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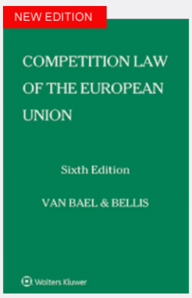
VBB on Competition Law

Issue Highlights



Jurisdictions covered in this issue

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ABUSE OF DOMINANT POSITION

European Union level

European Commission requires Meta to retrain Facebook Marketplace models without competitor data collected historically

On 26 March 2025, the European Commission (the "Commission") published its provisional decision, adopted on 14 November 2024 (See, VBB on Competition, Volume 2025, No. 1), imposing a € 797.72 million fine on Meta for abusing its dominant position in (i) the personal social networks market by tying Facebook Marketplace ("Marketplace") to Facebook; and (ii) in the markets for online display advertising on social media platforms by imposing unfair trading conditions on Marketplace competitors advertising on Meta's social media platforms (Case AT.40684 – *Facebook Marketplace*).

Meta has lodged an appeal with the General Court contesting, amongst other grounds, the Commission's decision to prescribe specific remedies for Meta to implement.

Meta's conduct

The Commission determined that Meta held a dominant position in the EEA-wide market for personal social networking services and found that Meta had engaged in unlawful tying conduct by giving all users of (personal social network) Facebook automatic access to Marketplace, regardless of their preferences or choice. As a result, competitors of Marketplace (i.e., competing providers of online classified ads services ("OCAS")) faced a distribution disadvantage in comparison to Marketplace, leading to their foreclosure.

The Commission also determined that Meta held a dominant position in the national markets for online display advertising on social media platforms within the EEA and found that Meta had imposed unfair trading conditions on competing OCAS providers that advertise on Meta's social media platforms – such as Facebook and Instagram. This allowed Meta to use ads-related data gathered from competitors for the benefit of its own OCAS provider, Marketplace.

Remedies

The Commission not only imposed a nearly € 800 million fine on Meta, but also envisaged far-reaching remedies – in addition to requiring Meta to cease and desist the conduct found to be abusive, it also described in detail remedial actions which Meta would have to take to address the harm caused.

With respect to the tying conduct, the Commission presented two options to Meta: (i) the unbundling of Facebook and Facebook Marketplace to make Marketplace a stand-alone service; or (ii) periodically offering end users a tool to neutrally choose their preferred OCAS provider(s) – from a list of eligible OCAS providers, which can include Marketplace, if done neutrally without favouring Marketplace – to be embedded in Facebook for their individual usage. Notwithstanding, the Commission left a margin of discretion to Meta allowing them to choose "*any equivalent measure which effectively brings the infringement to an end*."

With respect to unfair trading practices, the Commission stated that Meta should ensure from a legal and technical perspective that Meta cannot use non-publicly available ads-related data of rival OCAS providers for the benefit of Facebook Marketplace. The Commission proposed that this could be ensured by ads-related data not being available to Marketplace from the outset.

In addition, to correct the effects of past (and according to the decision, unlawful) use of the data of rivals, the Commission required that any machine learning Marketplace models which have been trained on the basis of ads-related data, be retrained on the basis of data which does not include ads-related data from competing OCAS providers. This is particularly notable, as the Commission appears to require a restorative remedy that would be designed to address the effects of past allegedly anticompetitive conduct, and seek to recreate competitive conditions as they would exist absent the infringing conduct.

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Meta argued that the Commission only has the power to adopt a cease-and-desist order and does not have the legal basis to prescribe any specific remedy. Meta equally alleged that the remedies set out by the Commission are disproportionate, as the tying solution goes beyond simply ending the tying practices and the remedy for unfair trading conditions mandates the removal of historic ads data use.

The Commission contended that it does have the power to prescribe any behavioural or structural remedy which is proportionate to the infringement concerned and necessary to end the infringement. That said, the Commission claimed that its provisional decision does not mandate specific remedies but instead sets out the results that Meta's remedies should achieve. The Commission also maintained that Meta has a margin of discretion and can adopt alternative and equivalent measures that end the infringement. In terms of retraining models, the Commission argued that the restorative remedy is necessary, as otherwise the models would continue to be based on the (unlawfully obtained) ads-related data from competing OCAS providers, and associated harm would persist.

Outlook

Meta has lodged an appeal against this decision alleging a number of errors of assessment including the specificity of the remedies proposed. It will be interesting to see whether the General Court will uphold the Commission's more prescriptive approach to remedies design or will align with Meta's more classical self-assessment approach. Moreover, the General Court will also have to take a position on the Commission's power to seek restorative remedies and require a dominant firm to take additional steps to eliminate or reduce the effects of past unlawful conduct, which is an issue that may have broader implications, especially in other abuse of dominance cases involving large digital players.

European Commission's first DMA non-compliance decisions: Apple and Meta fined € 500 million and € 200 million respectively

DMA non-compliance decisions against Apple and Meta

On 23 April 2025, the European Commission (the "Commission") fined Apple and Meta € 500 million and € 200 million respectively for breach of certain obligations under the Digital Markets Act ("DMA"). These are the first non-compliance decisions adopted under the DMA and the full text of these decisions is yet to be published. According to the Commission's press release,

- The Commission found Apple's restrictions on app developers to breach the anti-steering obligation under Article 5(4) of the DMA, which requires Apple to allow app developers to inform customers – free of charge – about alternative offers available outside Apple's App Store and steer them towards making purchases outside the App Store.

- Meta's "Consent or Pay" advertising model – which was active from March to November 2024 – was found to be in breach of Article 5(2) of the DMA, which requires Meta to give consumers the choice of an equivalent service – albeit less personalised – that uses less of their personal data. The Meta model, which required users to either consent to combination of their personal data across services (for personalised advertising) or pay a monthly subscription (for an ad-free service), was found not to be compliant with the DMA.

The fines imposed on both companies, although significant, were reportedly moderated in light of current transatlantic tensions. The Commission also required Apple to cease and desist its infringing restrictions on app developers – including in respect of its fees and commission structure – within the tight timeframe of 60 days or otherwise risk periodic penalty payments.

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European Union level

Additional decisions in respect of Apple and Meta

In addition to the above, the Commission took the preliminary view that Apple's approach to alternative app distribution on iOS – via third party app stores or directly from the web – does not comply with Article 6(4) of the DMA. According to the Commission, this is because (i) app developers seeking to use alternative app distribution channels are subject to a new fee, (ii) it is burdensome and confusing for end users to install apps via alternative app distribution channels, and (iii) there are overly strict eligibility requirements.

At the same time, the Commission closed its investigation into Apple's user choice obligations under Article 6(3) of the DMA – since Apple gave users the possibility to easily uninstall software applications (including Safari), change default settings on iOS using a centralised menu, as well as choose their default web browser from a choice screen.

The Commission also found that Meta's Facebook Marketplace should no longer be designated under the DMA given it had less than 10,000 business users in 2024.

ABUSE OF DOMINANT POSITION

National level

FRANCE

French Competition Authority fines Apple € 150 million for abusing its dominant position through the implementation of its App Tracking Transparency framework

On 31 March 2025, the French Competition Authority ("FCA") issued a decision finding that Apple's implementation of its App Tracking Transparency ("ATT") framework – which, since 26 April 2021, requires apps on the AppStore to obtain user consent, via a largely standardised pop-up, before tracking user data across third-party apps and websites for targeted advertising purposes – amounted to an abuse of a dominant position. The FCA decision also imposed a fine of € 150 million on Apple.

Background

Under the French Data Protection Act, tracking users on third-party apps and websites requires prior user consent. To facilitate an informed consent, Apple introduced the ATT framework, obliging apps to request such consent using a largely standardised pop-up window. Apple's own apps, however, were not covered by the ATT framework and user consent was obtained in a simpler format that – according to the FCA – was also more likely to encourage users to consent to third-party tracking than the ATT framework.

FCA Decision

The FCA decision did not challenge the objective pursued by the ATT framework to obtain consent for user tracking. Nevertheless, it found that Apple's implementation of the ATT framework infringed Article 102, as it was neither necessary nor proportionate; it did not meet the requirements of applicable privacy rules; it was not designed in a neutral way; and it disadvantaged rival apps compared to Apple's own.

First, the FCA found that the ATT framework was not necessary since the consent obtained was not valid under the French Data Protection Act. As a result, app publishers had to display another pop-up window to collect valid consent to authorise third-party tracking. According to the FCA, this rendered the use of apps unnecessarily complex for users.

Second, the FCA criticised the ATT framework for the lack of neutrality due to the design of the pop-up windows. It found that users could refuse tracking with a single action, whereas granting permission to track required two steps. This asymmetry, according to the FCA, undermined the informed consent that the ATT framework was supposed to facilitate, thereby causing definite harm to app publishers and advertising service providers.

Third, the FCA noted that Apple treated third party apps differently, as it did not subject its own apps to the same consent requirements. Apple was therefore able to collect user data via its own apps without triggering the ATT consent pop-up window, unlike third-party apps.

Based on these findings, the FCA ruled that Apple had imposed unfair trading conditions in breach of Article 102 TFEU. In addition to the fine imposed, Apple was ordered to publish a summary of the decision on its website for seven consecutive days and to cooperate with the French Data Protection Authority to identify the appropriate remedy for the abusive implementation of the ATT framework.

ABUSE OF DOMINANT POSITION

National level

Key Takeaways

The ATT framework case reflects the growing trend for digital platform practices to fall within the scope of multiple regulatory frameworks, including competition law, GDPR, and the DMA. This decision follows Case C-252/21 *Meta v Bundeskartellamt*, which affirmed that competition authorities may assess GDPR compliance when investigating abuses of dominance, provided they coordinate with data protection authorities (See, VBB on Competition Law, Volume 2023, No. 6). Unlike the German Bundeskartellamt, the FCA in the present case did not conclude that Apple's conduct infringed data protection law. But the FCA nevertheless had to closely examine the ATT framework from the perspective of the GDPR, collaborating during its investigation with the French Data Protection Authority.

The FCA decision likely is only the first decision by a national competition authority investigating Apple's implementation of the ATT framework, as the competition authorities in other EU Member States such as Germany and Italy are understood to be investigating the same conduct. This raises the question of whether the European Commission would not be better placed to investigate Apple, as such a devolved enforcement model (even if coordinated) inevitably raises concerns about an inefficient use of resources and inconsistent outcomes. Moreover, if other national competition authorities were to impose fines on Apple, this could raise double jeopardy concerns as Apple's alleged discrimination against rival app developers cannot be said to be localized conduct with distinct effects in different EU Member States.

GERMANY

German FCO adopts two commitment decisions against Google/Alphabet under Section 19a GWB

With its commitment decisions of 9 April 2025, the German Federal Cartel Office ("FCO") declared binding the commitments offered by Google Germany/Alphabet in relation to Google automotive services ("GAS") and Google maps platform services ("GMP").

The proceedings were conducted under Section 19a of the German Competition Act ("GWB"), which authorizes the FCO to prohibit companies which are of paramount significance for competition across markets from engaging in certain anti-competitive practices. Similar to the DMA, Section 19a envisages a two-step procedure, whereby the designation as a company of paramount significance for competition across markets (with respect to Google, see FCO Decision of 30 December 2021) is followed by an assessment of an alleged infringement.

Alleged infringements

According to the FCO's preliminary assessment, Google engaged in the following anticompetitive practices:

With its GAS contract terms, Google allegedly (1) bundled Google Maps, Google Play and Google Assistant, (2) offered vehicle manufacturers a share in advertising revenues on the condition that no services with comparable functions be installed in in-vehicle infotainment ("IVI") systems, (3) included default settings and prominent placement of services, and (4) restricted the interoperability between GAS services and third-party services.

In relation to the GMP services, Google allegedly (1) restricted the interoperability of GMP with third party services and (2) prohibited the display of Google content on non-Google maps.

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National level

Commitments

Google offered commitments that the FCO considered sufficient to dispel its competition concerns. In relation to GAS, these include (1) ensuring the interoperability of GAS software components with voice assistants, maps services and app stores of third-party suppliers in IVI systems, (2) developing integration-ready stand-alone versions of GAS software components, (3) undertaking to grant termination rights, (4) not granting economic advantages for not pre-installing competing services in IVI systems, and (5) not requiring default settings and the prominent placement of GAS software components or stand-alone versions. These commitments cover IVI systems in passenger cars that are or may in the future be registered in Germany, and thus *de facto* have effect for the entire European market.

In relation to GMP, Google essentially committed not to restrict the combined use of GMP and map services from other providers and to allow the display of map content provided by Google on third-party maps. These commitments cover all license holders of Google Maps services with a billing address in the EEA, again providing effects that go beyond Germany.

Commitments under German law despite the DMA

On 5 September 2023, the EU Commission designated Google as gatekeeper under the DMA. According to the FCO, the proceedings under Section 19a GWB were not precluded by the DMA since the commitment decisions amount to the imposition of "further obligations" allowed under Article 1(6) sentence 2 b) DMA, either because they concern Google services (such as Google Assistant) not listed in the designation decision of the Commission as core platform services or because they represent further obligations with regard to Google Maps and Google Play compared with those currently applicable under the DMA.

Outlook

The application of the commitments under Section 19a GWB in parallel to the DMA and the scope of the commitments going beyond Germany show that the FCO continues to take aggressive enforcement action against digital market players to open up digital markets and considers the national proceedings under German law as a valuable complement to the Commission's DMA proceedings.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Symrise loses challenge against European Commission decision to conduct dawn raids

On 30 April 2025, the General Court of the EU ("GC") dismissed in its entirety an action brought by Symrise AG challenging the European Commission's decision to conduct dawn raids at the company's premises in 2023. Symrise is a manufacturer and seller of fragrances and fragrance ingredients and is currently under investigation by the Commission into suspected collusion and market coordination, together with three other fragrance manufacturers and the International Fragrance Association ("IFRA").

Background

In March 2023, the Commission conducted dawn raids at the premises of Symrise, Firmenich International, Givaudan and International Flavors & Fragrances over suspected collusion in the fragrance sector. All four manufacturers are members of the IFRA, which is suspected of facilitating some of the alleged conduct. The suspected conduct includes colluding on and coordinating pricing strategies, market allocation and industry standards.

Symrise challenged the decision to conduct dawn raids at its premises before the GC on the grounds that the Commission had infringed its right to the inviolability of private premises and its right to privacy. Symrise also argued that the Commission had not fulfilled its obligation to state reasons, thereby infringing Symrise's rights of defence.

Judgment

In its appeal, Symrise claimed that the Commission's inspection decision was imprecise with regard to the subject matter and purpose of the investigation and was not clearly reasoned. However, the GC found that the inspection decision sufficiently identified the market concerned and the nature of the suspected illicit conduct and, concluded that, while Symrise's degree of involvement was not expressly outlined, Symrise could determine its suspected involvement. Moreover, the GC rejected arguments that the use of the term '*inter alia*' before listing the categories of suspected conduct rendered the Commission's reasoning imprecise and vague. Thus, the GC considered that the inspection decision contained the essential features of the alleged infringement enabling Symrise to understand the subject matter and purpose of the inspection.

Symrise also alleged that the inspection decision was arbitrary and disproportionate, arguing that the Commission had not had sufficiently serious evidence of the suspected conduct and Symrise's involvement to justify adopting an inspection decision and that the inspection had in essence been a "fishing expedition". On this point, the GC reaffirmed the requirement that the Commission should have reasonable grounds for suspecting an infringement of the competition rules in order to justify an inspection. On the facts, the GC found that the Commission already had sufficiently serious evidence to suspect an infringement of the competition rules before ordering the inspection. This evidence derived from intelligence reports and information requested and collected by the Commission which indicated, among other things, the relationship of dependency between manufacturers and suppliers, the level of interdependency and solidarity between manufacturers, as well as suspected incidents of collusion and coordination.

Key Takeaways

This judgment reaffirms that the Commission must have reasonable grounds to suspect an infringement of the competition rules before ordering a dawn raid. In this case, it is noteworthy that the evidence relied on by the Commission in this regard was derived from the Commission's own market enquiries rather than information supplied by an immunity applicant under the leniency programme. By reaffirming the

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European Union level

Commission's ability to conduct a dawn raid based on evidence gathered on its own initiative, the judgment may boost the Commission's appetite to conduct *ex officio* investigations, which in recent years have become an increasingly significant part of its cartel case load relative to investigations based on immunity applications.

Commission publishes annual statistics on cartels cases and Report on Competition Policy 2024

On 2 April 2025, the European Commission published its annual report on cartel statistics for 2024 and the first quarter of 2025. This period was marked by a low level of cartel enforcement activity. In 2024, the European Commission issued only one cartel enforcement decision along with two statements of objections, while the first quarter of 2025 has recorded one cartel decision (See, VBB on Competition Law, Volume 2025, No. 3). On 25 April 2025, the Commission also published its Report on Competition Policy 2024 in which it evaluated its competition policy and enforcement record during 2024.

Cartel Statistics

According to the published cartel statistics, the last three years have seen few cartel decisions being issued by the European Commission. A single decision was adopted in 2024 in relation to collusive behaviour in the second-hand rolling stock market and, in that year, the Commission recorded the lowest level of total fines for several years, amounting to € 48.6 million. The first quarter of 2025 has already seen an increase in the total value of fines imposed in comparison to 2024. The fines imposed on parties involved in the end-of-life vehicle recycling cartel amounted to € 457.9 million, the highest recorded figure since 2021 (See, VBB on Competition Law, Volume 2025, No. 3). The highest total and individual cartel fines imposed by the Commission remain those imposed in the truck cartel case, with a record total fine of € 3.8 billion (See, VBB on Competition Law ,Volume 2016, No. 7 and VBB on Competition Law, Volume 2017, No. 9).

The statistics illustrate that the sectors that have faced the most fines since 2010 are the manufacturing sector, the financial sector and basic industries. In particular, cartels in relation to car parts have featured heavily, with the Commission adopting 17 cartel enforcement decisions imposing € 2.2 billion worth of fines. In the same period, the Commission has adopted 12 cartel decisions in the financial sector with total fines of € 3.9 billion. The statistics equally indicate the popularity of the settlement procedure noting that 43 settlement decisions have been adopted since the introduction of this procedure in 2008.

The cartel statistics suggest a clear decrease in completed cartel enforcement activity since 2021. Notwithstanding this, the Director of the Cartel Directorate of DG Competition, Maria Jaspers, has indicated that DG COMP expects to adopt more cartel decisions in 2025, with a specific focus on information exchanges through direct and indirect channels.

Report on Competition Policy 2024 and Staff Working Document

In addition to the low number of enforcement decisions adopted in 2024, the Report on Competition Policy 2024 outlines that only two Statements of Objections were issued in this period. The first Statement of Objections was sent to six salmon producers suspected of sharing commercially sensitive information on various price-setting factors. The second centred on a suspected long-running cartel relating to a pharmaceutical ingredient used in abdominal antispasmodic drugs. The Commission also confirmed that that it had launched dawn raid investigations in the tyres sector and data centre construction sector in 2024.

Key Takeaways

The Commission's cartel statistics and competition policy report suggest a decline in cartel enforcement in recent years in terms of the volume of decisions adopted and the

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level of fines imposed. Notwithstanding this, it appears that a pick-up in cartel enforcement activity may be underway, with the most recent cartel decision adopted in April 2025 in the end-of-life vehicle recycling case being one of the largest cartel investigations conducted by the Commission in recent years. While cartel enforcement remains a priority, the demands of new areas such as the Digital Markets Act and the Foreign Subsidies Regulation are taking up a significant share of the limited resources of DG Competition.

European Court of Human Rights rules that transferring information collected from telephone tapping in criminal investigations to Dutch Competition Authority did not violate undertakings' right to privacy

On 1 April 2025, the Grand Chamber of the European Court of Human Rights dismissed the appeals lodged by four undertakings against the judgment handed down by a chamber of the Court, which had rejected their complaints against the Netherlands. The applicants alleged a violation of their right to respect for private life under Article 8 of the European Convention on Human Rights ("ECHR"), based on the fact that information lawfully obtained by Dutch prosecutors through telephone tapping — originally collected in the context of criminal investigations — had been transferred to the Dutch Competition Authority ("DCA") and subsequently used to investigate unrelated competition law infringements.

The case involved two separate criminal investigations: one targeting undertakings in the ship-generated waste collection sector for alleged violations of environmental law and another concerning building contractors suspected of bribing government officials to secure government contracts. In both cases, recordings of employees' intercepted telephone conversations were shared with the DCA after indications of price-fixing conduct emerged. These disclosures enabled the DCA to impose fines on the waste collection companies for participating in a price-fixing cartel and on the building contractor for bid-rigging.

The Court held that the interference with the undertakings' right to privacy was justified under Article 8(2) of the ECHR. It found that the transfer of data was provided for by law and pursued the legitimate aim of protecting the economic well-being of the country. The Court further concluded that a fair balance had been struck between the applicants' rights and the interests of the authorities. In this context, it emphasised the strong public interest involved in the effective enforcement of competition law. Noting the difficulties involved in detecting cartels, the Court underscored the importance of enabling cooperation between competition authorities and other law enforcement bodies to uncover and punish such anti-competitive practices.

CARTELS AND HORIZONTAL AGREEMENTS

National level

UNITED KINGDOM

CMA issues informal guidance on supply chain ESG initiative

On 31 March 2025, the Competition and Markets Authority ("CMA") issued a third informal opinion under its Green Agreements Guidance concerning a proposal by the Builders Merchants Federation ("BMF") to recommend that its members use a single preferred platform containing data on suppliers' ESG credentials.

Background

The CMA's Green Agreements Guidance (published in October 2023) sought to provide greater clarity on the application of the Chapter 1 prohibition (the UK equivalent to Article 101 TFEU) to sustainability agreements between competitors, whilst also introducing an "open door policy" through which companies can receive informal guidance from the CMA on environmental and sustainability collaboration initiatives.

The informal opinion issued to the BMF is the third example of such informal guidance issued by the CMA under this initiative – and the first to be sought by a trade association rather than a non-profit organisation. The first concerned Fairtrade's Shared Impact Initiative, whilst the second related to WWF-UK's proposal for supermarkets to make a joint commitment to reduce greenhouse gases in their supply chain by encouraging suppliers to adopt net-zero targets.

BMF's proposal

BMF, a trade association which represents merchants and suppliers of building materials and services in the UK and Ireland, proposed that a single preferred supply chain assurance provider should be recommended to conduct assessments of suppliers' environmental impact – and that such data should feed into a single preferred platform for the consultation of BMF members. Consistent with the Green Agreements Guidance, BMF's proposal did not require its members to use this platform – thus enabling such members to use or create alternative platforms.

BMF proposed an appropriate supply chain assurance provider and offered to collaborate with this provider to create an ESG questionnaire with the input of BMF members and non-members. This ESG questionnaire would then be circulated to suppliers who would submit a response and supporting evidence. Suppliers would subsequently receive a supply chain risk rating – and, in certain cases, a corrective action plan. BMF's proposal envisaged that the association would collaborate with the proposed provider to create a platform with pooled data on suppliers' ESG credentials.

CMA assessment and recommendations

The CMA conducted a 'light-touch' review, and – having considered that the proposal did not have an anti-competitive objective – engaged in an effects analysis (essentially focusing on whether use of a single preferred platform risked foreclosing competitors providing similar services).

Ultimately, the CMA concluded that the risk of significant competitive harm was low – such that it was unlikely to bring an enforcement action against the proposal (if implemented correctly). However, the CMA notably took issue with BMF's preselection of a sole preferred platform in the absence of a competitive selection process, and – in order to mitigate the risk of competitor foreclosure concerns in this regard – prescribed certain "*Additional Steps*" to ensure no substantial elimination of competition would occur (including putting in place a competitive process to select the supply chain assurance provider, making the questionnaire 'open source' and making supplier assessments transferable to alternative assessment providers or alternative platforms at no extra cost). The authority also stressed that BMF must ensure that the relevant safeguards are implemented, the single preferred platform provides access on an equal and non-discriminatory basis, the questionnaire process is transparent, and that the access, quality, and pricing of the platform provider is monitored.

Moreover, the CMA concluded that the benefits presented by the initiative outweighed any competition concerns – essentially because (i) the proposal would lead to both cost-reduction and environmental benefits (as quantified by BMF in its submission); (ii) final consumers were likely to benefit through greater availability of assured goods and services, at lower cost (and, in terms of environmental benefits, the CMA considered that resulting benefits would be to the advantage of all UK consumers); (iii) using a single preferred platform was reasonably necessary to achieve the claimed benefits, and would be more efficient than alternatives; and (iv) the abovementioned Additional Steps sufficiently mitigated the risk of a substantial elimination of competition.

Key takeaways

This detailed informal opinion provides further insight into the practical application of the Green Agreements Guidance – and, in particular, offers some helpful indications as to (i) which factors will be taken into account by the CMA in reviewing these types of proposals; and (ii) which safeguards the CMA may expect to be put in place (and deem acceptable) in order to allay substantive competition concerns that may be identified.

In addition, whilst the CMA's constructive engagement with the BMF – and the (important) modifications made to the proposal following such CMA feedback – clearly demonstrates the benefits of the open door policy, it is worth recalling that the process leading to the issuance of the CMA's opinion took over a year (and companies considering approaching the CMA under the open door policy in the future should thus expect a similarly rigorous exercise).

VERTICAL AGREEMENTS

European Union level

Court of Justice rules on when an exclusive distributor can benefit from restrictions on active sales into its territory under VBER

The Court of Justice of the EU (CJEU) held on 8 May 2025 that restrictions on active sales in a territory exclusively allocated by a supplier to a buyer can benefit from a block exemption under Article 4 (b)(i) of EU Regulation 330/2010 (the "2010 VBER") only if (i) the supplier has asked its other buyers not to engage in such sales in the territory exclusively allocated to that buyer and, (ii) these other buyers have accepted or at least acquiesced to that request (the "Judgment"). The mere circumstance that most buyers refrained from actively selling into the exclusively allocated territory is not sufficient to establish the existence of this arrangement.

Context – Belgian Proceedings

The dispute concerns a 1993 exclusive distribution agreement between the Dutch producer of Beemster cheese, Cono, and its exclusive distributor for Belgium and Luxembourg, Beevers Kaas. The case concerned a dispute between Beevers Kaas and companies belonging to the supermarket group Ahold Delhaize, which had started to actively sell Beemster cheese in Belgium sourced elsewhere. Beevers Kaas claimed that its exclusive distribution rights entailed a ban on the active sale of Beemster cheese in its exclusive territory by other companies and accused Ahold Delhaize of knowingly engaging in unfair trade practices contrary to Article VI.104 of the Code of Economic Law ("CEL"). Ahold Delhaize responded that the exclusive distribution agreement did not require Cono to protect Beevers Kaas from active sales into the latter's exclusive territory.

The President of the Antwerp Commercial Court dismissed the action of Beevers Kaas, observing that the agreement only prevented Cono from selling Beemster cheese to Belgian distributors.

Beevers Kaas appealed this judgment to the Court of Appeal of Antwerp (the "Court of Appeal"). In an interlocutory judgment of 27 April 2022, the Court of Appeal held that the exclusive agreement between Cono and Beevers Kaas was intended to protect the latter against active sales in Belgium and Luxembourg and that Cono had applied the prohibition of active sales in Belgium and Luxembourg to its other customers. However, the Court of Appeal decided to stay the proceedings to seek the amicus curiae opinion of the Belgian Competition Authority (the "BCA") on the compatibility of this agreement with the competition rules. In its amicus curiae opinion, the BCA interpreted the controlling provision, Article 4 (b)(i) of the 2010 VBER, as subjecting the validity of restrictions on active sales in a territory to three cumulative conditions:

1. the supplier must have appointed an exclusive distributor for a given territory;

2. the exclusive distributor must be protected by the supplier against active sales into its territory by the supplier's other buyers in the European Economic Area ("parallel imposition" condition); and

3. the sales of the customers of a distributor on whom the active sales restriction has been imposed are not hindered.

Regarding the second condition, the BCA found that an explicit or implicit agreement of the other buyers is required which can be provided for in their contracts with the supplier or inferred from their behaviour.

VERTICAL AGREEMENTS

European Union level

Questions Referred to the CJEU and Preliminary Ruling

The Court of Appeal decided to refer two questions to the CJEU seeking a preliminary ruling on the interpretation of the parallel imposition condition.

In its ruling, the CJEU has now held that the allocation by a supplier of territorial exclusivity to one of its buyers under Article 4(b)(i) of the 2010 VBER should necessarily go in tandem with a parallel obligation on that supplier to protect the buyer from active sales by other buyers into the first buyer's territory. The existence of such an arrangement to restrict active sales into an exclusive territory may be established not only by means of direct evidence (such as a contractual limitation on other buyers), but also by objective and consistent indicia that the supplier invited its other buyers not to make active sales into the exclusive territory of the buyer concerned and that these other buyers accepted or acquiesced to that request.

In this case, the CJEU observed that the distribution agreements concluded between Cono and its buyers do not contain any clause prohibiting active sales into the exclusive territory of Beevers Kaas.

Turning to possible indicia, the CJEU held that the circumstance that, except for Ahold Delhaize companies, none of Cono's other buyers engaged in active sales in Beevers Kaas' exclusive territory *"is not sufficient in itself"* to establish the existence of an agreement not to actively sell in that territory. The CJEU referred to the absence of a communication requiring those other buyers to respect the exclusive territory.

According to the CJEU, the conduct of Cono's other buyers, while relevant, does not establish with sufficient certainty their acquiescence in Cono's request not to actively sell into the exclusive territory of Beevers Kaas. This conclusion could be different, if there had been *"an explicit invitation from the supplier to comply with the ban on active sales in the exclusive territory"* and if the supplier had the means to implement this ban (e.g., by running a monitoring and penalties system).

Key Takeaways

The Judgment shows the importance – where exclusive distribution rights are granted – of having active sales restrictions expressly included in the agreements of the entire distribution system.

Should existing agreements not contain such a restriction, the supplier and its buyers would be well-advised to exchange communications expressing unambiguously their consent to the active sales restrictions. In practice, however, this alternative may be not so easy to implement as a distributor may be reluctant to later acquiesce in a potentially significant restriction on its commercial conduct that was not included in its distribution agreement.

In the same vein, buyers who have been granted an exclusive territory (or an exclusive customer group) should not presume that they are protected from active sales if this is not clear from their distribution agreement and from the agreements which the supplier entered into with its other buyers. In such a situation, they should seek confirmation from the supplier that it has explicitly agreed with all its other buyers on a restriction of active sales in the buyer's exclusive territory or customer group. Such confirmation may give an exclusive distributor recourse against the supplier in case it has in fact not reached such an agreement with a buyer that starts to sell actively into its territory.

Finally, while this Judgment concerns the 2010 VBER, the VBER that replaced it in 2022 should probably be interpreted in the same manner, as the Judgment appears consistent with paragraph 124 of the 2022 European Commission Guidelines on Vertical Restraints ("2022 VGL": "[f]*or the exclusive distribution system to* *benefit from the exemption provided by Article 2(1) of Regulation (EU) 2022/720, the appointed distributors must be protected from active sales into the exclusive territory or to the exclusive customer group by all the supplier's other buyers*". The Judgment is therefore also relevant for new exclusive distribution agreements.

It should be noted that the requirement of the VGL that all buyers in the Union should be prevented from actively selling into a territory where a supplier wishes to grant exclusivity to a distributor raises practical challenges, in particular in the context of multi-tier distribution systems involving a large number of buyers across the Union contracting at different times. In this respect, the 2022 VGL introduce a certain degree of flexibility which it is hoped will be applied reasonably in practice:

> "Where, for practical reasons and not with the object of preventing parallel trade, the exclusive territory or customer group is not protected from active sales by certain buyers for a temporary period, for example where the supplier modifies the exclusive distribution system and requires time to re-negotiate active sales restrictions with certain buyers, the exclusive distribution system may still benefit from the exemption provided by Article 2(1)" (2022 VGL, para. 122).

INTELLECTUAL PROPERTY/LICENSING

National level

GERMANY

Higher Regional Court of Munich disregards Commission intervention inupholding injunctive relief in SEP licensing proceedings

On 20 March 2025, the Higher Regional Court of Munich (the "Court") rendered its judgment in *VoiceAge EVS v HMD Global*, upholding the injunctive relief granted by the first instance court against the SEP implementer *HMD Global*. The Court confirmed that HMD Global had used the standard essential patent ("SEP") of VoiceAge EVS in mobile devices without a licence and could not validly claim that *VoiceAge EVS* infringed Article 102 TFEU when seeking an injunction. In particular, the Court rejected the implementer's defence that the licensing terms offered by the SEP holder were not fair, reasonable and non-discriminatory ("FRAND") since it considered that the implementer failed to provide an adequate security during licensing negotiations.

This judgment is notable since, as already indicated in its procedural notice of 30 October 2024, the Court disregarded the arguments raised in an *amicus curiae* brief by the European Commission ("Commission") that had challenged the SEP holder friendly approach of German courts (See, VBB on Competition Law, Volume 2025, No. 1).

Position of the Higher Regional Court of Munich

Contrary to the Commission's view, the Court held that FRAND negotiations do not have to follow a strict sequential ("step-by-step") in order to comply with Article 102 TFEU. Rather, FRAND negotiations are a "dynamic concept" in which a court must assess whether both parties acted in good faith when negotiating a FRAND licence agreement. This is in line with the recent judgments of the Unified Patent Court ("UPC") (See, VBB on Competition Law, Volume 2025, No. 1).

The Court further held that a SEP holder complies with its negotiation obligations if its last offer is considered to be on FRAND terms – a finding which aligns with the recent UPC rulings and the judgment of the German Federal Court of Justice ("FCJ") in *Sisvel v Haier II* (See, VBB on Competition Law, Volume 2021, No. 6). In the same vein, if a SEP holder's first offer was on FRAND terms, it is not obliged to react to any less advantageous counteroffer of the implementer. The Court would only assess whether the SEP holder's was on FRAND terms if the parties complied with the other steps of the FRAND negotiation framework established by the Court of Justice of the European Union ("ECJ") (See, VBB on Competition Law, Volume 2015, No. 7).

In the present case, the Court found that a FRAND compliance assessment was not required because *HMD Global* failed to provide an adequate security which should have reflected the (last) offer of the SEP holder – and not its counteroffer. Furthermore, as the SEP holder had offered a global SEP portfolio licence, the security could not be limited to patents in the relevant dispute in Germany. Referencing the recent UPC ruling in *Huawei v Netgear*, the Court also stated that the security must be provided in a binding form (a so-called "qualified security").

The Court has allowed an appeal to the FCJ. If the latter were to consider that the application of the *Huawei v ZTE* FRAND negotiation framework is unclear, it would be obliged, as a matter of EU law, to refer questions to the ECJ for a preliminary ruling.

INTELLECTUAL PROPERTY/LICENSING

National level

Impact

The present ruling continues the SEP holder friendly approach of German courts. Implementers that consider bringing a FRAND defence will need to provide an adequate and qualified security reflecting the SEP holder's offer even when it has not been established that such offer is FRAND compliant.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

Unannounced Inspections - Recent Developments

Recent judgments and decisions at both the national and EU levels indicate that companies continue to face significant fines for failing to preserve and produce electronic files during unannounced inspections (dawn raids), and face significant challenges when seeking to overturn inspection decisions in appeals to the courts.

In a ruling of 31 March 2025, the Finnish Market Court imposed a € 1.5 million fine on Attendo Suomi Oy ("Attendo") because an employee deleted work-related WhatsApp conversations and the phone call log during an investigation by the Finnish Competition and Consumer Authority ("FCCA"). The inspection concerned companies and a trade association active in the national market for care services. The fine imposed by the Market Court was the first such penalty imposed in Finland, but was significantly lower than requested by the FCCA because the Market Court decided that more weight should be granted to the cooperation provided by Attendo in restoring the deleted information.

Similarly, in a press release dated 19 March 2025, the Polish Competition Authority ("UOKiK") announced that it had fined the company M.A.S. for obstructing an unannounced inspection, conducted as part of an investigation by the authority into suspected bid rigging on the market for the supply of cooling and ventilation equipment. According to UOKiK, the President of M.A.S. failed to immediately provide access to the business phones of two employees suspected of participating in anticompetitive conduct. For one employee, access to the data was provided after a delay of over two months. For the other, the data from the employee's storage media was never provided. The authority therefore imposed separate fines on the company and its President of PLN 350,000 and PLN 50,000 respectively.

Key takeaways

The above rulings demonstrate the importance of regular trainings for employees that may face competition law inspections, as well as close collaboration between legal and IT teams to ensure that procedures are in place that allow the company to quickly lock-down and produce data in the event of an unannounced inspection, including on business phones and messaging apps.

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