HERBERT SMITH FREEHILLS

CARTEL INTEL:

UPDATES FROM OUR EMEA NETWORK

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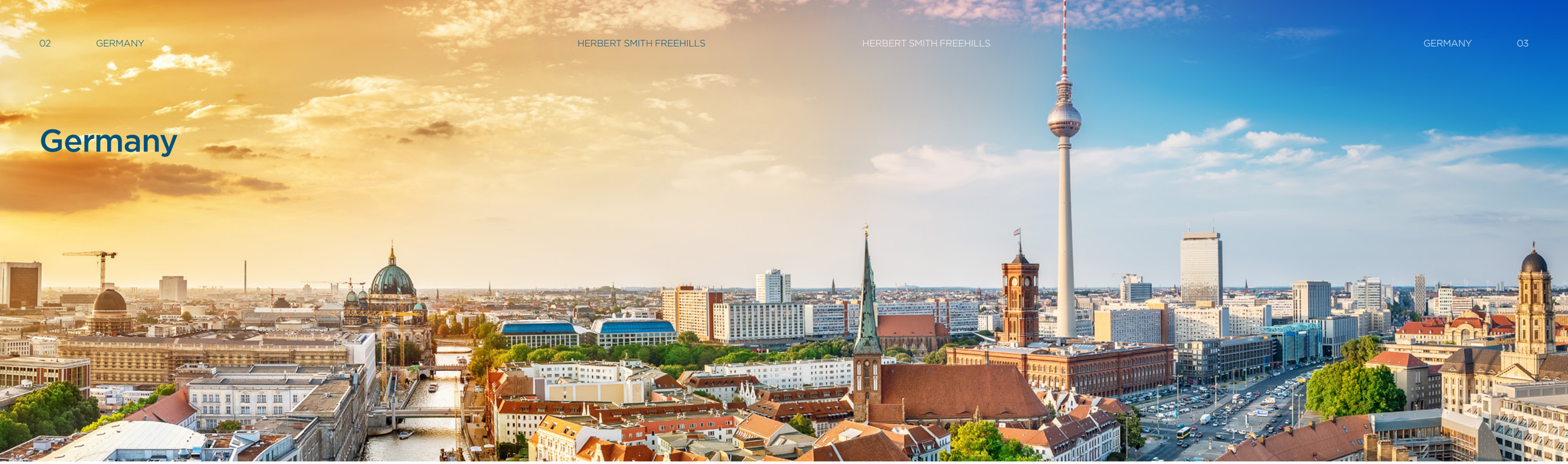

Managerial Liability – Higher Regional Court Düsseldorf denies director's civil liability for fines imposed by Federal Cartel Office

Background

German company law provides that directors are required to conduct the company's affairs with the due care of a prudent business person and that directors who breach the duties incumbent upon them are jointly and severally liable to the company for any damage arising (sec. 43 of the Act of Limited Liability Companies).

It is a highly controversial topic whether under German law companies can sue their directors under this provision to reimburse a fine that the German Federal Cartel Office ("**FCO**") has imposed for violation of competition law.

The Higher Regional Court of Düsseldorf had the chance to adjudicate on this matter in its judgment of 27 July 2023.[1] While the judgment is quite clear, the underlying questions of law are far from settled.

Facts of the case

In 2018 the FCO imposed fines totaling more than EUR 200 million on 10 stainless steel companies, two industry associations and seventeen individually responsible persons, including the defendant, for exchanging competitively sensitive information.[2]

The defendant had been the managing director of a German limited company (*GmbH*). The company is a stainless steel producer that had been fined EUR 4.1 million by the FCO for its involvement in the information exchange. The defendant had regularly participated in the exchange of competitively sensitive information in the period from July 2002 to the end of 2015 – in particular since 2012 also as chairman of the board of a relevant industry association.

The company sued its director for damages in the amount of the fine imposed on the company by the FCO. In addition, the plaintiff sought a declaration that the defendant be held liable for all future damages resulting from the cartel.

In its judgment of December 2021, the Düsseldorf Regional Court dismissed the action with regard to the corporate fine but found that the defendant was obliged to pay the plaintiff's compensation for all future damages resulting from the competition law infringement.

The Higher Regional Court's main reasoning

The Higher Regional Court confirmed the judgment of the Regional Court. The court assumed that the defendant intentionally participated in the exchange of information in violation of competition law. This assumption applied because he had exchanged with competitors information such as current order statuses, the development of stock levels, production stoppages and intended price increases. Against this background, the court found the notion that the individual was unaware of the competition law infringement to be far-fetched.

However, the Higher Regional Court agreed with the lower court's reasoning that the *GmbH* could not seek to reclaim the fine as damages based on a company law claim against the director. The court's main reasons for this are essentially two-fold:

- In contrast to EU competition law, German competition law explicitly provides for imposing fines against individuals acting for a company. In the eyes of the court, imposing civil liability on a managing director for fines imposed on the company would undermine this system of separate fines against the company and the acting individual.
- Holding the director liable for a fine applied to a company could also set the wrong incentives from a compliance perspective. The court considered there to be a risk that companies could otherwise effectively evade their liability for fines under competition law by pursuing claims for the monies against managing directors and board members. This risk would be even greater in circumstances where the management board and managing director are covered by D&O insurance and the sum insured is far higher than the fine imposed on the company (ie because the directors could rely upon this insurance policy to cover the financial impact).

However, the court also clarified that the director remains severally liable vis-à-vis its company for civil claims of third parties who have been harmed by the cartel, ie the company can seek redress from the director for follow-on damages that it has to pay to third parties.

Case closed?

Despite the clear position taken by the Higher Regional Court, the underlying legal question is far from settled. Firstly, the court has granted leave to appeal its decision to the Federal Court of Justice (the German Supreme Court), which has so far not had the opportunity to decide on this controversial legal issue.

Secondly, the reasoning of the court poses complex questions, which have been raised previously – most notably in a court order (not a judgment) of the Regional Court of Dortmund in August 2023. The Regional Court of Dortmund outrightly rejected the Higher Regional Court's judgment on the following grounds:

- The Higher Regional Court's reasoning is *inter alia* based on the peculiarities under German competition law with its two-tier system of separate fines for individuals and companies. Under EU competition law, the fine is addressed solely at the company involved in the infringement and not at the individual. The Higher Regional Court's reasoning would therefore lead to the counter-intuitive result that a company could have recourse against managing directors for EU fines but not for fines imposed by the FCO.
- It is doubtful whether the ability to claim damages from company directors would in fact lead to companies evading their liability for fines under competition law (in particular in cases where the level of fine is high, and significantly exceeds the director's economic capability (which is often the case in practice)). The Regional Court of Dortmund additionally noted that D&O insurance policies are usually capped and also do not apply where a director or manager acts intentionally. It hence seems unlikely that a D&O insurance policy would enable a company to escape liability in the event the company sued its directors for damages.

These arguments underline the substantial degree of legal uncertainty that still prevails regarding personal managerial liability for competition law violations. It remains to be seen if and to what extent the Supreme Court will clarify this important legal issue going forward.

Snapshot: Other German developments

- A revised version of the Act against Restraints on Competition has entered into force in November 2023. In particular, the FCO will now have the power to impose remedies independent of a violation of competition law. We have summarized the most important points here.
- However, the FCO will continue to monitor how consumer demand behaviour and the competitive processes evolve, particularly now that new participants have entered the market (see here)

1. Judgment available (in German only) here.
2. See FCO's press release here.

United Kingdom

Dawn raids in the UK: Enforcement continues, with private premises in the spotlight

With home working much more commonplace in a post-pandemic world, the CMA's powers of enforcement on domestic premises are currently under the microscope. The UK's specialist competition Court, the Competition Appeal Tribunal ("**CAT**"), has recently handed down a judgment which could herald changes in CMA practice. In this article, we consider recent CMA practice and what the CAT's judgment may mean for future dawn raids.

Background – the CMA's dawn raid powers and the case at issue

UK competition law confers on the CMA the power to undertake unannounced inspections ("dawn raids") on domestic premises pursuant to a warrant where the CMA suspects that there has been a breach of UK competition law.[3]

In connection with its ongoing investigation into suspected anti-competitive conduct in relation to the supply of chemicals for the construction industry, the CMA exercised its powers to conduct dawn raids – including pursuant to a warrant.

On 17 October 2023, the CAT granted the CMA three warrants to enter certain business premises in connection with its investigation but rejected an application for a warrant to enter domestic premises. As is usual with warrant applications, the CAT's judgment on the grant of the warrants was issued on a closed basis (the "**Closed Judgment**").

Unusually, however, the CAT handed down a judgment on 6 November 2023 as to whether the Closed Judgment should – in whole or in part – be rendered open (and thus made public) (the "**Publication Judgment**"). The CAT ultimately concluded that the Closed Judgment should be published.

3. See section 25 of the Competition Act 1998 ("**CA98**").

Snapshot: Other German developments

- The CMA has issued guidance permitting drug companies to work together on Combination Therapies. See our briefing here.
- The CMA has published its Green Agreements Guidance, which assists businesses with environmental sustainability agreements entered into between competitors. See our briefing here.
- The CMA has launched an investigation into a suspected cartel in the production and broadcasting of television content in the UK, excluding sports content.
- The CMA has opened an investigation into suspected anti-competitive conduct in relation to the supply of chemicals for use in the construction industry (see case page here).

Findings of the CAT: Publication Judgment

In the Publication Judgment, the CAT concluded – dismissing the CMA's appeals to the contrary – that a redacted form of the Closed Judgment should be rendered open. The CAT notes that those redactions, while agreed with the CMA, do not represent the totality of the redactions sought by the CMA.[4]

The CAT held that while it may (and does) operate entirely "closed" processes, such closed proceedings constitute a "derogation from the principle of open justice" which must be justified. The CAT acknowledged that where the CMA makes an application for a warrant to conduct a dawn raid, those proceedings ought to be "in secret" to mitigate the risk of evidence otherwise being concealed, removed, tampered with or destroyed.[5]

However, the CAT held that the redacted form of the Closed Judgment did not contain any information which could prejudice the CMA's investigation or its ability to apply for future warrants. It therefore concluded that the redacted form of the Closed Judgment should be published.

The CAT emphasised that its decision was specific to the case at hand – noting that "*questions of keeping material closed is a fact specific one that needs to be (and will be) considered on a case-by-case basis.*"[6]

The CMA had sought to argue that if the Closed Judgment was published, it would make it more difficult for the CMA to apply for warrants related to domestic premises in future. It therefore sought to argue that the Closed Judgment should stay closed on public policy grounds. The CAT rejected this argument, notably finding that "*if and to the extent that submission is suggesting that the reasons of the court in any given case should not be published because a party does not like or accept the outcome, then we reject that as a reason for keeping any judgment closed.*"[7]

The Closed Judgment

The Closed Judgment recounts that the CAT may issue a warrant where it is satisfied that there are reasonable grounds for suspecting: (i) that there are on the premises (business or domestic, as the case may be) documents which the CMA has the legislative power to require to be produced[8]; and (ii) where, if those documents were required to be produced, they would not be produced, but would be concealed, removed, tampered with or destroyed.

In this case, the CAT was satisfied that ground (i) was met. With regard to (ii), the CAT was sympathetic that – in cases where there is a "secret" cartel (as was the case here) – the CMA is likely to be concerned that documents may be concealed, removed, tampered with or destroyed, particularly given that covert cartels are intended not to be made public. However, the CAT queried whether this suspicion was sufficient – ie it was only the secrecy and covertness of the cartel that the CMA relied on in support of this concern.

In the context of the relevant businesses' premises to the warrant application, the CAT was satisfied that this was sufficient. The CAT did not, however, consider that this was sufficient for domestic premises. In the CAT's view, a warrant application relating to domestic premises requires a higher level of scrutiny under the European Convention on Human Rights/Human Rights Act 1998 and generally. As a result, the CAT concluded that the inference that documents would be

4. See para 3 of the Publication Judgment.
5. See para 7 of the Publication Judgment.
6. See para 10(1) of the Publication Judgment.
7. See para 10(2) of the Publication Judgment.
8. Pursuant to section 26 of the CA98.

concealed, removed, tampered with or destroyed was not sufficient to issue a warrant in this case. The CAT held that there must be additional evidence indicating a propensity to destroy documents. In this case, the property was occupied by others and the scope was wide-ranging (with the CAT noting that it could have been narrowed eg to specific devices).

The CAT also held that the adverse effects of not granting the warrant were low given that the CMA could obtain the devices by other means (eg a statutory demand under section 26 of the CA98) and if in that context an individual's devices were to disappear or were subject to sustained deletions, then adverse inferences could be drawn against the individual (and the company). The CAT also deemed the risk to be low since "in this modern electronic world" permanent deletion of material is difficult (albeit potentially costly to recover).

The Times They Are A-Changin': What happens next?

The ability of the CMA to conduct dawn raids on domestic premises is likely only to become more important now that homeworking is the norm. With devices and documents now more likely to be located on domestic premises, it may well be expected that the CMA will make greater use of these powers in future cases (other European regulators, eg the German FCO, were already pre-pandemic very used to and active in raiding domestic premises). It will be interesting to see what effect, if any, the publication of the Closed Judgment will have on the CMA's desire to raid domestic premises.

Clearly, the CMA would have preferred for the judgment to remain closed (hence its resistance in the Publication Judgment). The suggestion from the CAT is that a more granularly specific warrant application (eg specifying certain devices) may have been more likely to be granted. However, it is not clear to what extent the CMA would in practice know which devices will be located on domestic premises/whether there are additional devices which may be relevant to its investigation. The implication may simply be that the warrant should be limited to the devices of a specific individual at the address in circumstances where there are multiply occupiers.

It also remains to be seen what additional evidence the CMA could reasonably adduce to demonstrate a 'propensity' for the relevant individual to destroy documents. This may be difficult to prove in practice and could lead to the CMA relying on its other statutory information gathering powers instead (since, in the CAT's view, this provides sufficient scope for the CMA to obtain relevant materials and take appropriate action if material has been destroyed or tampered with).

New legislation to bolster ability to search domestic premises

The power to inspect domestic premises in connection with competition law infringements is already under scrutiny – with the Digital Markets, Competition and Consumer Bill ("**DMCC Bill**") seeking to extend the scope of the CMA's powers in this regard.

Under current legislation, the CMA does not have "seize and sift" powers for raids at domestic premises as it does for raids at business premises. At present, this provides some protection for individuals against the physical removal of any potentially relevant material – such as personal devices – from domestic premises, to be searched through at a later date.

However, the DMCC seeks to extend these "seize and sift" powers to domestic premises. In a consultation response published in April 2022, the government commented that *"given working patterns are becoming increasingly flexible and allowing employees to work from home regularly, it is even more probable that relevant evidence (which could, for example be stored on either work or personal laptops, phones, and other electronic devices) will now be located in domestic rather than business premises"*.[9] It therefore seems somewhat inevitable that domestic premises are undoubtedly more likely to be subject to inspections in future UK competition law investigations.

Key takeaways

The judgment is yet another reminder that the pandemic hiatus on dawn raids is well and truly over. Businesses should continue to ensure that they have robust guidance and procedures in place to handle a dawn raid at their premises – including appropriate guidance for staff on how to handle a dawn raid. Moreover, with increased homeworking – and the potential for the CMA to conduct dawn raids at domestic premises – businesses should ensure that appropriate information security and working from home guidance is in place to account for this enforcement risk. Businesses should also ensure they remain up to date on changes to the CMA's enforcement powers as envisaged by the DMCC Bill, which is expected to be passed into law during H1 2024.

Our dawn raid app – Dawn Raid Ready – available on the Apple App Store and Google Play is a quick reference tool designed to provide individuals with the essential information required in the event of a dawn raid. It covers the key information you need to know if a dawn raid does occur – an essential part of any robust dawn raid procedure.

9. See: https://www.gov.uk/government/consultations/reforming-competition-and-consumer-policy/outcome/reforming-competition-and-consumer-policy-government-response

European Union

Non-compete clauses in cooperation agreements - caution required

Non-compete clauses that require a party to an agreement (or both parties in case of a reciprocal non-compete obligation) not to enter a market where it is currently not present are common in M&A contracts. These non-compete arrangements are generally permissible under EU competition law so long as their duration, geographic scope, subject matter and the persons subject to the restriction do not go beyond what is reasonably necessary.

Non-competes can also be found in cooperation or distribution agreements between businesses. The application of EU competition law in these circumstances often relies on the logic applied in M&A cases. However, the Court of Appeal in Lisbon recently sought guidance from the Court of Justice of the EU ("**CJEU**") on this matter.[10] The case contains important statements on the concept of potential competition, the notion of ancillary restraints and the category of by-object restrictions under Article 101 TFEU.

Background

In January 2012, EDP Comercial and Modelo Continente entered into the "EDP Continente Scheme" (the "**Scheme**"). The Scheme was essentially a cross discount mechanism, whereby the parties agreed that customers of EDP Comercial and Modelo Continente would benefit from price reductions:

- Modelo Continente is active in the food distribution and consumer products sector in Portugal. Modelo Continente and its shareholder were part of Sonae Group, which is active in retail distribution, telecommunications and audiovisuals, shopping centers, wood products, tourism and energy. Sonae Group developed a business on the market for the supply of electricity between 2002 and 2008 in Portugal by means of an association with Endesa, through a JV (Sodesa), which was 50% owned by each of the participating companies.
- EDP Energias and EDP Comercial (EDP) are part of a Portuguese conglomerate the parent company of which is EDP Energias, active in, *inter alia*, the production and supply of electricity and natural gas in Portugal.
- The Scheme provided for reductions in electricity prices which were reserved for customers holding a "Continente Card", a discount card issued by Modelo Continente as part of a loyalty programme. Customers wishing to sign up had to conclude a contract for the supply of low-voltage electricity with EDP in addition to holding the Continente Card. Customers then benefited

10. Case C-331/21, *EDP – Energias de Portugal and Others*, EU:C:2023:812 (This case was an Article 267 reference for a preliminary ruling, a procedure through which the CJEU provides guidance to Member State courts on the interpretation of a point of EU law.).

from a 10% reduction on their electricity consumption, which was provided by issuing discount vouchers, which customers could use for the purchases in Modelo Continente stores. Initially, the amount of the reductions was borne entirely by EDP Comercial. Later it was agreed that Modelo Continente would bear part of the reductions.

Snapshot: Other EU developments

- The Commission fined Alkaloids of Australia, Alkaloids Corporation, Boehringer, Linnea and Transo-Pharm a total of €13,4 million for participating in a price-fixing cartel concerning a pharmaceutical ingredient, used to produce the antispasmodic drug Buscopan. C2 PHARMA was not fined as it revealed the cartel to the Commission under the leniency programme. All six companies admitted their involvement in the cartel and agreed to settle the case.
- The Commission carried out unannounced inspections at the premises of companies active in the construction chemicals sector in several Member States, on suspicion they conducted anti-competitive agreements. The Commission was accompanied by Member State Competition Authorities and coordinated raids with the UK and Turkish authorities. The Commission has also been in contact with the antitrust division of the US Department of Justice.
- The Commission sent an SO to automotive starter batteries manufacturers Banner, Clarios, Exide, FET, and Rombat as well as trade association Eurobat and its service provider Kellen on suspicion that they have breached EU antitrust rules by fixing the prices of car batteries. The Commission is concerned that Eurobat and Kellen actively assisted manufacturers in the alleged conduct.
- The Advocate General issued a (non-binding) Opinion that an exchange of information can be considered a restriction *by object*, if it artificially increases transparency and reduces uncertainty in the market.

The Scheme included a reciprocal non-compete obligation on EDP and Modelo Continente. The latter undertook not to (i) engage in the activity of supplying electricity and natural gas in mainland Portugal or (ii) conclude with any other electricity or natural gas supplier association agreements or other instruments which grant discounts relating to electricity or natural gas. EDP undertook corresponding obligations on the market for the retail distribution of food products in mainland Portugal.

By decision of 4 May 2017, the Portuguese competition authority imposed fines of EUR 34.5 million on EDP and Modelo Continente for a breach of the Portuguese equivalent of Article 101 TFEU. The authority took the view that the non-compete obligation amounted to unlawful market sharing between EDP and Modelo Continente.

EDP and Modelo Continente challenged the fine. In the context of this challenge, the Lisbon Court of Appeal asked the CJEU for a preliminary ruling on the following:

- Whether Article 101(1) TFEU must be interpreted as meaning that an undertaking managing a network of consumer product retailers may be regarded as being, on the electricity market, a potential competitor of an electricity supplier with which it has concluded a commercial agreement containing a non-compete clause, even where that undertaking is not active on that product market.
- Whether Article 101(3) TFEU, read in conjunction with Article 1(1)(a) of the 2010 Vertical Agreements block exemption Regulation ("**VABER**") must be interpreted as meaning that the Scheme concluded between two undertakings, active on different product markets which are not upstream or downstream of each other, falls within the category of a vertical agreement and an agency agreement.
- Whether Article 101(1) TFEU must be interpreted as meaning that the non-compete clause in the Scheme may be regarded as an ancillary restriction.
- Whether Article 101(1) TFEU must be interpreted as meaning that a non-compete clause, prohibiting one of the parties to that agreement from entering the national market for the supply of electricity on which the other party to that agreement is a major player, at the time of the final stages of the liberalisation of that market, constitutes an agreement which has as its object the restriction of competition, even if consumers derive certain benefits from that agreement and that non-compete clause is limited in time.

The CJEU's reasoning

EDP and Modelo Continente as potential competitors

The Court recalled its case law in the pay-for-delay cases in the pharma sector,[11] recounting that the key question was whether there was a real and concrete possibility (as opposed to a mere hypothetical possibility) for Modelo Continente to enter the market for the supply of electricity.

In this case, the CJEU made the following observations:

- *Subjective evidence*: Evidence of a subjective nature, such as the mere wish or desire of the undertaking which is not present on the market concerned to enter that market, cannot constitute decisive evidence demonstrating potential competition, but it can be taken into account to support objective evidence of potential competition
- *Perception*: The conclusion of the non-compete itself is a strong indication that there is potential competition. If the parties to a non-compete agreement did not perceive themselves as potential competitors, they would, in principle, have no reason to conclude such an agreement.
- *Activities at group level*: The activities of the entities of the group of which the undertaking concluding the non-compete forms part, and the activities of that undertaking itself on the relevant market (and on upstream and related markets) prior to signature of the agreement in question, may also be taken into account to identify potential competition. The Court therefore took the view that the activities of the Sonae Group can be particularly relevant here – irrespective of the question whether Sonae and Modelo Continente formed one undertaking under competition law.
- *Preparatory steps*: Preparatory steps cannot constitute an autonomous requirement for the purpose of demonstrating whether potential competition exists. In the Court's view it is therefore not necessary to establish that the undertaking concerned took preparatory steps in order to be regarded as a potential competitor.

11. In particular its 2020 judgment *Generics (UK) and Others*, C-307/18, see our summary here.

Definition of vertical agreement/ agency agreement

As regards the scope of application of the 2010 VABER the Court was quite clear that parties which do not operate at different levels of the supply chain – as in the case at hand – cannot conclude vertical agreements within the meaning of the VABER.

The applicants in the main proceedings had additionally argued that the Scheme should be regarded as being two cross-agency agreements, with each of the contracting parties being responsible for promoting sales by the other contracting party. However, given that EDP and Modelo Continente shared the risks associated with the Scheme, their arrangement – according to the CJEU – could not be characterised as an agency agreement.

Ancillary restriction

The Court essentially repeated its case law from *Mastercard and others v Commission*,[12] ie that if a "main" arrangement is not anti-competitive within the meaning of Article 101(1), then the restriction of the commercial autonomy of the participants to the arrangement is also not an infringement of Article 101(1) provided that the restriction is objectively necessary to implement the main agreement and is proportionate to its objectives. The test of necessity is interpreted strictly by the Court. The question is whether it would be impossible to carry out the neutral operation/activity in the absence of the restriction in question. The fact that that operation is simply more difficult to implement or even less profitable without the restriction concerned does not suffice.

In this case, the CJEU observed that:

- The non-compete exceeded the term of the Scheme by a year and was not limited solely to the supply of low-voltage electricity as was the Scheme, but also covered the supply of medium- and high-voltage electricity to industrial customers.
- With a view to the argument that the non-compete was necessary to protect business secrets of the other party (in particular electricity consumption patterns) the Court appeared sceptical and invited the Lisbon Court of Appeal to assess whether there were less restrictive solutions available. The CJEU mentioned in particular, that the arrangement in this case involved confidentiality and IP restrictions.

By-object restriction

The Court noted that in line with its previous case law the concept of a by-object restriction must be interpreted narrowly. However, market sharing agreements can be viewed as being so harmful to competition that they fall within this category. The Court then drew an analogy and stated that the same is true of market-exclusion agreements, which have as their object the elimination of potential competition and the prevention of competition by keeping a potential competitor outside the market concerned.

The mere fact that there are procompetitive effects is not sufficient to rule out such a classification. The threshold will only be met if those effects are specifically related to the agreement concerned and justify a reasonable doubt as to whether that agreement caused a sufficient degree of harm to competition. Therefore, in the case at hand the Lisbon Court of Appeal will need to take account of the fact that the non-compete clause coincided with the final phase of liberalisation of the market for the supply of electricity in Portugal. It will also need to assess whether the pro-competitive effects were in fact specific to that non-compete clause itself and not simply connected with that agreement as such.

Practical Implications

The judgement is important for various reasons:

- The Court provided useful guidance on the interpretation of potential competition outside of the pharmaceutical sector (the case law to date is mainly focused on pay-for-delay cases in the pharma sector[13]). Notably, the CJEU suggested that it is not necessary that undertakings have taken preparatory steps for a market entry.
- The Court indicated that where parties agree on a non-compete clause, they may be presumed to be competitors (and thus unable to rely on the VABER). It will be up to the parties to rebut this presumption before the Member State/EU Courts. Parties should also therefore ensure that appropriate safeguards exist to mitigate the risk of other potential horizontal competition law infringements (eg the exchange of competitively sensitive information) by putting in place appropriate information barriers.
- While the Court acknowledged that a non-compete can potentially be necessary to protect know-how and business secrets, undertakings need to assess thoroughly whether there might be less restrictive means to protect their know-how.

12. Case C-382/12P, *MasterCard and Others v Commission*, EU:C:2014:2201
13. Case C-591/16 P, *Lundbeck v Commission*, EU:C:2021:243

Spain

Compliance programmes as a means to avoid procurement bans imposed by the Spanish competition authorities

Spain's National Markets and Competition Commission (*Comisión Nacional de los Mercados y la Competencia*, or "**CNMC**") and some Spanish regional competition authorities have assessed in recent decisions whether a competition law compliance programme submitted by companies under investigation is sufficient to avoid a procurement ban or to have it lifted.

Procurement bans are applied automatically in the event of an infringement of Spanish competition rules where it takes the form of a cartel arrangement. These bans prohibit cartel participants from participating in future tender procedures for the award of public contracts during a given period.

Nevertheless, an economic operator under investigation may avoid a ban or have it lifted when, as well as undertaking to pay the fines imposed by the infringement decision, it adopts appropriate technical, organisational and personnel-related measures to prevent future administrative infringements being committed. Among other measures, this will include the implementation of an effective compliance programme.

Snapshot: Other Spanish developments

- The CNMC sanctioned the two main companies active in the provision of business information database services for entering into an agreement to fix prices and allocate clients.
- The CNMC sanctioned four companies and six managers for taking part in two cartels in the market for the supply, maintenance and modernisation of military equipment and, in particular, military vehicles.
- The ACCO imposed sanctions on two companies for colluding in the tender for the provision of restaurant services on Vilanova i la Geltrú beach.

The CNMC's recent decision: compliance programmes sufficient to avoid procurement bans

In case *S/0008/21 LICITACIONES MATERIAL MILITAR*,[14] the CNMC imposed fines totalling more than EUR 6 million on four companies and six managers for taking part in bid-rigging practices in the market for the supply, maintenance and modernisation of military equipment and, in particular, military vehicles. The anticompetitive practices consisted of two cartel agreements that affected the tenders for the supply of military material launched by the Spanish Ministry of Defence from 2016 to 2021. According to the CNMC, the sanctioned companies entered into non-compete arrangements, submitted cover bids or created unjustified consortia agreements (so-called UTEs) to take part in the tenders.

In its decision, the CNMC analysed whether *ex post* compliance programmes (ie, submitted after the CNMC became aware of the infringement) implemented by three of the four sanctioned companies would suffice to avoid a procurement ban. Although the CNMC concluded that the compliance programmes do not amount to a mitigating circumstance from the perspective of calculating the amount of the fines, it considered that two of the programmes would be appropriate to avoid the imposition of a procurement ban.

According to the CNMC's decision, once the compliance programmes have been effectively implemented – which should also be progressively improved – sanctioned companies will have adopted appropriate measures to prevent future infringements of competition rules, as required by Article 72.5 of the Public Sector Contracts Law ("**LCSP**") to avoid the imposition of public procurement bans.

14. See the CNMC decision dated 19 July 2023 in case *S/0008/21 LICITACIONES MATERIAL MILITAR*, available at https://www.cnmc.es/sites/default/files/4819415.pdf.

The Catalan Competition Authority does not consider compliance programmes sufficient to lift procurement bans

The Catalan Competition Authority ("Autoritat Catalana de la Competència") ("**ACCO**") has also assessed whether a compliance programme implemented by the company Transportes Urbanos y Servicios Generales, S.A.L.[15] ("**TUSGSAL**") complied with the necessary requirements to lift the procurement ban imposed on that company as a result of its involvement in two cartel agreements. In cases *100/2018 Aerobús*[16] and *102/2019 Aerobús 2*[17], the ACCO imposed sanctions on TUSGSAL and other transport companies for taking part in bid-rigging practices. In addition to facing monetary fines, the ACCO also triggered the public procurement ban mechanism and banned TUSGSAL from entering into contracts related to land transport services with the public body governing the metropolitan area of Barcelona.

The ACCO assessed whether TUSGSAL's compliance programme met the requirements of Article 72.5 LCSP to lift the public procurement bans imposed: (i) it had paid or undertook to pay the fine, and (ii) the compliance programme was appropriate for preventing future competition law infringements from being committed. According to the ACCO, the first requirement was met because TUSGSAL had paid one of the fines and the other one was suspended as a result of the injunctive measure granted by the High Court of Justice of Catalonia. However, the ACCO considered that TUSGSAL's compliance programme suffered from a number of shortcomings and that it could not therefore be considered as an appropriate measure for preventing or detecting future competition law infringements.

The following are among the shortcomings mentioned by the ACCO: (i) failure to adopt exemplary personnel-related measures as a result of the infringement of competition law; (ii) shortcomings in the communication/acceptance of the compliance programme by some recipients who, due to their positions, have exposure to competition law risks; (iii) inadequate and insufficient resources provided to the bodies responsible for the compliance programme (Compliance Committee and Compliance Officer); (iv) it was impossible to verify the updating of the risk map; (v) shortcomings in the updating, periodicity, sufficiency and communication of training actions; (vi) poor design of the incentive policy for compliance with the programme; and (vii) limitations on the effectiveness of the anonymous whistleblowing channel.

Practical Implications

These decisions are evidence that interest declared in the past by the Spanish Competition Authorities to promote competition culture through the development of compliance programmes is materialising in practice.

As such, companies must be aware that developing and implementing a compliance programme on competition law may shield them from a public procurement ban if they ultimately face an investigation by the Spanish Competition Authorities.

15. See the ACCO decision dated 26 July 2023 in case V100/2018 bis – V 102/2019, Aerobus, available at https://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/20230803_Resolucio-V100.2018-bis-V-102.2019-Aerobus-CAST-PUB.pdf.
16. See the ACCO decision dated 21 July 2020 in case 100/2018, Aerobús, available at https://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/20200814_Resolucion-100.18-Aerobus-NC.pdf.
17. See the ACCO decision dated 21 July 2021 in case 102/2019, Aerobús 2, available at https://acco.gencat.cat/web/.content/80_acco/documents/arxius/actuacions/20210721_resolucio_102_2019_esp.pdf.

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