fined up to 10% of the amount of the FDI if:

1. no or incomplete information was provided in the notification or following a request for information by the ISC;

2. the requested information was not timely provided; or

3. FDI is notified spontaneously within twelve months following its implementation or the ISC has launched an *ex officio* review within that period.

In addition, foreign investors may be fined up to 30% of the amount of the FDI if they:

1. fail to notify the FDI (and fail to notify the FDI spontaneously within twelve months following its implementation);

2. provide incorrect, distorted, or misleading information in a notification or response to a request for information by the ISC;

3. implement or complete the FDI prior to its approval; or

4. fail to observe the mitigating remedies.

Judicial Review

Decisions of the members of the ISC are subject to appeal to the Markets Court of the Brussels Court of Appeals. Such an appeal does not suspend the decision.

If the Markets Court annuls the decision, the case will be referred to the ISC where the FDI will be re-examined in a new screening procedure. The Markets Court will have full jurisdiction in decisions imposing administrative fines.

Next Steps

The Agreement must still be approved by the parliaments of the regions and communities. It will enter into force on the day of publication in the Belgian Official Journal of the last act by the relevant parliament approving the Agreement.

The Agreement provides that the obligation to notify FDI will apply as of 1 July 2023 or as of the first day of the month following the entry into force of the Agreement if this happens after 30 June 2023.

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FOREIGN DIRECT INVESTMENT

National level

Importantly, the Agreement allows the ISC to launch an *ex officio* review of FDI completed prior to these dates and up to two years following the completion of the FDI, or up to five years in case of indications of bad faith.

The text of the Bill can be found here.

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ABUSE OF DOMINANT POSITION

European Union level

Commission accepts Amazon's commitments in respect of Marketplace, Buy Box and Prime

On 17 February 2023, the European Commission (the "Commission") published its commitments decision dated 20 December 2022 in Case AT.40462 – *Amazon Marketplace* and AT.40703 – *Amazon Buy Box*. The Commission made the commitments offered by Amazon to resolve its alleged abuses of dominance legally binding under EU antitrust rules.

Background

On 17 July 2019 and 10 November 2020, the Commission opened investigations into possible abuses of dominance by Amazon, namely:

- Amazon's use of non-public business data of third-party retailers using its Marketplace to inform its own retail decisions – according to the Commission, the use of these data gave Amazon an unfair advantage over competing third parties on downstream markets ("Data Use Concern"); and

- Amazon's rules and criteria for selecting the Buy Box winner (the Buy Box prominently displays the offer of a single seller and allows products to be purchased by directly clicking on a "buy button") and governing Prime eligibility and Prime labelling (independent sellers can be eligible to sell to Prime customers, who receive premium services for a fee) – according to the Commission, these rules unduly favoured Amazon's own retail business, as well as Marketplace sellers that use Amazon's logistics and delivery services ("Buy Box Concern" and "Prime Concern", respectively).

It is worth recalling that the Italian competition authority imposed a record-breaking fine on Amazon of €1.1 billion in December 2021 for self-preferencing/tying by requiring third-party Marketplace sellers to use Amazon's logistics services to be eligible for Prime (see VBB on Competition Law, Volume 2021, No. 12). In the EU case, the Commission preliminarily considered that the unequal conditions of access to Prime between Marketplace sellers using Amazon's logistics services versus those that do not result in discrimination as between the two types of sellers. The Commission was also of the opinion that the conditions of access also favoured Amazon's own retail business.

On 14 July 2022, Amazon offered commitments to address these concerns (despite disagreeing with the Commission's preliminary assessment of the abusive conduct), and the Commission market tested these commitments until 9 September 2022. Subsequently, Amazon amended its initial proposal, and the Commission accepted Amazon's altered commitments and made them legally binding on 20 December 2022.

Legally binding commitments

The Commission considered the following final commitment to be sufficient to address the Data Use Concern:

- Amazon will not use non-public data provided by independent sellers, or derived from independent sellers' activities on Marketplace, for its retail business.

The Commission considered the following final commitments to be adequate to address the Buy Box Concern:

- For the purposes of selecting the Buy Box winner, Amazon will treat all sellers equally by applying objectively verifiable non-discriminatory conditions and criteria (not including Prime eligibility and Prime labelling).

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ABUSE OF DOMINANT POSITION

European Union level

- Amazon will display a second competing offer to the Buy Box winner if there is a second offer (i) from a different seller, (ii) that satisfies the same objectively verifiable non-discriminatory conditions and criteria as the Buy Box winner, and (iii) is sufficiently differentiated from the Buy Box winner on price and/or delivery speed. Both offers will display the same descriptive information and provide the same consumer purchasing experience.

The Commission considered the following final commitments to be sufficient to address the Prime Concern:

- Amazon will set objectively verifiable non-discriminatory conditions and criteria for the qualification of Marketplace sellers' offers for Prime eligibility and Prime labelling.
- Amazon will allow Prime sellers to choose freely any carrier for their logistics and delivery services and negotiate terms directly with the carrier of their choice, provided the seller's choice of carrier does not impact its ability to meet the conditions and criteria for Prime eligibility and Prime labelling.
- Amazon will (on request) make available to carriers the means to contact Amazon customers directly enabling them to provide equivalent delivery services to those offered by Amazon.
- Amazon will not use for its own logistics services any information obtained through Prime about the terms and performance of third-party carriers.

The Commission also required Amazon to increase the duration of its commitments relating to the second competing Buy Box and Prime offers from five to seven years and looked very closely at the design of the second competing Buy Box offer, such that Amazon had to amend its choice of colours and screen positioning in its final commitments.

The role of the monitoring trustee is also significant, and the final commitments substantiate this. The monitoring trustee will need to be kept abreast of any changes in the conditions and criteria for Buy Box selection and/or Prime eligibility and Prime labelling, and will be able to receive written complaints from Marketplace sellers and carriers suspecting non-compliance with the final commitments.

Observations

It is interesting to note the parallels between the commitments offered by Amazon and the obligations which Amazon was already required to comply with under the Digital Markets Act ("DMA"):

- The commitment geared at addressing the Data Use Concern, as well as the commitment not to use information from third-party carriers for Amazon's own logistics services, mirror Article 6(2) of the DMA.
- The commitments to apply objectively verifiable non-discriminatory conditions and criteria for selection of Buy Box winners and qualification for Prime eligibility and Prime labelling, are very similar to the obligation against self-preferencing in ranking in Article 6(5) (and along the same lines as the obligation to provide FRAND conditions of access in Article 6(12)) of the DMA).
- The commitment enabling third-party carriers to contact Amazon customers is in the same spirit as Article 6(10) of the DMA, which requires provision of specific data to business users and third parties authorised by them.

It appears that any commitments offered by designated gatekeepers will have to be far reaching, and along the same lines as the DMA obligations that they are anyway subject to, to assuage the Commission's concerns – which are preliminary and not subject to a detailed assessment – about possible abuses of dominance.

ABUSE OF DOMINANT POSITION

European Union level

It remains unclear what the interplay will be between commitments offered to DG Comp and DMA enforcement by DG Connect. Recital 86 of the DMA clearly states that compliance with the DMA will be subject to the principle of *ne bis in idem* and DG Connect will need to consider penalties imposed on gatekeepers for the same conduct pursuant to other EU rules. Nonetheless, how this will play out in practice, especially given the specific role of the monitoring trustee, remains to be seen.

Commission limits its Article 102 investigation of Apple's App Store terms, focusing more narrowly on a perceived "unfairness" of terms not covered by the DMA

On 28 February 2023, the European Commission (the "Commission") announced that in its investigation of Apple's App Store terms for music streaming app developers, it has adopted a new statement of objections ("SO") which replaces the previous SO issued against Apple back in April 2021, and significantly reduces the scope of the investigation.

This development, although only an intermediate procedural step, appears to be significant beyond this specific case. It could be a first illustration of future Article 102 enforcement in the shadow of the Digital Markets Act ("DMA"), and – more broadly and more worryingly – might signal a greater interest of the Commission to bring abuse of dominance cases under the nebulous "unfair trading conditions" standard of Article 102 (a) TFEU.

Background – the reduced scope of the new SO

In the 2021 SO, the Commission had taken the preliminary view that Apple abused its dominant position in the distribution of music streaming apps through its App Store in two ways:

- The, now discarded, first allegation focused on the "IAP obligation" with which Apple requires app developers distributing their apps via the App Store to use Apple's proprietary in-app purchase system and charges app developers a commission of up to 30% on all purchases via the App Store. The Commission was concerned that the IAP obligation would prevent app developers from using other, lower-cost payment systems outside the App Store. This, in turn, raised the costs of music streaming providers that compete with Apple's own *Apple Music* streaming service, costs which most music streaming providers were passing on to end users.
- The second allegation, which survived and made it into the 2023 SO, is that Apple's "anti-steering provisions", which prohibited app developers from informing consumers about alternative channels outside the App Store for purchasing their services, for example the app developer's own website, prevented consumers from knowing about other, often cheaper, subscription options outside the App Store, thus resulting in consumers paying higher prices.

With the new SO, the Commission thus decided to run only an "exploitation" theory of harm and focus on the alleged direct harm caused to consumers, while excluding concerns about foreclosure of rivals. Interestingly, when commenting on the new SO, Competition Commissioner Margrethe Vestager stated: "*We need to get the facts right, otherwise, our case won't stand up in court*."

Observations

<u>The Interplay between the DMA and Article 102 enforcement</u>

Designated gatekeepers will have to comply with the DMA's long list of do's and don'ts as of 2024. Article 5(7) of the DMA expressly prohibits a gatekeeper from requiring business users (and end users) to use a payment service of that gatekeeper, such as payment systems for in-app purchases.

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ABUSE OF DOMINANT POSITION

European Union level

It seems quite plausible that the Commission dropped its Article 102 TFEU objections against the IAP obligation because in future it will be much more effective and efficient to rely on the rules of the DMA, rather than trying to establish an Article 102 infringement by the gatekeeper which would likely be challenged in court.

A greater reliance on DMA enforcement could to some extent be the result of recent case-law concerning Article 102 TFEU, which requires the Commission to examine the likely effects on competition of the conduct at issue before establishing an Article 102 TFEU infringement. In *Intel* (Case C-413/14 P, see VBB on Competition Law, Volume 2017, No. 9) and very recently in *Unilever* (Case C-680/20, see VBB on Competition Law, Volume 2023, No. 1), the ECJ held that the Commission must assess the actual capability of exclusivity-inducing rebates as well as outright exclusivity clauses to exclude as-efficient competitors of the dominant firm. Evidence put forward by Apple could have complicated the ability of the Commission to establish an Article 102 infringement under these standards. If so, this would of course highlight the concern that the DMA prohibits conduct that would not be anticompetitive and would not lead to worse market outcomes.

Apple's anti-steering provisions, on the other hand, do not clearly fall under the DMA. Whilst recital 41 of the DMA sets out the general principle that "*the ability of end-users to acquire content, subscriptions, features or other items outside the core platform services of the gatekeeper should not be undermined or restricted*", the DMA does not expressly prohibit a gatekeeper from preventing business users from informing end users of alternative subscription options outside of the gatekeeper's digital ecosystem.

The lack of such an express prohibition under the DMA may well be the reason why the Commission decided to continue to pursue Apple's anti-steering provisions under Article 102 TFEU, and more specifically to characterise them as allegedly "unfair trading conditions" within the meaning of Article 102 (a) TFEU.

A potentially more prominent role for "unfairness" concerns in Article 102 cases

Interestingly, in the Commission's investigation of Meta's practices concerning markets for online classified ads, a similar "unfairness" allegation was a key element in the Commission's December 2022 SO. The Commission's reference to "unfairness" in two recent cases could indicate a greater willingness of the Commission to rely on the – vague and hard-to-define – notion of *unfair trading conditions* in Article 102 investigations.

Such a policy would clearly be a reason for concern. There are no limiting principles to foresee when a particular contractual term might be considered "unfair." As a result, almost any given contractual term or commercial practice of companies with appreciable market power could, in the context where it is applied, risk being held "unfair" and thus in violation of Article 102 (a) TFEU.

There is also nothing inherently "digital" in the notion of "unfairness." Thus, a more frequent application of the notion of *unfair trading conditions* could quickly find its way into other sectors and justify intervention against terms used by a dominant company which a competition authority or court deems to be "unfair."

If the Commission were to go down that road, it would not be alone. For example, the President of the Board of the Dutch competition authority reacted to the revised Apple SO by welcoming the Commission's willingness to use Article 102 (a) TFEU to enforce "an equitable solution against unfairness" in competition and to stop "unfair practices" by powerful companies. If this attitude is adopted more widely by national competition authorities in the EU, this could significantly increase the risk of intervention and reduce legal certainty for the contractual relationships of dominant companies.

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ABUSE OF DOMINANT POSITION

Member State level

BELGIUM AND FRANCE

Novartis and Roche have mixed fortunes in procedures regarding wet age-related macular degeneration medication

Belgium

On 23 January 2023, the Belgian Competition Authority ("BCA") imposed a fine of €2,782,808 on Novartis for allegedly abusive behaviour. The BCA took the view that Novartis had abused a collective dominant position which it allegedly held with Roche in relation to therapies for wet age-related macular degeneration ("AMD").

Novartis was found guilty of misleading ophthalmologists, hospitals and public authorities in warning against the off-label use of Avastin®, an oncology medicine of Roche, for the benefit of its own, more expensive product Lucentis® which, unlike Avastin®, is indicated for the treatment of AMD. According to the BCA, the position taken by Novartis was not supported by scientific evidence and is therefore misleading and abusive.

Novartis was also found to have abused its dominant position by running a "Free Goods Programme" of Lucentis® in the hospital channel. That programme went beyond what would have been possible under applicable sample rules. While the BCA did not address this issue, the programme may also have been in breach of the rules curbing the inducement of health professionals to prescribe contained in Article 10 of the Belgian Medicines Law of 25 March 1964.

The BCA thus partially emulated the proceedings which the French competition authority (*"Autorité de la concurrence*" or "AdC") had pursued in 2020 against Genentech, Novartis and Roche in a case that gave rise to an aggregate fine of €444 million (see, Van Bael & Bellis Life Sciences News and Insights of 9 September 2020). The BCA actually relied in part on theories of harm and evidence used by the French AdC. At first sight, this may cast doubt on the fate of the Belgian decision, following the annulment of the French decision by the Paris Court of Appeal ("PCA") on 16 February 2023.

France

In France, the AdC had found Genentech, a United States Roche subsidiary that developed the active substances at the basis of Avastin® and Lucentis®, Novartis and Roche to be a single entity because of a web of licensing agreements and shareholding relationships between the parties. The AdC then determined that this single entity occupied a collective dominant position on the market for the treatment of AMD and that it had engaged in two sets of abusive conduct between 10 March 2008 and the beginning of November 2013.

First, Novartis had mounted a communication campaign targeting ophthalmologists, including key opinion leaders, to explain that Avastin® should not be used for treating eye diseases at the expense of Lucentis®. According to the AdC, this campaign did not amount to a bona fide presentation of Avastin® in the interest of public health but was rather a self-serving tactic discrediting Avastin® and stoking fears over its use in the ophthalmological field.

Second, the three defendants were also found to have directed a series of misleading and "alarmist" messages at various public authorities, thus delaying a critical head-to-head trial comparing Avastin® and Lucentis® and at one point securing the prohibition of the off-label use of Avastin®.

In its judgment of 16 February 2023, the PCA took a dramatically different approach. Regarding the first type of conduct which the AdC had considered to be abusive, the PCA held that publicly disseminated information regarding a specific product will not be considered to be denigrating if it concerns a subject of general interest, has a sufficient factual basis and is brought in a measured tone. The PCA was of the view that the communication campaign of Novartis regarding the off label use of

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ABUSE OF DOMINANT POSITION

Member State level

Avastin® satisfied these criteria. In its assessment, the PCA noted that citing the differences between two medicines used for a specific therapeutic indication when only one of these medicines is actually registered for that indication is quite different from the situation in which an attempt is made to differentiate an original product from its generic version and both products benefit from the same presumptions of safety and efficacy. Additionally, the PCA only considered the scientific evidence that existed before 30 December 2011 when Law n° 2011-12 of 29 December 2011 (the "loi Bertrand") entered into force. As a result of the Loi Bertrand, it was no longer possible to prescribe a medicine for off label purposes when an appropriate alternative medicine had become available on the market. Given the availability of Lucentis®, Avastin® became off limits for AMD and no longer a viable alternative or indeed a competing product.

For broadly the same reasons, the PCA also rejected the notion that both Novartis and Roche had directed alarmist messages at the authorities, but had, on the contrary, observed the limits associated with free speech. They were also cleared of the finding by the AdC that they had created regulatory obstacles to a possible us of Avastin® for AMD.

Comparing Belgian and French cases

Despite the ostensible similarities between the Belgian and French cases, there are also important differences. First, notwithstanding the finding that both companies occupied a collective dominant position on the Belgian market for AMD medicines, the BCA only fined Novartis and not Roche (Genentech was not involved in the Belgian procedure). This is because the file contained no incriminating evidence against Roche.

Second, the BCA determined the period of infringement as extending between May 2011 and 31 December 2015. This is because, starting in May 2011, several clinical study outcomes saw the light of day which demonstrated that the off-label use of Avastin® for the treatment of AMD did not carry more risk than the use of Lucentis®. Before May 2011, the degree of risk associated with the off-label use of Avastin® was still uncertain, which caused communications pointing to that risk in a measured tone to be legitimate and not abusive. Interestingly, the BCA's approach would not seem to contradict the verdict of the PCA which decided, as noted, only to focus on the conduct of Novartis and Roche before the entry into force of the loi Bertrand. The resulting cut-off date therefore caused the PCA also to look only at the very period during which doubts regarding the safety of the off-label use of Avastin® were still considered to be legitimate. The regulatory obstacle for scrutinising the behaviour of Novartis and Roche in France after that date did not exist in Belgium and arguably allowed the BCA to review the messages of Novartis towards physicians and towards the authorities in the light of the new scientific evidence that had since emerged.

Third, the fine levied in Belgium is only a fraction of that which had been imposed in France (and has now been annulled). As a matter of fact, the fine which the competition college, the decision-making body of the BCA, eventually adopted is also dramatically lower than the fine which the competition prosecutor had proposed and which fell in a bracket between €60,000,000 and €70,000,000. This is because the competition college reduced the period of infringement (considered, as noted, to have started only in May 2011) and accepted a variety of mitigating circumstances in favour of Novartis.

Outlook

Further procedural developments should be expected. The PCA judgment was a heavy defeat for the AdC which reportedly will appeal the verdict to the French *Cour de cassation*. In Belgium, Novartis may also contemplate appealing the decision of the BCA to the Markets Court of the Brussels Court of Appeal. It will seek to capitalise on its success in France, but will have to be mindful of the seeming differences between the two cases and the BCA's ostensibly indulgent attitude when determining the fine which the Markets Court may want to revisit.

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CARTELS AND HORIZONTAL AGREEMENTS

National level

UNITED KINGDOM

"It's Not Always Easy Being Green": UK CMA Draft Guidance on Horizontal Agreements largely shadows EU approach but much-anticipated Draft Sustainability Guidance signals greater openness towards collaborative efforts to fight climate change

On 25 January 2023, the UK Competition and Markets Authority (the "CMA") opened a consultation on its Draft Guidance on Horizontal Agreements, which is intended to set out the framework for the application of the Chapter I prohibition of the Competition Act 1998 - the UK equivalent of Article 101 TFEU - to horizontal agreements. The Draft also provides guidance on the application of the Research and Development Block Exemption Order 2022 and the Specialisation Agreements Block Exemption Order 2022, which came into force on 1 January 2023. This was followed on 28 February 2023 by the CMA opening a second and much-anticipated consultation on its Draft Sustainability Guidance, which is intended to explain how the CMA will apply the Chapter I prohibition to environmental sustainability agreements. The deadline for responses to this consultation is 11 April 2023.

Replacing the existing EU Horizontal Guidelines

The opening of the CMA's consultations follows the European Commission's consultation on the EU horizontals regime, which was launched in March 2022 with the publication of its Draft Horizontal Guidelines and revised drafts of the block exemption regulations concerning R&D agreements and specialisation agreements (see VBB on Competition Law, Volume 2022, No. 3). The final versions of these texts are expected to be adopted by the Commission by the end of the first half of 2023.

Overall, the approaches proposed in the UK and the EU share many enforcement priorities. In particular, the updated horizontal guidelines and block exemptions are responsive to the latest economic and societal developments, namely digitisation and sustainability. At the same time, there are some key differences concerning the assessment of sustainability agreements that aim to reduce greenhouse gas emissions, which leave a question as to how much comfort businesses can take from a more permissive UK approach to these types of agreements if they may be subject to both the UK and EU regimes.

Key areas of alignment

There are several areas of alignment throughout both sets of texts, which should provide business some level of consistency between the application of the UK and EU competition rules. For example, proposed guidance in the EU's Draft Horizontal Guidelines on mobile infrastructure sharing agreements, bidding consortia and the distinction between joint purchasing and buyer cartels are also included in the draft UK Guidance. Although not an exhaustive list, some additional points of alignment are highlighted below.

- **Competitor definitions**: 'Actual' and 'potential' competitors are defined in the same way in both the UK and EU texts.
- **Relevant markets**: The CMA's Guidance on Market Definition has regard to the Commission's Market Definition Notice when considering market definition issues.
- **Thresholds and market shares**: Market share thresholds and the calculation of market shares are aligned across both the UK and EU texts.
- **Duration of exemption and grace periods**: The duration of the exemption and the grace period afforded when the combined market shares of the

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parties to an agreement that previously fell within the defined threshold subsequently exceeds it are applied uniformly across both the EU and UK block exemptions.

- **R&D poles and clusters**: For the purposes of the EU R&D block exemption, the EU's Draft Horizontal Guidelines define R&D poles as "*R&D efforts directed primarily toward a specific aim or objective that arises out of an R&D agreement*". This approach is mirrored in the Draft UK Guidance but is referred to as "*R&D clusters*". Concerned as to the potential impact of R&D agreements on competition in innovation, both the draft EU and the UK block exemptions require that three competing R&D efforts exist at the time an R&D agreement is entered into for the exemption to apply. This – highly controversial – requirement has delayed the adoption of the EU's final Horizontal Guidelines and R&D block exemption. Should it be dropped in the EU's final version because the Commission accepts that it is unworkable, the CMA would have to decide whether it will insist on maintaining the requirement in the UK block exemption.

- **Joint ventures, parents and decisive influence**: The added clarity in the EU's Draft Horizontal Guidelines regarding the relationship between joint ventures and their parent companies is also reflected in the UK Draft. In other words, the CMA suggests that the Chapter I prohibition would typically not apply to agreements and concerted practices between parent(s) and their joint venture concerning their activity in the relevant market(s) where the joint venture is active when the parents exercise decisive influence over the joint venture.

- **Information Exchange**: The additional guidance provided by the EU on the use of algorithms and ways to manage – and limit – how data is accessed and used is reflected in the UK's Draft.

Variations in approach to Sustainability

As expected in a post-Brexit age, the different policy priorities of the CMA are asserted in its proposals, *i.e.*, the precedence of the UK economy versus the resilience of the internal market and the commitment to the UK's Net Zero Strategy versus the commitment to the European Green Deal. In addition, the CMA is making moves to differentiate itself by, for example, maintaining an open-door policy to businesses seeking guidance on sustainability agreements and offering assurance that it will not act against any sustainability agreements that are consistent with its Guidance. Similarly, the CMA will not issue fines against parties that implement agreements informally discussed with the CMA in advance if the CMA's competition concerns were addressed. It is also noteworthy that, in the context of sustainability agreements, the CMA confirms that future – and not only current – benefits will be considered relevant to the assessment. This is an interesting distinction as the CMA recognises that it may take some time for sustainability benefits to materialise.

There are a handful of other important differences:

- **Broader interpretation of the relevant consumers benefitting from an environmental sustainability agreement**: The CMA confirms that it will take a more liberal assessment than the Commission of relevant consumers when assessing whether consumers receive a fair share of the benefits of an agreement. The UK Guidance indicates that there may be circumstances when the CMA considers it appropriate to take account of consumers in a separate but related market, rather than only those consumers present on the market directly concerned by the agreement.

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- **Special exemption for climate change agreements**: For those agreements that contribute to reducing greenhouse gas emissions, the CMA goes further than the Commission and outlines a broader interpretation: the benefit to 'consumers' concerned in climate change agreements will include *all* UK consumers, taking account of the totality of the benefits arising from the agreement, rather than only those on a specific market.

- **Precedence of sustainability principles**: It also appears that the CMA is ready to apply its more permissive approach even if such agreements are not purely sustainability-related – a 'centre of gravity' related to sustainability will suffice. For example, if there is a conflict between the Sustainability Guidance and other parts of the CMA's Horizonal Guidance, the CMA indicates that the Sustainability Guidance should prevail. This contrasts with the Commission's stated approach, which outlines that a sustainability agreement that concerns another type of horizontal agreement covered in its guidelines should be governed by the principles applicable to that category of agreement, while taking into account the specific sustainability objectives pursued. Admittedly, in practice, there may be little difference in the outcomes reached under the two approaches.

With its Draft Sustainability Guidance, the CMA appears to step away from the EU's more cautious approach and appears to be more aligned with the policies promoted by the Dutch and Austrian competition authorities. The changes outlined above will be welcomed by businesses and the CMA can be expected to constructively engage with parties who have considered its guidance carefully. At the same, it may be difficult for parties to rely on the guidelines and gain comfort by way of self-assessment that a collaboration agreement does not create competition law risks. For example, difficulties may arise in determining whether a particular agreement is part of a broader sustainability agreement or qualifies as a climate change agreement, and which standards apply. While the CMA's proposed approach diverges from that of the Commission as described, it will be necessary to await the issuance of the final packages from both regulators, as well as their decisional practice, to confirm just how these differences will apply in practice.

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PRIVATE ENFORCEMENT

European Union level

Court of Justice of European Union clarifies the scope of the right to full compensation and the recourse to judicial estimation of damages under the Damages Directive

On 16 February 2023, the Court of Justice of the European Union ("ECJ") handed down a preliminary ruling in Case C-312/21 (*Tráficos Manuel Ferrer*) which clarified the circumstances under which the exercise of the right to full compensation is rendered 'practically impossible or excessively difficult' within the meaning of Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions ("Damages Directive").

Following the decision of the European Commission of 19 July 2016 finding that DAF, Daimler and other truck manufacturers participated in a cartel between 1997 and 2011, a Valencian transport company ("claimant") filed an action for damages against Daimler ("defendant") before a local court in Spain ("referring court"). The defendant disagreed with the claimant's method for calculating damages and the referring court decided to make a reference to the ECJ for a preliminary ruling.

The referring court first asked whether the right to full compensation – enshrined in Article 3 of the Damages Directive – precludes a national rule of civil procedure under which an injured party whose claim is only upheld in part must bear a portion of the costs of the proceedings. The referring court noted that, even if a competition law infringement and resulting harm to the claimant have been established, damages actions are likely to be upheld only partially since harm must, to some extent, be approximated.

On this question, the ECJ ruled that neither the right to full compensation, nor any other provision of the Damages Directive, have a bearing on cost allocation in court proceedings. The ECJ explained that Articles 5 and 17 of the Damages Directive already provide some mechanisms to correct the inherent imbalance and information asymmetry between the parties (namely (i) the right to request disclosure, (ii) the presumption of harm and (iii) the possibility for national judges to estimate the damages in cases where it is practically impossible or excessively difficult to quantify precisely the damages suffered on the basis of available evidence). As a result, a national rule of civil procedure under which a claimant whose damages claim is partly granted must bear a portion of the procedural costs does not render '*practically impossible or excessively difficult*' the exercise of the right to full compensation. In ruling so, the ECJ chose not to extend the *Caixabank* case law (Case C-224/19) – which affords consumers and other 'weaker' parties certain protection against burdensome cost allocation in consumer protection proceedings – to actions for damages for competition law infringements.

Second and most interestingly, the referring court asked whether national courts may estimate the amount of harm under Article 17(1) of the Damages Directive on grounds of information asymmetry or unsurmountable difficulties to quantify the harm, even though the defendant has given the claimant access to its data. The ECJ recalled that the Damages Directive limits judicial estimation of damages to situations where harm has been established but where it is 'practically impossible or excessively difficult' to quantity such harm with precision. However, if that practical impossibility is due to inaction on part of the claimant, including failure to effectively exercise its procedural rights to disclosure under Article 5(1) of the Damages Directive, it is not for a national court to substitute itself to the claimant and remedy its shortcomings by resorting to judicial estimation.

Further to this ECJ ruling, instead of waiting for the national court to engage in judicial estimation of the damages, claimants might be expected to invest greater effort into demonstrating and quantifying harm – including

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by making better use of Article 5(1) of the Damages Directive, which was recently bolstered in *PACCAR and Others* (Case C-163/21) to cover requests to produce *ex novo* evidence as well (see, VBB on Competition Law, Volume 2022, No. 11).

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