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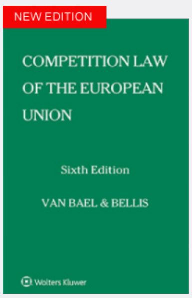
VBB on Competition Law

Issue Highlights



Jurisdictions covered in this issue

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MERGER CONTROL

European Union level

Commission prohibits Illumina's completed acquisition of Grail

On 6 September 2022, the European Commission ("Commission") announced its decision to prohibit Illumina from acquiring cancer detection test producer Grail, although the parties had already completed the transaction against the Commission's instructions in August of 2021. Interestingly, this decision marks a rare prohibition of a merger based exclusively on a vertical foreclosure theory of harm, despite the offer of behavioral remedies from the parties. It is also the latest step in the notoriously fraught Illumina/Grail saga that has already seen a challenge to the Commission's jurisdiction rejected on appeal to the General Court (see VBB on Competition Law, Volume 2022, No. 7)), as well as the opening of a gun-jumping investigation against the parties (see VBB on Competition Law, Volume 2021, Nos. 8 & 9).

The Commission's theory of harm

Illumina is a US-based genomics company that produces next generation sequencing ("NGS") systems for genetic and genomic analysis. These systems are used in a variety of downstream testing applications, including in a non-invasive early cancer detection test produced by US start-up Grail. Grail was originally owned by Illumina but spun off from its former parent in 2016. Before closing the re-acquisition, Illumina still owned a 12% minority share in the company.

According to the Commission's investigation, Grail and rival companies are currently engaged in an "innovation race" to develop early cancer tests, all relying on Illumina's NGS technology as a key input. This, the Commission found, would provide Illumina both the ability and incentive post-transaction to foreclose Grail's competitors, slowing the roll-out and/or increasing the costs of rival cancer detection systems.

Specifically, the Commission concluded that Illumina would have the ability to foreclose Grail's rivals because its high-throughput NGS systems are the only equipment currently on the market that meet the technical requirements of test developers. High barriers to entry due to IP litigation risks, the need to have NGS instruments deployed in third party laboratories, and the cost of switching NGS systems indicate that no credible alternatives to Illumina would arise in the near to medium term. The Commission found that Illumina would also have the incentive to foreclose Grail's rivals, as its NGS sales to other testing companies are modest in relation to the expected returns it could make on Grail's cancer detection tests, particularly if these were able to enjoy a significant first-mover advantage.

Remedies offered

While the Commission has often been willing to accept behavioral remedies to address vertical foreclosure concerns in previous merger transactions, in this case it found Illumina's proposed commitments to be insufficient. Specifically:

- To reduce barriers to entry for NGS systems, Illumina offered a license to open some of its NGS patents to rivals and to halt certain patent lawsuits for three years. However, the Commission concluded based on market testing that this would not likely result in the emergence of credible competitors to Illumina within that timeframe.

- To enable competing test producers to access Illumina's NGS systems, Illumina offered to conclude agreements with Grail's rivals under a standard set of contract conditions that would be applicable through 2033. The Commission, however, concluded that this commitment would be difficult to enforce and would not prevent Illumina from engaging in other types of foreclosure strategies, such as degrading support functions, or offering other preferential treatment to Grail.

European Union level

Conclusion

While *Illumina/Grail* has garnered significant attention due to its unusual jurisdictional and procedural aspects in Europe, the Commission's substantive conclusion also merits attention, in that it is the Commission's first prohibition of a merger on a purely vertical theory of harm since the introduction of its Guidelines on Non-Horizontal Mergers in 2007. While the Commission has generally considered that non-horizontal mergers are less likely than horizontal mergers to impede effective competition, it may well be that this is a case in which the likelihood of foreclosure and the resulting impact on cancer test development were simply not resolvable through the behavioral solutions offered.

At the same time, it is unclear to what extent Illumina's previous conduct in this case (Commissioner Vestager characterized its blatant flouting of the standstill requirement as "unheard of") may have impacted the remedies negotiations. Leaving aside any ill will between the Commission and Illumina, the Commission may have had legitimate concerns over whether a company that closed in violation of EU merger control law could be trusted to comply with behavioral commitments.

Given the unique jurisdictional and procedural aspects, it is difficult to say whether *Illumina/Grail* signals a clear shift toward greater enforcement by the Commission in purely vertical cases, although it is noteworthy that there is debate on the merit of the same vertical concerns in the US, where an administrative judge rejected foreclosure arguments put forward in an FTC complaint to block the deal (though this initial decision seems likely to be reversed).

Illumina, which has not shied from challenging the Commission at every stage in the process, has already announced its intention to appeal the decision to the General Court. We can expect that a significant portion of Illumina's appeal will be devoted to contesting the Commission's evaluation of the sufficiency of the proposed remedies. It is therefore unsurprising that the Commission has explicitly stressed the length of the – as yet unpublished – decision (over 600 pages) as well as the thoroughness of its second phase investigation and market testing process.

In the meantime, Illumina and the Commission are engaged in discussions on how to unwind the acquisition in the event Illumina does not prevail on its anticipated appeal of this decision, nor on its intended appeal of the General Court's July ruling on jurisdiction.

ABUSE OF DOMINANT POSITION

European Union level

General Court partially annuls Commission's Google/Android decision, but upholds key elements

In its judgment of 14 September 2022 (the "Judgment"), the General Court partially upheld Google's appeal against the Commission's 2018 *Google/Android* decision, but upheld the decision's most important and consequential elements, thus confirming that certain of Google's practices regarding the Android mobile platform could be considered parts of a strategy to protect and consolidate Google's dominant position for online general search services and infringed Article 102 TFEU (Case T-604/18, *Google and Alphabet v Commission*).

In summary, the General Court:

- confirmed the strict standards applicable to the assessment of exclusivity arrangements under Article 102, as developed in *Intel* and *Qualcomm*, and annulled the Commission's finding that Google's payments for the exclusive installation of Google apps on mobile phones under the portfolio-based Revenue Sharing Agreements ("RSAs") infringed Article 102, faulting the Commission's market coverage analysis and its use of the "as efficient competitor" ("AEC") test;

- showed considerable deference to the Commission's finding that the pre-installation requirements under the Mobile Application Distribution Agreements ("MADAs"), tying a license in the Google App Store to pre-installation of Google's general search app (Google Search) and browser app (Google Chrome), foreclosed rival search app providers as it provided Google a competitively significant distribution advantage;

- upheld the Commission's view that the anti-forking obligations under the Anti-Fragmentation Agreements ("AFAs") which prohibited OEMs that sold devices with pre-installed Google apps from selling devices with non-compatible Android forks, restricted competition by preventing the emergence of alternative mobile platforms where rival search service providers could have promoted their products.

The General Court also reduced the fine imposed on Google from € 4.34 billion to € 4.125 billion. The General Court's most significant findings are summarized below.

The Commission was entitled to disregard competition between the Google and Apple mobile ecosystems when defining relevant markets

The General Court agreed with the Commission that Google held a dominant position on the worldwide market (excluding China) for the licensing of smart mobile device Operation Systems ("OS"). Like the Commission, the Court found Google's arguments about competition between mobile ecosystems (namely that intense competition between Apple's and Google's mobile platforms prevented Google from exercising market power in its relationships with OEMs), irrelevant for market definition purposes. Competitive constraints exerted by Apple's platform were merely indirect and insufficient to counterbalance Google's market power.

Notably, the General Court endorsed the Commission's use of the novel SSNDQ test - an attempt to consider the likely effects of a small but significant and non-transitory decrease in quality - and confirmed that the SSNDQ test, despite its limitations, could constitute relevant evidence for the purpose of defining the relevant market.

The MADAs' preinstallation provided a competitive (distribution) advantage

The General Court agreed that the MADAs' pre-installation requirements created a "*status quo bias*" that disincentivized users from turning to competing search apps in sufficient numbers. Pre-installation thus provided Google with a significant competitive advantage that competing general search providers could not offset, whether through downloads, agreements with search engine developers, or pre-installation agreements with OEMs.

Google's counterfactual argument did not persuade the Court either. Google had argued that the contested decision failed to take into account that the Android platform created unprecedented competitive opportunities for rivals and that Google would not have been able to develop and maintain the open and free Android platform in the absence of the MADA conditions. The General Court disagreed, holding that the Commission was not challenging the MADA as a whole, but only the pre-installation conditions. The Court even agreed with the Commission's view that Google could instead have licensed the app store for a fee, thus questioning a key element in Google's business model, which built on the idea that a free license should reduce costs for OEMs and increase adoption of the Android platform.

The Anti-Fragmentation Agreements ("AFAs") prevented competition by forked Android platforms

The Court also found that the Commission had correctly assessed the effects of the anti-fragmentation obligations, which required OEMs to comply with a minimum compatibility standard for the implementation of the Android source code for all devices running on an OS developed from the Android source code. These obligations allowed OEMs to use "Android compatible forks," but prevented them from using "non-compatible Android forks."

The General Court noted that the Commission considered the anti-fragmentation obligations abusive only insofar as they applied to all Android OS devices and therefore included devices without preinstalled Google apps. Prohibiting OEMs from marketing any devices running a non-compatible Android fork deprived non-compatible Android forks of any commercial market and, in turn, rival search providers from a platform on which they could market their products.

The Commission failed to establish that exclusivity payments under the RSAs foreclosed competitors

The Court annulled that Commission's finding that Google's payments to certain OEMs and MNOs – on condition that they did not pre-install, or make available immediately after purchase, any competitive general search services on a portfolio of mobile devices in themselves constituted unlawful exclusivity loyalty payments, as they made access to the national markets for general search services more difficult for Google's competitors.

Relying on the Court of Justice's *Intel* judgment, the General Court found Google's argument – that the coverage of the portfolio-based RSA was less than 5% of the market defined by the Commission – to be plausible. At the same, the General Court noted that the Commission had failed to explain its own assessment of the market coverage. It therefore concluded that the share of the relevant market covered by the exclusivity payments could not be characterized as significant. In addition, like in *Intel*, the General Court found that the Commission had committed a number of errors when applying the AEC test to establish that the exclusivity payments had exclusionary effects.

Observations

The *Google/Android* judgment, coming after the Commission's successful defense of its *Google Shopping* decision, provides significant support for the Commission's enforcement agenda against large digital platforms. In contrast to the demanding standards governing the review of the Commission's assessment of exclusivity payments, the General Court continues to be more deferential when reviewing a finding by the Commission that certain conduct, even if not exclusivity-inducing, provides a significant competitive advantage that smaller rivals cannot overcome.

ABUSE OF DOMINANT POSITION

European Union level

Advocate General suggests that non-compliance with data protection laws can constitute a competition law infringement

On 20 September 2022, Advocate General ("AG") Rantos delivered his opinion in *Meta* (Case C-252/21), concerning the interplay between the competition rules and GDPR, suggesting that non-compliance with data protection laws can be considered in competition law investigations and support the finding of a competition law violation.

The *Meta* case follows the request for a preliminary ruling by the Higher Regional Court of Düsseldorf in the national proceedings relating to the review of the decision issued by the German Competition Authority, *Bundeskartellamt* ("BKartA"), against Facebook (now, Meta). In 2019, the BKartA found that Meta had abused its dominant position under national competition law by collecting data from services affiliated with Facebook (e.g., Instagram and WhatsApp) as well as third-party websites and apps, and by linking the data with users' Facebook.com accounts. According to the BKartA, Meta failed to obtain the users' valid consent pursuant to the GDPR as, in light of Meta's dominant position, users did not give their consent "freely" as required by the GDPR. The BKartA thus concluded that infringement of GDPR rules was an (abusive) "manifestation of Meta's market power".

While the referral request also includes purely privacy-related questions, two questions addressed the relationship between data protection and competition laws.

The interplay between competition and data protection law

First, the national court asked whether a competition authority is entitled to address in the context of an investigation of an alleged competition law infringement the incidental question of whether the data processing terms and their implementation in a specific case comply with the GDPR. The national court also asked whether the competition authority would have the power to conduct such an analysis pending a parallel investigation by the data protection authority.

The AG observed that the GDPR does not empower a competition authority to establish a breach of data protection rules. This would not, however, preclude authorities other than the data protection supervisory authority to assess, in an incidental manner, the compatibility of certain conduct with the GDPR. The AG pointed out that the competition authority must assess whether a dominant firm's conduct relied on methods other than those pertaining to competition on the merits. In this analysis, the competition authority must take into account the legal and economic context in which the said conduct takes place, including the data protection rules. Referring to Case C-457/10 P, *AstraZeneca*, the AG also stressed that compliance with other legal fields (such as the GDPR) does not preclude the finding of a competition law infringement, but also, *vice versa* that a GDPR violation does not automatically qualify as a competition law infringement.

Based on the above, the AG concluded that competition authorities may examine GDPR compliance incidentally when assessing conduct in the exercise of their competition enforcement powers.

The AG also opined that, while there is no clear cooperation mechanism provided by law, competition authorities are, at least, obliged to inform, and cooperate with, the relevant supervisory authorities. If the data protection authority has already ruled on the compatibility of the same (or a similar) practice with the GDPR, competition authorities could not in principle deviate from this interpretation. In the AG's view, a duty to inform and cooperate also applies if the competent data protection authority has not yet decided on the practice concerned but has either started an investigation or has indicated its intention to do so.

ABUSE OF DOMINANT POSITION

European Union level

Validity of consent given to a dominant undertaking

Under data protection rules, consent is invalid, *inter alia*, if it is not freely given. The national court asked whether consent to data processing can be considered as being effectively and freely given if the consent was given to a dominant undertaking.

The AG considered that, under the GDPR, consent is not freely given inter alia if (i) the data subject does not have genuine or free choice or is otherwise unable to refuse or withdraw the consent without detriment, or (ii) there is a "clear imbalance" in the bargaining power between the data subject and the controller.

In view of the above, the AG concluded that the holding of a dominant position alone does not establish an imbalance that would render a user's consent invalid. Nor would the finding of a dominant position be required to create such an imbalance. Rather, a competition authority should undertake a case-by-case analysis of whether a user's consent was valid, and dominance can be a relevant factor in the assessment.

Key takeaways

If the CJEU follows the AG's opinion, *Meta* would considerably broaden the powers of competition authorities. Competition authorities could not formally decide that a dominant firm has violated the GDPR (and therefore not order them to bring a GDPR infringement to an end). However, the right to "incidentally" examine GDPR issues would empower them to independently assess key elements of the EU's data protection law and transform whatever they consider a questionable or undesirable GDPR practice into an Article 102 infringement. Additionally, the opinion provides no guiding principles that would limit a competition authority's discretion in such an investigation or that would, more importantly, help undertakings to assess *ex ante* whether their data protection practices will satisfy not only the competent data protection supervisory authority, but also all competition authorities in the EU that may decide to investigate suspected data protection/competition law violations.

It also remains to be seen whether the CJEU will seek to limit the scope of its judgment to GDPR compliance alone or authorize competition authorities to "incidentally" use compliance with other legal areas as evidence in competition law cases.

Beyond the *Meta* case, the issues examined in the opinion are particularly relevant in the case of consent for the processing of data collected through online services. This case undoubtedly influenced the Digital Markets Act, and more specifically the obligation imposed on gatekeepers in Article 5(a) to obtain end user consent to the combining of data from different services and the signing in of end users to different services (see VBB on Competition Law, Volume 2022, No. 5). This makes the current opinion and the upcoming CJEU's interpretation even more important in the broader context of this evolving area of EU law.

VERTICAL AGREEMENTS

European Union level

The European Commission proposes to extend validity of Motor Vehicle Block Exemption Regulation and to amend Supplementary Guidelines – UK CMA largely follows suit

On 6 July 2022, the European Commission ("Commission") published (i) a draft Regulation extending the validity of the Motor Vehicle Block Exemption Regulation (Regulation (EU) No 461/2010) ("MVBER") by five years and (ii) a draft Communication which would modestly amend the Supplementary Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles ("the Supplementary Guidelines"). The Commission's proposed new texts come against the background of the entry into force on 1 June 2022 of the new version of the Vertical Block Exemption Regulation (the "General VBER") and Vertical Guidelines (the "General Vertical Guidelines"), which has resulted in significant changes to the treatment of vertical agreements – see VBB Insights of 21 June 2022. The two proposed motor vehicle sector-specific texts released by the Commission would introduce only very limited additional changes. Not surprisingly, access to vehicle data is a focus of the limited changes.

No change to MVBER regime

Whereas agreements related to the sale of new motor vehicles are exclusively subject to the rules contained in the General VBER, agreements related to motor vehicle aftermarkets (more precisely, agreements related to the supply and distribution of spare parts and the provision of repair and maintenance services) are also covered by the separate rules of the MVBER. This latter regime is partly stricter, by imposing three additional hardcore restrictions in relation to the supply of spare parts which apply in addition to the requirements of the General VBER. This reflects the assumption that competition in these aftermarkets is less intense than in the vehicle markets. The Supplementary Guidelines in turn provide additional guidance with respect to vertical agreements related both to the sale of new motor vehicles and to motor vehicle aftermarkets.

The current version of the MVBER is set to expire on 31 May 2023. On 28 May 2021, the Commission published an evaluation report, finding that the MVBER remains useful and relevant to stakeholders. In light of rapidly developing industry-shaping trends (resulting from vehicle digitalisation and new mobility patterns), the Commission is recommending extending the current MVBER until 31 May 2028 (and thus to continue to subject aftermarket agreements to the three current additional hardcore restrictions). The MVBER would continue to apply only to three or four-wheeled vehicles intended for use on public roads (and, therefore, not to motorcycles or to tractors).

Proposed amendments to the Supplemental Guidelines

Most of the proposed amendments aim to bring the Supplemental Guidelines in line with the structure and content of the new General VBER and General Vertical Guidelines, specifically in respect of:

- non-compete obligations tacitly renewable beyond five years – now block exempted provided the buyer can effectively renegotiate or terminate the vertical agreement containing the obligation with a reasonable notice period and at a reasonable cost (para. 26 of the Supplemental Guidelines).

- restrictions on active and passive sales in selective distribution system ("SDS") – now providing greater scope to restrict buyers and their customers from making active or passive sales to unauthorised distributors located in any territory where the supplier operates an SDS, even if those restricted buyers and their customers are located in areas where the supplier does not operate a SDS (paras. 46-47 of the Supplemental Guidelines).

VERTICAL AGREEMENTS

European Union level

Secondly, the Commission proposes expanding the scope of the inputs which, if withheld from independent aftermarket operators, could cause repairer and parts supply agreements forming part of a SDS to be caught by Article 101(1) TFEU in circumstances where they are not block exempted for reasons of market share (paras 62-68 of the Supplementary Guidelines). This is important in practice because the Commission still seems to assume that many, if not most, repairer and parts supply agreements (at least in relation to passenger vehicles) will not benefit from the block exemption because the market share of the supplier or its authorised network will exceed the 30% threshold. The current Supplemental Guidelines provide that a purely qualitative SDS, which would normally not fall foul of Article 101(1) TFEU, may nonetheless do so if the supplier fails to disclose necessary "technical repair and maintenance information" to independent operators, as well as related repair tools and training. The amended Supplemental Guidelines would extend the scope of the information which would need to be provided to independent operators (in order to avoid Article 101(1) being triggered) by referring to "essential inputs" that are essential for repair and maintenance, a broader category including – alongside technical information, tools and training – "vehicle-generated data" (meaning the data generated by a vehicle's integrated sensors).

In determining whether an item amounts to an essential input for repair and maintenance, the amended Guidelines would largely carry-over the existing criteria (para. 62a of the Supplemental Guidelines). In the case of vehicle-generated data, the amended Supplemental Guidelines would also direct that "existing standards and the relevant requirements of Regulation (EU) 2018/858 should be used as a guide" in determining whether a particular type of data constitutes an essential input.

UK rules look broadly set to follow EU rules

On 4 October 2022, the UK Competition and Markets Authority ("CMA") issued its Final Recommendation concerning the future block exemption regime covering the motor vehicle sector in the UK. The Recommendation largely follows the EU approach by, in particular, proposing that the same three additional hardcore restrictions in relation to the supply of spare parts would continue to apply under a new sector-specific regime, supplementing the UK's general vertical block exemption regime (summarised in "Distribution across Europe and the UK Verticals regime: Do you really need to mind the "gap"?") as of 1 June 2023. However, in contrast to the EU approach, the CMA recommends making restrictions on access to technical and vehicle information "excluded restrictions", which would exclude them from the benefit of the block exemption even where the 30% market share threshold is not exceeded. In addition, demonstrating a perceived need to further protect competition in aftermarkets, the CMA intends to provide further clarity by way of revised guidance on issues related to (i) the ability of independent operators to repair and maintain vehicles under warranty and (ii) limitations on the access to authorised repairer networks.

VERTICAL AGREEMENTS

National level

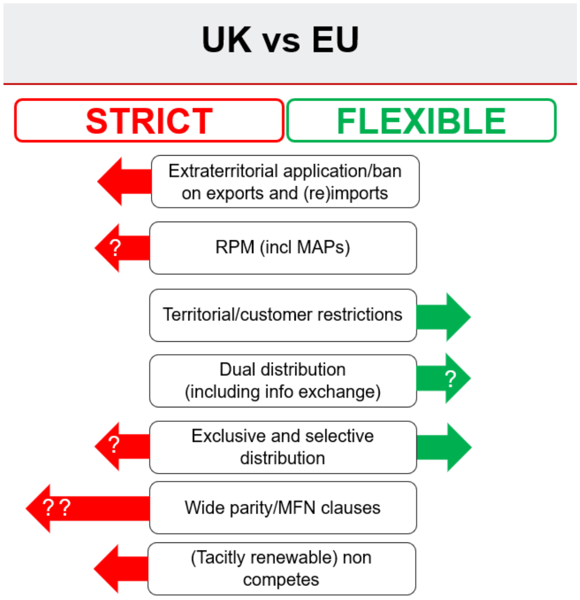
UNITED KINGDOM

Distribution across Europe and the UK Verticals regime: Do you really need to mind the "gap"?

Long awaited developments over the summer provided some appreciable clarity on the refreshed UK distribution regime (following the UK's withdrawal from the EU). In particular, pursuant to a consultation process that ran almost in parallel to the equivalent EU process, and also adopting the same analytical framework as the EU (see VBB Insights of 27 June 2022), the UK has also now introduced a new verticals agreements block exemption order ("VABEO") and accompanying CMA guidance. Both regimes also share the same de minimis exemption (15% absent a restriction by object).

Whilst it is no surprise that the respective EU and UK regimes tackle similar policy questions, the extent to which the two regimes appear aligned is perhaps somewhat surprising. Some, mostly marginal, divergences are observable but, overall, it is definitely feasible to continue with – or introduce – a common distribution strategy covering both jurisdictions. It is also encouraging that the CMA recognises that restrictions relating to exports outside the UK – or imports/reimports from outside the UK (including from the EU) – are "*unlikely*" to have the object of restricting competition within the UK. The EU guidance is clearer, noting that the equivalent restrictions "*cannot*" have the object of restricting competition.

Against this background, below is a summary comparison of some of the key aspects of the regime, focusing on the limited points of divergence:



Resale price maintenance ("RPM")

Despite hopes that the UK would take a more flexible approach towards minimum advertised prices ("MAPs"), it is now clear that both the EU and the UK consider that such practices constitute RPM. Moreover, it is interesting to note that the UK has not included combating free-riding as one of the potential defences for RPM.

VERTICAL AGREEMENTS

National level

Territorial/customer restrictions

In this respect, the new UK and EU regimes are very much aligned including in relation to restrictions on online sales. For instance, both regimes have relaxed the rules on dual pricing and the non-equivalence principle. Thus, suppliers can in principle charge different prices to the same partner for products resold online or offline; and suppliers in a selective distribution system can impose non-equivalent criteria on online and offline sales.

It is possible that the CMA will – over time – be more flexible when it comes to restricting the use of specific tools and search engines, as well as suppliers imposing higher quality standards when their partners engage in online advertising campaigns.

Dual distribution

Both regimes sensibly recognise the market realities and efficiencies associated with dual distribution, as well as the importance of detailed information being exchanged between a supplier and its resale partners.

However, it is worth noting that the UK regime – unlike its EU counterpart – does not have an additional requirement that for such information exchange to be block exempted it should be necessary to improve the production or distribution of the contract goods/services. Instead, it suffices that such information is required in order to implement the vertical agreement (which must be "*genuinely vertical*" in nature). That said, the relevant UK and EU examples/guidance on acceptable and problematic information exchange are essentially the same, with the UK guidance arguably utilising stricter language by reference to a likelihood of a by-object (horizontal) violation if the exchange does not satisfy the requirements of the UK block exemption.

Finally, dual distribution agreements relating to hybrid platforms (when providing online intermediation services ("OIS")) continue to benefit from the UK block exemption. This is not the case at the EU level where the provision of OIS by hybrid platforms is not covered by the EU block exemption.

(Shared) Exclusivity and selective distribution

The UK regime is largely aligned with the more flexible approach that has now been adopted by the EU. The UK has also adopted the concept of shared exclusivity but does not limit exclusivity to a maximum of 5 distributors. A "*limited number*" of partners can be appointed, to be determined "*in proportion to the allocated geographical area or customer group*" to incentivise investment by partners. What that "*limited number*" will be in any given scenario will, of course, require a careful and well documented assessment.

In contrast to the EU regime, the UK regime appears to allow the combination of exclusive and selective distribution systems in the same territory (if at different levels of the distribution chain) – but it is unclear whether this will still be the case if the exclusive distributors are also authorised retailers.

Parity clauses (also known as most favourite nation ("MFN") clauses)

Although both regimes are sceptical about the effect of wide retail MFNs, the UK VABEO takes an appreciably stricter approach and designates such clauses as "hardcore" restrictions (regardless of whether relating to online or offline indirect sales channels). The EU takes a more agnostic position, designating them as "excluded" restrictions.

VERTICAL AGREEMENTS

National level

The UK's stricter approach is largely based on the CMA's approach and decisional practice, most notably its recent enforcement action against the price comparison website *Compare the Market* (for which the 2020 CMA decision was overturned last month by the UK's Competition Appeal Tribunal ("CAT")). The CAT judgment was critical of the CMA's approach on several points and, in particular, cast serious doubt on the CMA's theory that wide MFNs should be presumed as harmful to competition. Instead, the CAT found that the wide MFN in question had no proven anticompetitive effects and effectively advocated for a more careful and market specific effects-based analysis. As such, the CAT's approach seems much more in line with the approach advocated by the EU VBER. Unless the CAT judgment is overturned on appeal, it is likely that the CMA will (also) have to demonstrate an anticompetitive effect if it is to succeed in any subsequent challenge of wide retail MFNs.

(Tacitly renewable) Non-competes

The new EU regime allows for tacitly renewable non-competes that exceed five years to be block exempted provided that the distributor can effectively renegotiate or terminate after five years. The UK regime does not allow for such flexibility.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

National level

ITALY

Annual Competition Law empowers competition authority to review below-threshold mergers and introduces a presumption of economic dependence vis-à-vis online platforms

On 27 August 2022, the 2021 Annual Law for the Market and Competition (the "Law") entered into force. Its most significant changes include the right of the Italian Competition Authority ("ICA") to review mergers below the notification thresholds, the introduction of a rebuttable presumption of economic dependence vis-à-vis platforms that offer online intermediation services, and expanded investigatory powers of the ICA.

Merger control

The most notable development concerns the ICA's right to review transactions below the generally applicable national notification thresholds. Italy thus follows a trend elsewhere in Europe to empower competition authorities to review acquisitions of targets with little or no market presence.

Under the new rules, the ICA can request, until six months after closing, the notification of transactions that create actual risks for competition in the national market or a substantial part thereof, including transactions that could harm the development of innovative undertakings, provided (i) at least one of the national merger control thresholds is exceeded; or (ii) the aggregate global turnover generated by the parties exceeds € 5 billion. Upon the ICA's request, the parties will be required to submit a notification within 30 calendar days. For transactions that have not yet been implemented, the notification request suspends the parties' right to close.

Other amendments align Italian merger control rules with the EU Merger Regulation ("EUMR"): the Law introduces the "significant impediment to effective competition" ("SIEC") test as the substantive test for the assessment of transactions; modifies the rules applicable to full-function joint ventures, which are now always considered concentrations; and adopts rules on turnover calculation in the banking, financial and insurance sectors that mirror those applicable under EUMR.

Presumption of economic dependence towards providers of online intermediation services

Italian law prohibits the abuse by an undertaking of another undertaking's economic dependence. The Law expands this concept by stipulating that an undertaking using online intermediation services (i.e., sellers on online platforms) will be presumed to be economically dependent on the service provider. It is not entirely clear at this stage how a provider of online intermediation services can rebut this presumption, although clarifications may be provided through forthcoming guidelines.

In this context, the Law also identifies three types of conduct that are considered to be potentially abusive when engaged in by the provider of online intermediation services: (i) supplying insufficient information or data to the seller relating to the scope and quality of the service provided; (ii) requesting services or activities from the seller that are not justified in view of the nature or content of the service provided; and (iii) prohibiting or hindering the use by the seller of a different service provider for the same service. The ICA is tasked with the public enforcement of these rules.

Antitrust investigations

The Law introduces the right of the ICA to close an antitrust investigation through settlement. Under the new regime, an undertaking may benefit from a fine reduction by acknowledging its participation in – and liability for – a

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

National level

breach of competition rules. The ICA has been mandated to develop the details of the new settlement procedure.

The Law also grants the ICA the power to send requests for information from undertakings "at any time," including outside of formal investigations, and to impose fines for non-compliance with these requests.

Key takeaways

In 2021, the ICA had recommended adopting a provision equivalent to Section 19a of the German Competition Law, which would have enabled the ICA to designate "undertakings of paramount importance" and prohibit such undertakings from engaging in certain types of conduct, unless the designated undertaking could prove that such conduct was objectively justified (see, VBB on Competition Law, Volume 2021, No. 3).

While this proposal was not taken up during the legislative process, the ICA did receive a wide range of new and far-reaching enforcement tools to regulate players in the digital economy. In addition to the right to review transactions that fall below notification thresholds, the ICA will be able to use the presumption of economic dependence to regulate the conduct of a wide range of platforms providing online intermediation services, far beyond a select group of gatekeepers.

In addition, the Law raises questions about the interplay between the Digital Markets Act ("DMA") and national regulations pursuing identical market contestability and fairness goals. The newly introduced presumption of economic dependence could create conflicts for gatekeepers that are subject to both the new national rules and the DMA, at least until the relationship between these two legal regimes has been clarified.

PRIVATE ENFORCEMENT

National level

GERMANY

German Federal Court of Justice rules that enforcement by debt collectors of damages claims bundled through mass assignment is compliant with German law ("*Financialright*" (VIa ZR 418/21))

On 13 June 2022, the German Federal Court of Justice ("FCJ") ruled that the mass assignment of individual damages claims to a debt collector, who then brings a consolidated claim supported by a qualified lawyer, does not violate the German Legal Services Act ("LSA"). This judgment gives a green light to the so-called "assignment model" and further eases access to collective redress in Germany. It is likely to make Germany an even more attractive forum for collective cartel damages claims.

In the aftermath of the "Dieselgate affair", which had uncovered that VW vehicles had been equipped with illegal defeat devices, a damages claim was brought against VW. The claimant, Financialright, is a registered debt collection agency pursuant to the LSA specializing in the enforcement of damages claims. Financialright bundled the claims of purchasers of affected vehicles from Switzerland who had assigned their damages claims to Financialright and had mandated it with the extrajudicial and judicial enforcement of those claims. If successful, Financialright was to receive a contingency fee of 35%; if unsuccessful, the assignors were not to bear any fees or costs. Litigation costs were covered via an external litigation funder.

In Germany (and other jurisdictions without a formal judicial class-action system), the assignment of claims is commonly used, such as in the context of enforcement of antitrust damages claims. In the past, courts had rejected bundled claims from claims vehicles such as Cartel Damages Claims and Financialright on the basis that an assignment of claims breached the LSA and was void due to a violation of a statutory prohibition.

In line with its previous case law from 2019 (VIII ZR 285/18) and 2021 (II ZR 84/20), the FCJ held that (i) a registered debt collector may enforce assigned claims in court, if represented by a lawyer; and (ii) the term "debt collection service" includes business models aimed exclusively or primarily at enforcing claims in court proceedings. In the present case, the FCJ clarified that its case law (i) also applies to mass assignments without limitation of the number of assigned claims; (ii) is not limited to claims governed by German law but also applies to claims governed by foreign law and (iii) extends to complex areas of law.

The FCJ overturned the judgment of the Higher Regional Court of Braunschweig that, according to the FCJ, had erred in concluding that bundling claims with varying chances of success leads to a conflict of interest, in particular in the case of a potential settlement. The FCJ found that the interests of Financialright, the assignors and the litigation funder, namely achieving the highest possible pay out for all claims, are aligned. The FCJ recognized that it could not be ruled out that a settlement including a multitude of claims assigned to Financialright carries the risk for a sub-optimal settlement amount for individual assignors due to the bundling of claims with lower chances of success. However, according to the FCJ, this risk is offset by considerable advantages compared to the enforcement of individual claims, such as lower or capped litigation costs, the spreading of potential costs to secure evidence and a considerably stronger position in settlement negotiations. The FCJ also held that in cases like the present, where in view of the statute of limitations the claims had to be brought before

liability had been established by a final judgment, only the bundling of several thousands of claims could generate a sufficient counterweight to VW's large resources to cover legal costs and experts' support.

The enforcement of antitrust damages claims of multiple parties, bundled by assignment to claims vehicles had initially been very controversial and over the years faced significant challenges in German courts. The present FCJ judgment clarifies the legal situation of claims vehicles and is likely to render Germany an even more attractive venue for follow-on damages claims and collective redress.

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