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Competition Law Newsletter

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From the editors

The April 2022 issue of Ashurst's competition law newsletter features some of the key recent competition law developments, including: two important rulings by the ECJ on the "double jeopardy" principle; the European Commission's draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines and new temporary crisis framework under State aid rules in response to the Ukraine conflict; and updates on recent antirust fines in France, China and Indonesia.

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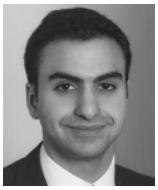

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Content

UPS loses €1,74 billion damages claim against European Commission

EU – MERGER CONTROL

On 23 February 2022, the General Court dismissed UPS's damages action for EUR 1.74 billion against the European Commission for the losses and costs resulting from the annulment of the UPS/TNT merger prohibition decision.

KEY TAKEAWAYS

- Annulment of a merger prohibition decision will not necessarily lead to an award of damages to the notifying parties
- The General Court confirmed that failure to communicate to UPS the final version of an econometric model amounted to a "sufficiently serious breach" of UPS's rights of defence
- To establish a causal link between the damages claimed and the breach of rights, the burden is on the claimant to prove that, absent the breach, the transaction would have been cleared by the Commission
- Transaction break fees are not considered to be damage resulting from a merger prohibition

BACKGROUND

On 30 January 2013, the European Commission prohibited the proposed acquisition of TNT by UPS because it would significantly impede competition in the market for international express small package delivery services in a number of EEA Member States.

UPS challenged the prohibition decision before the General Court in April 2013. On 7 March 2017, the General Court quashed the Commission's decision, finding the Commission had failed to communicate to UPS the final version of the econometric model used for the analysis of price increases resulting from the transaction, thereby breaching UPS's procedural rights of defence. The Court of Justice upheld the General Court's ruling in a judgment of 16 January 2019 (see our previous article).

In the meantime, the Commission cleared the acquisition of TNT by FedEx in 2016.

On 29 December 2017, UPS brought a claim for damages against the Commission, seeking EUR 1.74 billion compensation for its financial loss and costs resulting from the merger prohibition. This included:

- loss of profits reflecting the net value of the synergies of the proposed acquisition (estimated at EUR 1.638 billion);
- compensation paid to TNT under a termination clause (EUR 100 million); and
- legal fees relating to UPS's participation in the merger clearance procedure for the FedEx/TNT deal (EUR 3.7 million).

JUDGMENT OF THE GENERAL COURT

In in its judgment rejecting UPS's damages claim, the General Court reiterated established case-law regarding the three cumulative conditions for the non-contractual liability of the European Union to be triggered, namely: a sufficiently serious breach of a rule of law conferring rights on individuals; evidence of actual damage having occurred; and a causal link between the breach of law and the damage sustained. It analysed each of these conditions in turn.

First, the Court found that the Commission's failure to communicate to UPS the final version of its econometric model, which had led to the

prohibition decision being quashed, amounted to a sufficiently serious breach of UPS's rights of defence. However, the Court rejected UPS's other allegations of procedural and substantive errors by the Commission.

Secondly, the Court could not establish a direct causal link between the breach and the losses suffered by UPS. The Court considered that:

- the payment of a termination fee to TNT was the direct consequence of the contractual agreement between the parties, and not of the infringement of UPS's rights of defence by the Commission;
- the legal fees incurred by UPS in relation to the FedEx/TNT merger procedure resulted from UPS's free choice to participate in that process; and
- in relation to the alleged loss of profit sustained by UPS, it cannot be presumed that the UPS/TNT transaction would have been approved by the Commission had UPS's procedural rights not been infringed, and UPS did not provide evidence to support such a conclusion.

Thirdly, any direct causal link between the infringement and the damage was broken when UPS decided not to go ahead with the proposed acquisition as soon as the prohibition decision at issue was announced (in 2013).

The Court rejected UPS's claim for damages entirely. However, it ordered the Commission to bear its own legal costs and one third of UPS's costs.

COMMENT

The General Court's judgment confirms that, while a breach of the merger parties' rights of defence can lead to the annulment of a Commission prohibition decision, it will not necessarily lead to an award damages for losses suffered as a result.

In particular, the standard of proof to be satisfied by claimants in respect of the causal link is particularly high, and possibly unattainable: they must prove that, absent the breach, the Commission would have authorised the transaction.

This case also exemplifies the timing issues where parties to corporate transactions seek to have a Commission decision overturned before the EU Courts: by the time the UPS/TNT prohibition decision had been quashed at first instance (in 2017), TNT had already been acquired by FedEx.

Finally, to avoid breaking the causal link between the breach and the damage claimed, the General Court judgment effectively requires parties to "revive" the merger process pending the outcome of their claim, which is likely to be burdensome and not in the parties' commercial interests.

With thanks to Maëlle Vannet-Deprugney of Ashurst Europe for her contribution.

ECJ clarifies the protection provided by the non bis in idem principle

EU – ABUSE OF DOMINANCE / ANTICOMPETITIVE AGREEMENTS

On 22 March 2022, the European Court of Justice ("ECJ") delivered two judgments clarifying the scope of protection of the non bis in idem (double jeopardy) principle which provides that a (natural or legal) person may only be sanctioned once for a single unlawful course of conduct where the sanctions are designed to protect the same legal interest.

KEY TAKEAWAYS

- The *non bis in idem* principle does not protect an undertaking from dual proceedings where there are *distinct* protected legal interests pursued in each proceeding.
- Dual proceedings are only permissible where there are clear and precise rules that make it possible to predict (i) which acts or omissions are liable to be subject to duplicative proceedings, and (ii) that there will be coordination between two competent authorities.
- The duplicative proceedings must be conducted within a proximate timeframe and the overall penalties imposed must correspond to the seriousness of the offences committed.

The Austrian Supreme Court and the Belgian Court of Appeal referred questions to the ECJ in the context of appeals based on the *non bis in idem* principle for duplicative proceedings. On 22 March 2022, the ECJ delivered judgment in bpost (C-117/20) and Nordzucker and Others (C-151/20) which clarified the application of *non bis in idem* in the context of duplicative proceedings by multiple national competition authorities ("NCAs") and by an NCA and a national sectoral regulator.

NORDZUCKER

Two of the major producers of sugar in Germany, Nordzucker and Südzucker, agreed not to compete with each other in their respective traditional core sales areas. Südzucker's Austrian subsidiary, Agrana, noticed a delivery of sugar coming from Nordzucker's Slovak subsidiary. Südzucker subsequently informed Nordzucker of the delivery in a telephone conversation and referred to possible consequences for the German sugar market.

In 2014, the German NCA fined Nordzucker and Südzucker for participating in an anti-competitive agreement. The Austrian NCA subsequently filed an application before the competent Austrain court, seeking a declaration that Nordzucker had infringed competition law and to impose fines on Südzucker. The Austrian court of first instance ruled that the agreement concluded during the telephone conversation had already been subject to a penalty imposed by another NCA and therefore a new penalty would infringe the principle of *non bis in idem*. On appeal, the Austrian Supreme Court referred a question to the ECJ seeking guidance on whether the telephone conversation could be taken into account, even though it was expressly referred to in the German NCA's infringement decision.

The ECJ ruled that the *non bis in idem* principle did not prevent proceedings from being brought against the same undertaking by the NCA of a different Member State on the basis that the proceedings pursue complementary aims relating to different aspects of the same unlawful conduct of issue. The second NCA's decision must therefore not be based on a finding of an anticompetitive object or effect in the territory of the first Member State. In this context, the court needs to consider whether the legal assessments made by the German NCA related exclusively to the German sugar market or also included the Austrian sugar market.

BPOST

Bpost, the historical provider of postal services in Belgium, was successively fined by two Belgian authorities for its rebate system. The national sectoral regulator for postal services concluded that the rebate system applied by bpost in 2010 discriminated against some of bpost's clients. Following an appeal (including a request to the ECJ for a preliminary ruling), the postal regulator's decision was annulled on the basis that the situation did not amount to discrimination under the legislation relating to the postal sector.

Subsequently, bpost was fined by the Belgian NCA for abusing its dominant position by the application of the same rebate system between January 2010 and July 2011. On appeal, bpost disputed the legality of that second set of proceedings, relying on the principle of *non bis in idem*.

The ECJ held that the protection against double jeopardy does not prevent an undertaking from duplication of proceedings provided two *distinct* general legal interests are being pursued, even if the proceedings are based on the same facts. However, there must be clear and precise rules that enable undertakings to predict (i) which acts or omissions are likely to be result in duplicative proceedings and (ii) that the competent authorities in each area will

cooperate. In addition, the two sets of proceedings must be completed in a suitably coordinated manner within a reasonable time frame, and the aggregate penalties imposed must correspond to the seriousness of offences committed. Otherwise, the second public authority will infringe the principle of *non bis in idem* by instituting proceedings.

COMMENT

Previously, the *non bis in idem* principle has been applied differently depending on the field of EU law. In his Opinion, AG Bobek proposed a harmonised test of *non bis in idem* under Article 50 of the Charter on Fundamental Rights of the European Union which would require duplication of the offender, relevant facts and protected interest. While the ECJ rulings have harmonised the approach to *non bis in idem* across EU law, it has not adopted AG Bobek's suggestion.

With thanks to *Jessica Bracker* and *Robbie Paratore* of Ashurst for their contribution.

Ukraine conflict: European Commission adopts State aid crisis framework

EU – STATE AID

The aggression against Ukraine by Russia, the sanctions imposed by the EU and its international partners and the retaliatory counter-measures have created significant economic uncertainties, and disrupted trade flows and supply chains in many sectors. They have also led to exceptional price hikes, especially in gas and electricity, but also in numerous other inputs, raw materials and primary goods.

In response to these unprecedented challenges, the European Commission ("Commission") has adopted on 23 March 2022 a Temporary Crisis Framework ("Temporary Framework") to enable EU Member States to make full use of the flexibility foreseen under State aid rules to support the EU economy in the context of Russia's invasion of Ukraine (for further information on the EU State aid regime, see our State aid Quickguide). As with the similar framework adopted in the context of the COVID-19 crisis, the Temporary Framework provides for several types of aids deemed to be compatible under Article 107(3)(b) TFEU, which allows measures to remedy a serious disturbance in EU economies. It also reminds Member States that they have the possibility under Article 107(2)(b) TFEU to mitigate damage directly caused by the conflict in Ukraine.

This briefing note sets out the EU State aid legislative framework within which EU Member States may adopt measures to support their national economies in the context of the current crisis.

FINANCIAL SUPPORT MEASURES WHICH DO NOT NEED TO BE MODIFIED

The Temporary Framework recalls that a number of measures do not fall within the scope of State aid control or are exempted from notification to the Commission. These include:

- public support measures benefiting **non-commercial energy consumers**, provided that such measures do not indirectly benefit a specific sector or company, e.g. social payments, public support for energy efficiency improvements;
- public aids **available to all companies**, e.g. general reduction of taxes or levies, reduction of rates for the supply of natural gas or electricity including a reduction of network costs;
- **public aid for the transport of refugees and humanitarian materials** provided that the State acts within the exercise of its public powers and as long as transport services are not purchased above market prices;

- public aids falling under the ***de minimis* Regulation**, which applies until 31 December 2023. This can include aid up to EUR 200,000 for individual undertakings for three years; subsidised loans up to EUR 1 million and subsidised guarantees for loans of up to EUR 1.5 million; and
- public financial measures falling under the **General Block Exemption** ("GBER"). This includes reduction of harmonised environmental taxes provided they are in line with the specific conditions set out in the Energy Taxation Directive and the GBER.

FINANCIAL SUPPORT MEASURES WHICH NEED TO BE APPROVED

Subject to the Commission's prior approval, Member States can design a number of other measures to cope with the immediate effects of the crisis which will be considered compatible under EU State aid rules. Depending on the type of measure envisaged, Member States can rely mainly on two different legal bases, namely:

- Article 107(2)(b) TFEU; and/or
- Article 107(3)(b) TFEU and the Temporary Framework adopted under this provision.

COMPENSATION FOR THE DAMAGE CAUSED BY THE RUSSIAN AGGRESSION AGAINST UKRAINE (ARTICLE 107(2)(B) TFEU)

The Temporary Framework confirms that the conflict in Ukraine qualifies as an **'exceptional occurrence'** under Article 107(2)(b) TFEU. As a result, Member States can adopt measures directly under this provision to compensate companies particularly hard hit for the damage suffered due to this exceptional occurrence.

To be compatible under this provision, any aid must be:

- **directly linked** to the damage caused by the Russian aggression against Ukraine. This may include certain direct negative effects of economic sanctions or counter-measures on a beneficiary's economic activity; and

- **proportionate**, i.e. the compensation should not exceed what is necessary to make good the damage. This involves a precise assessment of the damage incurred as a result of the crisis and ensuring that there is no overcompensation or compensation for damage unrelated to the crisis (e.g. by setting-up claw back mechanisms).

Where these conditions are satisfied, the Commission has no discretion but to declare the aid compatible with the internal market. In the context of the COVID-19 crisis, the General Court has confirmed that aid under this provision can be declared compatible even if it is targeted at companies which are important to a Member State's national economy and does not extend to all companies active in a given sector (see our May 2021 newsletter article).

As regards the scope of application of this provision, the Temporary Framework clarifies that such aid can be granted to (i) undertakings in difficulty and (ii) credit institutions. Credit institutions will however only be able to receive aid under this provision if the aid does not have the objective of preserving or restoring their viability, liquidity or solvency. If, due to the current crisis and sanctions, credit institutions were to need extraordinary public financial support (e.g. in the form of liquidity or recapitalisation), such measures would need to be assessed under the EU legislation and State aid rules specifically applicable to the banking sector.

Aid to remedy a serious disturbance to the economy (Article 107(3)(b) TFEU and the Temporary Framework)

Article 107(3)(b) TFEU enables the Commission to approve national support measures *"to remedy a serious disturbance in the economy of a Member State"*.

The Temporary Framework recognises that the crisis originating from the Russian aggression against Ukraine as well as the related sanctions and counter-measures is causing a serious disturbance in EU economies. To complement the existing State aid toolbox, it provides for several types of aids deemed to be compatible under Article 107(3)(b) TFEU where specific conditions are met.

Where all the conditions of the Temporary Framework are not satisfied or where the measure is not covered by it, Member States can still obtain clearance directly under Article 107(3)(b) TFEU.

Scope of application

The measures covered by the Temporary Framework intend to support undertakings affected by the Russian military aggression and/or the consequences of the economic sanctions and the retaliatory counter-measures. Undertakings subject to sanctions adopted by the EU are excluded.

Importantly, and in contrast with the COVID-19 Temporary Framework, aid will be available to companies that qualified as undertakings in difficulty before the start of the crisis.

The Temporary Framework applies from 1 February 2022 to 31 December 2022.

Types of aid under the Temporary Framework

The Temporary Framework covers three different types of aid and sets the specific conditions for their assessment under Article 107(3)(b), namely:

- **Limited amounts of aid:** Member States will be able to set-up schemes to grant up to EUR 400,000 per undertaking (a lower cap of EUR 35,000 and specific conditions apply to undertakings active in the primary production of agricultural products, and the fisheries and aquaculture sector). Aid may be granted in the form of direct grants, tax and payment advantages or other forms (including repayable advances, guarantees, loans and equity).
- **Liquidity support in the form of subsidised State guarantees or loans with subsidised interest rates:** among other conditions, the maximum amount of loans shall not exceed (i) 15% of the beneficiary's average total annual turnover over the last three accounting periods, or (ii) 30% of its energy costs over the 12 last months preceding the application for aid. Such amount can be increased if "appropriately" justified (e.g. in the case of beneficiaries active in sectors particularly affected by disruptions of supply chains or increased risks of cyber-attacks).
- **Aid for additional costs due to the exceptionally high energy prices:**

- **Scope and form of aid:** aid must be granted on the basis of a scheme which can cover any form of aid, including direct grants. Member States can limit the aid to activities that support specific economic sectors of particular importance to the economy or to the security and resilience of the internal market.
- **Eligible costs:** the calculation of eligible costs is based on the increase in natural gas and electricity costs linked to the Russian aggression against Ukraine and involves a comparison with the average energy price paid by a company in 2021.
- **Overall cap:** the aid must not exceed 30% of the eligible costs, up to a maximum of EUR 2 million.
- **Higher ceilings for energy intensive users**: when an energy intensive user (i.e. businesses for which the purchase of energy products amount to at least 3% of their production value) incurs operating losses and aid is necessary to ensure the continuation of an economic activity, Member States may grant aid up to EUR 25 million and even up to EUR 50 million for companies active in particularly affected sectors (such as production of aluminium and other metals, glass fibers, pulp, fertilizer or hydrogen and many basic chemicals).
- **Advance payments:** granting authorities can make an advance payment to the undertakings when the aid is granted before the eligible costs have been incurred (based on estimations of such costs).
- **Green condition?** Although not a condition, Member States are *"invited"* to consider (in a non-discriminatory way) setting up requirements related to environmental protection/security of supply (e.g. requiring that a certain share of energy consumption needs is met by renewable energy or requiring investments to reduce or diversify natural gas consumption) for granting this type of aid.
- **Cumulation rules:** Aid to compensate for high energy prices can be cumulated with aid under 'Limited amounts of aid' above, provided that the capped amount of EUR 2 million (or the higher ceiling provided for energy intensive businesses) is not exceeded.

SAFEGUARDS

The Temporary Framework includes a number of safeguards to limit the negative consequences to the level playing field within the EU internal market. For example:

- the granting of aid shall not be subject to the relocation of an activity of the beneficiary from another country within the EEA to the territory of the Member State granting the aid, as such a condition would be harmful to the internal market; and
- there should be a link between the amount of aid that can be granted to businesses and the scale of their economic activity and exposure to the economic effects of the crisis, by taking into account their turnover and energy costs.

CUMULATION RULES

The Temporary Framework confirms that aid under Article 107(2)(b) TFEU and aid under the Temporary Framework can be cumulated provided that there is no overcompensation of damage suffered by the beneficiary.

These measures can also in principle be cumulated with aid granted under the COVID-19 Temporary Framework (subject to the specific cumulation rules laid down in that document). However, in the event Member States provide to the same beneficiary loans or guarantees under both the COVID-19 Temporary Framework and the Temporary Framework, they must ensure that liquidity needs are covered only once with aid.

COMMENT

The Temporary Framework and the qualification of the Ukrainian conflict as an *"exceptional occurrence"* echo the mechanisms put in place two years ago to help EU Member States support their

economies in the context of the COVID-19 outbreak. Like the COVID-19 Temporary Framework, which has been amended six times and has now been in force for over two years, the Temporary Framework will likely be reviewed and amended in light of the development of the Ukrainian conflict and its impact on energy markets, other input markets and the general economic situation.

Just as for aid notified to remedy the consequences of the COVID-19 crisis, the Commission is expected to approve swiftly aid notified under the Temporary Framework and to provide rapid and pragmatic guidance to Member States (including on aid which may not fall within the scope of State aid rules). Member States are recommended in the Temporary Framework to inform the Commission of their intentions and to notify plans to introduce State aid measures *"as early and comprehensively as possible"*.

With thanks to *Jessica Bracker, Cecilia Borelli and Emma Nekelson* for their contribution.

European Commission consults on draft guidance on sustainability agreements

EU – NEW POLICY

On 1 March 2022, the European Commission ("Commission") published its draft revised Horizontal Block Exemption Regulations and Horizontal Guidelines, which include a new chapter on the assessment of sustainability agreements under competition law. The consultation is open until 26 April 2022.

KEY TAKEAWAYS

- The draft Horizontal Guidelines include a new chapter on sustainability which provides guidance on the assessment of whether sustainability agreements give rise to competition concerns. It provides helpful additional guidance for industry but does not endorse the more flexible approach to sustainability agreements advocated by some national competition authorities (e.g. the Netherlands).
- Though cooperation in the area of sustainability may take many forms, the draft Horizontal Guidelines primarily focus on sustainability standardisation with the Commission proposing a "soft" safe harbour for agreements which meet certain cumulative criteria, in line with the Commission's previous guidance on standard-setting.
- The draft Horizontal Guidelines set out the Commission's proposed approach to consumer benefits which can be taken into account when assessing whether an agreement should benefit from an individual exemption. Any claimed sustainability efficiencies arising from the cooperation will need to be substantiated and where possible quantified. Only benefits which accrue to consumers of the products affected by the agreement may be taken into account, meaning that it will not be possible to exempt agreements on the basis of benefits which primarily accrue outside the EU (e.g. greener farming outside the EU or fair trade objectives).
- The draft Horizontal Guidelines state that sustainability agreements must not be used as a cover for illegal cartel conduct.

BACKGROUND

In its September 2021 Policy Brief, the Commission explored how competition rules can complement the EU's ambitious environmental and climate policies more effectively and confirmed its intention to provide guidance in its updated Horizontal Guidelines (see our October 2021 newsletter). National competition authorities in Austria, Greece and the Netherlands have also provided guidance on the assessment of sustainability initiatives under competition law, proposing a more flexible approach.

As anticipated, the draft Horizontal Guidelines provide guidance on the assessment of sustainability initiatives under Article 101 of the

Treaty on the Functioning of the European Union ("TFEU") and its proposed approach to sustainability initiatives, including under Article 101(3).

SUSTAINABILITY AGREEMENTS COVERED BY THE PROPOSED GUIDANCE

Under the draft Horizontal Guidelines, sustainability agreements cover "*any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, irrespective of the form of cooperation*". In line with the 2030 UN Agenda for Sustainable Development, sustainability is not limited to environmental cooperation but also covers initiatives aimed at improving animal welfare, workers' welfare or corporate social responsibility.

The Commission has emphasised that the mere fact that an agreement pursues a sustainability objective will not mean that competition law does not apply. Sustainability agreements are not a distinct type of cooperation and they may take many forms (such as standard-setting, joint research and development and joint procurement of sustainable raw inputs). Sustainability agreements should therefore be assessed based on the type of cooperation: for example, research and development projects should be assessed according to the Horizontal Guidelines chapter on research and development.

While the draft Horizontal Guidelines apply to all sustainability agreements, the guidance focuses on sustainability standardisation agreements which the Commission considers to be the most common form of cooperation. These are described as agreements that specify requirements for parties in a supply chain in relation to a wide range of sustainability metrics and cover all forms of industry-developed standards, commitments, codes of conduct, labels/certification systems that formulate a set of minimum quality requirements for the manufacture and/or supply of "greener" or "more sustainable" products or services.

SUSTAINABILITY AGREEMENTS UNLIKELY TO RAISE COMPETITION CONCERNS

In the Policy Brief, the Commission acknowledged that many sustainability initiatives will not raise competition concerns.

Sustainability agreements which do not affect the parameters of competition

Sustainability agreements will not raise competition concerns where they do not affect the parameters of competition (such as price, quality, quantity, choice or innovation). The draft Horizontal Guidelines provide some examples of such agreements, including agreements relating to:

- companies' internal sustainability policies (e.g. waste management/recycling programmes, sustainable business travel policy, etc.);
- industry-wide awareness campaigns;
- the creation of a database containing information about suppliers that have sustainable value chains or sustainable production processes, or distributors selling products in a sustainable manner, provided there is no requirement to trade.

In practice, companies will still need to carefully consider the type of information collected on suppliers and distributors as well as the precise modalities of access to the database.

PRINCIPLES FOR ANTITRUST ASSESSMENT OF SUSTAINABILITY AGREEMENTS

The draft Horizontal Guidelines emphasise that sustainability standardisation agreements often have pro-competitive effects. For example, they may contribute to sustainable development by improving product quality, stimulating innovation or enabling consumers

to make informed product choices considering a product or a service's ethical, social or environmental profile/attributes.

No cover for illegal cartels

In line with other competition authorities, the Commission emphasises that sustainability agreements should not be used as a cover for cartels. This is not new and reflects previous case law. For example, in the context of a voluntary environmental initiative launched at industry level and genuinely aimed at reducing the environmental impact through compaction of products and packaging, the Commission fined three major detergent manufacturers for discussing and coordinating prices of detergents.

According to the draft Horizontal Guidelines, where an agreement appears to involve price fixing, market/customer sharing and limitation of output or innovation (typically considered "by object" infringements), the burden of proof will be on the parties to provide evidence that the agreement *genuinely pursues* a sustainability objective and the sustainability objective is not being used to disguise an object infringement. Where this is established, the agreement will be assessed as a potential by effect restriction and not a by object infringement.

Specific guidance on sustainability standardisation

As set out above, the draft Horizontal Guidelines focus on sustainability standardisation agreements. Adoption of sustainability standards may require significant changes to existing production or trading processes (e.g. different product formulation) and the draft Horizontal Guidelines acknowledge that it is not uncommon for standards to lead to increased production or distribution costs which may in turn be passed on the consumer.

"Soft" safe harbour for sustainability standardisation agreements

The draft Horizontal Guidelines introduce a "soft" safe harbour for sustainability standardisation agreements. To fall within the safe harbour, the agreement must meet a list of cumulative conditions, which largely reflect the guidance on standardisation agreements generally in the current Horizontal Guidelines:

- transparent standardisation procedure;
- voluntary participation in the standard;
- participating companies remain free to adopt higher sustainability standards;
- no exchange of commercially sensitive information that is not necessary for the development of the standard;
- effective and non-discriminatory access to the outcome of the standardisation procedure;
- no "*significant*" increase in price or "*significant*" reduction in the choice of products, as a consequence of the standard; and
- monitoring mechanism to ensure compliance.

While the safe harbour is conditional upon agreements not *significantly* affecting price and/or product diversity, the Commission has not defined "significant" in this context. However, the Commission does note that economies of scale may allow companies to only apply an insignificant price increase where the standard is adopted by a significant part of the market.

Agreements which do not benefit from the "soft" safe harbour

Importantly, failure to satisfy the safe harbour conditions does not mean that the agreement is presumed to restrict competition. Where one or more of the conditions is not fulfilled, the parties will need to assess whether the agreement is likely to lead to an appreciable negative effect on competition and, if so, whether it may benefit from an individual exemption under Article 101(3).

The draft Horizontal Guidelines indicate that a sustainability standardisation agreement is likely to be restrictive of competition where it risks leading to a "*significant increase in price or reduction in output, product variety, quality or innovation*".

ASSESSMENT OF SUSTAINABILITY BENEFITS UNDER ARTICLE 101(3)

Where a sustainability agreement is caught by Article 101(1), it may still benefit from an individual exemption under Article 101(3). The agreement will be assessed on the basis of the four Article 101(3) criteria, namely that the agreement: (i) contributes to improving the production/distribution of goods or to

promoting technical/economic progress (efficiency gains), (ii) allows consumers a fair share of the resulting benefit, (iii) does not impose restrictions which are not indispensable, and (iv) does not afford the companies the possibility of eliminating competition in respect of a substantial part of the products in question.

Efficiency gains

The draft Horizontal Guidelines allow for a broad spectrum of sustainability benefits to be taken into account as efficiency gains, including less pollution, more resilient infrastructure or supply chains and better quality products. These efficiencies will need to be substantiated and will not simply be assumed.

Indispensability

In principle, each company should decide for itself how to pursue sustainability benefits. Cooperation to achieve sustainability goals should therefore be objectively justifiable and companies should be able to demonstrate that each restriction is reasonably necessary to achieve the sustainability benefits and that no less restrictive means are available.

Fair share for consumers

The assessment of whether consumers receive a fair share of the resulting benefits has been a topic of debate amongst academics and national competition authorities, with some advocating for a broader approach taking into account the wider benefits for society. In the draft Horizontal Guidelines, the Commission has set out its proposed approach: "*sustainability benefits that ensue from the agreements have to be related to the consumers of the products covered by those agreements*". This contrasts to the approach proposed by the Dutch competition authority under which benefits to society as a whole could be taken into account in certain circumstances.

The draft Horizontal Guidelines distinguish between three different types of consumer benefits:

- "Individual use value benefits": direct consumer benefits that result from the use of a sustainable product and directly improve the consumer's experience, such as improved product quality efficiencies (e.g. healthier grown vegetables).
- "Individual non-use value benefits": indirect benefits resulting from the consumer's personal appreciation of the impact of sustainable consumption on others. For example, consumers may be prepared to pay more for a sustainable product if the sustainable product has a less negative impact on the environment (e.g. a less polluting car fuel) which benefits society as a whole and future generations.
- "Collective benefits": sustainability efficiencies which benefit a larger group of society, irrespective of the choices made by individual consumers. For example, phasing out polluting technology may be necessary to deliver sustainability benefits to a larger group of society.

The draft Horizontal Guidelines state that in some cases one type of consumer benefit may be sufficient to satisfy the conditions of Article 101(3) and in other cases a combination of more than one type of benefit may be required.

Companies will bear a significant burden of proof as any expected benefits will need to be "*substantiated and cannot simply be assumed*". In practice, this may be a significant obstacle for companies to overcome in order to benefit from the exemption under Article 101(3). Companies will need to provide "*cogent evidence*" demonstrating the actual willingness of consumers to pay a higher price for sustainable products (e.g. through customer surveys).

Collective benefits

For collective benefits to be taken into account, companies should be able to:

- clearly describe the claimed benefits and provide evidence that they have already occurred or are likely to occur;
- clearly define the beneficiaries;
- demonstrate that the consumers in the relevant market substantially overlap with the beneficiaries or are part of them; and
- demonstrate what part of the collective benefits occurring or likely to occur outside the relevant market accrue to the consumers of the product in the relevant market.

As a result, negative effects arising from sustainability initiatives would not be outweighed where beneficiaries of the collective benefits are situated outside the EU. For

example, there is unlikely to be a significant overlap between the consumers who buy clothing made of sustainably grown cotton and the beneficiaries of the environmental benefits (such as less chemicals and water use on the land where the cotton is cultivated).

The collective benefits also need to be significant enough to compensate consumers in the relevant market for any harm suffered. Where a lack of data prevents a quantifiable analysis, it must be possible to foresee a "*clearly identifiable positive impact*", though no further guidance is provided on how this should be demonstrated. In the draft Horizontal Guidelines, the Commission recognises that it currently lacks experience of measuring and quantifying collective benefits and indicates that it may provide additional guidance in the future.

No elimination of competition

This condition may be satisfied even where the agreement covers the whole industry, provided the parties continue to compete "*vigorously*" on at least one important parameter of competition such as price.

COMMENT

The draft Horizontal Guidelines reflect the Commission's current thinking but the ongoing public consultation process will further fuel the ongoing debate. In particular, the Commission has raised on several occasions that it lacks concrete examples of sustainability initiatives which would require specific and additional guidance to ensure that companies do not fall foul of competition law. The public consultation process provides an opportunity for stakeholders to share concrete and practical examples of initiatives, in particular outside the realm of sustainability standardisation. Industry may for instance also benefit from specific guidance on data collection and database development aimed at connecting various actors in a more sustainable value chain.

National competition authorities (most notably in the Netherlands, Greece, Austria and the UK) are also actively contributing to the discussion and have published (draft) guidance clarifying the application of competition rules to sustainability agreements. The Dutch competition authority has broadly welcomed the proposed new chapter on sustainability agreements in the draft Horizontal Guidelines, and in particular the proposal for a soft safe harbour for sustainability standardisation but it does call for a broader application thereof.

The UK Competition and Markets Authority ("CMA") has also recently published its advice to the UK government on environmental sustainability and the UK competition and consumer regimes. While the CMA does not believe any legislative change is required, it has stated that it will provide additional guidance on when sustainability agreements will not restrict competition, the concept of benefits and what constitutes a fair share of benefits for consumers.

UK High Court issues first judgment on application of State rules under Northern Ireland Protocol and new UK subsidy control regime

UK – STATE AID

On 24 February 2022, the UK High Court issued the first judgment on the interpretation of EU State aid rules under the Northern Ireland Protocol and the new UK subsidies regime (the "Judgment").

KEY TAKEAWAYS

- After Brexit, UK measures (including tariff measures) can still be subject to EU State aid rules under the Northern Ireland Protocol if they have an effect on trade between Northern Ireland and the EU. According to the High Court, this requires to show a "genuine and direct effect" on trade.
- A finding of State aid requires to show that a (tariff) measure is "selective". Similarly, for a (tariff) measure to qualify as a "subsidy" under the UK subsidy control regime, it must be "specific". This is not the case where a tariff measure does not differentiate between companies in a comparable position.
- WTO case-law can be relevant for the interpretation of the subsidies provisions under the TCA.

BACKGROUND

As part of the new UK tariff regime post-Brexit, the UK government introduced an autonomous tariff quota (ATQ), allowing tariff free imports of a given quantity of raw cane sugar for refining on a first-come first-served basis (the "Decision"). Tariffs after exhaustion of the quota were £28/100kg, save where other preferential tariff regimes applied.

British Sugar (BS), the only beet sugar producer in the UK, brought a judicial review claim against the Decision, alleging that the ATQ (i) constituted an unlawful State aid to Tate & Lyle Sugars (TLS) within the meaning of the Northern Ireland (NI) Protocol; and (ii) amounted to a subsidy prohibited by the EU/UK Trade and Cooperation Agreement (TCA). TLS, which competes with BS on the downstream market for refined sugar, is the only substantial raw cane sugar refiner in the UK.

JUDGMENT

The High Court dismissed both grounds, finding that the ATQ did not constitute unlawful State aid and was not a subsidy.

Ground 1 - No State aid

The High Court found that the ATQ was not "selective". It noted that there was nothing in the terms or design of the ATQ that could lead to a conclusion of selectivity. Moreover, BS was unable to show that there was a discrimination between companies in a comparable position: (i) BS is not in a comparable position to TLS because it does not pay any tariff on its raw material (sugar beet), and (ii) any other importer of raw cane sugar would face the same regime as TLS.

That finding of no selectivity was enough to conclude that the ATQ did not amount to a State aid under EU law. The Judgment also addressed two issues specific to the NI Protocol:

- It held that tariff measures adopted by the UK government are capable in principle of falling within Article 10 of the NI Protocol and the EU State aid regime.
- It ruled that the jurisdictional requirement of an effect on trade between NI and the EU was not met. In this respect, in the light of the content of the EU Political Declaration on the NI Protocol, the High Court noted that the relevant test is whether there is a "*genuine and direct*" effect on trade between NI and the EU. In the present case, there was no evidence of such effect since the effect is indirect (there is no sugar refined in NI and no trade in raw cane sugar between the NI and the EU) and very small volumes of refined sugar were involved.

Ground 2 - No subsidy

The High Court found that the ATQ was not "specific" (and therefore not a "subsidy") within the meaning of the TCA for reasons similar to those supporting its conclusion of no selectivity.

COMMENT

The Judgment, which is subject to appeal, is significant as it is the first UK judgment considering the State aid provisions of the NI Protocol (including the threshold of an effect on trade between NI and the EU) and the TCA provisions on subsidy control. As regards the interpretation of the TCA provisions on subsidy control, it is worth flagging that these are partially inherited from WTO rules and that WTO case-law may therefore be relevant.

With thanks to Jessica Bracker of Ashurst for her contribution.

French Competition Authority fines EDF EUR 300 million for abuse of dominance

FRANCE – ABUSE OF DOMINANCE

The French Competition Authority ("FCA") has fined Électricité de France ("EDF") EUR 300 million for taking advantage of its dominant position as public provider of regulated electricity tariffs. It was found that EDF engaged in conduct with the objective of maintaining its market share in the electricity supply sector and to strengthen its position in the related gas and energy services markets in France. EDF did not contest the decision and offered a series of commitments to the FCA as part of an agreed settlement procedure.

KEY TAKEAWAYS

- Undertakings in dominant positions cannot take advantage of the control they possess over assets which cannot be re-produced by new entrants in order to preserve their market share position and inhibit the development of competition.
- Importantly, information collated in a database reflecting a long history of dealings with a large volume of consumers can constitute an asset incapable of reproduction. Accordingly, careful regard must be had to how a dominant entity in possession of that data uses it to protect its dominance.
- In this case the FCA accepted a commitment from EDF to make the non-reproduceable data in its possession accessible to competing electricity suppliers in a bid to level the playing field and encourage greater competition in the electricity supply market.

BACKGROUND

The supply of electricity pursuant to a regulated electricity tariff is a public service obligation to which EDF is subject in France. Regulated tariffs for medium and large non-domestic customers ("green" and "yellow" tariffs) were removed in 2016, while regulated tariffs for domestic and small non domestic customers ("blue" tariffs) remain in place. EDF's conduct, found to have constituted an abuse of its dominant position, took place between 2004 and 2021 during a period where regulation of the energy sector (through these tariff structures) was relaxing, and new entrants were entering the market. During this period, while EDF was required to offer a fixed electricity price set by regulation, customers could look to acquire electricity and other energy services from new entrants on the market, free to set their own prices.

FCA FINDINGS

On 22 February 2022, the FCA published a decision against EDF finding that EDF:

- held a dominant position in the market for the supply of electricity to residential and non-residential customers in France; and
- abused that position, by using the means at its disposal as a regulated tariff operator (including access to customer data and certain commercial infrastructure dedicated to the management of customer contracts for the sale of electricity at regulated prices) to:
- promote the marketing of its own gas market offers and energy services;
- create confusion amongst consumers between the marketing of regulated tariffs and non-regulated market offers;
- take advantage of it position as incumbent electricity provider to a large number of customers benefiting from electricity supply at regulated tariffs to maintain its market share in the electricity supply sector; and
- knowingly make available to alternative (competing) suppliers an incomplete database of customers at regulated tariffs.

It was found that EDF did this with the objective of maintaining its market share in the electricity supply sector and to strengthen its

position in the related gas and energy services markets.

PENALTIES

By electing not to contest the facts and findings against it and opting for a settlement procedure, EDF was able to reach a settlement resulting in a:

- penalty of EUR 300 million; and
- two sets of commitments, binding for a period of three years:
  - the first, to make its "blue" tariff customer files available to alternative electricity suppliers requesting access, including anonymised data relating to all "blue" tariff customers, individual data relating to "blue" tariff non-residential customers and residential customers (subject to customer consent); and
  - the second, to separate its subscription process for customers interested in offers at the regulated price and customers interested in offers at market prices.

With thanks to Hélène Fricaudet and Eva Murguet of Ashurst for their contribution.

Amendments to Belgian Competition law enter into force

BELGIUM – MERGER CONTROL / NEW LAW / POLICY

On 17 March 2022, the Belgian Act transposing the ECN+ Directive and also introducing several other amendments to Belgian Competition law (ie, Book IV of the Code on Economic Law) and the Belgian Criminal Code entered into force.

KEY TAKEAWAYS

- The ECN+ Directive aims to empower EU National Competition Authorities to enforce competition law by providing them with the necessary resources and independence to enforce the law to ensure the proper functioning of the internal market.
- The ECN+ Directive has now been transposed into Belgian Competition law, along with several other amendments to the law, effective from 17 March 2022.
- Merger filing fees, fines for failure to notify mergers and other procedural changes with respect to the admission of evidence, leniency and immunity will take effect and will serve to strengthen the powers of the Belgian Competition Authority ("BCA") and improve cooperation within the European Competition Network.

On 17 March 2022, the Belgian Act transposing the ECN+ Directive and also introducing several other amendments into the Belgian Competition law and Belgian Criminal Code entered into force.

Key amendments of note include:

- **merger filing fees** – filing parties will now need to pay a filing fee of EUR 17,450 for a simplified merger procedure and EUR 52,350 EUR for a regular merger procedure. These amounts will be adjusted annually in line with the consumer price index and are expected to help fund the BCA's increased budget and resources
- **fine of up to 1% of the worldwide annual turnover for failure to notify a concentration** – Belgian Competition law already includes a fine of up to 10% of the worldwide annual turnover of undertakings to a notifiable transaction for breach of "standstill obligations" while a transaction is under review (ie, gun- jumping conduct). The Belgian Competition Law will now additionally introduce a fine for a failure to notify a notifiable concentration
- **clarification of rules on leniency available for parties to a "secret cartel"**- the rules on leniency applications contained in the BCA's Leniency Guidelines are now included in Belgian Competition law with some clarifications regarding the languages

in which a leniency statement can be made and new conditions for leniency

- **extending immunity from criminal liability for bid-rigging immunity applicants** – the amendments give effect to changes to the Belgian Criminal Code to permit an undertaking that successfully applies for immunity to the BCA in the case of bid-rigging conduct to also receive an immunity from criminal liability (bid-rigging conduct is the only form of anti-competitive conduct that attracts both civil and criminal liability)
- **case law on the use of and reliance on evidence obtained through unlawful means to apply to competition law investigations** - case law regarding the admissibility of unlawful evidence now applies to competition law investigations making it more difficult for parties to dispute the admissibility of evidence that may be used against them even if obtained through improper means
- **voluntary disclosure of confidential documents** – the Belgian Competition Law now provides for a voluntary disclosure procedure for parties under investigation enabling them to agree to voluntarily disclose confidential documents to the BCA. This formalises a common practice in Belgian antitrust investigations.

The Belgian Government has taken the transposition of the ECN+ Directive as an opportunity to update the Belgian Competition Act. The new amendments are surely welcome by the BCA, now more adequately resourced and with a more robust regime to enforce its competition law enforcement mandate.

With thanks to Max Ryckx of Ashurst for his contribution.

ACCC announces its compliance and enforcement priorities for 2022/23

AUSTRALIA – NEW LAW / POLICY

Misleading advertising and greenwashing, competition issues in supply chains, anti-competitive conduct in the financial services sector and exclusive dealing are all key issues the Australian Competition and Consumer Commission ("ACCC") will be tackling in the coming financial year. Outgoing ACCC Chair, Mr Rod Sims, set out the ACCC's enforcement and compliance priorities for 2022/23 offering a glimpse into the regulator's future advocacy for law reform.

KEY TAKEAWAYS

- Key industries at the centre of this year's ACCC enforcement priorities include the financial services sector, the digital economy, energy and telecommunications providers and businesses subject to industry codes of conduct (particularly in agriculture and franchising).
- The ACCC will also be taking a close look at exclusive arrangements by companies with market power, greenwashing claims, consumer guarantees (including for motor vehicles, in particular) and COVID-19 related consumer issues.
- Cartel activity, anti-competitive conduct, product safety and conduct particularly affecting Indigenous Australians and vulnerable consumers remain enduring priorities for the ACCC.
- The ACCC intends to continue advocating for merger reforms, changes to consumer guarantees, a prohibition on unfair practices and a general safety provision.

On 3 March 2022, Mr Rod Sims made one of his final appearances as the Chair of the ACCC in his address to the Committee for Economic Development of Australia. Mr Sims outlined the ACCC's compliance and enforcement priorities for financial year 2022-23 and announced that the regulator will give immediate focus to these areas, putting businesses and stakeholders on notice of the ACCC's intentions.

COMPETITION ENFORCEMENT AND COMPLIANCE PRIORITIES

This year's competition enforcement priorities for the ACCC are:

- *Digital platforms markets*: As the ACCC continues to monitor the conduct of digital platforms in areas such as payments, search, apps and adtech, it remains concerned that new regulatory tools are necessary to address competition and consumer issues in this space. In particular, the ACCC is drawing inspiration from overseas regulators for options for reform.
- *Global and domestic supply chains:* The COVID-19 pandemic has triggered major disruptions to the supply of retail goods resulting in higher freight costs that businesses are passing on to consumers. To better share intelligence and detect illegal conduct across global supply chains, the ACCC has recently formed a "five eyes" working group with its overseas counterparts in the US, the UK, Canada and New Zealand.
- *Anti-competitive conduct in the financial services sector:* In response to the accelerated shift from cash to payments services, the ACCC will be particularly focused on the issue of competition in payments services, including with respect to competition in digital wallet services and access to least-cost routing. The ACCC has recently accepted a court enforceable undertaking from Visa in this space and will continue to investigate similar allegations of anti-competitive conduct.
- *Exclusive arrangements by firms with market power that impact competition:* The ACCC noted examples of concerning exclusionary behaviour to include firms with market power restricting access to bottleneck goods or services (impacting the abilities of competitors or new entrants to compete) and "most favoured nation clauses" that prevent competitors from offering a better deal to consumers.

CONSUMER AND FAIR TRADING ENFORCEMENT AND COMPLIANCE PRIORITIES

The ACCC's consumer enforcement priorities for the coming financial year are:

- *Environmental claims and sustainability:* The false promotion of green credentials, including carbon neutrality, in a bid to attract consumers (known as 'greenwashing') has been a long-standing concern of the regulator. The ACCC will extend its purview beyond consumer goods to look into claims made in the manufacturing and energy sectors, and will work with the Australian Securities and Investments Commission and the Clean Energy Regulator to identify the appropriate enforcement agency to take this work forward.
- *Manipulative or deceptive advertising and marketing in the digital economy:* The ACCC will be cracking down on business use of "dark patterns" – ie, website interface techniques that distort a user's online preferences. These can range from low-stock warnings and false sale countdowns to pre-selected add-ons and targeted advertising.
- *COVID-19 related consumer issues:* COVID-19 continues to create new challenges for the regulator, with the ACCC noting increased complaints relating to credit vouchers for cancelled flights and the supply of rapid antigen tests.
- *Pricing and selling of essential services:* A lack of transparency in agreements with essential service providers, misleading representations in advertising and mis-selling of essential service products continue to concern the ACCC, particularly in the energy and telecommunications sectors.
- *Industry compliance with consumer guarantees:* Non-compliance with consumer guarantees continues to be the most reported issue to the ACCC, particularly in relation to high value goods such as motor vehicles and caravans.
- *Small business protection:* The ACCC will continue to ensure that small businesses are protected under the competition and consumer laws, including by enforcement actions where appropriate. In particular, the ACCC is concerned by non-compliance with industry codes of conduct, including in the agriculture and franchising sectors.
- *Product safety:* This remains a key priority for the ACCC, with a focus on battery safety standards and children's products.

AREAS FOR REFORM

In addition to its focus on the enforcement priorities above, the ACCC will also continue to advocate for law reform in the following areas:

- reforms which shift Australia's merger control from a voluntary to a mandatory regime;
- breaches to consumer guarantee obligations to be made illegal;
- a general prohibition on unfair practices;
- a prohibition on the supply of unsafe products to consumers; and
- increased flexibility for mandatory standards.

CONCLUDING REMARKS

With new ACCC Chair, Ms Gina Cass-Gottlieb, commencing her term on 21 March 2022, these priorities offer insight into the ACCC's enforcement strategy in Ms Cass-Gottlieb's first year with the regulator. As always, we expect the ACCC to proactively scrutinise business activity and take enforcement action when necessary, especially in those sectors targeted by this coming year's priorities.

With thanks to Judy Zhao and Laurel Donnelly of Ashurst for their contribution.

Beijing AMR fines pharmaceutical company CNY 9 million for RPM conduct

CHINA – ANTICOMPETITIVE AGREEMENTS

On 9 February 2022, China's Beijing Municipal Administration for Market Regulation ("Beijing AMR") fined Geistlich Pharma CNY 9.12 million (c. USD 1.45 million) for engaging in resale price maintenance ("RPM") in breach of China's Anti-Monopoly Law ("AML").

KEY TAKEAWAYS

- Article 14 of the AML prohibits "monopoly agreements" that fix or restrict the resale price of goods (ie, RPM conduct). Under Article 15 of the AML, RPM conduct is not prohibited if it can be proven that the re-sale price arrangement is for one or more exempted purposes (eg, to improve technology or product quality) and will not substantially restrict competition in a relevant market.
- A violation of Article 14 could attract penalties of up 10% of annual turnover. In this case, the penalty amounted to 3% of Geistlich Trading (Beijing)'s annual domestic sales in 2020. When deciding the applicable penalty, the Beijing AMR took into account Geistlich Trading's proactive cooperation during its investigation into the conduct, active steps taken by Geistlich to rectify the conduct, including by amending the terms of its distribution contracts, and steps to improve its anti-monopoly compliance system.
- The Geistlich decision follows a string of similar actions by China's State Administration for Market Regulation against other pharmaceutical companies penalised for RPM conduct. These earlier decisions highlighted difficulties faced in defending RPM practices under the AML, notwithstanding the availability of exemptions under Article 15.

BACKGROUND

On 9 February 2022, the Beijing AMR fined Geistlich CNY 9.12 million (c. USD 1.45 million) for engaging in resale price maintenance in breach of China's AML. The Beijing AMR has delegated authority from the State Administration for Market Regulation to enforce the AML.

Geistlich Pharma is a Swiss-owned pharmaceutical company specialising in regenerative medical devices.

The Beijing AMR commenced an investigation into conduct undertaken by Geistlich in November 2020 and a formal case was filed in July 2021. The investigation revealed that between 2008 and 2020, Geistlich had entered into agreements with its distributors to restrict the resale price of its Bio-Oss and Bio-Gide products. Bio-Oss and Bio-Gide are "benchmark products" in the field of regenerative dentistry used to enhance bone and tissue regeneration. They are "Class III" medical devices imported by Geistlich into China. Geistlich's distributor network in China re-sells the products to hospitals or secondary distributors.

Geistlich implemented the agreements by imposing rules and regulations for its distributors to adhere to. Geistlich monitored resale prices closely and rewarded distributors which complied with the resale price policy, and punished those that chose to disregard the policy by temporarily raising the purchase price.

According to the Beijing AMR, Geistlich's conduct restricted competition in a market with already high entry barriers (including rigorous approvals required to sell Class III medical devices). The Beijing AMR noted there was an imbalance of bargaining power with distributors ultimately being dependant on Geistlich (a leader in the industry). The Beijing AMR found that the conduct had also harmed the interests of end-users by causing the prices of high-

value medical consumables to remain high for a significant period of time.

GEISTLICH'S DEFENCE

In its defence, Geistlich argued:

- that the relevant price-restricting clauses had been included in distribution contracts prior to the introduction of China's AML in 2008; and
- the agreements were not actually being implemented because there were occasions where resale prices were in fact lower than the recommended resale price policy.

The Beijing AMR rejected Geistlich's arguments, noting that:

- the company had signed a number of contracts between 2008 and 2018 containing the price-restricting terms. It considered the contentious conduct to be continuous and not outside the retroactive statute of limitations; and
- occasional cases of lower resale prices referred to by the company did not dissuade the agency from its determination that Geistlich had entered into and implemented monopoly agreements.

PENALTY

The Beijing AMR concluded that Geistlich had violated Article 14(2) of the AML by engaging in RPM. It imposed a penalty of CNY 9,123,598 (c. USD 1.45 million) and ordered the company to cease its infringing conduct.

The penalty was reported to represent approximately 3% of Geistlich's China revenue in 2020. Geistlich's active cooperation with the investigation and its commitment to revise its distribution contracts and anti-monopoly compliance systems were all mitigating factors considered by the Beijing AMR in determining the final penalty.

CONCLUDING REMARKS

The Geistlich RPM decision follows a string of similar actions by China's State Administration for Market Regulation against other pharmaceutical companies including Yangtze River Pharmaceutical Group and Simcere Pharmaceutical Group - each fined CNY 764 million (c. USD 120 million) and CNY 100.7 million (c. USD 15.8 million), respectively for RPM conduct in 2021.

The Geistlich decision, along with the earlier decisions highlight, amongst other things, the difficulty of defending RPM practices under the AML and the strong presumption that any form of RPM conduct will likely be considered illegal by authorities in China.

Companies active in China should be mindful of any policies or contract terms that encourage direct or indirect RPM in their distribution networks, and take steps to actively audit sales and distribution practices to ensure this conduct does not take place in day-to-day distributor network relationships.

Indonesian Competition Authority continues active enforcement against bid rigging conduct

INDONESIA – CARTELS

In February 2022, the Indonesia Competition Commission ("ICC") published two decisions involving bid-rigging conduct pursuant to government funded tenders. The first case related to a fishing port tender in Tulungagung and the second case related to the construction of a swimming pool in South Kalimantan.

KEY TAKEAWAYS

- Article 22 of the Indonesian Competition Law ("ICL") prohibits business actors from conspiring with other parties to arrange or determine the winner of a tender where this may result in unfair business practices.
- In the first case, the ICC imposed a penalty against the winner of a fishing port tender and issued an order prohibiting other tender participants involved in the collusive conduct from participating in state-funded construction tenders for one year.
- In the second case, the Supreme Court of Indonesia upheld the ICC's earlier finding that the relevant state procurement office responsible for a swimming pool construction tender was knowingly involved in and therefore itself in breach of Article 22 of the ICL. In that case, the ICC recommended that relevant staff of the procurement office be reprimanded by removing them from duties in the procurement division for a period of one year. The ICC had also imposed a penalty against the winner of the tender, and issued an order to prohibit all other entities involved in the collusive conduct from participating in state-funded construction tenders for two years.

In February 2022, the ICC published two decisions involving bid-rigging conduct pursuant to government funded tenders. The first case related to a fishing port tender in Tulungagung and the second case related to the construction of a swimming pool in South Kalimantan.

FISHING PORT CASE

The ICC published its decision against five parties found to have conspired with one another to fix the outcome of a tender related to development works for a fishing port in the Tulungagung Regency in the East Java Province of Indonesia.

The parties involved were:

- PT Cipta Karya Multi Teknik ("Party 1" and winner of the tender);
- PT Bangun Persada Construction ("Party 2");
- PT Wahana Eka Sakti ("Party 3");
- PT Tiara Multi Teknik ("Party 4"); and
- the Technical Implementation Unit for Goods and Services Procurement, Investment and Integrated Services Agency of the East Java Province ("Party 5"),

(together, the "Parties").

The ICC found that the Parties had conspired on the outcome of the tender, and took into account evidence of:

- direct relationships (including family-relations) that existed amongst Parties 1, 2, 3 and 4;
- coordination of tender offers amongst Parties 1, 2, 3 and 4; and
- forms of "neglect" by Party 5 during its administration of the tender procurement process.

The ICC:

- imposed a penalty of IDR 2.7 billion (c. USD 188,000) on Party 1;
- imposed a prohibition on Parties 1, 2, 3 and 4 from participating in tenders in the construction sector funded by the State Revenue and Expenditure Budget and Regional Revenue and Expenditure Budget for one year; and

- made recommendations to the Governor of East Java to impose disciplinary sanctions on Party 5 for its role in facilitating the collusive conduct.

SWIMMING POOL CASE

The Supreme Court of Indonesia upheld the ICC's earlier decision to penalise four parties for conspiring with one another to fix the outcome of a tender related to the construction of a swimming pool in the Hulu Sungai Selatan Regency in the South Kalimantan Province of Indonesia.

The parties involved were:

- PT Cahayahikmah Jayapratama ("Party 1" and winner of the tender);
- PT Karya Kandangan Nasional ("Party 2");
- PT Diang Ingsun Mandiri ("Party 3"); and
- the Procurement Service Unit of the Hulu Sungai Selatan Regency ("Party 4"), (together, the "Parties").

The ICC previously found that the Parties had conspired on the outcome of the tender, including Party 4 who was aware of "various indications of conspiracy" between tender participants during the tender process.

Accordingly, the ICC:

- imposed a penalty of IDR 1.35 billion (c. USD 94,000) on Party 1;
- imposed a prohibition on Parties 2 and 3 from participating in tenders funded by the State Revenue and Expenditure Budget and Regional Revenue and Expenditure Budget for two years; and
- made recommendations to the head of Party 4 to prohibit relevant staff who were involved in the tender from being involved in the relevant procurement work unit for one year

Party 4 appealed the ICC's decision against it to the Commercial Court of Surabaya. The Commercial Court found Party 4 had not engaged in conduct in violation of Article 22, however this view was superseded by a subsequent decision of the Supreme Court of Indonesia which upheld the ICC's original decision.

CONCLUDING REMARKS

Actions against entities engaging in forms of collusive bid-rigging conduct have accounted for a significant proportion of the ICC's historical enforcement activity. This is an area anticipated to continue to be at the forefront of the ICC's enforcement priorities in 2022.

Beyond the imposition of significant monetary penalties we are now also observing the ICC impose non-monetary penalties such as prohibitions against colluding party participation in future tenders for specified periods – sending a strong message of deterrence to participants of government funded tenders in Indonesia.

With thanks to Oscar Han of Ashurst for his contribution.

ECN statement on the application competition law in the context of the crisis in Ukraine

EU – NEW LAW / POLICY

On 21 March 2022, the European Competition Network ("ECN") issued a joint Policy Statement ("Statement") on the application of competition law in the context of the war in Ukraine. ECN members include: the European Commission ("Commission"), the EFTA Surveillance authority and national competition authorities ("NCAs")

KEY TAKEAWAYS

- The ECN understands that companies may need to cooperate to ensure the purchase, supply and fair distribution of scarce resources and to mitigate severe economic consequences. Such cooperation would likely not amount to an infringement of competition law.
- The ECN will not actively intervene in cooperation initiatives which are "*strictly necessary and temporary measures*" in the current circumstances.
- Companies may contact members of the ECN for informal guidance if they have concerns about the compatibility of any cooperation initiatives with EU/EEA competition law.

The ECN's Statement follows the European Council's statement on 24 February 2022 condemning Russia's military aggression against Ukraine. In the Statement, the ECN acknowledges that the conflict in Ukraine may trigger increased business disruptions, and that companies may be required to turn to their competitors and others in the vertical supply chain for assistance.

Referring back to its statement at the beginning of the Covid-19 pandemic, the ECN notes that the EU/EEA competition instruments have mechanisms in place to take into account market and economic developments but that the objective of competition law (to ensure a level playing field between companies) remains relevant during crises. The Statements set out that, during the war in Ukraine, ECN members will not intervene if cooperative measures are "*strictly necessary*", "*temporary*" and designed to:

- ensure the purchase, supply and fair distribution of scarce products and inputs, or
- mitigate severe economic consequences, including those arising from compliance with sanctions imposed by the European Union.

However, the statement does not provide details of the types of cooperation or the conditions to be fulfilled by companies in order to take advantage of the policy. Companies will therefore have to self-assess to determine whether the practice complies with competition laws. If a company has doubts about the compatibility of their cooperation initiatives with EU/EEA competition law, informal advice may sought from the Commission, the EFTA Surveillance Authority or the relevant NCA(s).

The Statement concludes with a warning that the ECN will not hesitate to take action against companies taking advantage of the current situation by entering into cartels or abusing their dominant position.

COMMENT

Where companies are cooperating with competitors as a result of the market impact of the crisis in Ukraine, it would be prudent to:

- maintain a record setting out the business disruption arising from the conflict in Ukraine and how cooperative efforts may mitigate the problem;
- limit any cooperation to ensure that it is no broader than necessary to cure the legitimate disruption;
- regularly re-evaluate the need for cooperation as circumstances change to ensure continued collaboration is still required; and
- remember that the ECN has warned companies against using the current situation as a cover for entering into cartels or abusing their dominant position.

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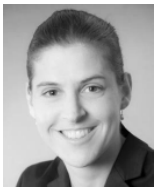

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