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VBB on Competition Law

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vbb@vbb.com
www.vbb.com

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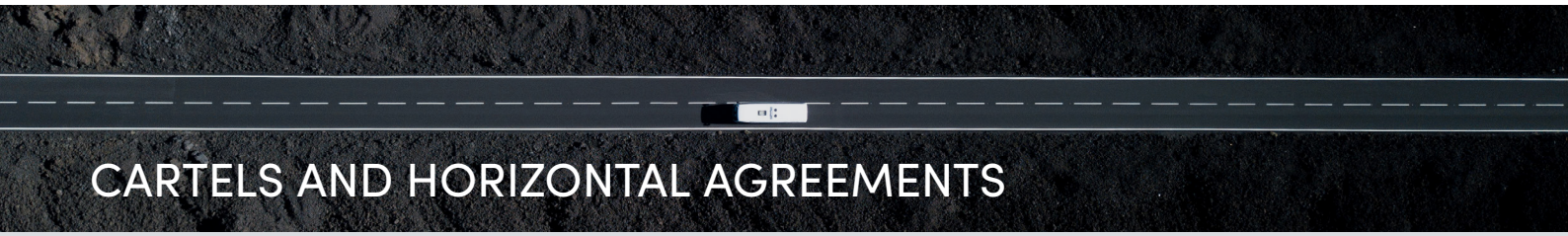
Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com



CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Court of Justice issues important judgments on the application of EU competition law to sports federations in the ISU and ESL cases

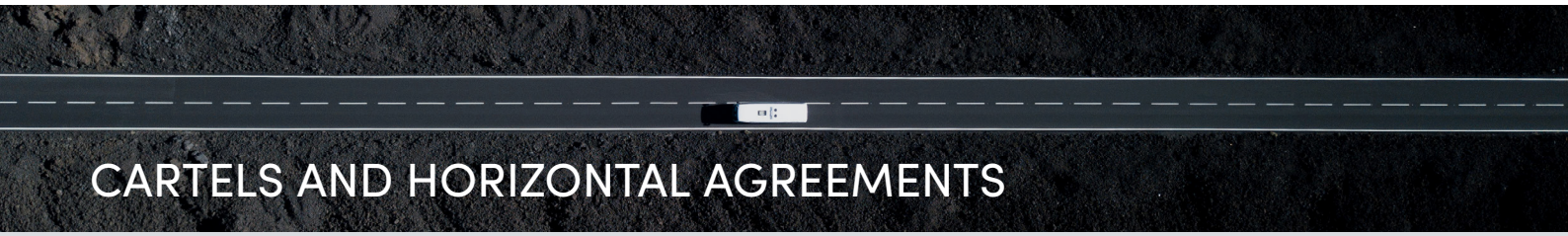
On 21 December 2023, the Court of Justice of the European Union ("Court of Justice"), in its Grand Chamber composition, delivered two important judgments relating to the application of EU competition law to sports federations in Cases C-124/21 P, *International Skating Union* ("ISU") and C-333/21, *European Superleague Company* ("ESL").

The *ISU* judgment concerns a Commission decision adopted on 8 December 2017, which was the first decision under Article 7 of Regulation 1/2003 involving a sports federation. In that decision, in which no fine was imposed, the Commission found that the ISU had infringed Article 101 TFEU by adopting and enforcing its eligibility rules with respect to speed skating ("Eligibility Rules") which were found to restrict competition by object and by effect. The ISU Eligibility Rules provide that skaters may only take part in skating competitions which are authorised by the ISU or its members and which comply with the rules set out by the ISU. In that decision, the Commission also took the view that the compulsory grant of exclusive jurisdiction to the Court of Arbitration for Sport ("CAS") over disputes relating to the application of the ISU Eligibility Rules, while not constituting in itself an infringement of EU competition law, reinforced the restriction of competition resulting from the Eligibility Rules.

In its appeal to the General Court, the ISU argued that the Commission had wrongly found that its conduct amounted to a restriction of competition. All the applications for authorisation of third-party skating competitions submitted to the ISU had been approved with the sole exception of an event planned in Dubai to showcase a new concept of speed skating competitions combined with betting which the ISU considered to be inconsistent with its ethical rules.

On appeal, the General Court accepted that a pre-authorisation system, intended to ensure that any third-party event organiser respect common standards, is not prohibited by Article 101 TFEU. The General Court also acknowledged that "*it was legitimate for the applicant to establish rules seeking to prevent sports betting from creating risks of manipulation of competitions and athletes*". The General Court nevertheless upheld the Commission's finding that the ISU's Eligibility Rules constituted a restriction of competition by object on the ground that they went beyond what was necessary to achieve those legitimate objectives in so far as there was no direct link with such legitimate objectives and disproportionate sanctions were imposed. The General Court refrained from considering whether the rules had the effect of restricting competition: according the Court, the finding of infringement in the Commission decision solely related to the content of the Eligibility Rules and not to the ISU's conduct in applying the rules which was allegedly only referred to as an "*illustration*" of how the rules are applied. As regards the CAS, the General Court disagreed with the Commission's assessment that the grant of jurisdiction to CAS reinforced the restriction of competition at issue and annulled that part of the Commission decision.

The ISU lodged an appeal before the Court of Justice challenging the finding of restriction of competition by object made by the General Court. The ISU also criticised the General Court judgment for failing to address the ISU's argument about the legitimate nature of its refusal to approve the Dubai event, which was the only third-party skating event that the ISU had ever refused to authorise under its Eligibility Rules.



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European Union level

In an Opinion issued on 15 December 2022, Advocate General Rantos agreed with the ISU's argument that the General Court had not validly established that the ISU's Eligibility Rules are a restriction of competition by object. The Advocate General advised the Court of Justice to annul the finding of restriction of competition by object and to refer the case back to the General Court to ascertain whether the rules at issue have the effect of restricting competition.

In its judgment, the Court of Justice upheld the finding of restriction of competition by object made in the Commission decision and the General Court's judgment. The Court did not address the issue of how the ISU Eligibility Rules had been applied in practice as it considered that the finding of infringement in the Commission decision related exclusively to the rules as they were written and not as they were applied. As regards the CAS, the Court overturned the General Court's annulment of that part of the Commission decision.

The *ESL* judgment stems from a request for a preliminary ruling by a Madrid Commercial Court concerning the interpretation of the TFEU's provisions on competition law and the freedom to provide services in the context of a dispute involving UEFA's refusal to approve the setting up of a new interclub football competition by a third-party undertaking. In reply to the questions posed by the Madrid court, the Court of Justice held in essence that the rules under which UEFA made its decisions infringe Articles 101, 102 and 56 TFEU where there is no framework providing for substantive criteria and detailed procedures suitable for ensuring that the rules at issue are transparent, objective, non-discriminatory and proportionate.

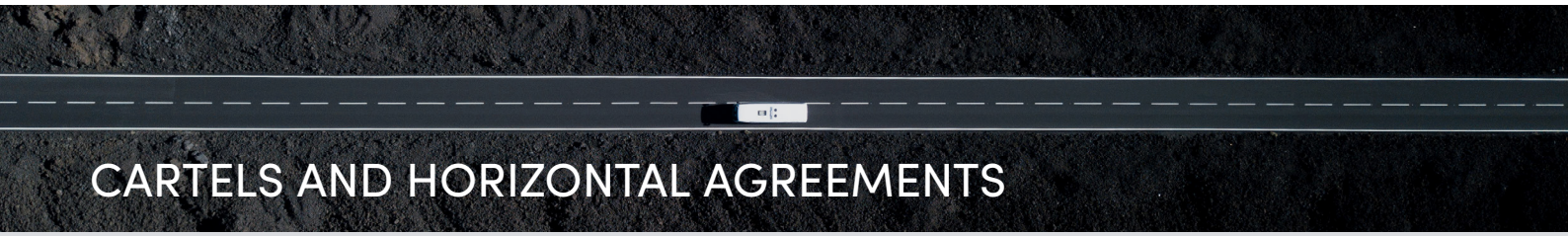
While a number of questions relating to the exploitation of commercial and media rights are discussed in the *ESL* judgment, this note will focus on two aspects of the *ISU* and *ESL* judgments which are of major practical interest for international sports federations, namely (1) the status of prior authorisation systems under EU competition law and (2) the extent to which compulsory exclusive jurisdiction can be validly granted to the CAS over disputes involving sports federations under EU competition law.

The status of prior authorisation systems under EU competition law

The question of whether prior authorisation systems applied by sports federations are consistent with EU competition law was at the core of the *ISU* case.

The initial position taken by the Commission in the Statement of Objections issued during the administrative procedure was that a compulsory prior authorisation system, combined with a general prohibition for athletes to participate in unauthorised events, was prohibited by Article 101(1) TFEU and could not be justified as pursuing a legitimate objective under the *Meca-Medina* case law. Under the *Meca-Medina* case law, an otherwise restrictive agreement does not fall within the scope of Article 101(1) TFEU if that agreement: 1) is justified by the pursuit of legitimate objectives in the public interest; 2) the means used to pursue those objectives are genuinely necessary for that purpose; and 3) the restriction does not go beyond what is necessary, in particular by eliminating all competition. The Commission was only prepared to accept a voluntary prior authorisation system, not a compulsory one imposed on athletes.

However, following interventions by the International Olympic Committee and EU Athletes (an association representing professional athletes which intervened in the judicial proceedings in support of the Commission), the Commission changed its position. In the Decision, the Commission gave the ISU the option of either abandoning its pre-authorisation system or maintaining it by making a number of changes. The ISU took the latter option and, following implementation discussions with the Commission, adopted a new version of its Eligibility Rules. As regards the legal status of prior authorisation system, however, the Commission refrained from determining whether a compulsory prior authorisation system was consistent with Article 101 TFEU.



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European Union level

This question, which the Commission left unanswered in the Decision, was addressed by the General Court in its judgment. The General Court accepted that the ISU's pre-authorisation system is a "*suitable mechanism*" to achieve the legitimate objective of ensuring compliance with common standards. Nevertheless, the General Court upheld the Commission's conclusion that the ISU's pre-authorisation system restricted competition by object because some aspects of the approval process for third-party events allegedly went beyond what was necessary to pursue the legitimate objective of ensuring that sporting competitions comply with common standards.

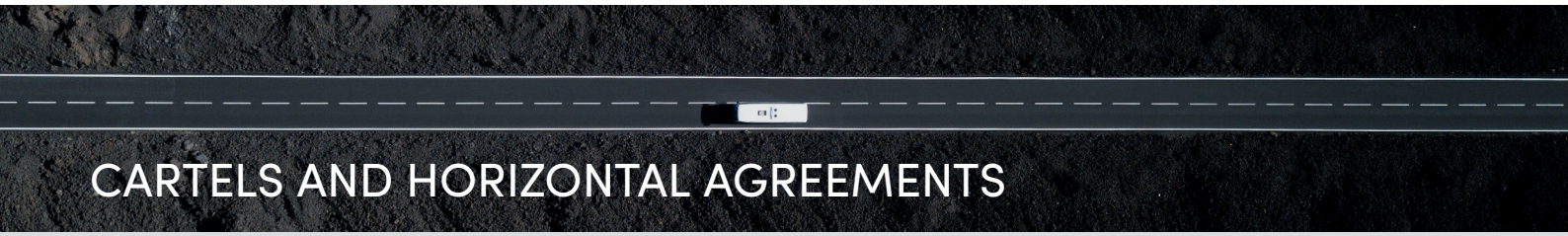
Advocate General Rantos in his Opinion agreed with the ISU that an analysis of whether or not the prior authorisation rules at issue were disproportionate to the legitimate objective pursued by such a system could not serve as a basis for a finding of a restriction of competition by object. The Advocate General considered that such an approach would unduly extend the concept of restriction of competition by object, contrary to the established case-law of the Court of Justice requiring a restrictive interpretation of that concept. According to the Opinion, it is only by looking at how the rules are applied in practice under a by effect analysis that their consistency with Article 101 can be validly assessed.

This approach was not followed by the Court of Justice in its judgment. The Court considered that the mere fact that the rules of a prior authorisation system may be regarded as not being "*transparent, objective, non-discriminatory and proportionate*" suffices for the system to be characterised as a restriction of competition by object. The anti-competitive object of the rules may be inferred from the mere fact that they "*are thus able to be used to allow or exclude from that market any competing undertaking, even an equally efficient undertaking, or at least restrict the creation and marketing of alternative or new competitions in terms of their format or content*". This conclusion is based exclusively on an analysis of the wording of the rules "*considered as such and therefore independently of their application to specific cases*". The Court also made it clear that whether or not the rules were intended to exclude third-party sporting event organisers is irrelevant to the finding of that specific restriction by object.

In embracing this purely procedural interpretation of the concept of a by object restriction of competition under Article 101(1) TFEU, the Court of Justice judgment has in effect introduced into Article 101 TFEU the concept of abuse of a dominant position which it developed in the parallel ESL judgment. In that judgment, the Court held that the prior authorisation rules of a sports federation constitute an abuse of a dominant position where there is no framework providing for substantive criteria and detailed procedures suitable for ensuring that the rules are transparent, objective, non-discriminatory and proportionate.

Since, as shown above, the by object restriction of competition set out by the Court integrates the *Meca-Medina* case law, that case law cannot be relied upon to call into question the finding of restriction of competition by object applied to a pre-authorisation system that is not based on transparent, objective, non-discriminatory and proportionate rules, as the Court has made it clear. The *Meca-Medina* case law may, however, be relied upon to justify actual decisions by a sports federation not to authorise third party events in the context of a by effect analysis.

As a practical matter, sports federations should take comfort in the fact that their right to have a prior authorisation system for third-party sporting events has been expressly upheld by the Court of Justice. Such a prior authorisation system does not constitute a restriction of competition by object as long as it is based on substantive criteria and detailed procedural rules that are transparent, objective, non-discriminatory and proportionate. In the analysis of whether the application of such a system has the effect of restricting competition, sports federations may rely on the legitimate objectives pursued by the rules.



CARTELS AND HORIZONTAL AGREEMENTS

European Union level

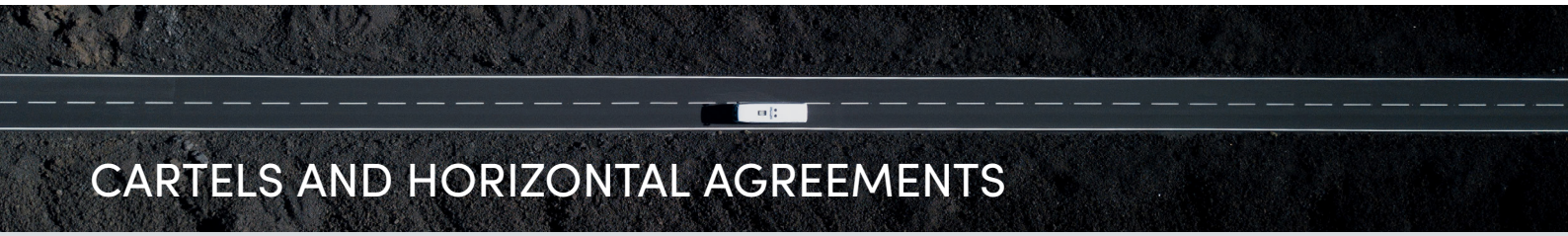
The extent to which compulsory exclusive jurisdiction can be validly granted to the CAS over disputes involving sports federations under EU competition law

The ISU Court of Justice judgment addresses the question of whether compulsory exclusive jurisdiction granted to the CAS is consistent with EU competition law.

In its decision, the Commission had taken view that such a grant, while not constituting in itself an infringement of EU competition law, reinforced the restriction of competition in the ISU pre-authorisation system, as then written. According to the Commission, the grant of exclusive jurisdiction to the CAS prevented interested parties from raising EU competition law arguments before Member State courts which alone have the power to submit requests for preliminary rulings to the Court of Justice. While the General Court and Advocate General Rantos disagreed with that assessment, the Court of Justice upheld it even though the Commission had not appealed the General Court judgment on this point (which was only the subject of a cross-appeal by the interveners).

The Court of Justice, however, went out of its way to stress the very limited impact of its judgment. First, the Court of Justice made it clear that it does not question the existence, organisation or operation of the CAS as an arbitration body, nor its exclusive jurisdiction with respect to pure sporting or technical rules. Second, the Court also emphasised that EU law only applies to the implementation of pre-authorisation rules in the territory of the EU, not outside of the EU. This is somewhat ironic bearing in mind that the refusal to approve a third-party speed skating event that triggered the complaint which led to the ISU decision concerned an event planned in Dubai. Third, the Court also noted that the grant of exclusive jurisdiction to the CAS was imposed on athletes in the ISU rules.

From the careful language used by the Court in its judgment it can be inferred that, in cases involving the application of a prior authorisation system relating to an event taking place in the territory of the EU, the relevant parties should not be required by the rules to have exclusively recourse to the CAS. This matter should be left to their discretion. But, for all other disputes, in particular those relating primarily to the application of ethical, technical and sporting rules, as well as those involving events in non-EU countries, a compulsory grant of exclusive jurisdiction to the CAS should not raise any EU law issue.



CARTELS AND HORIZONTAL AGREEMENTS

National level

FRANCE

French Competition Authority sanctions food container producers for collusion on use of Bisphenol A

On 11 January 2024, the French Competition Authority ("FCA") fined three professional canned food associations, namely the *Fédération des Industries d'Aliments Conservés* (FIAC), the *Association des Entreprises de Produits Alimentaires Elaborés* (ADEPALE) and the *Association Nationale des Industries Alimentaires* (ANIA), as well as can manufacturers' trade union the *Syndicat National des Fabricants de Boîtes, Emballages et Bouchages Métalliques* (SNFBM) for implementing a collective strategy aimed at preventing manufacturers from competing on the use of Bisphenol A ("BPA") in food containers. Eleven individual companies were also prosecuted and fined as members of these associations because they attended meetings during which the collusive conduct was discussed. The fines totalled approximately € 20 million.

The infringing conduct took place in the context of the progressive ban of BPA, a synthetic chemical used in the manufacture of food contact materials, in particular for the inner protective lining of metal food cans, which had been found to pose health concerns. A French law banned BPA from all food containers as from 1 January 2015. However, in order to sell off existing stocks, products containing BPA that were already on the market on 1 January 2015 could still be sold after that date.

The FCA found that, between October 2010 and July 2015, members of the associations agreed not to compete against each other as regards the presence or absence of BPA in their products. This was made possible by the actions of the associations, namely:

- the associations agreed to encourage manufacturers not to compete on the presence or absence, of BPA in their cans. The parties also tried to convince retailers to follow the same strategy and pressured market players not to label their products as BPA-free.
- FIAC and SNFBM encouraged manufacturers to refuse to supply BPA-free cans before 1 January 2015 and then to refuse to stop selling cans with BPA after this date, despite retailers' requests to quickly switch to BPA-free cans. This is because an early switch to BPA-free products would have made it more difficult to refuse to use the absence of BPA as a selling point.

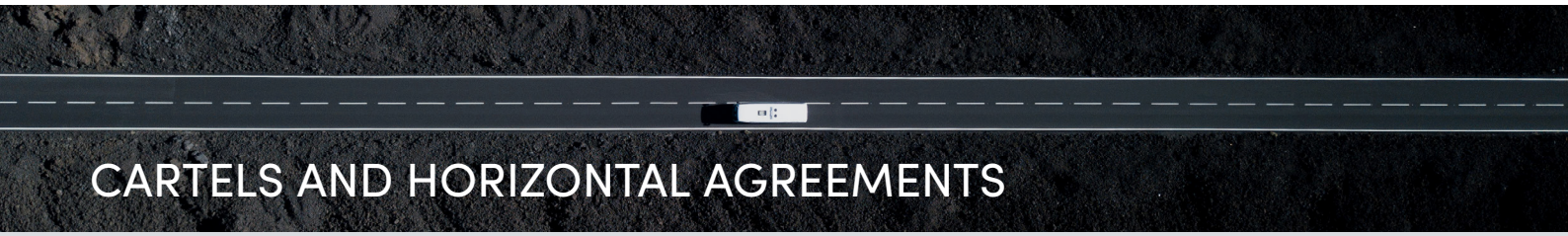
The FCA found that these practices restricted competition by object and aimed at depriving consumers of the possibility of choosing BPA-free products at a time when BPA was already considered to be dangerous.

The parties notably argued that French consumer law proscribes "BPA-free" claims since companies cannot advertise on characteristics that are required by law. In the case of products that can legally include BPA, the parties argued that a "BPA-free" label could be misleading if BPA is used on the outer lining of cans, and that BPA is in any case "ubiquitous". The FCA rejected these arguments. It found that consumer law does not automatically prevent all communication about BPA and that, in any event, the parties agreed to refrain from competing on BPA, which is different from a mere desire to comply with consumer law.

The FCA also ruled that the crisis affecting the sector could not justify the implementation of such practices and that, in any event, they had no pro-competitive effects that could raise doubts as to whether they were sufficiently harmful to competition.

This case is interesting in several respects.

First, this decision establishes that a restriction on a very limited aspect of competition – such as the presence of a specific chemical compound – is sufficient to trigger a cartel investigation and fines. More generally, it reminds companies that arrangements concerning a strategic



CARTELS AND HORIZONTAL AGREEMENTS

response to a change in law (in this case, the upcoming ban of BPA in food containers) may amount to a restriction of competition by object.

Second, the scope of this case is noteworthy. The FCA sent a statement of objections to over 100 companies. However, most of these companies were not ultimately sanctioned as the alleged infringements were time-barred. The FCA found that, despite being invited to participate, retailers did not join the cartel.

Third, in setting the fines, the FCA decided to depart from its own fining guidelines. It observed that the parties were both associations and individual companies of very different nature, role and economic weight. The FCA also noted that the four prosecuted associations had no turnover. As a result, applying the French fining guidelines would have led to the imposition of disproportionate fines.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

National level

UNITED KINGDOM

UK court upholds the CMA's extra-territorial document production powers

On 17 January 2024, the Court of Appeal of England and Wales handed down a significant judgment on the powers of the UK Competition and Markets Authority ("CMA") under section 26 of the Competition Act 1998 ("CA 1998") to require the production of documents and information by foreign companies and their UK subsidiaries.

Overturning the first instance judgment, the Court of Appeal found that the CMA had the power to issue a notice under section 26 CA 1998 (equivalent to a request for information or "RFI" in the European Commission's practice) to (i) legal persons incorporated outside of the UK – thereby requiring them to produce documents and information they hold outside of the UK – and (ii) undertakings comprising UK and non-UK incorporated companies – thereby requiring UK companies to produce documents and information which is under the control of a non-UK company within the same undertaking, and over which the UK company may not have any control as a matter of contract or company law. The judgment is a significant victory for the CMA's ability to investigate anti-competitive conduct affecting the UK market which is agreed upon or devised abroad.

The case arises from two RFIs issued by the CMA in 2022 as part of its investigation into an alleged cartel in the automotive sector. The RFIs were addressed to the "BMW Group" – comprising BMW AG (the German parent), BMW UK (an indirect UK subsidiary of BMW AG) and "any other legal entities within the same undertaking" – and "Volkswagen Group" – similarly comprising Volkswagen AG, Volkswagen UK, and other legal entities. BMW AG informed the CMA that it would not be responding to the RFI because it had been advised that, as a non-UK company, the CMA did not have the power to require it to respond. Subsequently, the CMA imposed an administrative fixed and periodic penalty on BMW AG pending compliance with the RFI. BMW appealed the penalty to the Competition Appeals Tribunal ("CAT"), and Volkswagen AG sought to judicially review the CMA's decision to issue it with a RFI. In a joint judgment, the CAT and the Administrative Court held that the RFIs were ineffective as against BMW AG and Volkswagen AG because section 26 CA 1998 did not grant the CMA an (extra-territorial) power to require non-UK companies to produce information or documents held outside of the UK.

Court of Appeal's judgment

The judgment addresses two issues. First, the Court of Appeal considered whether the CMA's power under section 26 CA 1998 to issue a RFI to "any person" could be exercised against BMW AG and Volkswagen AG (i.e., non-UK companies with no territorial connection to the UK). It found that no territorial limitation could be read into section 26, in view of the extra-territorial reach of other parts of CA 1998. Section 2 CA 1998 (the UK equivalent to Article 101(1) TFEU) covers agreements which "may affect trade within the UK" and which are "intended to be implemented in the UK". Parliament therefore intended to render in express terms the (extra-territorial) implementation test implicitly established in EU law in the *Woodpulp* case. Furthermore, section 25 CA 1998 – the umbrella provision governing the exercise of the CMA's investigatory powers – equally applies to non-UK companies lacking a jurisdictional connection as long as the CMA has reasonable grounds for suspecting their involvement in conduct which "may" affect trade within the UK. Since section 26 CA 1998 is an implementation of the substantive section 2 and of the procedural section 25, the Court of Appeal concluded that Parliament must have intended to give section 26 the same extra-territorial effect. The CMA was therefor entitled to require BMW AG and Volkswagen AG to provide information and documents under their control outside of the UK.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

National level

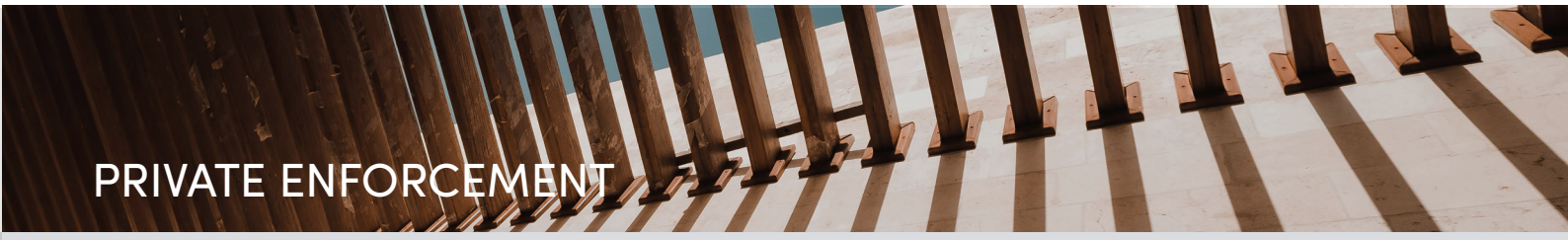
Second, the Court of Appeal considered whether BMW UK and Volkswagen UK could be required by the CMA to provide information and documents under the legal control of other companies belonging to the same undertaking, such as BMW AG and Volkswagen AG. The Court of Appeal first confirmed that the CMA had the power to serve a RFI upon an undertaking (as opposed to only a specific legal person) because the phrase "any person" in section 26 CA 1998 includes "any undertaking" by virtue of section 59 CA 1998. The Court of Appeal then found that a RFI served upon the BMW Group or the Volkswagen Group created a joint and several obligation on all the companies belonging to those undertakings to provide the requested information or documents. Accordingly, any issue concerning the specific company within the undertaking with access to the requested information or documents is a matter internal to the undertaking which is irrelevant to the question of whether the undertaking is complying with the RFI. It followed that it was not open to BMW UK and Volkswagen UK to raise by way of defence the fact that they had no power in company or contract law terms to compel the production of information or documents from BMW AG and Volkswagen AG respectively.

Commentary

The Court of Appeal's position is intuitive as a matter of policy. Without a power to request the production of information or documents held overseas, the CMA "would become largely toothless when confronting international cartels". It is furthermore clear that the judgment will strengthen the CMA's hand in unilateral conduct investigations, as well as investigations under the upcoming Digital Markets, Competition and Consumers Bill.

The Court of Appeal was also seemingly motivated by a desire to align the CMA's powers with those which – in the Court's view – are at the disposal of the European Commission. The Court of Appeal cited the Commission's practice of addressing RFIs to non-EU companies or to the EU subsidiaries of non-EU parent companies with a view to obtaining from the EU subsidiary information on behalf of the entire undertaking. However, the Court of Appeal did not seem to give much weight to the fact that the Commission had consistently taken the view that it does not have the power to impose penalties on a non-EU company which fails to respond to a RFI (which is what the CMA did in respect of BMW AG).

It remains to be seen whether BMW AG and Volkswagen AG will seek permission to appeal to the UK Supreme Court. The Court of Appeal's judgment could be challenged, for example, in light of the presumption against the extra-territorial effect of legislation. In its 2021 judgement in KBR, the Supreme Court, relying on that presumption, held that the Serious Fraud Office did not have the power to compel a US company to produce documents held outside the UK.



PRIVATE ENFORCEMENT

National level

FRANCE

Bordeaux Commercial Court awards Carrefour approximately € 0.6 million in damages despite successful passing-on defence

On 15 December 2023, the Bordeaux Commercial Court awarded Carrefour damages of approximately € 0.6 million from fruit compote supplier Valade in the context of a follow-on damages action.

In December 2019, the French Competition Authority ("FCA") imposed fines on seven fruit compote suppliers, including Valade, for their participation in a price-fixing and market-sharing cartel from October 2010 until January 2014. The cartel was uncovered by leniency applicant Coroos, which obtained full immunity from fines. It concerned, *inter alia*, products sold to mass retailers under the retailers' own brand (private label) and covered approximately 90% of the relevant national market. In 2022, the FCA's decision was largely upheld on appeal by the Paris Court of Appeal.

Carrefour organises tenders to select suppliers that will produce its private label products. In its action against Valade, the retailer claimed that it had paid an overcharge of 13.5% because of the cartel, amounting to a claim for damages of € 1.76 million. Valade argued in return that Carrefour had not suffered this damage as it had passed the overcharge on to the consumers.

The Court agreed with Valade that, given the oligopolistic structure of the compote market and the resulting inelasticity of demand, Carrefour had necessarily passed on the overcharge. Nevertheless, the Court concluded that Carrefour's costs had indeed increased (albeit only marginally) due to the cartel. On that basis, the Court awarded the claimant damages of approximately € 0.6 million, which represents one third of Carrefour's claim.

The Bordeaux Commercial Court judgment is interesting in that it applies the passing-on rules and principles, formalised in the European Commission's Practical Guide on quantifying harm in antitrust damages actions and its Passing-on Guidelines, to a market heavily impacted by a competition law violation.

As the upstream market had been affected almost entirely (90%) by the cartel, downstream players such as Carrefour were deprived of alternative suppliers who could sell them the private label products without the cartel overcharge. This means that all competing retailers were similarly exposed to this industry-wide overcharge. This, in turn, made Carrefour more likely to pass the overcharge on to the consumers given that, by doing so, it faced almost no competitive disadvantage towards the other retailers.

Brussels
Glaverbel Building
Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone:+32 (0)2 647 73 50
Fax:+32 (0)2 640 64 99

Geneva
26, Bd des Philosophes
CH-1205 Geneva
Switzerland

Phone:+41 (0)22 320 90 20
Fax:+41 (0)22 320 94 20

London
Holborn Gate
330 High Holborn
London
WC1V 7QH
United Kingdom

T +44 (0)20 7406 1471

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www.vbb.com