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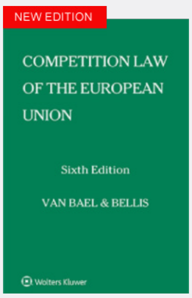

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MERGER CONTROL

National level

FRANCE

French Competition Authority investigates non-notifiable merger in the wake of Towercast ruling

For the first time, the French Competition Authority ("FCA") has undertaken an antitrust examination of several concentrations falling below the national notification thresholds. The FCA suspected meat cutting companies Akiolis, SARIA France and Verdannet of engaging in an anticompetitive agreement to geographically divide the market. However, the FCA found that the parties had only discussed the preparation of five concentrations, which all fell below the notification thresholds. The FCA therefore examined whether these transactions were anticompetitive. As it found that they did not have an anticompetitive object, it decided to close its investigation.

Although the French investigations were initiated before the EU Court of Justice's ("CJEU") *Towercast* judgment (see VBB on Competition Law, Volume 2023, No. 4), in its decision, the FCA indicated that it relied on *Towercast* to continue its investigation once it determined that the agreements in question concerned below-threshold concentrations. In the *Towercast* judgment, the CJEU confirmed that competition authorities can examine whether a merger that does not meet the thresholds for *ex ante* merger control review (and has not been referred to the European Commission under Article 22 of the EU Merger Regulation) constitutes an abuse of dominance contrary to Article 102 of the TFEU. *Towercast* has had a strong influence on national competition authorities, notably in the *Proximus / EDPnet* saga in Belgium in 2023 (see VBB on Competition Law, Volume 2023, No.12). Interestingly, the FCA concluded from this ruling that it can also investigate whether a non-notifiable merger amounts to collusion contrary to Article 101 TFEU.

SPAIN

Spanish Competition Authority fines Rheinmetall for concealment of information following merger clearance

On 14 May 2024, the Spanish Competition Authority ("CNMC") fined Rheinmetall AG € 13 million for two serious infringements involving concealing information and failing to cooperate by providing misleading information (SNC/DC/081/23). The CNMC concluded that Rheinmetall had omitted – and provided misleading – information on the relevant markets affected by the merger, both prior to the merger clearance and following an injunction as part of the infringement procedure once the CNMC became aware of the additional affected markets.

The CNMC had cleared the acquisition of Expal Systems S.A. by Rheinmetall AG in Phase 1. Both companies are active in the defence and security sectors. However, Rheinmetall did not disclose in its notification that the merger affected several additional markets (the manufacture and marketing of nitrocellulose, nitroglycerine and wet pulp), and provided information that misled the CNMC into concluding that there were no such additional affected markets. Following the clearance decision, a third party complained to the CNMC and appealed the decision before the Spanish High Court. On the basis of the new information that became available regarding the impact on those additional markets, the CNMC initiated an infringement procedure and issued an injunction requesting that Rheinmetall provide more information on its activities in the additional markets.

The CNMC concluded that Rheinmetall had omitted – and provided misleading – information at two separate procedural stages (during the notification stage, and following the injunction), each of which was a separate serious infringement under Article 62.3.c) of the Spanish Competition Act. It therefore imposed two fines of € 6.5 million for each separate infringement.

MERGER CONTROL

National level

SWEDEN

Swedish Competition Authority blocks three-to-two merger in the market for pharmacy services

In its decision of 29 April 2024, the Swedish Competition Authority (the "Authority") prohibited the acquisition of Svensk dos AB (Svensk dos) by Apotekstjänst Sverige (Apotekstjänst) on the ground that the proposed transaction – which would have combined the number one and number three players and left the Swedish market with a duopoly – would reduce competition in the market for contracts governing the provision of individually packed prescription pharmaceuticals to patients.

The transaction concerned the supply of individual packages of prescription pharmaceuticals. Individual packages should help patients – particularly the elderly and those who have been prescribed a range of different pharmaceuticals – to take the right pharmaceuticals at the right time. Regions in Sweden are responsible for ensuring that patients with medical needs are supplied with individually packaged pharmaceuticals. To meet their responsibility, they award multi-year contracts for the exclusive provision of these services through competitive tenders.

Intense competition among the three pharmacies in Sweden that are licensed to supply individually packaged pharmaceuticals has resulted in "negative" prices in tenders: the pharmacies compete in relation to how much they are willing to pay the regions for the exclusive contract, and the winner of a tender expects to recoup payments for the contract through the (regulated) profits when supplying individually packed pharmaceuticals – but also through additional sales of other prescription pharmaceuticals and non-regulated products sold in pharmacies.

The review of the proposed transaction focused on two key issues: the nature of the bidding markets, and the correct counterfactual.

The parties had argued that, considering the characteristics of the competitive process when regions tendered multi-year contracts, outcomes of the tenders would not depend on the number of bidders: demand was "lumpy" as the regions awarded few, very large contracts; the tenders resulted in winner-takes-all outcomes; the previous supplier had no incumbency advantages in new tenders; and the winner of contracts faced no capacity constraints (as they could adjust capacity after winning a contract). Thus, the parties argued that the effects of the proposed transaction should be assessed in light of economic models predicting competitive outcomes of tenders (irrespective of the number of bidders).

Although the parties' arguments appeared quite plausible, the Authority disagreed. It considered that there was uncertainty about how other bidders would price their bids, and that even potentially less attractive bids would create competitive pressure. Fewer bidders would result in a reduced risk of losing a bid, and therefore in bids with higher prices. The Authority also rejected the winner-takes-all characterization, as regions may split up contracts and every bidder has opportunities to win sufficient contracts to cover its capacity (even if it loses a specific bid). The Authority also disagreed with the parties about the existence of capacity limitations. It therefore concluded that a reduction in the number of tender participants likely would lead to less competitive outcomes in future tenders.

Arguments about the proper counterfactual became relevant when, late in Phase 2 of the competition authority's review, the parties submitted that the target – Svensk dos – would wind down its activities and leave the market if the transaction was not approved. The Authority, however, refused to accept a Svensk dos exit from the market as the relevant counterfactual. In its view,

it was not required to consider facts in its assessment that the parties had created during the investigation and that – in any event – the parties had not demonstrated that Svensk dos' exit was the most plausible counterfactual. The Authority observed in particular that Svensk dos had recently (and after a prolonged period of unsuccessful bids) won a tender – and that there was therefore a reasonable prospect of Svensk dos remaining in the market, or that Svensk dos could be acquired by another firm.

In this context, the Authority also considered the parties' argument that – after Svensk dos had won a recent tender – it entered into a subcontracting arrangement with Apotekstjänst. Under this subcontracting arrangement, Apotekstjänst would carry out the preparations and supply of individual packages of prescription pharmaceuticals on behalf of Svensk dos. For the parties, this was an indication that Svensk dos was not interested in remaining in the market. For the Authority, however, the arrangement was not relevant to the counterfactual. Rather, it considered that the subcontracting arrangement – which was included in the parties' deal agreement – raised gun-jumping concerns (as it conferred material influence on Svensk dos' business on the acquirer). As part of its prohibition decision, the Authority gave the parties two months to unwind the subcontracting arrangement. However, the Authority has not yet published any decision on potential gun jumping concerns.

Observations

The decision illustrates how difficult it can be for parties persuade a competition authority with a "bidding market argument," whereby tenders for contracts should ensure competitive outcomes even if a transaction would reduce the number of bidders in future tenders in already highly concentrated markets. In this case, the facts appeared to provide some support for the parties' argument: markets were fiercely competitive, tenders were infrequent, contract volumes were significant, and the winners of contracts could adjust their capacities after the contract award. Yet, even with these favourable facts, the parties failed to overcome doubts expressed by the competition authority.

The parties have appealed the prohibition decision, and it therefore remains to be seen whether the courts will uphold the skeptical view of the Authority.

UNITED KINGDOM

UK CMA adopts updated merger guidance to reflect revised framework for in-depth reviews

On 25 April 2024, the UK Competition and Markets Authority ("CMA") issued updated guidance on jurisdiction and procedure in merger reviews (and has also consulted on updating the 'de minimis' exception and published revised guidance in this regard – which is not the subject of this article). The CMA's merger review process consists of two phases: a standard Phase 1 review and, if necessary, an in-depth Phase 2 investigation. In particular, the updated guidance outlines a revised process for Phase 2 investigations.

In brief, the most notable changes focus on three key areas: (1) early engagement on substance and key issues; (2) improved engagement between merging parties and the CMA; and (3) constructive discussions on remedies.

What's changing?

(1) <u>Early engagement</u>

- The CMA's Phase 1 decision has replaced the Issues Statement (IS) as the starting point for the substantive assessment to identify the key issues at the start of the Phase 2. The merging parties – and any interested third parties – will then be invited to provide comments on the Phase 1 decision at the outset of the Phase 2 process (typically within 14 calendar days of referral).

MERGER CONTROL

National level

- The CMA has replaced the Provisional Findings (PFs) with a new "interim report" containing the Inquiry Group's provisional decision on jurisdiction and substance, which will now be published on the CMA's online case page earlier in the process – around weeks 12-14, rather than around week 15 – and, crucially, ahead of the main party hearing (which will be held around weeks 16-18). Merging parties – and any interested third parties – will then be invited to make written submissions on the interim report.

(2) Improved engagement

- The updated guidance formalises the CMA's recent practice of holding a "teach-in" session – often together with a site visit – in the early stages (i.e., likely within the first six weeks) of each Phase 2 investigation. Whilst such teach-ins will provide more opportunities for the CMA to hear directly from the merging parties (regarding, e.g., how their industries work and their rationale for pursuing a deal), the CMA has also introduced a new "initial substantive meeting" for the merging parties to present their case to the Inquiry Group – in person, and at an early stage (following the submission of the merging parties' response to the Phase 1 decision).

- The updated guidance also indicates that the CMA case team will make more use of informal and periodic update calls with the merging parties – as well as increased direct engagement with the merging parties' economists, where appropriate (which may be particularly useful in cases involving complex data analysis and/or novel theories of harm).

(3) Remedies

- The updated guidance codifies – at various points – the CMA's position that it encourages early "without prejudice" discussions/proposals on remedies. More specifically, the CMA now envisages opportunities for the merging parties to propose draft submissions and hold early discussions with the Inquiry Group – and obtain feedback – ahead of the publication of the interim report.

- The CMA has replaced its remedies working paper with an interim report on remedies – setting out the Inquiry Group's assessment of the remedy options and its provisional decision on remedies – which will (if relevant) be published after the main party hearing and around weeks 18-21, and on which the merging parties would have seven calendar days to comment. Whereas previously merging parties typically had to wait until the Final Report before understanding the Inquiry Group's view on remedies, this change should provide an additional milestone through which merging parties will know if a remedy will be acceptable (and/or if any modifications are required).

- The CMA has also introduced a new template Phase 2 Remedies Form (alongside a revised Merger Notice and a revised template waiver) – in which merging parties can outline their remedies proposal within 14 days of publication of the interim report on remedies (and, if such proposals are put forward, the CMA will publish a non-confidential version of these and invite third party comments).

- The updated guidance also envisages a "final remedies call" between the CMA and the merging parties (to clarify any outstanding issues on this topics) – meaning that the process should again be more transparent and with more touch points than before.

What does this mean in practice?

It is worth noting that these changes – which are only applicable to Phase 1 cases opened by the CMA as of 25 April 2024 and which are referred for an in-depth Phase 2 investigation – are procedural as opposed to substantive in nature. As such, the CMA's legal standard for substantive assessment at Phase 2, the relevant decision-makers, etc. remains the same.

National level

The changes have generally been received positively by the UK antitrust community. In particular, the reforms – which are driven in part by sustained criticism directed towards the CMA by merging parties and antitrust lawyers involved in noteworthy recent Phase 2 cases (such as Microsoft/Activision) – should bring the CMA's Phase 2 process more in line with the European Commission's Phase 2 process (e.g., in terms of enabling discussions of remedies earlier in Phase 2), and should thus hopefully lead to fewer divergent outcomes over time.

Will the UK Courts be less deferential to the CMA's merger assessments going forwards?

The recent ruling of the Court of Appeal in *Cérélia/Jus-Rol* provided a rare and important clarification on the scope of the Competition Appeal Tribunal's ("CAT") review of the CMA's merger decisions. In reviewing such decisions, the CAT applies a "judicial review" standard rather than conducting a "re-hearing" on the merits.

The Court of Appeal dismissed in its entirety the appeal brought against the CAT's judgment upholding the CMA's decision requiring the divestment of Jus-Rol, acquired by Cérélia in 2022. Cérélia has filed an application to appeal the Court of Appeal's decision before the UK Supreme Court.

Although dismissing the appeal in this case, the Court of Appeal's discussion of the scope of the CAT's review arguably strengthens the CAT's ability to hold the CMA more accountable in its decision-making. The ruling clearly confirms the position that challenging the CMA's substantive assessment remains a very difficult task, given the high degree of judicial deference the CAT is expected to show (such that it remains focused on any procedural failings by the CMA). That said, the Court of Appeal recognises (a view already acknowledged by the CAT itself) that the CAT is a specialist tribunal, and – in contrast to a typical court – it is expected to (i) engage in a detailed assessment of the evidence in order to decide whether the CMA has acted within legitimate bounds; and (ii) examine whether the CMA's decision is sufficiently supported by evidence.

It could be argued that the Court of Appeal ruling supports the CAT's appetite to – in some cases – examine the CMA's interpretation of the evidence. Whether there will be any practical implications of the Court of Appeal ruling in this case remains to be seen.

FOREIGN DIRECT INVESTMENT

National level

UNITED KINGDOM

UK Foreign Investment Control: updated guidance issued

Having announced its intention to refresh and improve the UK FDI regime last month –and following public consultations – the UK Government has recently issued two updated sets of guidance, aimed at clarifying the complex legal framework which was introduced by the National Security and Investment Act 2021 (the "NSIA").

In particular, the UK Government has updated the existing Market Guidance and the so-called "Section 3 Statement". The former assists parties and their advisers with understanding the factors that the Government will take into account when assessing the risks posed by an envisaged deal, whereas the latter guidance explains when deals will be called-in for a detailed NSIA review.

The majority of the changes found in these updated sets of guidance are primarily clarificatory in nature – and provide further explanations, examples and tips for practitioners and interested parties. However – and importantly – such updates do not amend anything substantive in terms of the relevant sectors that are covered by the NSIA regime.

Key updates/clarifications include:

- *In the updated Market Guidance*:
    - ***Outward investment***: further explanation has been provided as to the application of the NSIA framework to deals concluded outside the UK but having a UK nexus (such as IP and technology transfers, and the creation of joint ventures abroad). The key substantive element in such cases remains whether there is any link between the transaction and a sector which is covered by the mandatory NSIA notification regime.
    - ***Timing***: there is new guidance on the possibility of shorter overall timeframes in exceptional cases – and, in particular, on expedited reviews necessary for acquisitions of targets in financial distress.
    - ***Notifications***: new practical tips have been included regarding the preparation of notification forms, determining and handling classified information, and calculating timelines.
- *In the updated Section 3 Statement*:
    - ***National security risks***: further details and examples have been added regarding national security risks that the Government may consider when deciding whether to call in a transaction – including new references to supply chain risks; disruption, erosion or degradation of critical national infrastructure; and others.
    - ***New examples***: additional hypothetical scenarios have been provided to demonstrate how the call-in power may be exercised in practice. The new examples cover hot topics, such as: AI technology deals; joint ventures involving Government sub-contractors; licensing agreements; and acquisitions of particularly sensitive targets by low-risk buyers.
    - ***Assessing acquirer risk***: more explanation has been added regarding the overall approach to assessing the acquirer risk – and specific acquirer characteristics have also been identified. Notable examples include: the intent behind the acquisition; the acquirer's past behaviour (and that of linked parties, such as fund providers and ultimate beneficial owners); and the cumulative impact of serial transactions across a particular sensitive sector by the same acquirer.

FOREIGN DIRECT INVESTMENT

National level

The above clarifications are clearly a step in the right direction. Whilst the practical impact remains to be seen, it is likely that the new guidance will be more useful if it is accompanied by some more substantive changes relevant to the interpretation of the NSIA regime – and especially its scope and application.

In terms of next steps, the Government is planning to consult and publish further guidance on several critical topics – most notably (i) the definition of the 17 NSIA sectors which require mandatory notifications in the UK; and (ii) further targeted exemptions for internal reorganisations. The public consultation process is expected to commence at some point during the summer months, although it is unclear how the UK General Election called for 4 July 2024 might impact the intended timeline.

ABUSE OF DOMINANT POSITION

European Union level

European Commission imposes fine of € 337.5 million on Mondelēz for restricting parallel trade and artificially partitioning EU internal market

On 23 May 2024, the European Commission ("Commission") fined Mondelēz International, Inc. ("Mondelēz") € 337.5 million for restricting the cross-border trade of various chocolate, biscuit and coffee products, and for abusing its dominant position through unilateral strategies limiting cross-border sales of chocolate tablets into certain national markets. This is the highest fine ever imposed by the Commission in a case concerning unlawful restrictions on parallel trade between Member States.

In particular, the Commission found that Mondelēz breached Article 102 TFEU by refusing to supply a German broker, with the aim of preventing the resale of its chocolate tablet products to Austria, Belgium, Bulgaria and Romania, where the price of the product was higher. Mondelēz also ceased supply entirely in the Netherlands to prevent its product from being imported into Belgium for the same reason.

The Commission also found that Mondelēz breached Article 101 TFEU through 22 agreements/concerted practices which:

- limited the territories/customers to which seven wholesale customers could resell Mondelēz products. (One of the agreements also required the relevant customer to apply higher prices for exports as compared to domestic sales.)
- prevented ten exclusive distributors from replying to sale requests from customers located in different Member States (to where the relevant distributor was active) without prior approval from Mondelēz.

All the above conduct was found to artificially partition the internal market, such that cross-border trade could not lead to price decreases in countries with higher prices - to the detriment of EU consumers.

In setting the fine, the Commission took into account the gravity and long duration of the infringements, as well as the value of Mondelēz's sales corresponding to the geographic scope of the infringement (which was found to cover all EU markets). Mondelēz benefited from a 15% fine reduction on account of its acknowledgement of the infringement and cooperation with the Commission.

Observations

The Mondelēz decision is the latest in a series of decisions in respect of internal market-partitioning adopted by the Commission in recent years, which has clearly again become a key enforcement priority after a long period of inactivity on the part of the Commission. These more recent cases have mainly concerned agreements found to infringe Article 101 TFEU (in particular, the Guess decision in 2018; the three decisions concerning merchandising products in 2019-2020; and the PC video games decision in 2021).

The Commission's decision in the Mondelēz case is notable, in that it demonstrates the Commission's interest in also pursuing abuse of dominance cases in the context of partitioning of the internal market, if it is able to establish a brand's dominance (as was found to be the case with Mondelēz in respect of chocolate tablets). The Commission similarly fined AB InBev in 2019 for abusing its dominant position on the Belgian beer market by hindering cheaper imports of its Jupiler beer from the Netherlands into Belgium, including by limiting supplies to certain Dutch wholesalers. From an Article 102 TFEU perspective, it is noteworthy that the Commission characterised Mondelēz's strategies as object restrictions, escaping the need to analyse the strategies under *Intel*'s more demanding effects-based framework. This suggests more broadly that the Commission may seek to analyse restrictions considered object restrictions under

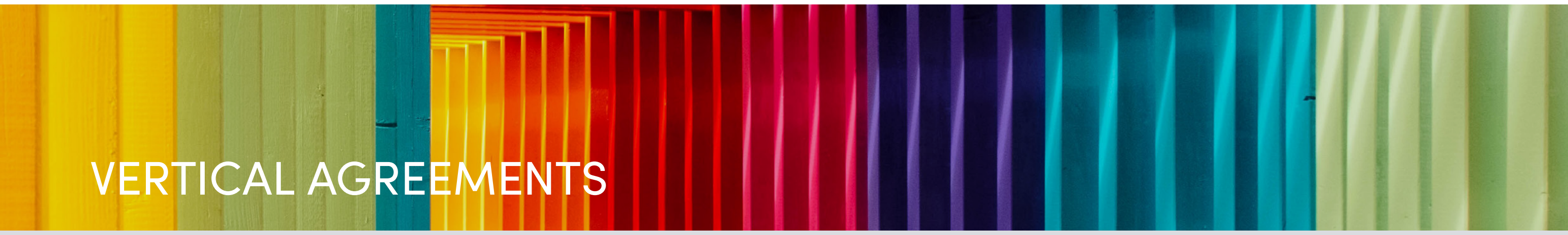
ABUSE OF DOMINANT POSITION

European Union level

Article 101 TFEU, by reference to the same framework in Article 102 TFEU cases.

This decision comes at a time of heightened political concerns over price differences between Member States in branded food products, which are allegedly underpinned by artificial "territorial supply constraints" imposed by brands. As these are often unilateral practices, the ability of the Commission to tackle them under competition law is limited as this would require the brand to have a dominant position. A number of Member States – led by the Netherlands – are therefore calling for regulatory legislation to prohibit the use of these practices by all brands, and Commissioner Vestager has promised to carry out an extensive fact-finding exercise. This has been welcomed by the main brands' association, AIM, which considers that there are numerous reasons for cross-border price differences (which are not the result of the conduct of its members). It remains to be seen how the Commission will decide to implement this fact-finding exercise, and how it will follow up on its results.

Commissioner Vestager has promised that more internal-market partitioning cases will be brought by the Commission, and that the Commission's decision against Mondelēz should serve as a warning to other brands – whether dominant or not – that partitioning of the internal market will attract hefty sanctions.



VERTICAL AGREEMENTS

European Union level

European Commission imposes fine of € 337.5 million on Mondelēz for restricting parallel trade and artificially partitioning EU internal market

See abuse of dominance section.

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