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VBB on Competition Law

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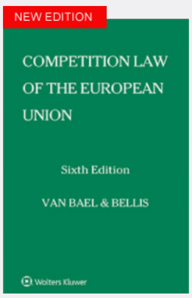

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MERGER CONTROL

National level

FRANCE

French Competition Authority grants derogation of standstill obligation despite competition concerns

On 13 March 2025, the French Competition Authority ("FCA") announced that it had cleared the acquisition by supermarket chain Carrefour of the French operations of rival retailer Louis Delhaize. The clearance was conditional on Carrefour divesting seven stores to competing banners and terminating a franchise agreement in favour of a rival banner, in order to ensure that consumers would continue to have access to sufficient alternatives post-transaction.

Notably, after Carrefour notified its planned acquisition, the FCA granted a derogation from the suspensive effect of merger control (i.e., the standstill obligation), allowing the transaction to be completed before approval. This is remarkable since derogations are normally only granted in exceptional circumstances where the transaction does not raise any prima facie competition concerns – whereas, in this instance, divestiture commitments indicated that there were such concerns.

The FCA's full decision, once published, is expected to provide further insight into the reasoning behind this exceptional derogation.

THE NETHERLANDS

Dutch Competition Authority calls in non-notifiable merger for potential abuse of dominance

On 7 March 2025, the Dutch Competition Authority ("DCA") announced the launch of an antitrust investigation into Brink's recent acquisition of the Dutch branch of German cash-in-transit company Ziemann. While the transaction did not meet the turnover thresholds for a mandatory merger control notification, the DCA is investigating whether the transaction amounts to an abuse of dominance. This marks the first time the DCA has applied the European Court of Justice's *Towercast* ruling, which confirmed that Article 102 TFEU's prohibition of abuses of dominance can be applied to scrutinize mergers that are not subject to mandatory notification.

This case reflects a broader trend among national competition authorities relying on the *Towercast* ruling to scrutinize below-threshold mergers that could harm competition. The Belgian Competition Authority has launched two similar investigations – one into Dossche Mills Group's proposed acquisition of Ceres' artisan bakery segment and another into Proximus's bid to buy EDPnet (See VBB on Belgian Business Law, Volume 2025, No. 1). Likewise, the French Competition Authority investigated five non-notifiable mergers in the form of asset-swap transactions in the meat-cutting sector (See VBB on Competition Law, Volume 2024, No. 5).

CARTELS AND HORIZONTAL AGREEMENTS

European Union and United Kingdom

European Commission and CMA reach settlement with major car manufacturers and related associations over end-of-life vehicles recycling cartel

On 1 April 2025, the European Commission announced that it had issued fines totalling €458 million against 15 car manufacturers and the European Automobiles Manufacturers' Association ("ACEA") for their involvement in a cartel concerning end-of-life vehicle ("ELV") recycling. In parallel, the UK Competition and Markets Authority ("CMA") announced total fines amounting to £77.6 million against 10 car manufacturers along with trade associations, ACEA and the Society of Motor Manufacturers and Traders Ltd ("SMMT"), in relation to the same conduct. Both the Commission's and the CMA's decisions were adopted following the settlement of the proceedings with the car manufacturers and trade associations concerned.

Background

In March 2022, the European Commission and the CMA conducted dawn raids at the premises of automotive companies and related associations in the EU and the UK suspected of collusion concerning the collection, treatment and recovery of ELVs.

The investigation was initiated following an immunity application made by Mercedes-Benz in 2019 in which it informed the Commission and the CMA of the suspected collusion. As a result, Mercedes-Benz was not subject to a fine from either authority. Stellantis, Mitsubishi and Ford followed suit and submitted their own leniency applications to the Commission, resulting in maximum fine reductions for each entity. Stellantis, Mitsubishi and SMMT equally received a fine reduction following their leniency applications to the CMA after the launch of its investigation.

Commission decision

The Commission concluded that Mercedes-Benz, Stellantis, Mitsubishi, Ford, BMW, Honda, Hyundai/Kia, Jaguar Land Rover/Tata, Mazda, Renault/Nissan, Opel, General Motors, Suzuki, Toyota, Volkswagen and Volvo, along with ACEA had participated in anticompetitive agreements and concerted practices concerning the recycling of ELVs. The Commission categorised these practices as a single and continuous infringement of Article 101 TFEU, which started in 2002 and ended in 2017 and which covered the EEA market.

More specifically, the Commission determined that the parties had colluded on two aspects of ELV recycling. First, the Commission found that the parties had agreed not to pay car dismantlers for processing ELVs, adopting a so-called "zero-treatment-cost strategy" towards them, having agreed to consider the recycling of ELVs to be a sufficiently profitable business. Second, the Commission found that the parties had agreed not to promote how much of an ELV can be recycled, recovered and reused and how much recycled materials are used in new cars. The Commission concluded this aspect of the conduct aimed at preventing recycling performance playing into consumer choice when purchasing vehicles and reducing competitive pressure on manufacturers to exceed their legal requirements.

Trade association ACEA was considered to have facilitated the cartel because it arranged meetings and contacts between the manufacturers involved. ACEA was fined €500,000 for its involvement as facilitator. All the parties admitted to their involvement in the unlawful conduct and agreed to settle the case. The fines imposed on manufacturers other than Mercedes-Benz (which benefited from immunity), ranged from €1.6 million (Jaguar Land Rover/Tata) to €127.7 million (Volkswagen).

CARTELS AND HORIZONTAL AGREEMENTS

European Union and United Kingdom

CMA decision

The findings of the parallel UK investigation largely align with those of the Commission. In its decision, the CMA found that vehicle manufacturers Mercedes-Benz, BMW, Ford, Jaguar Land Rover, Peugeot Citroen, Mitsubishi, Nissan, Renault, Toyota, Vauxhall and Volkswagen along with two trade associations, ACEA and SMMT, had engaged in similar conduct in the UK, which had also lasted from 2002 to 2017.

More particularly, the UK authority concluded that manufacturers had agreed not to advertise whether their vehicles exceeded the legal requirements for recyclability and not to pay companies for ELV recycling services. In terms of trade association involvement, the CMA determined that ACEA meetings had been used to facilitate and maintain the unlawful practices and that the SMMT had also attended relevant meetings and intervened in disputes.

In contrast to the single overall infringement found by the Commission, the CMA considered that the two practices – the agreement on advertising and the agreement not to pay for ELV recycling services – constituted two single and continuous infringements of the Chapter I prohibition of the Competition Act 1998. All the car manufacturers and industry associations concerned admitted their participation in the anticompetitive conduct and settled the proceedings. The total fines imposed on vehicle manufacturers ranged from £898,531 (Mitsubishi) to £18.5 million (Ford).

Key takeaways

This investigation is one of the largest cartel investigations conducted by the Commission in several years and marks the first cartel investigation in which the Commission and CMA have engaged in such close coordination post-Brexit. The case also highlights the commitment of the EU and UK authorities to ensure that companies continue to compete to promote and invest in recycling their products, which fits within the broader policy objective of promoting a sustainable and circular economy. In addition, the case provides an example of how cartel enforcement may apply to coordination on purchasing terms even if most cases concern coordination on sales terms.

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CARTELS AND HORIZONTAL AGREEMENTS

European Union level

General Court largely upholds European Government Bond cartel decision

On 26 March 2025, the General Court ("GC") issued its judgments in relation to the actions brought by UBS, Natixis, Nomura, Bank of America, UniCredit and Portigon against a 2021 European Commission Decision, which had found that these seven investment banks had participated in a cartel on the EEA market for European Government Bonds ("EGBs"). The General Court largely upheld the Decision but slightly reduced the fines imposed on Nomura and Unicredit (Joined cases T-441/21, T-449/21, T-453/21, T-455/1, T-456/21 and T-462/21, *UBS Group and others v Commission*).

Background

In July 2015, the European Commission began an investigation into suspected collusion between seven banks following an application for immunity filed by the Royal Bank of Scotland (now NatWest). In March 2021, the Commission issued a decision which found that NatWest, Nomura, UniCredit, WestLB, Bank of America, Natixis and UBS had colluded in the primary and secondary market for EGBs in the EEA between January 2007 and November 2011.

According to the Commission, the collusion was carried out by traders who were in regular contact, predominantly through chatrooms. The traders shared commercially sensitive information, including prices and volumes of EGBs before auctions, prices displayed to customers and their market and bidding strategies. These communications were found to have as their object the restriction of competition in the EEA-wide EGB market.

Total fines of €371 million were imposed on Nomura, UBS and UniCredit. As the successful immunity applicant, NatWest was not subject to a fine. The imposition of financial penalties for the conduct of Bank of America and Natixis was time-barred. No fines were imposed on Portigon since it had a net turnover of zero during the last business year of the infringement.

Judgment

The banks challenged the 2021 decision on a number of grounds which were largely dismissed by the GC, including alleged infringements of their rights of defence, alleged errors as to the classification of the conduct as a single and continuous infringement and alleged errors in the characterisation of the infringement as a restriction by object.

Nomura, Portigon and UniCredit also claimed that they should not be held liable for the conduct of their traders, arguing that they had acted on their own initiative and did not hold management functions. The GC upheld the findings of the Commission on this point and concluded that an employee working for and under the direction of an undertaking is part of the economic unit formed by that undertaking. Accordingly, a company is liable for its employee's anticompetitive conduct even if the company's management had not authorised and was not aware of it. Therefore, the banks could not escape liability for their traders' conduct.

However, the GC found that the Commission had committed two errors when calculating the fines imposed on Nomura and UniCredit. As regards UniCredit, the GC found that the Commission had been wrong to find that UniCredit's participation in the cartel began when they initially logged into the chatroom concerned as no sensitive information was shared until a later date. Therefore, UniCredit could not be considered to have tacitly colluded at this point and their infringement instead began when their trader actively participated in the exchange of sensitive information. On this basis, the GC established that the duration of UniCredit's participation was 17 days later than found by the Commission and accordingly reduced the fine imposed on UniCredit from €69.4 million to €65 million. As regards Nomura, the GC criticised the Commission for not taking into account certain data that was relevant to the fine calculation and reduced the fine imposed on Nomura from €129.5 million to €125.6 million.

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European Union level

Key Takeaways

The GC judgments largely uphold the Commission's decision, while granting modest fine reductions to Nomura and UniCredit based on their specific factual circumstances. This is not the first time the Commission has fined a group of investment banks for engaging in a cartel in bonds markets. In April 2021, Bank of America, Merrill Lynch, Crédit Agricole, and Credit Suisse faced a total fine of €28 million for participating in a cartel in the secondary trading market within the EEA of Supra-sovereign, Sovereign and Agency (SSA) bonds (See VBB on Competition law, Volume 2021, No. 5). The GC's judgments make it clear that companies will be held liable for the anticompetitive conduct carried out by their employees even where this is not directed by or even known to company management.

CARTELS AND HORIZONTAL AGREEMENTS

National level

UK CMA fines four major sports broadcast and production companies £4 million for pay-related collusion

On 21 March 2025, the Competition and Markets Authority ("CMA") announced that it had issued an infringement decision against five major sports broadcast and production companies: BT, IMG, ITV, Sky and BBC. The CMA identified 15 separate bilateral infringements of competition law involving collusion on pay rates for freelance workers. Sky reported its involvement in the anticompetitive conduct to the CMA under the leniency programme and received immunity. The four remaining companies settled, agreeing to pay fines amounting to £4,240,356.

Background

On 12 July 2022, the CMA initiated an investigation into suspected breaches of Chapter I of the Competition Act 1998 by sports broadcast and production companies. The CMA opened an investigation after Sky informed it of the unlawful conduct.

Notably, this decision is the first time the CMA has found an infringement of competition law concerning labour markets. On the same day as the infringement decision, the CMA closed a comparable investigation into possible coordination on pay rates for freelance workers involved in the production and broadcasting of non-sports related content, opting instead to communicate its concerns around possible anti-competitive behaviour to the companies under investigation in order for them to take remedial action. Additionally, the CMA announced that – in the coming months – it will publish updated guidance to help employers avoid anti-competitive conduct in labour markets.

Infringement decision and fines

In its decision, the CMA identified 15 separate bilateral infringements of competition law involving either an exchange or a disclosure and receipt of information relating to the pay of freelance workers. The commercially sensitive information shared included pay rises and day rates. The CMA determined that all of these instances amounted to by object restrictions, with ten restrictions considered to have coordination on pay as their primary objective. Coordination on pay rates concerned a number of freelance roles involved in the production and broadcasting of sports in the UK, including sound technicians, technical producers and camera operators.

BT, IMG, ITV and BBC settled and admitted they had engaged in anticompetitive conduct – and, as a result, the four companies benefited from a fine reduction (with BT, IMG and ITV receiving a further fine reduction for assisting the CMA under the leniency programme). The breakdown of the fines imposed is as follows:

- BT was fined £1,738,453 (reflecting a 15% leniency discount and a 20% settlement discount) for 6 infringements that took place between August 2014 and September 2021.

- IMG was fined £1,737,820 (reflecting a 40% leniency discount and a 20% settlement discount) for 6 infringements that took place between April 2016 and October 2021.

- ITV was fined £339,918 (reflecting a 42.5% leniency discount and a 20% settlement discount) for 5 infringements that took place between March 2014 and May 2018.

- BBC was fined £424,165 (reflecting a 20% settlement discount) for 3 infringements between July 2016 and October 2021.

CARTELS AND HORIZONTAL AGREEMENTS

National level

While Sky committed 10 infringements between March 2014 and January 2021, it was granted immunity and was thus not subject to a fine.

Key Takeaways

This decision marks the first finding of an infringement by the CMA specifically concerning labour market conduct, and suggests that – notwithstanding the closure of the related CMA investigation into non-sports broadcasting – such issues remain an enforcement priority for the CMA (and European competition authorities more generally) (See, for example, VBB on Competition Law, Volume 2025, No. 2). Accordingly, this development serves as a timely reminder that labour market-related conduct should be firmly incorporated into the compliance policy of every company doing business in the UK or indeed elsewhere in Europe.

VERTICAL AGREEMENTS

European Union level

European Commission conducts unannounced inspections in the non-alcoholic drinks sector

On 10 March 2025, the European Commission announced that it had carried out unannounced inspections (dawn raids) at the premises of companies active in the non-alcoholic beverages sector in several Member States. In parallel, the Commission stated that it had sent a formal request for information to a company active in the personal care sector. According to the press release, the inspections form part of an investigation into possible restrictions on the cross-border trade of goods within the EU internal market and potential market segmentation practices, which may still be ongoing in several Member States. The Commission indicated that the suspected conduct may fall under both Article 101 and Article 102 TFEU.

The Commission's latest investigative steps underscore its continued focus on tackling suspected conduct that restricts cross-border sales within the EU, particularly where such conduct helps maintain price differences between Member States for branded products. In May 2024, the Commission imposed its highest-ever fine in a case involving cross-border sales restrictions in the *Mondelēz* decision (see VBB on Competition Law, Volume 2024, No. 5). This was followed in November 2024 by fines on Pierre Cardin and its principal licensee, Ahlers, for preventing other Pierre Cardin licensees and their customers from selling branded products to retailers outside their licensed territories (see VBB on Competition Law, Volume 2024, No. 11). The latest dawn raids further demonstrate that the Commission consistently treats suspected restrictions on cross-border trade as serious enough to justify unannounced inspections, as was also the case in both *Mondelēz* and *Pierre Cardin*.

INTELLECTUAL PROPERTY/LICENSING

European Union level

AG Opinion backs up the General Court's "pay-for-delay" findings in Teva and Cephalon Case

On 27 March 2025, Advocate General ("AG") Rantos delivered an opinion in which he recommended that the Court of Justice of the European Union ("CJEU") should uphold the General Court's dismissal of the application for annulment filed by Teva Pharmaceutical Industries Ltd ("Teva") and its (now) subsidiary Cephalon Inc ("Cephalon") (Case C-2/24, *Teva Pharmaceutical Industries and Cephalon v Commission*).

The proceedings concern an appeal of the decision by the European Commission ("Commission") to impose a fine of €60.5 million on pharmaceutical companies Teva and Cephalon for agreeing to delay for several years the market entry of a generic version of Cephalon's medicine for sleeping disorders, modafinil, after Cephalon's main patents had expired. According to the Commission, under the so-called "pay-for-delay" settlement agreement concluded between the parties, Teva committed to respect both a non-compete and a non-challenge clause and concluded with Cephalon a package of transactions amounting to a "transfer of value" in favour of Teva. These included (i) a licence granted by Teva to Cephalon under the IP rights held by Teva relating to the active substance concerned, (ii) access granted by Cephalon to Teva to clinical data it had co-developed, (iii) the supply of certain raw materials by Teva to Cephalon, (iv) payments from Cephalon to Teva for avoiding litigation costs, and (v) a distribution agreement in favour of Teva for the UK market (See VBB on Competition Law, Volume 2023, No. 10). The Commission found that the agreement infringed Article 101 TFEU because it prevented competition on the merits between the parties, a finding that was predicated on Teva otherwise having entered various Member State markets with a generic version of modafinil.

The General Court dismissed the appeal on the grounds that the pay-for-delay agreement constituted a 'restriction of competition by object' (See VBB on Competition Law, Volume 2023 No. 10). An appeal to the Court of Justice followed.

In his Opinion, AG Rantos considers that the General Court applied the right test to determine whether the agreement concluded between Teva and Cephalon constituted a restriction of competition by object. According to AG Rantos, not all pay-for-delay agreements resolving patent disputes constitute a breach of Article 101 TFEU. These agreements can be justified when the "net gain" is compensation for the costs or disruption caused by litigation, or provides a remuneration for the actual supply of goods or services by the supplier of the generic medicine. Conversely, if the payment for the delay is excessive in relation to those costs, compensates for non-compete commitments in different markets, or reaches beyond the scope of the original patent, the net gain is likely not justified.

According to AG Rantos, if the net gain is not justified, it must be ascertained whether the transfer of value has no other explanation than the commercial interest of preventing the parties from entering into competition on the merits. This test is satisfied if the transfer for value is sufficiently large to actually provide an incentive for the generic manufacturer to stay out of the market and not to compete with the originator of the medicine. However, this does not require that the net gain exceeds the profits likely to be made if the generic manufacturer had entered the relevant market. A case-by-case analysis will be required of the whole agreement (i.e., of both the commitments not to compete/challenge IP and the individual transactions) including its economic and legal context.

In light of the above, AG Rantos held that General Court applied the correct legal test in assessing that the transfer of value was aimed to induce Teva not to enter the market, and that no plausible alternative explanation for the transactions was provided by the appellants. In particular, the payment of €5.57 million exceeded the cost for litigation and the non-compete commitment went beyond Cephalon's patents. Thereby, contrary to what the

INTELLECTUAL PROPERTY/LICENSING

European Union level

appellants claimed, the General Court did not reverse the burden of proof by requiring the parties to demonstrate that their alternative explanations for the transfer of value were certain, which the appellants had claimed would be impossible to demonstrate in practice. Furthermore, the Advocate General rejected the appellants' argument that the General Court had improperly based its finding of an object restriction on a counterfactual-based effects assessment (by assessing whether the transactions in favour of Teva would have been concluded in any event under normal market conditions, i.e., absent the non-compete and no-challenge commitments agreed by Teva).

The Opinion also finds – considering the appellants' arguments on the point to be based on an erroneous reading of the judgment – that the General Court's judgment did not contain the alleged errors in reasoning in its analysis of the alleged pro-competitive effects of the agreements at issue. Furthermore, relying on the clarification to the caselaw provided by the CJEU in *European Superleague Company* and *Servier*. AG Ramos noted that – in any event – potential pro-competitive effects do not need to be taken into account in assessing whether an agreement has the object of restricting competition.

Finally, the Opinion also rejects the plea alleging errors in the General Court's assessment of anti-competitive effects on the grounds that such effects likewise do not need to be considered where it is established that the agreement has the object of restricting competition.

It remains to be seen if the CJEU will follow the Opinion in this complex area of the law.

STATE AID

European Union level

Commission finds that an arbitration award requiring Spain to pay compensation to an EU company constitutes incompatible State aid

On 24 March 2025, the Commission announced the closure of its in-depth investigation on the State aid compatibility of an arbitral award rendered between Spain and an EU-based company. By building on previous case-law of the Court of Justice of the European Union ("CJEU"), the Commission found that the award constitutes incompatible State aid and should, therefore, not be enforced.

An investor-State arbitration was initiated in 2013 by the Luxembourg-based company Antin Infrastructure Services Luxembourg S.à.r.l. and its Dutch subsidiary Antin Energia Termosolar B.V. ("Antin"), which had invested in two companies producing electric energy in Spain. Antin claimed that the regulatory changes introduced by the Spanish legislator to a scheme supporting the production of renewable energy violated its rights under the Energy Charter Treaty ("ECT"), since they severely affected its expectations to obtain a return on its investments. In 2018, the arbitral tribunal that was set up to resolve the dispute found that Spain had breached the ECT by failing to grant fair and equitable treatment to Antin's investments. Spain was thus required to pay compensation of EUR 101 million (plus interest and legal costs).

In 2019, Spain notified the award to the Commission to have it reviewed under the State aid framework. After initiating a formal investigation, the Commission announced on 24 March 2025 that the arbitration award is incompatible with the EU State aid rules. Indeed, by referring to the CJEU judgments in Achmea (C-284/16) and Komstroy (C-741/19), the Commission observed that intra-EU investor arbitration – such as that at issue in the case under discussion – violates the jurisdiction of the CJEU and the primacy of EU law. Hence, the Commission concluded that the award amounted to incompatible State aid because a measure that infringes other provisions of EU law cannot be compatible with the State aid framework.

Comment

Following this decision, the likelihood of enforcement of this award within the EU appears at this stage extremely limited, especially in light of the case-law mentioned above. Nevertheless, the award remains enforceable outside the EU, in line with international law. Indeed, Antin has sought enforcement in other jurisdictions, such as in the UK, where the national courts recently sided with the company.[1]

In light of the conflict between international law and EU law in in relation to intra-EU investor arbitration, the EU has taken active steps to limit the impact of such conflict on the EU legal order. Besides the Commission decisions consistently considering intra-EU arbitral awards as incompatible State aid, it is worth recalling that the EU and some of its Member States (including Spain) notified their withdrawal from the ECT, due to the failure of its parties to reach a unanimous agreement to amend the ECT, including the scope of the investor-State arbitration clause. In addition, the EU and its Member States also adopted, in 2024, a common declaration making clear that the ECT investor-State arbitration clause is not applicable in case of intra-EU arbitration, hoping to further limit its effectiveness under international law. [2] Given this resolve, it will be interesting to see whether the Commission will in the future use other tools at its disposal (e.g., the Foreign Subsidies Regulation) to try to de facto nullify the effects of a potential enforcement of the award in a third country, so as to discourage companies from further pursuing intra-EU arbitrations.

1 See judgment of the Court of Appeal of England and Wales of 22 October 2024 in Infrastructure Services Luxembourg SARL & Anor v The Kingdom of Spain.

2 Declaration on the legal consequences of the judgment of the Court of Justice in Komstroy and common understanding on the non-applicability of Article 26 of the Energy Charter Treaty as a basis for intra-EU arbitration proceedings, 2024/2121.

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