December 2022

VBB on Competition Law

Issue Highlights

Jurisdictions covered in this issue

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Table of contents

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ABUSE OF DOMINANT POSITION

European Union level

Advocate General Rantos issues opinion in *European Superleague Company* case

On 15 December 2022, Advocate General ("AG") Rantos issued an opinion in the *European Superleague Company* case in which he recommended that the FIFA-UEFA rules on the prior approval of new sports competitions should be held to be compatible with Articles 101 and 102 TFEU. The AG considered that, whilst the European Superleague Company ("ESLC") is entitled to establish its own independent football competition, it cannot do so and participate in the competitions organised by FIFA and UEFA without obtaining the latter's prior approval (Case C-333/21, *European Superleague Company*).

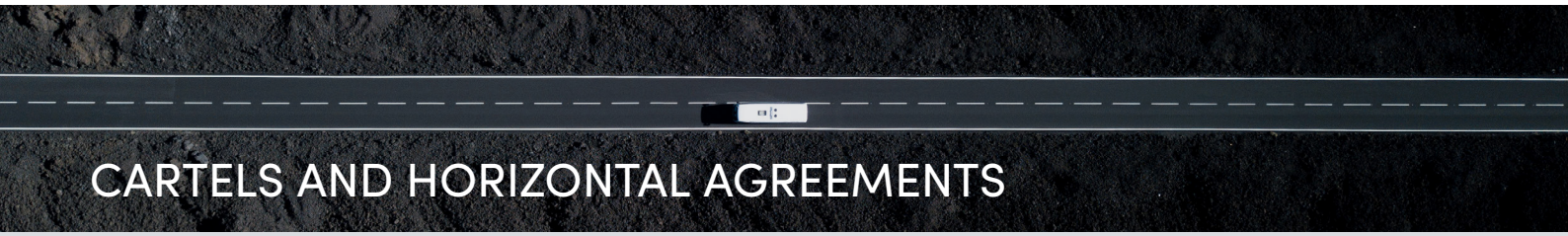
The dispute arose in April 2021 when twelve major European football clubs announced the creation of the ESLC, a Spanish company that planned to organise the first European football competition to exist independently of FIFA and UEFA. Following that announcement, UEFA released a statement in which it indicated that it would refuse to recognise the European Superleague ("ESL") and warned of disciplinary measures against clubs and players participating in that tournament. The clubs were threatened to be banned from UEFA-organised competitions.

The ELSC brought proceedings before the commercial court in Madrid arguing that the conduct of FIFA and UEFA was anti-competitive under Articles 101 and 102 TFEU. The commercial court in turn requested a preliminary ruling from the Court of Justice of the EU in which it referred six questions about the compatibility with EU competition law (Articles 101 and 102 TFEU) and the TFEU's free movement provisions of the prior approval system for new competitions and the sanctioning mechanisms contained in FIFA's and UEFA's Statutes. The compatibility of the relevant rules with Article 102 is dealt with below.

The referring court inquired whether the FIFA-UEFA's rules concerning the prior approval and sanction schemes may fall within the scope of Article 102 TFEU. In his Opinion, AG Rantos recalled that, while UEFA holds a "*dominant position (if not a monopoly) on the market, since it is the sole organiser of all major interclub football competitions at European level*", an abuse of dominance does not arise given that the FIFA-UEFA practices constitute a proportionate means of achieving a legitimate objective.

First, the AG dismissed the ESLC's claim that UEFA's dual structure as both the regulator and the organiser of football competitions must result in a conflict of interests when authorising third-party competitions. On the contrary, the AG pointed out that "*the mere fact that a sports federation performs the task both of regulator and of organiser of sporting competition does not entail in itself an infringement of EU competition law*". The AG added that potential conflicts of interest can be prevented by identifying pre-defined approval criteria in an objective and non-discriminatory manner.

Second, the AG considered that the FIFA-UEFA "ecosystem" cannot be regarded as an "essential facility". According to AG Rantos, the prior approval mechanism does not constitute a legal obstacle preventing the ESLC from organising a new football competition. The approval of FIFA-UEFA is thus required only in so far as the clubs participating in the ESLC wish to remain affiliated to UEFA and to continue to participate in the football competitions organised by it. Therefore, it is the ESLC's clubs' insistence on "*dual membership" which justifies FIFA-UEFA's refusal, which may be "objectively justified both in sport terms* [...] *and economically in order to combat free riding*". On this basis, the AG concluded that FIFA-UEFA's prior approval and sanctions scheme are proportionate for achieving the legitimate objectives pursued and, consequently, is not precluded by Article 102 TFEU.



CARTELS AND HORIZONTAL AGREEMENTS

European Union level

European Commission fines styrene purchasers €157 million in cartel settlement

On 29 November 2022, the European Commission (the "Commission") announced that it had imposed fines totalling €157 million on five companies involved in a purchasing cartel concerning styrene monomer ("styrene") for various periods between 1 May 2012 and 30 June 2018. The five companies fined - Sunpor, Synbra, Synthomer, Synthos and Trinseo - admitted their involvement in the cartel and agreed to settle the case under the Settlement Notice, as did immunity applicant Ineos.

Styrene is a chemical product that is used as an input for other products, including plastics, resins, rubbers and latexes. According to the Commission, the companies involved exchanged sensitive commercial information and coordinated their negotiation strategy to lower the industry reference price of styrene, the Styrene Monthly Contract Price ("SMCP"). Because of the volatility of styrene prices, the industry widely uses the SMCP as a reference price which formed part of the pricing formula in styrene supply agreements.

Ineos received full immunity from fines for revealing in 2017 the existence of the cartel to the Commission. A fine reduction was also granted to Synthos (40%), Sunpor (30%), Trinseo (20%) and Synthomer (10%) for their cooperation in the investigation under the Leniency Notice. All companies received a 10% fine reduction under the Settlement Notice, the 40th settlement since the introduction of the Notice. The fines imposed ranged from €17.215 million (Synbra) to €43.011 million (Synthomer).

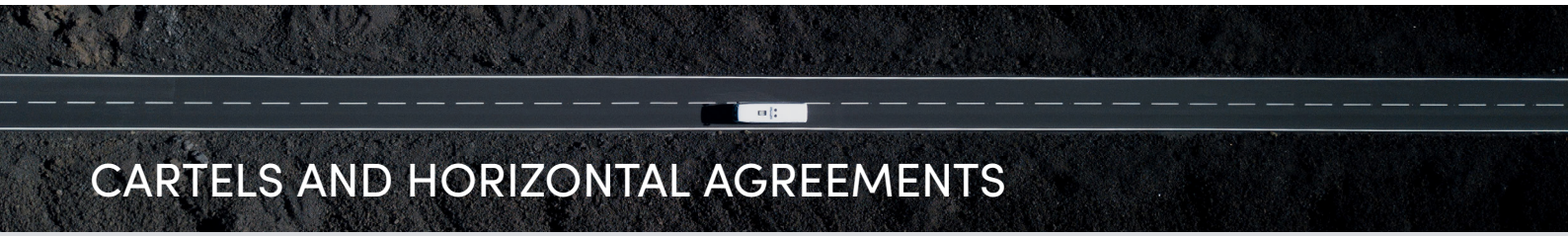
General Court dismisses appeal in re-adopted Retail Food Packaging cartel decision

On 7 December 2022, the General Court dismissed the appeal brought by Consorzio Cooperative di Produzione e Lavoro, Coopbox Group and Coopbox Eastern (together, the "Applicants") against a re-adopted Commission decision in the Retail Food Packaging cartel case (Case T-130/21, *CCPL and Others v Commission*).

In 2015, the Commission imposed a fine of €33.694 million on the Applicants for their involvement in three separate cartels. Ruling on their appeal against this original decision, the General Court noted that the Applicants were awarded a 25% reduction in fines based on their inability to pay but, there was nothing in that decision explaining why the Commission considered that 25% reduction to be sufficient to avoid a forced liquidation. Accordingly, the General Court annulled the decision. In 2017, the Commission re-adopted the decision against the Applicants and reduced the fine to €9.44 million. The Applicants filed an application for annulment against the re-adopted decision on three grounds.

The Applicants first challenged the Commission's finding that CCPL was the ultimate parent company of the Coopbox entities during the entire infringement period. According to CCPL, the fact that it had a shareholding of 93.864% was not sufficient to trigger the presumption that it exercised decisive influence over the conduct of its subsidiaries. The General Court rejected that argument as unfounded and noted that CCPL had not put forward any evidence rebutting the presumption applied by the Commission that it had exercised decisive influence over its subsidiaries.

The General Court also disagreed with the Applicants that the application of the ceiling of 10% of turnover set out in Article 23(2) of Regulation 1/2003 for each of the three infringements in which the Applicants were involved was contrary to the principles of proportionality and equal treatment. In this regard, the General Court noted that



CARTELS AND HORIZONTAL AGREEMENTS

European Union level

the finding of separate infringements in one decision may lead to the imposition of several separate fines, each of which is subject to the 10% limit. The General Court held that the Commission is not required to ensure that the final amounts of the fines reflect any distinction between the companies in terms of their overall turnover.

Finally, the General Court confirmed that the Commission had not infringed its duty to state reasons, as set out in Article 296 TFEU, in relation to the evidence it considered when assessing the Applicants' inability to pay under point 35 of the Fining Guidelines. According to the General Court, in the context of the assessment of a corporate group's ability to pay, the Commission is entitled to take into account the financial situation of all the entities of the group insofar as the resources of these entities can be used to pay the fines. In this regard, the Applicants had not argued that they could not use the cash available at group level to pay the fines nor that the payment would irremediably jeopardise the economic viability of the companies concerned.

Based on the above, the General Court dismissed the appeal in its entirety as unfounded.

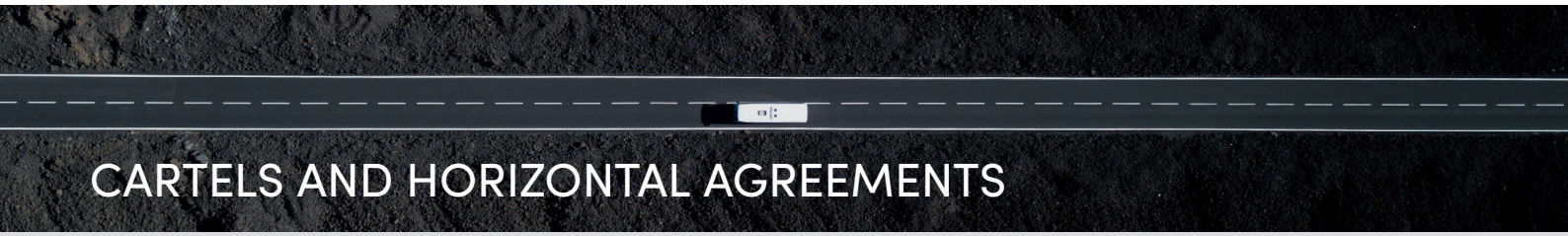
Advocate General Rantos advises Court of Justice of EU to set aside General Court judgment in *International Skating Union case*

On 15 December 2022, Advocate General ("AG") Rantos issued an opinion in which he recommended that the Court of Justice of the EU should set aside a General Court judgment largely upholding a 2017 Commission decision that the eligibility rules of the International Skating Union (the "ISU") had infringed Article 101 TFEU (Case C-124/21, *International Skating Union v Commission*).

The ISU is the exclusive body recognised by the International Olympic Committee ("IOC") in the field of figure skating and speed skating on ice. The ISU has a dual function: it is responsible for regulating, organising, governing and promoting figure and speed skating on ice, as well as carrying out the economic activity of organising international ice skating events.

On 8 December 2017, the Commission adopted a decision finding that the ISU eligibility rules imposing sanctions on athletes participating in speed skating competitions that were not authorised by the ISU restricted competition, both by object and by effect, in breach of Article 101 TFEU. According to the Commission, these rules prevented potential organisers of competing international speed skating events from entering the relevant market and restricted the possibility of professional skaters from taking part freely in such events. The Commission also found that the restriction of competition at issue was reinforced by the fact that disputes about the application of the eligibility rules are subject to the exclusive jurisdiction of the Court of Arbitration for Sport ("CAS"). The General Court largely upheld the challenged decision, finding that the ISU eligibility rules restricted competition by object but annulling the finding concerning CAS.

The main issue raised by the ISU on appeal to the Court of Justice of the EU was whether the General Court was right to hold that the ISU eligibility rules had the object of restricting competition. In his Opinion, AG Rantos recalled that a restriction of competition by object can be found only if the conduct at issue can be regarded, by its very nature, as being harmful to the proper functioning of normal competition and if its harmful nature is easily identifiable. At the same time, while sport is subject to competition rules, not every measure taken by a sports federation, which may have a restrictive effect on competition, necessarily falls under the scope of Article 101 TFEU. Indeed, the AG recalled that, under the *Meca-Medina* case law, when restrictive effects can be regarded as necessary to guarantee a legitimate sporting objective, and when those effects do not go beyond what is necessary to ensure that objective, such measures do not fall within the scope of Article 101 TFEU.



CARTELS AND HORIZONTAL AGREEMENTS

European Union level

In the present case, AG Rantos noted that the approach followed by the General Court contained a number of errors and was "*the source of some confusion*" since it conflated the two stages of the analysis. This is because the General Court had examined whether the ISU eligibility rules had the object of restricting competition (found in Section 8.3 of the challenged decision) together with whether the restriction of competition is inherent and proportionate to the pursuit of legitimate objectives (found in Section 8.5 of the challenged decision). According to the AG, the General Court could not find that the content of the ISU eligibility rules restricted competition by object based on the ISU's theoretical capability of undermining competition because of an alleged conflict of interest arising from ISU's regulatory powers and the fact that it carried out an economic activity. The AG added that the General Court could not hold either that the severity of the penalties and the fact that the ISU did not provide an exhaustive list of the requirements for authorisation of a third-party events were, in themselves, an infringement by object.

Additionally, with respect to the legal and economic context of the ISU eligibility rules, AG Rantos observed that, because figure and speed skating were governed by the same eligibility rules, this situation was capable of raising questions as regards the Commission's finding that the rules applicable to speed skating restricted competition by object, while it failed to make similar findings regarding the rules applicable to figure skating.

Finally, AG Rantos considered that the General Court was wrong to rely on case-law relating to restrictions of competition by effect in order to find a restriction of competition by object. The General Court had relied on the *OTOC* judgment, a preliminary ruling case in which the Court of Justice of the EU had set out the factors which the referring court should apply when examining the restrictive effect on competition of the regulation at issue, to conclude that the ISU's authorisation criteria had the object of restricting competition.

Based on the above, AG Rantos concluded that there were elements in the present case which raised doubts as to the inherent degree of harmfulness of the ISU eligibility rules and, as a result, recommended that a fully-fledged effects analysis should be carried out by the General Court on remand. Two skaters and EU athletes had lodged a cross-appeal against the annulment of the negative finding relating to CAS in the Commission decision, as well as some other statements favourable to sports federations in the General Court judgment (such as the statement that the defence of its economic interests was a legitimate objective for a sports federation). AG Rantos recommended that these cross-appeals be dismissed.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

Orde van Vlaamse Balies: Court of Justice of EU rules that legal professional privilege extends to all communications from external counsel

On 8 December 2022, the Court of Justice of the European Union ("CJEU") handed down a judgment (C-694/20, *Orde van Vlaamse Balies*) which appears to strengthen the protection afforded by legal professional privilege ("LPP") under EU law. In its judgment, the CJEU has held for the first time that LPP is based on the right to privacy in addition to the right to a fair trial. Although the ruling concerned notification obligations imposed on tax lawyers, it is likely highly significant for EU competition law as it holds that the right to privacy extends to all communications between external counsel and their clients. Applying this approach in EU competition proceedings would expand the scope of LPP beyond that recognised in the landmark *AM&S* judgment of 1982, where, based on the right to a fair trial, the CJEU held that LPP in competition proceedings was limited to "*written communications exchanged after the initiation of proceedings*" as well as "earlier written communications which have a relationship to the subject-matter of that procedure". Determining whether these conditions are met has long been a source of uncertainty when assessing which external counsel-client communications are protected from disclosure to the European Commission in the context of competition law investigations. The judgment may have other important implications for the Commission's ability to examine and require the disclosure of external legal advice in such proceedings.

Background

The judgment concerned the implementation of a provision in Directive 2011/16 on administrative cooperation in the field of taxation (the "Directive") which requires intermediaries to report information on certain cross-border tax arrangements to competent authorities. The Directive provides that if reporting the tax arrangement would breach LPP recognised in national law, the intermediary (*i.e.*, the lawyer) must notify any other intermediary or, if there is no other intermediary, the taxpayer that they are under a duty to report the arrangement to the tax authorities ("notification obligation"). Ruling on a reference from the Belgian Constitutional Court, the CJEU examined, among other things, whether this notification obligation infringed the right to privacy (including privacy of communications) enshrined in Article 7 of the EU Charter of Fundamental Rights ("Charter").

Right to privacy

The CJEU found that the notification obligation infringes the right to privacy protected by Article 7 of the Charter, in particular the right to respect for communications between client and lawyer. In reaching this conclusion, the CJEU pointed to the need to ensure consistency between corresponding rights guaranteed by each of the Charter and the European Convention on Human Rights ("ECHR"). The European Court of Human Rights has held that Article 8(1) ECHR (equivalent to Article 7 of the Charter) protects communications between lawyers and their clients, and covers not only the activity of defence, but also legal advice, both in terms of its content as well as its existence. The CJEU considered that Article 7 of the Charter must be interpreted identically and therefore must also protect communications between lawyers and their clients. The CJEU also held that, consistent with the Charter and related case law, any interference with the Article 7 rights must be provided for by law, respect the essence of the right and be necessary and proportionate to meet objectives of general interest or to protect the rights of others.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

Key takeaways

While the case specifically concerned the notification obligations of tax lawyers, the CJEU's ruling on the basis and scope of LPP is of broader significance and may have an important impact in the field of EU competition law. In particular, the CJEU's anchoring of LPP in the right to privacy under Article 7 of the Charter (in addition to the right to a fair trial) means that LPP would cover all communications between external lawyers and their clients irrespective of whether these are exchanged after an investigation is initiated or are related to the subject matter of a subsequent investigation (the conditions of the *AM&S* case-law). Applying the same principle, LPP would cover not only the advice of external competition lawyers, but also, for instance, the advice of external tax or IP lawyers, which could also be relevant in competition law proceedings (e.g., cases involving alleged state aid through tax arrangements or the licensing of standard essential patents).

The anchoring of LPP in Article 7 of the Charter may also have implications for the Commission's practices during inspections and for the exercise of its investigative powers in competition proceedings more broadly. For example, the Commission currently assumes that it has the right to take a "cursory glance" at external legal advice during an inspection to confirm an LPP claim. However, given that the CJEU recognises that the very fact of having sought legal advice falls within the scope of Article 7, this practice would likely be regarded as infringing LPP and, to be potentially justified, would have to be provided for by law, respect the essence of rights of the defence and genuinely meet objectives of general interest. It remains to be seen how the Commission will react, but it is arguable that it would be necessary to put any such exceptions to the privacy of clients' communications with their lawyers on a formal statutory footing in order to comply with the Charter and avoid legal challenges.

By contrast, the judgment does not appear to signal any intention to reverse or refine the position towards advice of in-house counsel established in *AM&S* and the subsequent *Akzo* case, under which such advice does not benefit from LPP. Similarly, it is unclear to what extent the judgment affects the European Commission's current position that the advice of external counsel who are not admitted to practice in an EEA Member State does not benefit from LPP. While there are strong arguments that the ECHR and the Charter should recognise LPP irrespective of the jurisdiction in which a lawyer is admitted (particularly given the recognition that LPP is based on a right to privacy of legal consultation generally rather than only on the right to a fair trial in any particular jurisdiction), it seems likely that the application of the principles set out in *Orde van Vlaamse Balies* to this question, as well as to the scope of LPP in EU competition proceedings more generally, will need to be further tested and defined in future litigation before the EU courts.

Commission publishes Draft Implementing Regulation of Digital Markets Act

On 9 December 2022, the European Commission ("Commission") published a Draft Implementing Regulation on detailed arrangements for the conduct of certain proceedings by the Commission pursuant to Regulation (EU) 2022/1925 ("Draft Implementing Regulation"). The Draft Implementing Regulation provides procedural guidance on specific proceedings conducted under the Digital Markets Act ("DMA"). It is surprisingly short and does not address a range of significant issues on which stakeholders expected clarification. In a worrisome development, the Draft Implementing Regulation materially curtails the rights of the defence of (potential) gatekeepers for the sake of speed and efficiency of DMA proceedings.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

Gatekeeper designation

The Draft Implementing Regulation first and foremost addresses practical arrangements in connection with gatekeeper designation. This is admittedly the most pressing issue, considering that providers of core platform services ("CPS") must notify the Commission by 3 July 2023 if they meet the quantitative thresholds set out in Article 3(2) DMA. The notification – which may eventually lead to gatekeeper designation – must be made in accordance with "Form GD," which requires detailed information on the notifying undertaking, the CPS (under any plausible delineation), and data necessary to assess the satisfaction of the quantitative thresholds.

Under the DMA, the Commission must designate a gatekeeper within 45 working days of receiving a complete notification. The Draft Implementing Regulation suggests that the terms "incomplete information" will be interpreted strictly. This, along with a reference to pre-notification contacts in the recitals, suggests that notifying undertakings may in practice have to respond to several rounds of information requests before their notification is deemed complete (in a process akin to merger notifications to the Commission). If a notification relates to more than one CPS, the Commission has the option – but not the obligation – to specify that information is incomplete only in relation to certain CPS.

Page limits

The Draft Implementing Regulation sets out formatting requirements and provides for strict page limits in respect of various submissions under the DMA:

- Notifications of CPS that meet the quantitative thresholds under Article 3(2) DMA must fit within 50 pages for each distinct CPS identified. All information required by Form GD must fit within these 50 pages, with the sole exception of documentation supporting the notifying undertaking's estimates of its CPS's number of active end and business users.
- Sufficiently substantiated arguments to demonstrate that a CPS that meets the quantitative thresholds does not satisfy the qualitative criteria for gatekeeper designation must be provided in an annex to Form GD of maximum 25 pages.
- Reasoned requests for the suspension of a substantive obligation which would endanger the economic viability of a CPS in the EU or for an exemption from a substantive obligation on grounds of public health or security must be made within a maximum of 30 pages.
- Replies to preliminary findings, which the Commission may issue under different circumstances (e.g., in response to reasoned requests, in the context of market investigations, or if it considers adopting a non-compliance decision), must fit a maximum of 50 pages.

Procedural rights

The Draft Implementing Regulation only cursorily addresses the right to be heard and the protection of business secrets in written submissions. Potential gatekeepers can only submit written observations on the Commission preliminary findings, which must be filed within 14 days (although the Commission may take later submissions into account). The Draft Implementing Regulation provides for no right to request an oral hearing.

While notifying undertakings and gatekeepers may make claims for business secrets and other confidential information, the Commission may consider that submissions do not contain business secrets or other confidential information if such claims are not submitted within the time limits set by the Commission. More attention is devoted to access to file, in particular the possible contents of the applicable terms of disclosure.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

Finally, in the many cases in which the Commission may set time limits under the DMA, it is invited to "*give due regard to all relevant elements of facts and law*" but may at the same time balance the expediency of proceedings against rights of the defence.

Key takeaways

Regrettably, the repeated references in the Draft Implementing Regulation to the need for "*expediency*", "*efficiency*" and "*a rapid and effective investigatory and enforcement process*" look like attempts to justify numerous limitations on due process. The most striking illustration lies in the strict page limits that it imposes in relation to a majority of written submissions under the DMA. Clearly, the Commission is concerned that (potential) gatekeepers might strategically seek to delay proceedings. But the issues that will arise under the DMA are highly complex, and Commission staff will have limited experience to quickly grasp and objectively evaluate all complexities if submissions cannot lay out all the necessary details and arguments.

Elevating expediency to the overall governing principle in this situation clearly creates a significant risk of undermining the legitimate interests of parties under investigation. This concern becomes even more relevant as the Draft Implementing Regulation does not envisage a reference to the Hearing Officer in case of disagreement between gatekeepers and the Commission regarding the effective exercise of procedural rights, as is the case in antitrust and merger control proceedings.

Moreover, the Draft Implementing Regulation fails to address many obvious issues on which further guidance could have been expected. For example, it does not provide guidance on how gatekeepers should notify the Commission about intended transactions, especially if these are not notifiable at EU or Member State level. Nor does the Draft Implementing Regulation provide any rules concerning the Commission's market investigations or inspections under the DAM or concerning the possibility for gatekeepers to obtain confirmation – and therefore legal certainty – that a contemplated measure ensures compliance with a given obligation under Article 6 or 7 DMA.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

National level

GERMANY

German Federal Court of Justice holds that arbitral awards that apply specific competition rules, including the abuse of dominance provision, are subject to full review by the ordinary courts

In its landmark judgment of 27 September 2022 (KZB 75/21), the *Bundesgerichtshof*, the German Federal Court of Justice ("FCJ"), held that arbitral awards involving Sections 19 to 21 of the German Act against Restraints of Competition ("ARC") related to the abuse of dominance, abuse of relative or superior market power, boycott and other restricted practices, are subject to full factual and legal review by the ordinary courts (the "2022 Judgment").

The FCJ has now clarified that any incorrect application of these ARC provisions runs contrary to public policy (*ordre public*) and that an arbitral award that incorrectly applies these rules must not be recognised or enforced by German courts.

Case-law prior to the 2022 Judgment

In the 1960s, under the then applicable German Civil Procedural Law, the FCJ carried out a full review of arbitral awards and rejected requests for recognition of arbitral awards that incorrectly applied the German abuse of dominance provisions or EU competition law rules concerning restrictive agreements.

This changed in 2014 when the FCJ held that under the currently applicable German Civil Procedural Law an arbitral award only infringes public policy if its recognition or enforcement would lead to a result that "obviously" runs contrary to the essential principles of German law. The underlying case concerned the enforcement of an arbitral award that allegedly misapplied the provision on restrictive agreements contained in Section 1 ARC.

As a result, German higher regional courts started to exhibit diverging views on the applicable scope and intensity of court review when scrutinising arbitral awards which dealt with antitrust issues. Those views ranged from a very limited review to a full review of the merits of the case, with middle-ground approaches such as "summary review" or "plausibility control".

The 2022 Judgment

The 2022 Judgment has settled this debate in favour of a full review of facts and law, at least for arbitral awards applying Sections 19-21 ARC. The FCJ clarified that Sections 19-21 ARC form part of the essential foundation of the legal order so that the recognition or enforcement of an arbitral award based on an incorrect application of these provisions runs contrary to public policy and the essential principles of German law. With reference to the Opinion of Advocate General (AG) Wathelet in *Genentech* (Case C-567/14), the FCJ concluded that ordinary courts must not recognise or enforce arbitral awards which incorrectly apply the most essential provisions of German law, such as Sections 19-21 ARC, irrespective of whether or not the mistake was obvious.

According to the FCJ, the full review of an arbitral award for an infringement of Sections 19-21 ARC is warranted because these provisions not only serve the interest of the parties to the arbitration proceedings, but also protect the public interest in functioning competition. Moreover, the Federal Cartel Office can intervene only in proceedings before ordinary courts, and only an ordinary court can refer a preliminary question on EU competition law to the Court of Justice of the EU. The FCJ further reasoned that a full review of arbitral awards was also the intention of the German legislator. When amending the ARC, the legislator deleted a provision in the ARC according to which arbitral agreements were void if they did not allow the parties to choose an ordinary court for review. The

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

National level

amendment was made because it was clear that arbitral tribunals are required to apply mandatory competition law provisions and their application of competition law can be reviewed by ordinary courts during the recognition or enforcement proceedings.

The FCJ specified that litigation concerning Sections 19-21 ARC regularly raises complex questions of fact and law and that infringements are rarely "obvious". A limitation of the full review standard to "obvious" infringements of Sections 19-21 ARC would therefore cause that court review to become impossible or excessively difficult.

Observations

The scope of the 2022 Judgment is limited to arbitral awards that apply Sections 19-21 ARC and does not decide whether other provisions of German or EU competition law also represent an essential principle of the legal order that warrant full judicial review. This uncertainty applies in particular to the prohibition of anti-competitive agreements under German law (Section 1 ARC).

However, EU case law may offer some guidance. In 1999, the Court of Justice of the European Union ("CJEU") held in *Eco Swiss/Benetton* (case C-126/97) that the prohibition against restrictive agreements in EU competition law formed part of public policy. The CJEU ruled that a national court must annul an arbitral award inconsistent with these rules if the procedural rules of the Member State require the annulment of arbitral awards that are contrary to public policy. In addition, in his *Genentech* Opinion, AG Wathelet rejected the argument that the review of international arbitration awards should be limited to flagrant, obvious or manifest infringements of public policy under Article 101 TFEU. Given the frequently covert nature of cartel agreements in breach of Article 101 TFEU, a review limited to "obvious" infringements would likely exclude infringements by effect and would render the review so limited that it would arguably run counter to the principle of effectiveness of EU law.

In the 2022 Judgment, the FCJ referred on multiple occasions to AG Wathelet's opinion which clearly favoured a full review of infringements of Article 101 TFEU. Yet, the FCJ refrained from explicitly overturning its 2014 judgment (III ZB 40/13) in which it had rejected a full review because it considered that the incorrect application of the cartel prohibition of Section 1 ARC was not "obvious". In the end, however, if EU and German competition law should be fully aligned, the full review standard should arguably also apply to the review of arbitral awards involving the cartel prohibition under German law.

The likelihood of German courts undertaking a full review of arbitral awards involving competition law will increase and this development may undermine some of the specific benefits of arbitration, namely the finality of the award and the confidentiality of the proceedings. The 2022 Judgment will impact both German-seated arbitration proceedings and cases in which a foreign arbitral award is up for recognition and enforcement in Germany.

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