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VBB on Competition Law

Issue Highlights

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MERGER CONTROL

European Union level

General Court confirms that asset swaps do not form part of a "Single Concentration"

On 17 May 2023, the General Court issued a ruling that dismissed a third-party challenge to the European Commission's ("Commission") approval of *RWE/E.ON Assets* and clarified the concept of a "single concentration" in relation to asset swaps.

RWE and E.ON, two energy companies, entered into a series of three transactions to exchange assets: (i) RWE acquired sole control of certain E.ON assets; then (ii) E.ON acquired sole control of a RWE subsidiary, Innology; and finally (iii) RWE acquired a minority shareholding in E.ON. The first two operations were each notified to the Commission and cleared, while the third was notified to the German federal competition authority.

A third-party competitor, EVH, challenged the Commission's clearance of the first concentration before the General Court, arguing that – among other things – the Commission had erred by failing to review all three transactions as part of a single concentration. EVH noted that these three operations occurred simultaneously, were economically interdependent, were legally conditioned on one another and were therefore unitary in nature.

The General Court dismissed this argument, observing that not all interdependent transactions necessarily form part of a "single concentration". Rather, in addition to interdependency, the transactions must also meet a second condition. Specifically, only those operations that actually contribute to achieving one and the same concentration can be considered part of a single concentration. In other words, the intermediate steps that result in giving one undertaking (or group of undertakings) control over a target (or targets) can be considered part of a single concentration. However, if the transactions at issue each aim to confer control of different targets to different undertakings, then they cannot be considered as parts of a single concentration. In this case, the transactions at issue involved two different acquirers (RWE and E.ON) each acquiring control of different target entities. As such, although the operations are linked, they cannot be considered to form part of the same concentration.

In issuing this ruling, the General Court confirmed the position taken in the Commission's Jurisdictional Notice, which also asserts that operations must ultimately result in control being acquired by the same undertaking(s) in order to be considered part of the same concentration and that asset swaps therefore do not normally constitute a single concentration.

MERGER CONTROL

National level

UNITED KINGDOM

Microsoft/Activision: Is it 'game over' for behavioural remedies in the UK?

On 26 April 2023, the UK Competition and Markets Authority (CMA) blocked Microsoft's $68.7 billion deal to buy Activision, a leading video games publisher, citing concerns that the deal would distort competition on the nascent cloud gaming market and ultimately lead to reduced innovation and choice for the UK's 45 million gamers.

On 24 May 2023, Microsoft filed an appeal against the CMA's decision to block the acquisition with the UK's Competition Appeal Tribunal (CAT) – likely to be heard in late July – claiming that the regulator's analysis contained significant mistakes and accusing the CMA of being a global 'outlier' in blocking the deal.

Microsoft's appeal against the CMA comes off the back of 10 other regulators approving the merger – including the Commission which conditionally approved the deal on 15 May 2023.

The CMA stands alone?

Notably, the behavioural remedies Microsoft offered to secure the Commission's approval (i.e., promising to supply rival cloud gaming platforms with access to Activision's games for a 10-year period) appear to be largely the same as those offered to – and ultimately rejected by – the CMA just three weeks earlier. It is currently unclear what the outcome of the US FTC's complaint against the proposed acquisition will be; an evidentiary hearing is scheduled for early August.

While the Commission's statement approving the deal after a Phase II investigation highlighted that Microsoft's remedies fully addressed the competition concerns identified and represented "a significant improvement" in the future cloud gaming market, the CMA's decision noted the opposite, claiming that the tech giant's remedies failed to address competition concerns and would have a negative impact on innovation and the development of the future market.

In a similar vein, Brad Smith, Microsoft's president, argued that the remedies package offered to both the EU and the UK "will apply globally and will empower millions of consumers worldwide" – a narrative accepted by the Commission. By contrast, the CMA's assessment of the deal was one of disempowerment, with the chief executive of the CMA, Sarah Cardell – taking the very unusual step of responding to the Commission's decision – stating that Microsoft's commitments would allow it to "set the terms and conditions" for the cloud gaming market for the next 10 years.

It remains to be seen whether this divergence in approach to behavioural remedies will be specific to this case or representative of a wider trend, but the answer is likely to be a mixture of both. Whilst the Commission and the CMA differ in approach and practice in a handful of key areas, and with these differences contributing to some extent to the divergent outcomes in Microsoft/Activision, the Commission has a significantly greater level of experience with complex behavioural remedies in global deals compared to the CMA's limited level of experience gained since Brexit.

With that said, the CMA's experience with – and therefore risk appetite for – behavioural remedies will likely increase over time. It is also to be expected that, in light of the divergence in this case, future deals may find parties trying to better align Commission and CMA discussions (i.e., by obtaining conditional clearance from the Commission first and leveraging this before the CMA).

MERGER CONTROL

National level

One-off glitch or the latest release in a multi-player game of divergence?

This is the most high-profile CMA decision to diverge from the Commission's approach since the UK's withdrawal from the EU, but it is not the only one and is unlikely to be the last. Whilst other recent cases of divergence have included Cargotec/Konecranes, Meta/Kustomer, Veolia/Suez, and LeasePlan/ALD, the similarities between Cargotec/Konecranes and Microsoft/Activision are most striking: both regulators agreed that the deals would harm competition, but took very different stances on the remedies needed to address these competition concerns.

While the divergence has concerned only a handful of cases, representing a small percentage of total deals reviewed by both the Commission and CMA, the cases where there has been divergence – to one extent or another – are big enough and the stakes are high enough that the effects of a CMA block are raising questions about the UK's prospects for economic growth and its ability to sink a global deal all on its own.

In particular, the CMA has demonstrated once again its more sceptical stance on behavioural remedies, highlighting a key difference in remedy policies. Although Sarah Cardell has indicated that the CMA remains open to behavioural remedies where structural remedies cannot be found, she has also reiterated the CMA's general doubts regarding their effectiveness. This key divergence in approach is likely to generate concerns for companies involved in global deals, and has created a significant amount of uncertainty for Microsoft in this case.

With a global merger hanging in the balance (given the CMA's decision and the pending FTC challenge), Microsoft's fate may rest on the CAT's ruling on its challenge of the CMA decision. However, based on precedent, it seems unlikely that Microsoft will be successful in ultimately obtaining CMA approval, since (i) such appeals are rarely successful; and (ii) even when they are, the CMA usually still arrives at the same conclusion if it is required to re-assess the merger in a Phase 2 remittal process.

ABUSE OF DOMINANT POSITION

National level

French Competition Authority imposes interim measures by ordering Meta to define new objective, transparent, non-discriminatory and proportionate criteria to access its data

On 4 May 2023, the French Competition Authority ("FCA") imposed interim measures on Meta Platforms Inc., Meta Platforms Ireland Ltd. and Facebook France ("Meta"), to remedy the harm likely caused to the independent advertising verification sector and to the complainant Adloox SAS ("Adloox") by Meta's refusal to grant advertising verification service providers access to Meta's data on transparent and non-discriminatory terms.

This case shows that the FCA is increasingly focusing on the online advertisement sector. This is indeed not the first time that Meta's advertising practices have come under the FCA's scrutiny since, in June 2022, Meta had to change its access criteria for other types of advertising partnerships in order for the FCA to close an abuse investigation against it. It also shows that the FCA readily resorts to interim measures, probably more frequently that any other competition authority in the EU, and will not hesitate to impose such measures on large global digital players when small, local players complain about being harmed in their ability to compete.

Advertisement verification companies such as Adloox check the quality of their clients' advertising based on several parameters, including "viewability" (i.e., whether an ad is actually seen) and "brand safety" (i.e., whether an ad is displayed in an environment that does not harm the brand). Verifying ads that are located on Meta's platforms requires access to Meta's data. In October 2022, Adloox lodged a complaint against Meta, claiming that Meta had abused its dominant position between 2016 and 2022 by discriminatorily denying it access to "viewability" and "brand safety" partnerships – despite having provided such access to other companies in similar circumstances. Adloox also claimed that Meta was imposing unfair access conditions by providing only partial access to its ecosystem.

The FCA found that Meta likely abused its probable dominance on the French market for online advertising on social media and on the broader non-search related online advertising market by (i) not defining transparent, objective, non-discriminatory and proportionate access criteria and (ii) discriminatorily refusing access to Adloox, whose business significantly declined since 2017 while its competitors which were admitted to Meta's ecosystem saw an increase in theirs. The FCA stressed that Meta's practices resulted in the oligopolistic structure of the market becoming more entrenched and that, absent interim measures, Adloox could be foreclosed from the market before the end of the investigation.

Interestingly, in its decision, the FCA also recalled that the purpose of opening access to data of digital platforms was one of the main objectives of the Digital Markets Act ("DMA"). In this regard, it indicated that urgency to act to preserve competition was also necessary in this particular context as the DMA's obligations are not yet in force.

The FCA therefore ordered Meta: (i) to suspend the application of its eligibility criteria to the "viewability" and "brand safety" partnerships; (ii) to define and make public within two months new criteria for access to these partnerships that are objective, transparent, non-discriminatory and proportionate; (iii) to implement the new criteria in accordance with a transparent access procedure that is not based on Meta's sole initiative, (iv) to regularly report to the FCA on the implementation of these measures. It also issued an injunction to allow Adloox to be quickly admitted to these partnerships, provided that the company meets the new access criteria. These measures will remain in place until the FCA adopts a decision on the merits. Of course, there may no longer be a basis for such a decision once the investigated conduct will be covered by the DMA, as the pursuit of two antitrust proceedings concerning the same conduct in parallel could raise due process concerns.

ABUSE OF DOMINANT POSITION

National level

ITALY

Commitments by Italian national rail incumbent on data and ticketing policy to increase competition in rail services

On 18 April 2023, the Italian Competition Authority ("ICA") accepted commitments offered by the Italian national rail incumbent, Trenitalia S.p.A. ("Trenitalia"), whereby Trenitalia will grant Italo – Nuovo Trasporto Viaggiatori ("NTV"), its competitor in high-speed rail transport services, access to data that will allow NTV to sell combined tickets including Trenitalia's regional and mid-distance trains.

The ICA's decision ends one of several antitrust investigations in the national rail services market, focusing on allegedly anticompetitive strategies by rail incumbents that prevent independent passenger rail transport providers from competing more effectively. These investigations will set important parameters for competition between incumbents and new entrants in the rail sector and should result in greater choice for customers. More competition and more choice should in turn also support current efforts to encourage greater use of train services.

Investigated conduct and Trenitalia's commitments

NTV sought an agreement with Trenitalia to be allowed to sell combination tickets for its high-speed rail services and Trenitalia's regional and mid-distance trains (which Trenitalia operates under a legal monopoly and with State subsidies) and to receive access to Trenitalia's relevant data for this purpose. After some delay caused by Trenitalia, the parties eventually concluded an agreement on the sale of tickets of regional train services that however imposed allegedly unreasonable conditions on NTV in respect of access to and treatment of the relevant data.

The ICA's concern was that Trenitalia was unlawfully leveraging its dominant (monopolist) position with the aim of expanding its position on the market for high-speed rail transport services, where NTV has been a highly successful challenger, to the detriment of NTV.

To address this concern, the ICA accepted the following commitments from Trenitalia:

1. to give access to anonymous, individual and aggregated data relating to Trenitalia's regional transport services;

2. to allow NTV to process and store for its own purposes the personal data of customers who purchase combined tickets;

3. to extend the agreement to the sales of mid-distance transport services;

4. to facilitate the conclusion of similar agreements by NTV with other regional railway service providers controlled by Trenitalia;

5. to include the train connections with NTV's trains on the on-board monitors of regional trains and in announcements via loudspeakers.

Rail ticketing in the spotlight – implications for competition in passenger rail services

Data access in the railway sector is currently under scrutiny by competition authorities in the EU. While the above-mentioned Italian case concerns access to data from a competing rail operator, several other ongoing investigations involve the withholding of data from competing ticketing platforms.

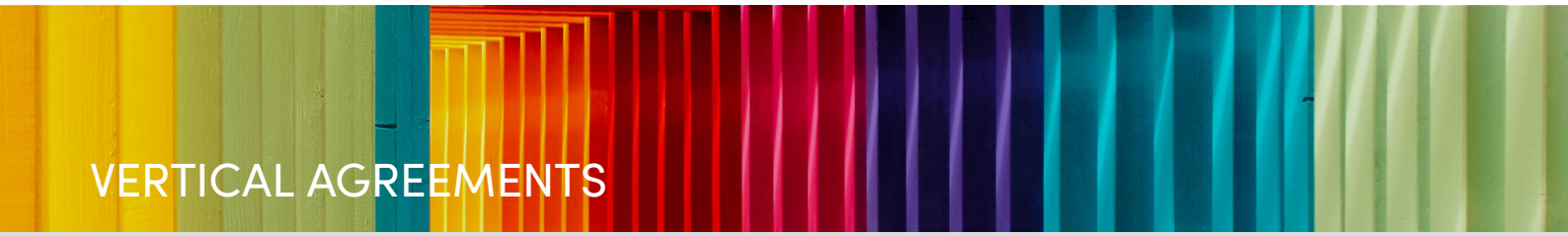
ABUSE OF DOMINANT POSITION

National level

Indeed, the German Federal Cartel Office ("FCO") is investigating the national rail incumbent, Deutsche Bahn ("DB"), since 2019 with regard to alleged restrictions of the findability and attractiveness of digital mobility platforms that provide travel information, allow the comparison of different modes of transportation, and sell tickets. These restrictions concern advertising in app stores, search engines and social networks (e.g., by disallowing the use of the word "bahn" in advertisements, which in German can mean many different sorts of railways or roads). DB allegedly also prohibited platforms from granting discounts to final customers (despite granting them itself) and withheld "essential data" such as real-time train traffic data (e.g., information on platform changes, train delays and cancellations) from mobility platforms that compete with its own mobility platform. DB offered commitments to the FCO in an attempt to settle the latter's probe, and these commitments are currently being market-tested with industry players.

Similarly, on 28 April 2023, the Commission started an investigation against the Spanish rail incumbent, Renfe, to ascertain whether it abused its dominant position in the passenger rail transport market by refusing to supply rival ticketing platforms with (i) content on its range of tickets, discounts and features, and (ii) real-time train data. Renfe offers such data on its own ticket selling websites and applications, and the Commission is concerned that Renfe's alleged refusal to supply this data to rival platforms may prevent them from competing with Renfe's own direct digital channels to the detriment of consumers. The Commission made it explicit that it was open to considering commitments from Renfe to settle the inquiry. Renfe is reportedly preparing commitments to offer to the Commission.

Both pending investigations focus on restrictions imposed on rival ticketing platforms. However, resolving these cases and providing rival ticketing platforms with greater access to the incumbent's data should also benefit independent rail services providers and allow them to compete more effectively: if rival ticketing platforms can offer a fuller set of relevant travel data and are able to offer seamless ticketing services, they will become more attractive for consumers and will in turn become a more effective sales channel for independent rail service providers. This would be an important step in encouraging more competition in rail services.



VERTICAL AGREEMENTS

European Union level

Resale price maintenance: National Competition Authorities maintain enforcement momentum

Tackling resale price maintenance ("RPM") remains a priority for National Competition Authorities ("NCAs") in the European Union, as evidenced by the following overview of recent enforcement practice.

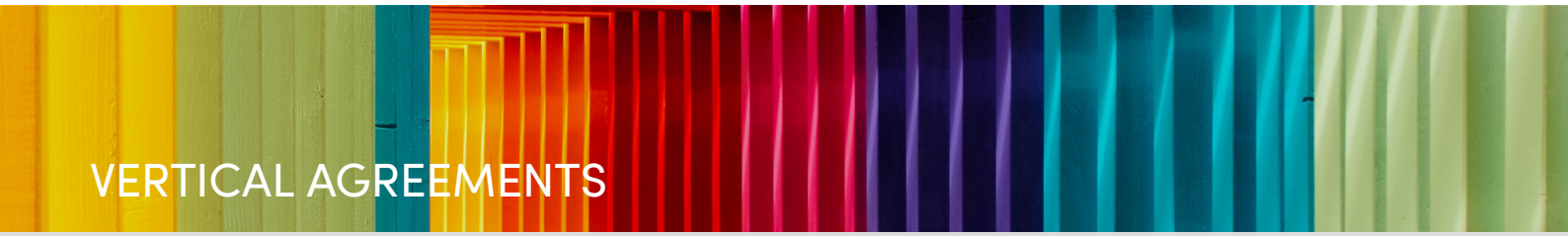
Date of decision / press release	Authority	Sector	Practice	Total fines (EUR)
5.06.2023	Czech Office for the Protection of Economic Competition	Pet food	RPM	13 012
16.05.2023	Czech Office for the Protection of Economic Competition	Consumer electronics and household goods	RPM	1 300 000
20.04.2023	Hellenic Competition Commission	Children's toys	RPM	628 450
18.04.2023	French Competition Authority	Bakery equipment	RPM and passive sales restrictions	1 950 000
13.04.2023	Hungarian Competition Authority	Fishing equipment	RPM	73 255
20.03.2023	Dutch Authority for Consumers and Markets	Smart sports devices, food supplements, and portable television receivers	RPM	Warning only
20.01.2023(*)	Belgian Competition Authority	Cosmetic products	RPM and passive sales restrictions	859 310
9.01.2023	Czech Office for the Protection of Economic Competition	Sewing equipment	RPM	48 057
15.11.2022	Portuguese Competition Authority	Health foods and supplements	RPM	1 250 000

(*) Re-adoption decision following the annulment of a 2021 decision concerning the same conduct.

Almost all of the decisions above were adopted following some form of settlement procedure, whereby the undertakings acknowledged that the conduct at issue amounted to an infringement and cooperated in exchange for reduced sanctions. While each case turns on its own set of evidence, this willingness to settle may reflect an awareness of the continued reluctance of NCAs to accept justifications for RPM practices under Article 101(3) TFEU despite the various possible justifications for RPM set out in the Guidelines on Vertical Restraints (which were further extended in the 2022 version of the Guidelines: see VBB Insights of 21 June 2022).

Although the most recent fines imposed for RPM have been low in absolute terms, this likely reflects the relatively small size of the national markets concerned. However, settling parties must also consider the increasing risk of follow-on damages actions, a prospect as plausible in vertical price-fixing cases as in horizontal ones. For example, in 2022, collective proceedings were commenced in the UK Competition Appeals Tribunal against Roland, Fender, Casio, Korg and Yamaha, following on from the Competition and Markets Authority's (settlement) decisions adopted in its RPM investigations in the musical instruments sector (see VBB on Competition Law, Volume 2019, No. 8).

In terms of the risks of detection, it is notable that NCAs are increasingly conducting online sampling of retail prices in order to ascertain pricing anomalies suggesting the existence of RPM. For example, the Hellenic Competition Commission indicated that its investigation into children's toys had been commenced ex officio, after the authority's online surveys revealed unusual levels of price rigidity in a product market otherwise characterised by seasonal pricing. Similarly, the Portuguese Competition Authority stated in its health foods and supplements decision that it had conducted an "unofficial" online sampling of prices in order to decide whether to pursue an anonymous tip-off..



VERTICAL AGREEMENTS

European Union level

Other larger investigations are currently ongoing. On 30 May 2023, Electrolux Group announced that it had agreed with the French Competition Authority on settling an investigation into RPM in respect of the home appliances sector (as well as exchanges of information relating to small appliances). While the final amount of the fine is to be determined at a later stage, Electrolux disclosed that it will set a provision of EUR 55 million in connection with the case. News reports have also suggested that an investigation recently launched by the European Commission in the high-end fashion sector may (at least in part) concern RPM.

The prevalence of RPM cases may be explained by the desire of competition authorities to pursue cases which can be presented as bringing immediate benefits to consumers, in particular by removing an obstacle to lower retail prices – an increasingly important goal in the context of the current cost of living crisis. Indeed, the majority of the decisions listed above concern the retail price of consumer goods.

STATE AID

European Union level

General Court upholds actions for annulment against decisions of the Commission authorising State aid to airlines during the Covid-19 pandemic

On 10 May 2023, the General Court ("Court") delivered two judgments upholding Ryanair and Condor's actions to annul the decisions of the European Commission ("Commission") approving State aid granted by Germany to Lufthansa (Joined Cases T-34/21 and T-87/21) and by Sweden and Denmark to SAS (Case T-238/21) in the context of the Covid-19 crisis. Unlike previous judgments whereby the Court annulled similar decisions due to the Commission's failure to provide sufficient reasoning, in the *Lufthansa* and *SAS* judgments the Court annulled the respective decisions on the basis of substantive reasons, thus explicitly criticizing the Commission's assessment.

The Commission decisions

In the *Lufthansa* and *SAS* cases, the aid consisted of recapitalization measures aimed at supporting the financial viability of the two airlines during the Covid-19 crisis. In particular, Lufthansa and SAS respectively received individual aid of approximately EUR 6 billion and EUR 1 billion, both in a combination of equity and hybrid capital instruments. The measures were duly notified and later approved by the Commission, which found them to be compatible with the internal market under Article 107(3)(b) TFEU (aid to remedy a serious disturbance in the economy of a Member State) and the *Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak* ("Temporary Framework"). As for many other similar cases, Ryanair (and Condor, as regards the aid to Lufthansa) challenged the Commission decisions before the General Court.

The judgments of the General Court

Differently from previous judgments concerning Covid-19 aid granted to airlines, this time the Court annulled the decisions at issue not because the Commission failed to provide an adequate statement of reasons [1], but because the Commission's assessment was found to be substantially flawed in several parts.

In the *Lufthansa* case, for instance, the Court noted that the Commission failed to properly assess the condition set at point 49(c) of the Temporary Framework – i.e., whether the beneficiary would have been able to find financing on the market on affordable terms. According to the Court, the Commission simply asserted that the collateral of the beneficiary would not have been sufficient to cover the entire amount of the funds, failing however to consider that Lufthansa owned over 85% of its aircraft fleet when the decision was adopted. In this regard, the Court observed that the purpose of point 49(c) would be undermined if public resources were to be spent to cover the totality of the funding needed, even though the company could obtain "*a non-negligible part of its needs*" on the market. For this reason, the Commission's assessment was found to be intrinsically flawed.

Another interesting finding of the Court concerns the so-called step-up mechanism – i.e., a mechanism aimed at incentivizing the company to buy back the State's equity participation and hybrid instruments (when converted into equity), by increasing their remuneration. In both the *Lufthansa* and *SAS* cases, the Court observed that the "*overall structure*" of the measures at issue – which the Commission accepted as an alternative to the step-up mechanism – did not satisfy the conditions of the Temporary Framework[2]. In this regard, the Commission had primarily found that the significant discount at which the shares were offered to the State should be regarded

1 On 25 May 2023, the General Court annulled the Commission decision authorizing an aid scheme for airlines with an Italian operating license (Case T-268/21). In this case, the Court found again that the statement of reasons was insufficient.

2 In the SAS case, the Court found that the Commission failed to require the inclusion of a step-up mechanism only with regard to the equity participation.

STATE AID

European Union level

as having – together with other secondary elements – an equivalent effect to the step-up mechanism. The Court, however, disagreed with this argument. In fact, while the step-up mechanism is intended to be "*an* ex post *incentive* [...] *to buy back that shareholding as quickly as possible*", the price reduction "*has an* ex ante *impact*" and it is not necessarily intended to increase such incentive over time, "*since the price of the shares may rise as well as fall*". Thus, the Commission erred in considering this argument – in conjunction with others – as sufficient, and in not requiring the inclusion of a step-up or similar mechanism in the measure at hand.

Conclusion

In conclusion, considering the substantive findings of the Court, the *Lufthansa* and *SAS* judgments could pave the way for the annulment of other Commission decisions concerning Covid-19 aid in which similar errors may have been committed. Indeed, by these judgments, the Court seems to suggest that even though the aids at issue were granted in exceptional circumstances, they cannot escape full judicial scrutiny.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

General Court rules that a third party to a concentration must have influenced the outcome of the administrative procedure in order to have standing to challenge a Commission decision in competition proceedings

On 17 May 2023, the General Court dismissed an application for annulment brought against a European Commission ("Commission") decision declaring a concentration to be compatible with the common market due to the applicant's lack of standing (Case T-321/20, *enercity v Commission*). The judgment clarified the circumstances under which a third party has standing to challenge a decision adopted under the EU's merger control regime.

In March 2018, E.ON and RWE, two major German energy suppliers, announced a series of three transactions designed to bring about an asset swap between them. Two of these transactions were notified under the EU Merger Regulation, and the third one was notified to the German national competition authority. The Commission cleared the notified transactions in Phase 1 ("Contested Decision"). enercity, a third party which had opposed the transaction during the Commission's review, brought an action for annulment of the Contested Decision.

Under Article 263 TFEU, natural or legal persons may bring an action for the annulment of a decision addressed to another person if that decision is of *direct* and *individual* concern to them. The General Court found that the Contested Decision was of *direct* concern to enercity, because it was capable of bringing about an immediate change in the state of the market on which it is active. Whether a third party in an EU merger review is considered *individually* concerned depends on the effect on that third party's market position (in particular, whether it counts among the main competitors of one or more parties to the concentration) and on the third party's active participation in the administrative procedure. Active participation, for its part, requires the existence of acts by the third party which may have influenced the procedure at issue and distinguish the third party from other market participants that have been involved in the Commission's investigation.

Yet, while enercity's observations during a meeting with the Commission bore some relevance to the investigation and had been addressed by the Commission, the General Court found that they had not been conclusive to the assessment of the concentration. In particular, the General Court observed that enercity's concerns had been examined not as part of the reasoning which led the Commission to conclude that the concentration was compatible with the common market, but as part of a separate and subsequent section on additional concerns raised by third parties which had been included in the Contested Decision for the sake of completeness. Moreover, the General Court ruled that merely responding to a questionnaire in the context of a market investigation or being recognised by the Hearing Officer as an interested third party constituted only 'minimal' participation in the procedure. Accordingly, the General Court determined that enercity was not individually concerned and therefore lacked standing to bring an application for annulment against the Contested Decision. It therefore dismissed enercity's action as inadmissible.

'Active participation' in the administrative procedure is a factor regularly taken into account to determine whether a third party has standing to bring an application for annulment against a decision in competition proceedings (including merger control proceedings). In this context, the General Court's ruling in *enercity v Commissio*n sets a high bar for third parties in competition proceedings to challenge a resulting Commission decision before the General Court.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

General Court dismisses Meta Platforms Ireland's action for annulment of a Commission decision requiring the disclosure of documents to be identified by search terms

On 24 May 2023, the General Court dismissed Meta Platforms Ireland's ("Meta") action for annulment of the European Commission's ("Commission") decision requiring Meta to disclose documents containing certain search terms. In doing so, the General Court ruled on the lawfulness of a Commission request for information based on search terms and of a specific procedure for the selection of documents containing sensitive personal data in the investigation file that were caught by broad search terms.

In 2020, the Commission issued a decision requiring Meta to produce all documents prepared or received by three of its executives during the period in question, which contained one or more identified search terms ("Contested Decision"). Meta brought an action for interim measures and for the annulment of the Contested Decision.

As a result of the action for interim measures, the General Court suspended the operation of the Contested Decision until a specific procedure for the selection of documents caught by the search terms but unrelated to Meta's business activities and containing sensitive personal data was established. Subsequently, the Commission amended the Contested Decision and set up a procedure for the selection of documents unrelated to Meta's business activities and containing sensitive personal data. Under this procedure, relevant documents were to be placed in a virtual data room to which only limited members of the case team and Meta's lawyers would have access. Moreover, the amended Contested Decision provided for a dispute resolution system in case of continuing disagreement as well as for the possibility – subject to the Commission's views – to produce certain documents in redacted form.

In its action for annulment, Meta argued that the Contested Decision was in breach of the principle of necessity, prescribed by Article 18 of Regulation 1/2003, as it would lead to the capture of a large number of documents that were irrelevant to the investigation. Moreover, Meta argued that its objections to specific search terms should be regarded as non-exhaustive examples of a broader argument concerning the Contested Decision as a whole.

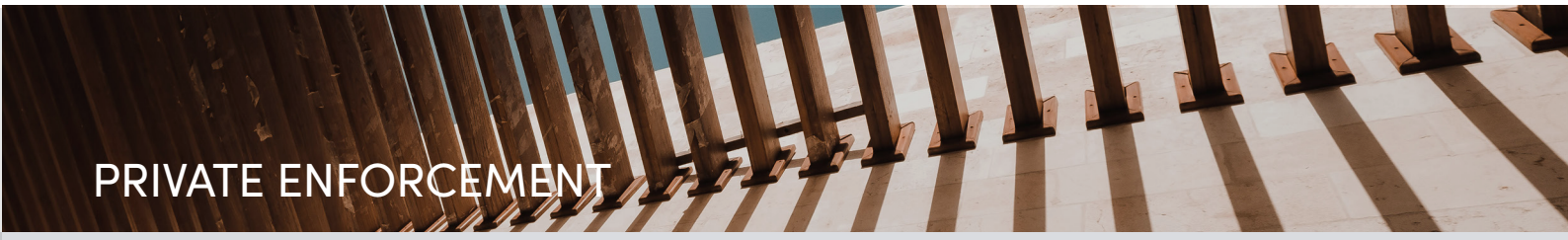
The General Court first recalled that the necessity requirement is satisfied as long as the Commission can reasonably suppose, at the time of its request, that the information may help it reach a finding on the existence of an infringement. Moreover, the circumstance that certain search words may – according to the applicant – be vague does not prevent other search terms from being sufficiently targeted. The General Court went on to consider that, given the presumption of legality of the Commission's acts, it would only review the lawfulness of the search terms which Meta had explicitly criticised in its application for annulment, and found that Meta had not successfully demonstrated that the search terms in question did not comply with the principle of necessity.

Meta also argued that, by requiring the production of documents unrelated to its business activities and containing sensitive personal data, the Contested Decision breached the right to privacy guaranteed by, among others, the EU Charter of Fundamental Rights. However, the General Court concluded that the Contested Decision contained an acceptable limitation of this right, because it was in accordance with the law (i.e., Article 18 of Regulation 1/2003), constituted an appropriate measure for achieving an objective of general interest pursued by the EU (namely, the protection of competition) and, in light of the document selection procedure established by the Commission, was proportionate to the objective pursued.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

The General Court conducted a similar analysis under the personal data protection rules and concluded that the data processing was lawful under the General Data Protection Regulation, because the processing pursued a significant public interest with a basis in EU law, was necessary to fulfil that public interest and, in light of the document selection procedure, was also proportionate to the objective pursued.



PRIVATE ENFORCEMENT

National level

ITALY

Court of Milan extends period of single and continuous infringement established by the Commission as regards Italy and awards damages

On 15 May 2023, the Court of Milan delivered a judgment awarding damages in the context of a private enforcement action. The case constitutes a rare combination of a follow-on action based on a decision of the European Commission ("Commission") of 2010 establishing a pan-European cartel in the prestressing steel market in the period from 1984 to 2002 (Case COMP/38.344, the "Commission Decision") and a stand-alone action relating to facts that were not part of the Commission's final findings, but to which reference was made in the Commission Decision. In its judgment, the Italian Court extended the infringement found by the Commission to facts that were not established in the Commission Decision.

Limitation period

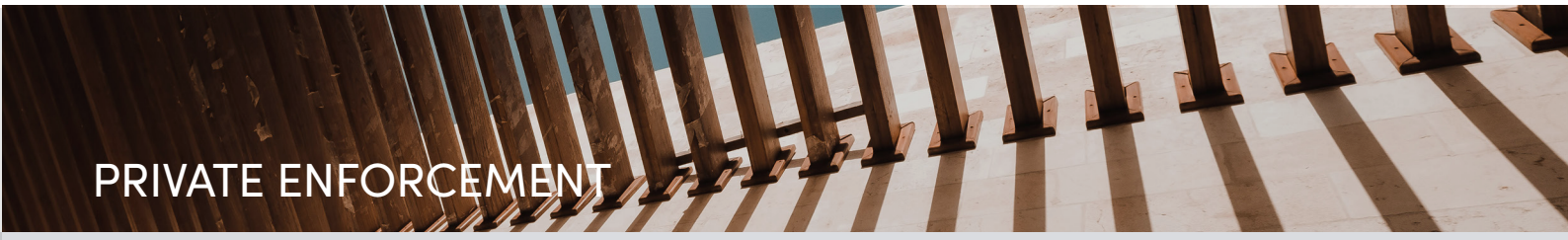
With regard to the admissibility of the action for damages, the Italian Court dismissed the argument that the limitation period had expired on the basis of the precedent set by the CJEU in *Volvo – DAF Trucks* (C-267/20). The Italian Court determined that the relevant starting date for the limitation period (*dies a quo*) was the date of publication of the summary of the Commission Decision in the Official Journal. In contrast, previously published sources, such as statements by other undertakings, specialised press articles, anti-dumping regulations, or a generic press-release by the Commission on the Statement of Objections, were held to lack sufficient information regarding crucial aspects of the cartel, including the identity of the undertakings involved, the nature of the cartel, its duration, and its geographical scope.

Extension of the Commission Decision's findings to other conduct

The Commission Decision established the existence of a cartel operating at European level, which covered, among others, the Italian market. While the Commission established an infringement with respect to Italy as of 1995 onwards, the Italian Court found that instances of price-fixing, information exchange and market-sharing practices in violation of Article 101 TFEU had occurred in Italy already prior to that period. In support, the Italian Court relied on the findings of the court-appointed expert of anomalous prices between 1984 and 1995. The expert had adopted the *difference in differences* methodology (by comparing cartel prices with those that were not considered to have been affected by the cartel) and found that an unlawful overcharge had been applied in Italy without interruption from 1984 to 1995.

In its assessment, the Italian Court also drew upon the references contained in the Commission Decision to meetings among competitors, which included discussions on price-fixing, information exchange, and market-sharing concerning Italy.

In addition, according to the Italian Court, there was a strong link between the pan-European cartel and the parallel Italian cartel from the very beginning (i.e., since 1984). The Court considered that the Italian cartel could not have existed without the pan-European cartel or, at least, without coordination with the latter on quotas and prices, since the pan-European cartel restricted exports of goods to Italy, thereby insulating Italian firms from competition through imports. Additionally, the pan-European cartelists apparently drew inspiration from the already active Italian cartel in setting up the cartel at European level. Moreover, the expert's findings showed that supplies of prestressing steel in Italy had been directly influenced by the pan-European cartel. Based on these findings, the Italian Court found that both types of conduct (i.e., in relation to the Italian cartel and in relation to the European cartel) were part of a single and continuous infringement.



PRIVATE ENFORCEMENT

National level

Liability and damages

The extension of the cartel established in the Commission Decision by the pre-1995 Italian cartel had an impact on the Court's finding of liability. Given the 'single' nature of the violation and the application of the principle of joint liability, the Italian Court considered that all companies found liable in the Commission Decision are also in principle liable for damages caused by the Italian cartelists. The Italian Court further held that, as a consequence of the joint liability for such damages, any undertaking involved in the cartel which could not prove the absence of a causal link between its conduct and the damage was liable for damages resulting from the infringement. Since evidence on the absence of a causal link was not produced, the Court held a Dutch company liable for damages, even though it had not sold any product to the claimants.

Regarding the damages, the Italian Court upheld the claim for compensation of the umbrella effects of the cartel. Umbrella damages are damages resulting from an increase in the price applied by non-cartelists which compete with the cartelists and which follow the upward price trend in the market that was triggered by the cartel. In particular, the Italian Court considered that, in view of the large number of undertakings participating in the cartel and its long duration, the prices of undertakings that were not part of the cartel were directly influenced by the unlawful agreements.

Furthermore, relying on the analysis conducted by the court-appointed expert, the Italian Court also awarded damages for the distortive effects on competition persisting in the two years following the termination of the cartel. In particular, the Italian Court held that, during that period, the overcharge remained at levels comparable to the (previous) years of the infringement.

Lastly, the Italian Court conducted an examination of the passing-on defence. The Italian Court clarified that, in accordance with the jurisprudence of the CJEU (as the Damages Directive was deemed inapplicable due to time considerations), the burden of proving a passing-on rests on the defendant. However, no evidence of a passing-on had been presented. Rather, the Italian Court analysed the downstream contracts and found that prices had not been revised to take account of the anticompetitive overcharge. Furthermore, an analysis of the claimants' financial records revealed a decline in their profitability, suggesting that no passing-on had occurred.

This judgment shows that Italian courts do not hesitate to award damages for competition law infringements and that this particular Milan court was even prepared to extend the parameters of the infringement established by the Commission Decision to make its own findings of facts and liability. It remains to be seen whether, if appealed, the findings of the Milan court will be upheld and whether this is the direction that other Italian courts will follow.

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