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QUICK LINKS

European Commission publishes findings of its evaluation of the Vertical Block Exemption Regulation

On 8 September 2020 the European Commission concluded the first part of its review of Regulation 330/2010, otherwise known as the Vertical Block Exemption Regulation (VBER), by publishing a staff working document (SWD) summarising findings from its evaluation of the VBER and the accompanying Guidelines on Vertical Restraints (Guidelines). The SWD is the Commission's final working document evaluating the effectiveness of the current rules on vertical agreements, and summarises the evidence gathered over the past two years - which has included a public consultation, third party submissions, stakeholder workshops and an external evaluation support study (which was published earlier this year - see our previous newsletter).

The evaluation found that the VBER and Guidelines remain useful tools in facilitating the self-assessment of vertical agreements by businesses. However, the Commission has identified some issues that it aims to address in the next iteration of the rules to take account of market developments since 2010, a lack of clarity in respect of certain provisions, and the scope for diverging interpretations by national competition authorities (NCAs).

BACKGROUND

Article 101(1) TFEU prohibits agreements between undertakings that restrict competition. Article 101(3) TFEU provides an exemption to this restriction where the agreement concerned contributes to improving the production or distribution of goods or promotes economic or technical progress, while allowing consumers a fair share of the resulting benefits.

The VBER provides a safe harbour by setting out the types of vertical agreements that are considered to fulfil the conditions in Article 101(3), and therefore fall outside the general prohibition in Article 101(1).

With the current rules set to expire on 31 May 2022, the Commission has been reviewing the VBER and Guidelines to decide whether it should allow them to lapse, extend the rules in their existing form, or re-issue them with amendments. During the course of its evaluation, the Commission has explored whether the VBER has met its intended objectives, whether it remains relevant and whether, applying a cost-benefit analysis, it is efficient in achieving its objectives.

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MARKET DEVELOPMENTS

The evidence gathered by the Commission suggests the VBER and Guidelines are useful tools, and increase legal certainty. The evidence further suggests that the costs incurred by businesses in assessing the application of the VBER and Guidelines to vertical agreements are proportionate to the benefits brought by the rules.

That said, the evaluation found that the VBER and Guidelines are not well adapted to the present market environment: since their adoption, commerce has changed significantly due to the growth of online sales and platforms, the proliferation of new market players via the online marketplace, and consumer expectations around omni-channel access to products. There is greater use of selective distribution systems, enabling suppliers to apply tighter control over resale conditions, and new types of sales restrictions becoming prevalent.

The evaluation also highlighted new types of vertical restrictions that have become more common over the past decade, such as restrictions on online advertising where manufacturers require marketing and advertising materials used by their retailers to be pre-approved or provided by them. The requirement by manufacturers for retailers to provide pre- and post-sales advice to customers, product-specific training and the stipulation to purchase a minimum number of units in respect of contractual products were found to be particularly common. The widespread use of retail price parity clauses was also noted.

KEY ISSUES IDENTIFIED

In light of these market developments, the Commission identified a number of issues that it believes need addressing to make the VBER and Guidelines fit for purpose:

- **Clarity**: A number of provisions in the VBER are unclear, and may make self-assessment for companies difficult. For example, guidance on agency agreements and the rules on resale price maintenance were highlighted as areas that need to be simplified. It was also noted that some rules do not reflect developments from case law (for example, the rules around selective distribution systems and online sales bans after the European Court of Justice's *Coty* judgment[1]), suggesting that - more generally - the VBER and Guidelines need to be refreshed.
- **Interpretation**: The SWD flags that there have been diverging interpretations of the rules for vertical arrangements by NCAs and courts, for example when applying them to new types of restrictions not specifically covered in the VBER or Guidelines. NCAs have acknowledged that the limited guidance provided in the VBER and Guidelines regarding the assessment and legal qualification of price parity clauses may result in differences in the way in which these clauses are treated. This leads to a lack of legal certainty for businesses, and undermines the objective of providing a common framework of assessment throughout the EU. Further work could therefore be done to overcome these divergences.
- **Scope**: The 'hardcore' restrictions and excluded restrictions covered by the VBER and Guidelines were found to be generally appropriate, but some types of efficiency-enhancing agreements between non-dominant companies were identified as normally satisfying the conditions of Article 101(3), and might therefore be covered by the revised VBER's safe harbour.

NEXT STEPS

The Commission will now launch the impact assessment phase of its review, which will consider the policy options available to address the issues identified in the evaluation phase. The Commission intends to launch a public consultation allowing stakeholders to provide their views on the impact assessment, and aims to publish a draft of the revised rules over the course of 2021.

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[1] Case C-230/16 *Coty Germany GmbH v Parfümerie Akzente GmbH*, judgment of 6 December 2017.

The publication of this SWD is also covered in Slaughter and May's The Lens blog, available here.

OTHER DEVELOPMENTS

ANTITRUST

HKCC PREPARED TO ACCEPT SEAPORT ALLIANCE COMMITMENTS

On 26 August 2020 the Hong Kong Competition Commission (HKCC) concluded its public consultation on the commitments offered by the Hong Kong Seaport Alliance (Alliance) to address competition concerns identified by the HKCC following an 18-month investigation.

The Alliance is a contractual joint venture between four terminal operators in Hong Kong. The HKCC's concerns flow from the Alliance's 2018 combined market share of over 90 per cent of the Kwai Tsing Gateway market. The Alliance's proposed commitments to remedy these concerns involve:

- capping Gateway cargo handling charges to shipping lines and non-shipping lines at a level applied prior to the implementation of the Alliance;
- providing a minimum service level for truck services;
- maintaining reciprocal overflow arrangements and terms with the only remaining competitor at the Kwai Tsing port; and
- ensuring that no representatives of the Alliance are appointed as directors of the terminal operators of two other nearby Chinese ports (at Shekou and Chiwan).

The HKCC received nine market responses to the proposed commitments. While the market was broadly supportive, some changes to the commitments were suggested - in particular: (1) the addition of a new commitment to require the Alliance to pass on a reasonable share of cost efficiencies generated to its customers; and (2) imposing an open-ended duration for the commitments, whilst giving the Alliance the ability to request a consultation on varying, substituting or releasing the commitments after five years. Some market participants have also suggested more transparency should be provided on the indexation mechanism with reference to which the Alliance will be able to increase its charges capped by the proposed commitments.

The HKCC has not yet indicated if any changes to the proposed commitments will be required to reflect the market feedback, but regardless the case demonstrates the pragmatic approach of the HKCC to resolving competition concerns. For further information and analysis on the case, please refer to our recent client briefing.

GENERAL COMPETITION

CMA SIGNS AGREEMENT WITH FIVE OTHER COMPETITION AUTHORITIES TO COORDINATE INTERNATIONAL RESPONSE TO ANTI-COMPETITIVE BEHAVIOUR

On 2 September 2020 the UK Competition and Markets Authority (CMA) signed an agreement with five other competition agencies, seeking to improve international and inter-agency cooperation in targeting anti-competitive activity. This reflects the increasingly cross-border nature of competition investigations in a globalised world. The other parties are the Australian Competition and Consumer Commission, the New Zealand Commerce Commission, the Competition Bureau Canada, the United States Department of Justice and the United States Federal Trade Commission. The Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities (MMAC), which is not legally binding, includes a Memorandum of Understanding (MoU) which provides a framework for reinforcing and developing existing cooperation and coordination on investigations as regards cartels and other anti-competitive agreements and arrangements, unilateral conduct or monopolistic practices, and merger control. The MoU provides *inter alia*, for the agencies to cooperate and provide assistance, including by exchanging information on the development of competition issues, exchanging experience, providing training and advice, sharing best practices, and collaborating on projects of mutual interest.

The MMAC also provides a Model Agreement - intended to be broadly reciprocal - to act as a base for negotiating individual agreements between agencies to provide investigative assistance for individual investigations. It addresses the nature of assistance parties can request, the process for making requests, confidentiality, legal privilege, and the scope of use of any information that is shared between the parties. Where an investigation is not covered by an agreement similar to the Model Agreement, the MoU contains a framework for collaboration. It sets out provisions for sharing public information, coordinating investigative activities, facilitating voluntary witness interviews, and providing copies of publicly available records.

The CMA's Chief Executive Officer, Andrea Coscelli, noted: "*As the UK prepares to leave the EU and the CMA embraces its expanded role, it is even more important for us to forge strong relationships across the world, and work with partners both closer to home and further afield*".

REGULATORY

OFGEM IMPOSES FINE OF £2.06 MILLION ON SSE FOR DELAY IN PUBLISHING INSIDE INFORMATION

The UK's Office of Gas and Electricity Markets (Ofgem) announced on 3 September 2020 that it has fined SSE £2.06 million for delaying the publication of inside information relating to future generation capacity. This is the first instance of a fine being imposed relating to the publication of inside information in the energy markets in the UK and the EU. The fine follows an Ofgem investigation which found that SSE had breached Article 4(1) of the Regulation on Wholesale Energy Market Integrity and Transparency (REMIT) requiring market participants to publicly disclose in an "*effective and timely manner*" inside information (i.e. information that is likely to significantly affect the price of wholesale energy).

The delayed announcement related to a non-binding agreement (Agreement), which SSE signed with National Grid on 22 March 2016. SSE agreed to provide National Grid from 1 April 2016 with 'Black Start' capability whereby three generating units at Fiddlers Ferry power station were to provide this capability. This capability restores power without reliance on external supplies in the event of a shutdown of an electricity transmission system. However, SSE had previously announced that these three units were likely to close from that date. These units could generate three per cent of peak electricity demand and supply in Great Britain. SSE delayed the announcement of the Agreement with National Grid until 30 March 2016, which was the date the contract was finalised.

Ofgem found that the signing of the Agreement reversed the likelihood of the closure of the three units. Given the significant impact which the generating capacity of these three units had on demand and supply in the wholesale energy market in the UK, this reversal constituted inside information. Jonathan Brearley, chief executive at Ofgem, said: "*SSE's failure to publish inside information in a timely and effective manner resulted in market participants trading for four working days under a false impression of supply availability in GB's electricity marke*t". As a result, market participants may have ended up paying more than they should for wholesale energy.

The investigation further found that SSE had considered whether it was in possession of inside information, but had failed to reach the correct conclusion and publish. Ofgem found no evidence of bad faith. SSE did benefit from a 30 per cent discount in the fine due to its full cooperation with the investigation and settling early, which resulted in a fine of £2.06 million.

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