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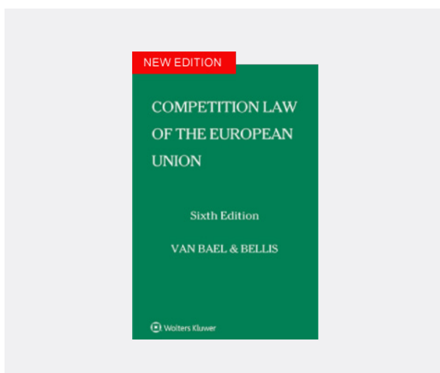

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MERGER CONTROL

European Union level

Advocate General Sides Against the Commission's Exercise of Jurisdiction in *Illumina/Grail*

On 21 March 2024, Advocate General ("AG") Nicolas Emiliou issued an opinion in the *Illumina/Grail* case, which is currently on appeal to the European Court of Justice ("ECJ"), concluding that the European General Court ("GC") had erred in upholding the Commission's exercise of jurisdiction to review the transaction. The AG's non-binding opinion rejects the Commission's controversial new interpretation of Article 22 of the EU Merger Regulation ("EUMR"), according to which the Commission could accept jurisdiction to review a concentration on referral, even if it did not meet EUMR thresholds and was not reviewable under the national laws of the referring Member State(s). If the ECJ ultimately follows the AG's reasoning, this would require a significant reversal in Commission policy and herald a return to a more predictable merger control landscape in the EU.

Background

In March 2021, the European Commission ("Commission") announced that it would change its approach toward accepting referrals under Article 22 of the EU Merger Regulation ("EUMR"). Specifically, it would welcome referrals even where the referring Member State had a merger control regime but lacked jurisdiction to review the transaction. Previously, the Commission's policy was to accept such referrals only from Member States that had jurisdiction to review the transaction under their own merger control rules or that did not have a national merger control regime in place. The stated aim of this new policy was to ensure that transactions that risked harming competition but did not generate sufficient turnover to meet any national review thresholds would not escape merger control scrutiny (see VBB on Competition Law, Volume 2021, No. 4).

A month later, the Commission put this new policy into practice by accepting a referral request to review Illumina's proposed acquisition of Grail. The request was brought by the French Competition Authority, and joined by several other Member States, despite the transaction failing to meet the merger control review thresholds in any referring Member State. Although Illumina and Grail maintained that the Commission had no power to accept jurisdiction, they initially complied with the request to notify the transaction at EU level. However, when the Commission decided to open an in-depth investigation, the parties closed the deal in defiance of the Commission's standstill requirement. This prompted a gun jumping investigation, which eventually led the Commission to impose a record €432 million fine on Illumina (see VBB on Competition Law, Volume 2023, No. 6). In parallel, the Commission concluded its substantive review, ultimately prohibiting the deal in September 2022. This marked the first time that the Commission blocked a transaction based on purely vertical foreclosure concerns (see VBB on Competition Law, Volume 2023, No. 8-9). In October 2023, it ordered Illumina to divest Grail (see VBB on Competition Law, Volume 2023, No. 11).

While Illumina has challenged several of the Commission's procedural and substantive decisions on appeal, fundamentally every such decision rests on the validity of the Commission's original 2021 decision to accept jurisdiction. The General Court ("GC") dismissed Illumina's appeal of that decision in 2022. In doing so, the GC concluded that Article 22 permitted referral of all concentrations that could affect competition in the internal market but that did not meet EUMR or national merger control thresholds as a "corrective mechanism" to ensure effective merger control (see VBB on Competition Law, Volume 2022, No. 7).

The AG's Opinion

The AG considered that the GC and the Commission had not correctly considered the full textual, historical and teleological context needed to interpret the scope of Article 22.

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Article 22 does not expressly limit the referral process to Member States with national jurisdiction to review the transaction, as it allows Member States to refer "any concentration" that does not meet the EUMR thresholds but threatens to significantly affect trade within the territory of the Member State making the request. The GC concluded that, in principle, a literal reading of Article 22 in isolation tends to support – but does not definitively confirm – the Commission's view.

Nevertheless, the AG concluded that an analysis of other interpretative elements, including the history, context and objectives of the provision, made clear that the scope of Article 22 should not be construed in the way the Commission or GC had done. In particular, the AG noted that not a single preparatory document pointed toward Article 22 functioning as a catch-all "corrective mechanism". Instead, he noted that the use of general language in Article 22 was originally intended to enable the Commission to step into the place of national authorities that did not have a merger control regime. He concluded that the broader language and context of the EUMR indicate that the legislative purpose of Article 22 is two-fold: namely to allow referrals from Member States without merger control systems, and to allow referrals by several Member States at the same time to avoid multiple filings and parallel proceedings.

The AG further observed that the Commission's interpretation would result in the introduction of a far-reaching exception to the Commission's one-stop-shop principle and reduce legal certainty. Article 22 allows national authorities 15 working days from the time they are sufficiently informed of the transaction to bring a referral request. Under the Commission's new policy, even if a transaction did not meet any jurisdictional thresholds in the EU, to obtain complete assurance that the deal was free from further scrutiny, merging parties would need to file informal notices with every national competition authority to start this 15-day referral clock. Such informal submissions would need to contain sufficiently detailed information for the national competition authorities to assess whether a referral might be warranted, making such submissions potentially as burdensome as formal merger notifications. Moreover, if some Member States without jurisdiction chose to refer the transaction while others with national jurisdiction chose to examine it themselves, this could multiply rather than reduce the number of parallel merger review processes in the EU. In sum, the AG concluded that the Commission's interpretation of Article 22 would broaden the Commission's review powers in a way that is inconsistent with the EUMR's objective of promoting the swift and efficient review of concentrations and thus the aim of the EU legislators.

The AG further observed that the GC's interpretation would be at odds with the principle of international comity, in that it could allow the Commission to claim jurisdiction over deals with significant foreign elements but a weak domestic link – which competition authorities might not be able to be establish with sufficient certainty within the short referral period. The AG also pointed out that the GC's approach risked violating the fundamental principles of equality and proportionality, as companies with limited (if any) turnover in the EU might, paradoxically, be placed in a worse position than those with more significant turnover (and which could therefore rely on the certainty of the EUMR's one-stop-shop principle). Such scenarios run counter to the introduction of merger control thresholds at both EU and Member State levels, whose purpose is to identify the transactions most likely to affect competition in the respective territories.

The AG also pushed back against the Commission's claims that overturning the GC's interpretation of Article 22 would result in under-enforcement of merger control, contrary to the EUMR's aims. Firstly, he noted that competition authorities could still conduct ex-post control of such transactions under Articles 101 and 102 TFEU. These articles provide effective remedies, including potentially the dissolution of the transaction in the most problematic cases. Moreover, the AG observed that Member States had sought to address potential gaps in their own merger control rules by enacting new legislation, for instance by

European Union level

introducing size-of-transaction thresholds. The EU could likewise use the legislative process to expand the scope of the EUMR to address areas of underenforcement.

The AG's opinion is welcome news to the global business community, which has been struggling with how to plan for the uncertainties created by the Commission's new policy. Due to the Commission's policy, merging parties are forced to decide whether to close a transaction that does not meet the merger control thresholds anywhere in the EU, and hence cannot be notified even if the parties wanted to do so, if there is a risk that the deal could still be referred to the Commission for review post-closing. The AG has now rejected the Commission's use of the broad wording of Article 22 to stretch its review powers beyond what he considers the legislation's original purpose. The AG's opinion also appears to recognize the extensive, real-world effects that such jurisdictional overreach could produce. While the purpose of merger control is to guard against competitively problematic transactions, its ex-ante nature means that it inherently must take into account pragmatic considerations like the speed of review and the principle of legal certainty to be effective. Indeed, the AG has acknowledged the importance of not upsetting the "carefully devised balance" between the requirements of sound administration and the need for legal certainty in business transactions. It remains to be seen whether the ECJ will ultimately follow the AG's opinion in its forthcoming judgement. Given that the Commission's approach to Article 22 is consistent with a literal reading of the provision, it would be easy for the ECJ to reject the AG's opinion. However, If the ECJ agrees with the AG, this will not only rewrite the entire *Illumina/Grail* saga, but will also signal a seismic shift toward restoring reliable jurisdictional boundaries to the EU merger control regime.

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National level

FRANCE

French Competition Authority Grants Derogation to Standstill Obligation

On 19 March 2024, the French Competition Authority ("FCA") granted food retailers Intermarché, Auchan and Carrefour a derogation from the suspensive effect of the merger control rules. The merger control rules provide for a standstill obligation, which prevents potentially irreparable damage to competition by prohibiting parties to a notifiable concentration from implementing their transaction before its notification and/or before obtaining merger control clearance.

In this case, Intermarché, Auchan and Carrefour notified the FCA of their intention to acquire a total of 323 food retail stores currently operated by debt-laden Casino Group. At the same time, they also requested a derogation from the standstill obligation, which the FCA granted.

Such derogations are granted only exceptionally. In this case, the FCA found that the target is "experiencing significant difficulties" which "jeopardise its viability", and that the parties proved the urgency of immediately acquiring the stores. The derogation is granted without prejudice to the final decision that the Authority will take on the proposed acquisitions at the end of its substantive review.

ITALY

Italian Competition Authority Opens Phase II Investigation for Below-Threshold Transaction

On 27 February 2024, the Italian Competition Authority ("ICA") opened its first ever Phase II investigation into a transaction falling below its national merger control thresholds. The investigation (*Ignazio Messina/Terminal San Giorgio*) concerns two companies active in the market for maritime terminal services for goods. According to the ICA, the transaction threatens to create the largest third-party terminal operator active at the port of Genoa.

The investigation was initiated pursuant to the new powers conferred to the ICA in August 2022 (see VBB on Competition Law, Volume 2022, No. 8 & 9), which allow the ICA to request the notification of transactions that do not meet the national thresholds (i.e., a combined turnover of the parties in Italy of at least € 567 million, and a turnover generated in Italy by each of at least two parties to the transaction of at least € 35 million) if certain conditions are met. Specifically, the ICA can call in transactions where: (i) the transaction was completed a maximum of six months before the request for notification is made; (ii) at least one of the turnover thresholds is met; and (iii) the transaction raises real risks to competition on the national market. So far, the ICA had called in eight investigations pursuant to its new powers, but – prior to this case – none had progressed to an in-depth, Phase II investigation.

In the present case, although the target's turnover did not meet the relevant national threshold, the ICA determined that the deal risks creating a dominant entity capable of partially excluding competitors of one of the buyer's controlling companies (Marinvest) through various means, including by increasing costs or limiting the space available. In the decision opening the Phase II investigation, the ICA stated that this effect could potentially result from the concession held by the target over one of the docks at the port of Genoa. The ICA found that the acquisition of this concession would result in a post-transaction share of around 60% in the market for roll-on/roll-off terminal services.

It is interesting to note that the new powers conferred upon the ICA were mostly intended to address "killer acquisitions" and other transactions in innovative markets where the target – despite having future competitive potential – generates such low turnover that the acquisition fails to meet either EU or Italian merger control thresholds. However, the present case does not

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concern a particularly innovative sector – simply one in which the acquisition results in high market shares. The ICA therefore appears willing to use its new powers to claim jurisdiction over transactions that may give rise to competition issues, regardless of the particular sector concerned.

The ICA's decision to pursue this case falls into the general trend spearheaded by *Illumina/Grail*, see VBB on Competition Law, Volume 2022, No. 7 and *Towercast* (C-449/21, see VBB on Competition Law, Volume 2023, No. 3), whereby the Commission and national competition authorities have sought to expand the reach of their merger control regimes beyond transactions caught by their turnover thresholds. In doing so, competition authorities have pointed to the need to control concentrations that raise real competitive risks in relation to EU or national markets but otherwise escape review. Unfortunately, such developments decrease legal certainty for economic operators, as such operators cannot reliably predict if – or when – the ICA might request a notification (within the timespan of 6 months) or launch an ex-post assessment pursuant to Article 102 TFEU.

ABUSE OF DOMINANT POSITION

European Union level

European Commission imposes fine of over €1.8 billion on Apple as it considers App Store trading conditions vis-à-vis distributors of music streaming apps to be "unfair"

On 4 March 2024, the European Commission (the "Commission") fined Apple over €1.8 billion for abusing its dominant position on the market for distribution of music streaming apps to iOS users (that is, iPhone and iPad users) through its App Store. Following a 2019 complaint by Spotify and a lengthy investigation, the Commission found that Apple's anti-steering provisions infringed Article 102 TFEU as they prevented music streaming app developers from informing iOS users about alternative and cheaper music subscription services available outside of their App Store-distributed apps.

The Commission had initially investigated Apple's anti-steering provisions as an exclusionary abuse on the ground that they raised the costs of competing music streaming app developers. Ultimately, however, the Commission dropped this theory of harm and characterised the anti-steering provisions as an exploitative abuse – namely, "unfair trading conditions" resulting in higher prices, less choice, and a degraded user experience for iOS users.

Commission decision

Apple's terms and conditions – which app developers must abide by in order to be able to access Apple's App Store and distribute their apps to iOS users – both (i) prohibit music streaming app developers from informing iOS users about prices of alternative subscription offers available outside of their apps; and (ii) ban them from informing iOS users about price differences between in-app subscriptions (sold through Apple's in-app purchase mechanism) and those available elsewhere. Apple also prohibits music streaming app developers from providing instructions to iOS users about how to subscribe to alternative offers – this includes a ban on adding links in apps that lead iOS users to the music streaming app developer's website on which alternative subscriptions can be bought. Music streaming app developers are also prevented from contacting newly acquired users (such as by email) to inform them about alternative pricing options after they set up an account with the app developer.

The Commission found that these anti-steering provisions prevented music streaming app developers from fully informing iOS users about alternative and cheaper music subscription services available outside of their App Store-distributed apps. As a result, iOS users had a degraded user experience where they either had to search to find relevant offers outside the apps, or they never subscribed to services they were unable to find. In addition, iOS users may have also paid significantly higher prices for their subscriptions – because music streaming app developers passed on the high commission fee imposed by Apple for in-app payments to consumers (in the form of higher in-app subscription prices). The Commission concluded that these provisions were neither necessary nor proportionate for the protection of Apple's commercial interests in relation to the App Store (such as for funding the running of the App Store), and amounted to unfair trading conditions in breach of Article 102(a) TFEU.

The amount of the fine was determined in line with the Commission's 2006 Guidelines on fines. Following the traditional parameters and taking into account Apple's total turnover and market capitalisation, the duration and gravity of the infringement, as well as Apple's submission of incorrect information during the administrative procedure, the fine would have been approximately €40 million. The Commission, however, relied on Point 37 of the 2006 Guidelines to add a staggering €1.8 billion to the amount of the fine – to ensure it has a sufficient deterrent effect on Apple (and companies like Apple). The Commission also imposed a cease and desist order on Apple.

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Observations

It is noteworthy that the Commission in the end tethered its case to Article 102(a) TFEU, namely the imposition of unfair trading conditions. Article 102(a) TFEU has rarely been used by the Commission in its past decisional practice. The press release makes clear that – in the Commission's view – Apple imposed terms and conditions on music streaming app developers that caused consumer harm and were neither necessary nor proportionate. It will be interesting to see, when the full decision is published, how the Commission identifies "unfairness" – and whether it compares Apple's conduct to a benchmark of what it considers to be "fair".

The decision also raises interesting questions about the relationship between antitrust enforcement and the EU's Digital Markets Act ("DMA"). Apple was required to comply with DMA obligations (including the removal of anti-steering provisions such as the ones at issue in this case) as of 7 March 2024 – that is, a mere three days after the Commission imposed its fine. Apple also published a summary of its DMA compliance report on 7 March 2024, in which it indicated how an app developer can inform consumers about alternative subscription and payment options. The timing of the Commission decision arguably calls into question the Commission's belief in the effectiveness of the DMA going forward – if there was confidence in the DMA's ability to curb the use of anti-steering provisions, the Commission's cease and desist order was arguably not necessary. The same can also be said of the level of the fine and the addition of the €1.8 billion for "*deterrence*" – indeed, such need for deterrence is arguably redundant given the DMA obligations and the ability to fine non-compliant companies up to 10% of their total worldwide turnover (and up to 20% of their total worldwide turnover in the case of recidivism). It will be interesting to see, when the full decision is published, if the Commission makes any reference to the DMA obligations that Apple would in any event be obliged to follow – especially when setting the fine.

In addition, the entire "unfairness" framework in the Commission decision also gives the decision much more of a DMA flavour than traditional antitrust decisions. The Commission also opened a non-compliance investigation against Apple under the DMA with respect to its App Store anti-steering provisions on 25 March 2024, raising further questions about how these two regimes interact.

Apple released a statement on the same day that the Commission adopted its decision, confirming its intention to appeal the decision. Unsurprisingly, Apple claims that the Commission's decision is not grounded in existing competition law, but instead seeks to enforce the Digital Markets Act (DMA) before it comes into force.

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National level

PORTUGAL

Portuguese Competition Authority fined SIBS Group for abusive tying practices in payment services

The Portuguese Competition Authority (AdC) imposed a fine of approximately €14 million on the payment services provider SIBS Group ("SIBS"), for abusing its dominant position on the payment schemes market. The AdC found that SIBS required card issuers and acquirers seeking to access SIBS' payment schemes to also contract SIBS' processing services. It considered this requirement to be an anticompetitive tying practice, through which SIBS foreclosed rival payment processing services providers.

AdC decision

SIBS is the entity responsible in Portugal for domestic payment schemes, which are accessed by both card issuers (i.e., institutions that provide cards to consumers under one or more payment schemes) and card acquirers (i.e., institutions that process card transactions on behalf of merchants and act as intermediaries between merchants and payment schemes). Access to SIBS' payment schemes is necessary for issuers to be able to provide cards to their consumers. Acquirers also need access to the payment schemes so that they can enable merchants to accept card payments.

SIBS also offers processing services for processing payment instructions between card issuers and acquirers, which ensure authorisation, clearing and settlement of transactions. Although SIBS holds the majority market share in the processing market (over 90%), there are alternative processors operating in Europe that could offer their services in Portugal – and even some acquirers that would be capable of processing their own transactions.

The AdC found that – over the course of approximately three years – card issuers and acquirers seeking to access SIBS' payment schemes (such as SIBS MB and MB WAY) were required to also contract SIBS' processing services, and did not have the option of only contracting access to SIBS' payment schemes. According to the AdC, SIBS' tying practice foreclosed alternative processing services providers and allowed SIBS to maintain over 90% market share in the processing market throughout the duration of the infringement. The AdC highlighted that the violation of competition rules not only reduced consumer welfare, but also harmed companies' competitiveness – thereby penalising the economy.

Observations

This case was initiated by the AdC in November 2020 after its monitoring of the financial sector – and, in particular, an inquiry directed at a group of fintech companies. Indeed, there appears to be significant interest from the AdC in relation to competition and innovation in the payment services sector – and further such investigations can thus likely be expected going forward. The AdC appears particularly interested in potential barriers to the entry and/or expansion of fintech operators – in terms of access to customer account data and access to payment clearing and settlement systems.

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European Union level

Competition law deterrence by means other than fines: recent developments regarding public procurement bans and director disqualification

While competition authorities in Europe commonly impose fines on companies for breaches of competition law, there are a number of other ways in which companies – and individuals – implicated in competition law violations may be subject to sanctions. In this article, we focus on recent developments in relation to two of these additional sanctions: public procurement bans and director disqualification.

Public procurement bans

Latest developments at EU level

On 21 December 2023, the Court of Justice delivered a judgment interpreting the Portuguese provision transposing Directive 2014/24/EU ("Public Procurement Directive") as regards the grounds on which economic operators may be excluded by contracting authorities from public tenders in case of a competition law infringement (Case C-66/22, *Infraestruturas de Portugal and Futrifer Indústrias Ferroviárias*).

Under Article 57(4) of the Public Procurement Directive, contracting authorities can exclude economic operators from a public procurement procedure in a number of circumstances, including where (i) they are liable for serious professional misconduct (which includes competition law infringements) which renders their integrity questionable; (ii) they entered into agreements with other economic operators aimed at distorting competition; or (iii) they were previously involved in a distortion of competition in the preparation of the procurement procedure.

In its judgment, the Court of Justice underlined that Member States have an obligation to transpose into national law the grounds on which economic operators may be excluded from public procurement procedures, as set out in Article 57(4) of the Public Procurement Directive. However, while Member States are free to decide whether the exclusion should be optional or an obligation, they cannot restrict the scope of those grounds. According to the Court of Justice, national legislation that restricts the possibility of excluding economic operators based on the existence of "significant evidence" of distortion of competition infringed the Public Procurement Directive.

The Court of Justice further stressed that the EU legislature intended to confer discretion on the contracting authorities as regards the applicability of exclusion grounds. The option or the obligation to exclude an economic operator from a public procurement process is intended to enable the contracting authority to assess the integrity and reliability of each of the economic operators participating in a public procurement procedure.

As regards the necessary probatory evidence, the Court of Justice held that a decision by a competition authority finding that an economic operator had been involved in a bid-rigging cartel is of particular significance – and that the contracting authorities must, in principle, rely on the outcome of the antitrust investigation when assessing whether or not to exclude that economic operator from a public procurement. The contracting authorities' assessment must comply with the principle of proportionality and take into account all the relevant factors.

However, the Court of Justice further stated that, given the discretion conferred by the Public Procurement Directive, the assessment cannot be based solely on a competition authority's decision. Therefore, a national rule that ties the assessment of the integrity and reliability of economic operators involved in a tender solely to the findings of a competition authority undermines the discretion conferred on contracting authorities under the Public Procurement Directive.

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The Court's position in this respect is consistent with the Commission's Notice of 2021 on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (2021/C 91/01), as well as with the position of other Member States (e.g., Italian Supreme Administrative Court, September 2022, *Gi. One and Exitone v Italian Competition Authority*), stressing that an infringement decision of a competition authority does not remove the contracting authority's obligation to carry out its own assessment on whether to exclude an economic operator from a given tender procedure. That assessment is based on the principle of proportionality and is subject to the obligation to state reasons.

Recent developments at national level: Spain

The judgment of the Court of Justice may affect how public procurement bans are adopted in a number of EU countries. The impact of the judgment in Spain provides a useful example.

Under Spanish law, companies and individuals found to have seriously infringed competition law are prohibited from participating in public tenders. According to the Spanish Competition Authority ("SCA") (for instance in 2022 *MSD* abuse decision, case already reported in Van Bael & Bellis Life Sciences News and Insights, 25 October 2022), the prohibition on participating in public tenders follows automatically from a serious infringement of competition law. In practice, however, the SCA does not impose the ban itself, but merely refers the case to the Advisory Body for Public Procurement within the Ministry of Finance (*Junta Consultiva de Contratación Pública del Estado*) which determines the duration and scope of the prohibition.

In June 2023, the SCA published Communication 1/2023 on the criteria for the determination of the ban on public procurement on grounds of distortion of competition (the "Communication"). The main developments introduced by the Communication concern: (i) the introduction of non-exhaustive factors for determining the scope and duration of the prohibition on participating in a public tender (namely the geographical and product scope, duration, seriousness and degree of participation of the undertaking in the infringement); and (ii) the exclusive competence of the SCA to determine the duration and scope of the prohibition (that competence no longer belongs to the Advisory Body).

The power of the competition authority to impose on companies a ban on participating in public tenders becomes, de facto, automatic following the finding of an infringement of competition law. This effectively removes the contracting authorities' role, which is required by the Public Procurement Directive and stressed by the Court of Justice's judgment. It is worth noting that two appeals challenging the competition authority's power in this respect (Cases Nos. 9091/2022 and 20/2023) are currently pending before the Spanish Supreme Court in relation to a 2019 infringement decision issued by the Catalan Competition Authority in relation to two companies' (MCV and ADASA) participation in a market-sharing agreement in the context of public tenders for the installation, maintenance and supply of radar and weather stations between 2011 and 2019. The compatibility of the current Spanish regime with the Public Procurement Directive, as interpreted by the Court of Justice, is likely one of the issues that the Spanish Supreme Court will consider.

Recent developments at national level: the UK and public procurement blacklists

Many countries have national databases collecting relevant information (e.g., on penalties related to corruption, fraud, terrorism, money laundering or tax) to help contracting authorities assess the eligibility of economic operators to bid for public contracts. In compliance with the Public Procurement Directive, contracting authorities remain free to determine whether competition law infringements may result in the exclusion of the infringing entity participating

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European Union level

in a public tender. Although the databases of certain countries (e.g., Germany) also list competition law infringements, this would not prejudice the contracting authorities' assessment of whether a ban is justified in a particular case.

By contrast, concerning jurisdictions outside the EU, in November 2023, the UK Parliament passed the Procurement Act – establishing a new, centralised "debarment list" that sets out several grounds on which contracting authorities can or must exclude certain companies from participating in public procurement procedures. As of October 2024, if a supplier is added to the debarment list for a mandatory exclusion ground, they will be automatically excluded from bidding for any future public contract until removed from the list. Among these mandatory grounds for exclusion are – notably – cartel and competition law infringements.

Director disqualification

Prohibition from participating in public tenders is not the only tool available for the enforcement of competition law under national law. In fact, in some jurisdictions, competition authorities use directors' disqualification as an additional penalty to pursue general and specific deterrence and, as a result, to maintain or improve the standards of corporate management. Although the application of such a penalty is not a widespread practice among Member States (being utilised as an enforcement tool in a limited number of countries, including Sweden, Lithuania, Poland, Ireland and the Czech Republic), the UK regulator has been unafraid to exercise its director disqualification powers with increasing frequency in recent years.

In February 2019, the Competition and Markets Authority ("CMA") published its Guidance on Competition Disqualification Orders, in which it provided an overview of the legal framework for the CMA's powers to seek Competition Disqualification Orders or accept Competition Disqualification Undertakings. Notably, the Guidance provided the CMA with greater procedural flexibility and discretion in exercising these powers. Since then, the CMA has often wielded its disqualification powers. For instance:

- In March 2021, it secured the disqualification of five company directors after finding that they had infringed competition law by forming cartels in the construction industry, with two of the disqualifications representing the longest disqualification periods secured by the CMA to date – 12 and 11 years respectively (see VBB on Competition Law, Volume 2021, No. 3).

- In March 2023, the CMA also secured the disqualification of three directors of firms from construction companies involved in rigging bids for demolition and asbestos removal contracts involving both public and private sector projects (see VBB on Competition Law, Volume 2023, No. 3).

Notably, on 8 February 2024, the High Court rejected a request from one of the disqualified directors in the latter case to continue to act as a director, thereby endorsing the CMA's approach to deterring anticompetitive conduct in this manner.

An additional development in the UK relates to the Digital Markets, Competition and Consumer Bill (the "Bill"), which is expected to receive Royal Assent in April 2024 and enter into force in around October 2024. Under the Bill, the rules on director disqualification are extended to include breaches of tailored conduct requirements or pro-competition interventions under the UK's new digital markets regime and applicable to firms designated with Strategic Market Status by the CMA (see VBB on Competition Law, Volume 2023, No. 3).

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European Union level

Key takeaways

To conclude, competition authorities in Europe have various different tools at their disposal to ensure sufficient deterrence in competition law enforcement, in addition to the imposition of fines.

The developments regarding procurement bans show that companies active in certain jurisdictions (notably, Spain) should be particularly alert – since an involvement in antitrust infringements may also lead to exclusion from taking part in public contracts, which may seriously impact those economic operators active in sectors in which public procurement is prevalent (e.g., pharmaceutical, construction, telecommunications, or defence).

Similarly, the willingness (particularly by the CMA) to pursue director disqualifications following findings of competition law infringements affirms the need for directors and managers of businesses to take the necessary steps to implement a robust competition law compliance culture that mitigate risks – for their companies, and for themselves.

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