BRUSSELS REGULATORY BRIEF: SEPTEMBER 2020

Date: 9 October 2020

European Regulatory / UK Regulatory Newsletter

By: Mélanie Bruneau, Giovanni Campi, Francesco Carloni, Antoine de Rohan Chabot, Nicolas Hipp, Alessandro Di Mario, Miguel A. Caramello Alvarez, Philip Torbøl

ANTITRUST AND COMPETITION

The French Competition Authority Imposes a Record Fine of €444 Million on Three Pharma Companies for Collectively Exploiting Their Dominant Position

On 9 September 2020, the French Competition Authority (FCA) found that three pharma companies collectively held and exploited their dominant position in the age-related macular degeneration (AMD) market. A finding of exploitative abuse is rare in the FCA's decisional practice. In this case, the FCA did not hesitate to impose a record fine of €444 million on the three pharma companies solely on the basis of a collective abuse of dominance.

AMD is a disease that progressively destroys the central portion of the retina and is the leading cause of severe vision loss in people aged 50 and over. The FCA found that the three pharma companies held a collective dominant position on the basis of their structural and strategic links in the AMD market. These links included licensing agreements and cross-shareholdings between the pharma companies. According to the FCA, such links enabled the companies to adopt a common strategy aimed at sustaining the sales of a much more expensive AMD treatment, to the detriment of a competing product, 30 times cheaper. Both products are developed by one of the three companies and marketed by the two others.

The three pharma companies implemented a disparaging campaign aimed at preserving the position and the price of the more expensive AMD product. The practices notably consisted in discrediting the use of the cheaper version, spreading alarmism and engaging in misleading and deceptive conducts before the public authorities regarding alleged risks associated with the use of the competing product.

When setting the level of the €444 million fine, the FCA took into account the gravity of the anti-competitive conducts. The FCA considered the anti-competitive practices to be particularly serious as they had been implemented in the healthcare sector, in which competition is limited and at a time of public debate over the impact on social security finances of the extremely high price of the AMD product—a drug that is fully reimbursed by the French Social Security system—while there was a significantly alternative cheaper product that could be used.

This decision sends a stark reminder to all pharma companies with respect to the risks of breaching antitrust rules, even if these companies do not enjoy individually a dominant position in circumstances where there are economic links or other factors that may give rise to a connection between companies.

The European Commission Publishes its Preliminary Findings in the Ongoing Review of EU Competition Rules for Vertical Agreements

In October 2018, the European Commission (Commission) launched the evaluation phase of its review process of the Vertical Block Exemption Regulation (VBER) and the accompanying Guidelines on Vertical Restraints (VGL). The review was been prompted by the apparent need to adopt: (i) a new framework that would take effect following the expiration of the current legal framework in May 2022; and (ii) new rules that could better address the challenges and opportunities posed by the significant growth of e-commerce over the last 10 years. On 8 September 2020, the Commission published a Staff Working Document that summarizes its preliminary findings on the subject.

Between spring 2019 and spring 2020, the Commission received significant input through a public consultation, a stakeholder workshop, and spontaneous contributions. The Commission's findings thus reflect the views of the contributing stakeholders which include companies, trade associations and the national competition authorities of the EU member countries. Although the Commission considers that the VBER remains a useful tool for the self-assessment of businesses' vertical agreements, it noted that the increase of online sales and the growth of new digital market players led to a number of significant changes in the market that will need to be properly addressed by the new legal framework.

These changes have notably pushed manufacturers to increase their direct sales and to increasingly resort to selective distribution systems to control their distribution channels more efficiently. These changes have also resulted in the spread of new types of restrictions, in particular, restrictions on marketplace sales and restrictions concerning online search advertising.

Against this background, the Commission identified a number of issues relating to the application of the VBER and the VGL. The Staff Working Document mentions that some provisions lack clarity or are interpreted differently from one EU member country to another. It also highlights that the current rules do not cover certain restrictions that have arisen over the last 10 years. Furthermore, the current rules fail to properly reflect the most recent decisional practice and case law. This is notably the case of the Court of Justice of the EU case law (CJEU) on marketplace ban.

The Commission will now open the impact assessment phase of the review process, consisting of how to revise the applicable rules in order to address the issues identified during the evaluation phase. In the course of 2021, the Commission will publish a draft of the revised VBER and VGL that stakeholders will be able to comment on. The plan is to finally adopt the new rules by May 2022.

DIGITAL ECONOMY

Legal Advisor to the Court of Justice of the EU Delivered Opinion on a Taxi App Case

On 10 September 2020, legal advisor to the CJEU, Advocate General Szpunar, delivered his opinion in case C-62/19. The case concerned a smartphone application placing users of taxi services (customers) directly in touch with taxi drivers (the Taxi App). The core of the dispute lied in assessment of whether the service offered by the Taxi App constitutes an Information Society Service (the ISS), which is a service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services. EU law prohibits EU countries from subjecting the provision of ISS to regulations which would be unfair and

discriminatory. This general prohibition is designed to protect cross border trade and to reduce regulatory burdens for businesses wanting to operate on the whole EU market. In the same spirit, ISS are bound by the rules of the EU country in which they are based, and not by the rules of other EU countries where their products and services are offered to the customer.

In fact, the CJEU had already provided guidance on this matter in case C-434/15, in which it stated that a service may not be regarded as falling within the concept of ISS, where the service provided by electronic means is inherently linked to the provision of another (primary) service, which is not provided by electronic means (e.g., a transport service). Such inherent link can for example occur when the service provider organizes operations of non-professional drivers who could otherwise not offer their services in an economically viable way.

In the present case, however, Advocate General Szpunar remarked that the Taxi App drivers are licensed and have the necessary means to provide urban transport services. The Taxi App offers them only an add-on to enhance the efficiency of their own services. The Taxi App does not carry out any selection or recruitment process of drivers. The Taxi App does not exercise control or decisive influence over the conditions under which drivers provide their transport services. The company does not control either the quality of the vehicles and their drivers or the drivers' conduct. The Taxi App is therefore merely an external provider of an ancillary service, which is important but not essential for the efficiency of the transport service. Consequently, the advocate general concluded that the Taxi App displays the characteristics of an ISS.

The advocate general's opinion is not binding on the CJEU, but merely advises the CJEU by offering counsel on a legal solution. The judgment of the CJEU will be given in the coming months. As outlined above, an assessment of whether an online service constitutes an ISS is crucial for its functioning in the EU single market. It is expected that the final judgment will further clarify this key concept.

European Commission Launches Sector Inquiry into the Consumer Internet of Things (IoT)

Companies have until 15 October 2020, to submit their replies to the questionnaires related to the Commission's antitrust inquiry into the *Internet of Things* (IoT) sector. On 16 July 2020, the Commission launched the said sector inquiry (the Inquiry) with the goal to gain a more comprehensive understanding of competition issues, market dynamics, and business challenges in consumer IoT. In addition, the Commission said it will use this Inquiry to build awareness in the sector about competition rules. However, it is clear that should the Commission identify indications of anti-competitive practices, it will not hesitate to open antitrust investigations against the implicated companies. In addition, information collected during the Inquiry will be useful to inform future legislative initiatives, such as the Digital Services Act and, notably, the announced ex-ante regulation of gatekeeper platforms.

The products covered by the Inquiry are limited to consumer (as oppose to industrial) IoT products and services, divided mainly in three broad categories:

- *Smart Devices:* These are wireless electronic devices that connect with each other and can be commanded by the consumer, such as wearables (e.g., smartwatches and fitness trackers), smart speakers, and smart home devices (e.g., security-related products and lighting systems).
- *Consumer IoT Services*: These are services that consumers can access via a smart device, a voice assistant and/or other user interfaces.

- *Voice Assistant:* These are voice-activated pieces of software that can supply information, connect or control smart devices, perform certain tasks and provide IoT service(s) or content based on questions and commands. This type of software are considered in their own rights but also how they interact with other devices.

Particular emphasis is given to smart home devices (most of questionnaires sent by the Commission were addressed to smart home device manufacturers) and to the so-called triangular relationship between the consumer, the device (smart home or voice assistant) and the service provided (e.g., delivery service, car-sharing).

The importance of 'intermediation' is key to the Inquiry, in particular in the context of the interaction between devices and services and well as the dual role of some platforms. Thus, it is claimed that the specific nature of some devices that act as intermediators and providers of service at the same time can potentially create a conflict of interests leading to foreclosing third parties and “not acting in the best interest of consumers”. The Inquiry also focuses on data collection, mostly on how companies collect data, how data flows are organized, used, shared and how the company monetizes the data.

These issues also feature prominently in the Commission's thinking concerning its European Digital Strategy. The Inquiry came at roughly the same time as public consultations were launched on a possible new competition tool and an ex-ante regulatory instrument for very large online platforms acting as so-called “gatekeepers”. The Inquiry is therefore intended to complement and inform these ongoing regulatory initiatives.

With the 15 October 2020 deadline, companies were given unusually long to respond to the Commission questionnaires, in light of the current sanitary situation. A preliminary report on the Inquiry is expected to be published in the spring of 2021 and will be submitted to a public consultation. The final report should follow in the summer of 2022.

ECONOMIC AND FINANCIAL AFFAIRS

European Commission Adopts Package to Make it Easier for Capital Markets to Support Europe's Recovery

On 24 July 2020, the Commission issued a Capital Markets Recovery Package (the Package) to help capital markets support business recovery from the COVID-19 crisis.

The Package comprises: (i) a proposal for targeted amendments to MiFID II as regards information requirements, product governance, and position limits to help the recovery from the COVID-19 pandemic (MiFID II quick fix); (ii) a public consultation on amendments to the MiFID II Delegated Directive to increase the research coverage regime for small and mid-cap issuers and for bonds; (iii) adjustments to the Prospectus Regulation; and (iv) amendments to the Securitization Regulation and the Capital Requirements Regulation.

As regards MiFID II, the targeted amendments had already been identified during the MiFID II/MiFIR review's public consultation as being overly burdensome or hindering the development of European markets. Therefore, the MiFID II quick fix aims to: (i) streamline the disclosure and information requirements for transactions between professionals; (ii) simplify complex requirements that have obstructed the prompt execution of investment decisions; (iii) improve the coverage of small-and-medium-sized enterprises by research analysts; and (iv) promote nascent euro-denominated energy markets.

Furthermore, the Commission pushes for the development of an “EU Recovery Prospectus”, a type of short-form prospectus for companies with a track record in public markets. The objective is to facilitate the recapitalization of companies affected by the COVID-19 economic shock. This new short-form prospectus of maximum 30 pages (instead of hundreds currently) will be easy to produce by issuers, easy to read by investors, and easy to scrutinize by national authorities. As the EU Recovery Prospectus has been proposed in the context of COVID-19, it is a temporary measure that will expire 18 months after its date of application. In line with this, the Commission also put forward an amendment to the Prospectus Regulation's provisions relating to supplementary prospectuses aimed at facilitating fundraising by banks'.

Against this backdrop, the Commission underpins that the current economic downturn in all EU Member States caused by the COVID-19 pandemic is expected to result in a considerable amount of bank loans becoming non-performing, as borrowers struggle to keep up with their payments. Hence, the recommended changes would increase banks' capacity to provide loans to households and companies by extending the simple, transparent, and standardized (STS) securitization to on-balance sheet securitization, which is mostly used for SME loans. These adjustments are complemented by a separate legislative proposal to amend the Capital Requirements Regulation, including changes to make the prudential regime for STS on-balance sheet synthetic securitizations and non-performing exposure securitizations more risk-sensitive.

As for the next steps, the European Parliament and the Council still need to reach a final agreement on these legislative texts. After the Package is adopted and enters into force, the MiFID II amendments will need to be transposed into national laws before they can apply. The amendments to the Prospectus Regulation and Securitization framework will apply directly in EU Member States.

FREEDOM OF ESTABLISHMENT

The Court of Justice of the European Union Rules Against Italian Ownership Restrictions Designed to Protect Pluralism of Information

In 2016, the French media company Vivendi SA (Vivendi) launched an acquisition campaign for shares of an Italian company, Mediaset Italia Spa (Mediaset), operating in the same sector and controlled by the Fininvest group. Vivendi succeeded in acquiring of 28.8 percent of Mediaset's share capital and 29.94 percent of its voting rights.

In the context of subsequent national proceedings between Vivendi, on the one hand, and the Communications Regulatory Authority in Italy together with Mediaset, on the other hand, the Court of Justice of the European Union (CJEU) was asked to rule on a question of EU law. The question concerned a provision of Italian law which prohibits a company from receiving revenue in excess of 10 percent of the total revenues generated in the integrated communications system (SIC), in the case where that same company generates at least 40 percent of its total revenues within the electronic communications sector. The SIC covers the following activities within the media sector: daily newspapers and periodicals; publication of directories and electronic publications, including via the internet; radio and audiovisual media services; cinema; external advertising; communication initiatives for goods and services; and sponsorship.

On 3 September 2020, the CJEU ruled that, although a restriction on the freedom of establishment may, in principle, be justified by an objective of general interest, such as the protection of pluralism of information and the media, the provision at issue is not appropriate to achieve this objective on three different grounds:

- Firstly, the Italian provision does not seek to prevent the negative aspects of convergence between the electronic communications sector and the SIC as it does not establish the link between the thresholds referred to in that provision and the risk to media pluralism.
- Secondly, the Italian provision at issue defines the electronic communications sector too restrictively, excluding notably markets having a significant economic dimension for the transmission of information, namely mobile telephone retail services or other electronic communications services linked to the internet and satellite broadcasting services. These, however, have become the main avenue of access to media, with the result that there is no reason for excluding them from that definition.
- Lastly, the CJEU also found that treating a 'controlled company' in the same way as an 'affiliated company', over which the company concerned exercises a 'significant influence', when calculating the revenue of an undertaking in the electronic communications sector or the SIC does not appear reconcilable with the objective pursued by the Italian provision. Indeed, such treatment does not make it possible to establish that a company can actually exert an influence on another company in such a way as to undermine the pluralism of information and of the media. Therefore, this Italian provision is not appropriate in so far as it sets thresholds which do not allow to determine whether and to what extent a company is actually in a position to influence the media content.

KEY CONTACTS

MÉLANIE BRUNEAU
PARTNER

BRUSSELS
+32.2.336.1940
MELANIE.BRUNEAU@KLGATES.COM

GIOVANNI CAMPI
GOVERNMENT AFFAIRS ADVISOR

BRUSSELS
+32.2.336.1910
GIOVANNI.CAMPI@KLGATES.COM

FRANCESCO CARLONI
PARTNER

BRUSSELS, MILAN
+32.2.336.1908
FRANCESCO.CARLONI@KLGATES.COM

ANTOINE DE ROHAN CHABOT
COUNSEL

BRUSSELS
+32.2.336.1941
ANTOINE.DEROHANCHABOT@KLGATES.COM

