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EU Competition Law Newsletter

Highlights

— The Commission Fines Carmakers For Collusion In Emission Cleaning Technology

— The Court Clarifies Rules On National Territorial Jurisdiction in Cartel Follow-On Damages Actions

The Commission Fines Carmakers For Collusion In Emission Cleaning Technology

On July 8, 2021, the European Commission adopted a cartel settlement decision imposing €875 million in fines on three German carmakers (BMW, Daimler, and Volkswagen Group) for restricting competition in emission cleaning as part of a technical cooperation agreement concerning AdBlue, a substance used to reduce harmful NOx emissions in diesel cars.[1] It is the first time that the Commission imposed fines under Article 101(1) of the Treaty on the Functioning of the European Union (the "TFEU") for an agreement between competitors that limits or controls "technical development" and does not involve the elements of price fixing or market sharing.

The AdBlue cartel

In October 2017, the Commission carried out dawnraids at the German premises of Audi, BMW, Daimler, and Volkswagen Group.[2] The investigation centered on (i) selective catalytic reduction ("SCR") systems, which inject AdBlue into the exhaust streams of diesel cars to eliminate hazardous NOx emissions; and (ii) 'Otto' particle filters ("OPF"), which reduce toxic emissions from petrol cars. The Commission did not find sufficient proof of collusion concerning OPF, but pursued the investigation concerning the AdBlue arrangements, which resulted in a Statement of Objections issued in April 2019.[3]

According to the Commission, BMW, Daimler, and Volkswagen Group had participated in periodic technical meetings from June 2009 until October 2014, where they had agreed to avoid competing on the development of emission cleaning technologies. The car manufacturers were found to be aware of their technology's potential, but "decided to collude by indicating to each other that none of them would aim at

[1] *Car Emissions* (Case AT.40178), Commission decision of July 8, 2021 (not yet published). *See* Press Release IP/21/3581, "Antitrust: Commission fines car manufacturers €845 million for restricting competition in emission cleaning for new diesel passenger cars", July 8, 2021 (the "AdBlue Press Release").

[2] Commission Statement 17/4103, "Antitrust: Commission confirms inspections in the car sector in Germany," October 23, 2017.

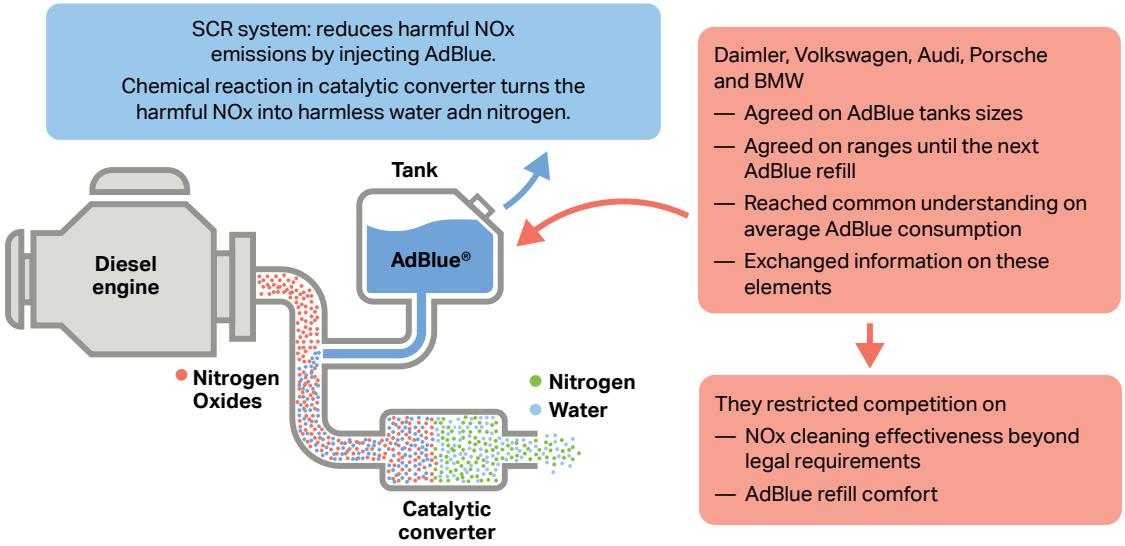
[3] AdBlue Press Release.

cleaning above the minimum standard."[4] The infringement consisted of agreeing and sharing information on AdBlue tank sizes, ranges until next refill, and estimates on AdBlue consumption, restricting the full capabilities of the SCR system.[5]

The case shows that it is not straightforward to separate cooperation arrangements that restrict competition from those that spur innovation and benefit consumers. The Commission recognizes that the anticompetitive elements of the carmakers' arrangement were part of a legitimate technical cooperation, which led to the development of SCR systems in the first place.[6] To provide legal certainty, the Commission has announced that it will publish a separate guidance on the aspects of technical cooperation that did not raise competition concerns in the present case, such as the standardization of the AdBlue filler neck, the discussion of quality standards for AdBlue, or the joint development of an AdBlue dosing software platform.[7]

The Commission concluded that it was not necessary to analyze the effects of the agreement because it amounted to a by-object restriction of competition in innovation in the form of a limitation of technical development, a type of infringement explicitly referred to in Article 101(1)(b) TFEU. It imposed c. €373 and €502 million fines on BMW and Volkswagen Group, respectively. Under the Commission's leniency program, Daimler received immunity because it had disclosed the existence of the cartel, while Volkswagen Group secured a 45% fine reduction for cooperating and providing evidence of the cartel. Both BMW and Volkswagen Group received a further 10% fine reduction for acknowledging their participation in the infringement.

Figure 1 - The Commission's Findings In AdBlue Cartel



Source: European Commission

[4] Statement 21/3583 by Executive Vice-President Vestager on the Commission decision to fine car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars, July 8, 2021.

[5] AdBlue Press Release.

[6] Statement 21/3583 by Executive Vice-President Vestager on the Commission decision to fine car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars, July 8, 2021.

[7] AdBlue Press Release. Cooperation agreements that may have limited "technical development" have attracted the Commission's scrutiny in the past. In October 2014, the Commission sent a Statement of Objections to Honeywell and DuPont regarding cooperation on a new refrigerant used in car air conditioning systems (R-1234yf). The Commission's provisional allegations were that the cooperation has reduced Honeywell's and DuPont's decision-making independence and resulted in restrictive effects on competition, including "a limitation of the available quantities of the new refrigerant that would have otherwise been brought to the market, as well as a limitation of related technical development." In October 2017, the Commission closed its investigation "after careful assessment of all the evidence in this case, together with the various submissions of the parties and other interested third parties" and after three complainants withdrew their complaints. *See* Commission Press Release 'Antitrust: Commission closes car air-conditioning refrigerant investigation,' October 25, 2017.

Green Deal antitrust

The decision signals the Commission's willingness to step up competition enforcement where arrangements between businesses obstruct environmental efficiencies. It is expected that EU competition law will be used to complement the Commission's Green Deal objectives to make Europe the first climate-neutral continent by cutting greenhouse gas emissions by 50% to 55% by 2030, and to zero net emissions by 2050.[8] To support the Green Deal, the Commission has been exploring ways for EU competition policy to complement the proposed EU Climate Law and extended emissions trading scheme. The Commission also assesses whether specific guidelines and/or treatment should apply to horizontal and vertical agreements between companies pursuing the Green Deal objectives.[9]

In May 2021, the Commission published findings of the evaluation of EU horizontal block exemption regulations on research and development and specialization agreements ("HBERs"), which are set to expire on December 31, 2022.[10] The Commission highlighted the need to align the HBERs with the pursuit of sustainability goals and to provide guidance on the assessment of societal benefits and economic efficiencies generated by sustainability agreements, such as reduction in CO_2 emissions or increased animal welfare.[11]

The Commission concluded that under the current HBERs non-monetary outcomes of horizontal agreements are not correctly weighted because "the focus on the short term (*e.g.*, the impact on product prices) does not capture future, longer term environmental efficiencies (*e.g.*, reduction in CO_2 emissions)."[12] A longer term horizon has also become more relevant in the competitive assessment in EU merger control where in a number of cases the Commission has raised concerns about the effect of certain transactions on "innovation competition."[13]

Looking forward, the Commission will step up merger and conduct enforcement against practices that may have an impact on green technologies and markets critical to the Commission's sustainability initiatives.

The Court Clarifies Rules On National Territorial Jurisdiction in Cartel Follow-On Damages Actions

On July 15, 2021, in the context of follow-on damages litigation in Spain, the Court of Justice issued a preliminary ruling clarifying which courts in a Member State have jurisdiction over actions for damages caused by a cartel that infringed Article 101 TFEU.[14] The Court held that claimants have the option to seek damages before a national court where it purchased the goods or, if it purchased goods in places that are subject to jurisdiction of several national courts, the court where the claimant has its registered office.

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[8] *See* Cleary Gottlieb's Alert Memoranda "A Sustainable Recovery for Europe: The EU's Green Deal," July 9, 2020, and "The European Commission's "Fit for 55" Legislative Package to Meet 2030 Emissions Target," August 16, 2021. See also Cleary Gottlieb's Alert Memoranda "European Commission Consults On Sustainable Corporate Governance," December 3, 2020, and "The Corporate Sustainability Reporting Directive: From "Non-Financial" to "Sustainability" Reporting," May 21, 2021.

[9] *See* Cleary Gottlieb's Alert Memorandum "EU Commission Call for Contributions on "Competition Policy Supporting the Green Deal,"" October 19, 2020.

[10] Commission Press Release IP/21/2094 "Antitrust: Commission publishes findings of the evaluation of rules on horizontal agreements between companies," May 6, 2021.

[11] Commission Staff Working Document of the Horizontal Block Exemption Regulations of May 6, 2021, pp. 66, 68, and 75.

[12] Commission Staff Working Document of the Horizontal Block Exemption Regulations of May 6, 2021, p. 68.

[13] *See, e.g.*, Case COMP/M.7275, *Novartis/GSK Oncology Business*, Commission decision of 28 January 2015, para.104 (Commission assessed 'innovation competition' between pipeline products at early stages of clinical development); and Case COMP/M.7932, *Dow/DuPont* Commission decision of March 27, 2017 (Commission assessed whether the transaction would reduce 'innovation competition' across a number of agrochemical markets resulting from a structural reduction of the overall level of innovation). Moreover, based on the Commission's change to the EUMR Article 22 referral policy, the Commission now seeks to extend its jurisdiction over transactions that do not meet EU or national merger control thresholds but that involve "innovative companies conducting research & development projects and with strong competitive potential, even if these companies have not yet finalized, let alone exploited commercially, the results of their innovation activities." *See* Cleary Gottlieb's Alert Memorandum "European Commission Implements New Policy To Investigate Transactions That Would Otherwise Escape Merger Review," April 23, 2021.

[14] *See Volvo and Others* (Case C-30/20) EU:C:2021:604 (the "Volvo Judgment").

Background

The Spanish follow-on action was brought by RH, an undertaking domiciled in Cordoba, Spain. Between 2004 and 2009, RH purchased five trucks in Cordoba, Spain, from a dealer of Volvo Group España, which has its registered office in Madrid, Spain. On July 19, 2016, the Commission decision found that truck manufacturers, including three Volvo entities none of which were domiciled in Spain,[15] engaged in collusive arrangements in relation to certain categories of trucks (the "Commission Decision").[16]

Subsequently, RH brought an action before the court in Madrid for follow-on damages against four Volvo entities. The defendants included the three Volvo entities that were the addressees of the Commission Decision, and one Volvo entity, Volvo Group España, that was not an addressee of the Commission Decision but is seated in Madrid, Spain.[17]

Volvo contested the international jurisdiction of the Spanish court, arguing that the applicant should instead have brought its damages actions outside of Spain, where the harmful event giving rise to the applicant's damages occurred. The referring court in Madrid highlighted to the Court the specific question of whether the Brussels I bis Regulation[18] determines both the international jurisdiction and national territorial jurisdiction of courts in matters relating to tort, delict or quasi-delict, such as follow-on damages actions for a competition law infringement.

The Spanish court did not refer a question about the admissibility of the action against an anchor-defendant entity (Volvo Group España) that was not mentioned in the Commission Decision but is a subsidiary of the addressee of the Commission Decision.[19] There are no details available regarding the basis on which the Spanish court exercised jurisdiction over non-Spanish defendant entities in relation to the Spanish claimant's alleged damages.[20] Similarly, the referring court did not raise question on whether Spanish dealerships, which appear to have been the direct purchasers of the relevant trucks from Volvo Group España, actually passed on the alleged price increases to the claimant in these proceedings.

The Court's ruling

According to the special jurisdiction rules of Article 7(2) of the Brussels I bis Regulation, in addition to the courts of the Member State where it is domiciled, in matters relating to tort, delict or quasi-delict, a defendant may also be sued in the courts of a Member State "where the harmful event occurred." Previous case law has clarified that this is intended to cover both "the place where the damage occurred" and "the place of the event giving rise to it."[21] As a result, defendants may be sued for the specific damage also in the court of a Member State that is part of the relevant market affected by the cartel.[22] It means that in many cases direct and indirect purchasers are able to bring damages claims before courts of their home jurisdictions.

The Court's judgment in Volvo clarifies that in the absence of centralized jurisdiction in a Member State,[23] defendants may be sued, at the option of the claimant, before a national court of the place

[15] These include Volvo, Volvo Group Trucks Central Europe, and Volvo Lastvagnar.

[16] *See Trucks* (Case AT.39824), Commission decision of July 19, 2016.

[17] In national proceedings, Volvo did not contest the territorial jurisdiction of the court in Madrid.

[18] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 351, 20.12.2012, p. 1–32. Also known as Brussels I Regulation (recast).

[19] A related issue has been decided in the *Sumal* preliminary ruling case. The case concerns whether and in which circumstances, based on the competition law doctrine of the single economic unit, follow-on damages claims for an EU competition law infringement may be brought not from the parent company specifically referred to in the Commission's decision, but from the subsidiaries which are part of the same group of companies. *See* Sumal (Case C-882/19) EU:C:2021:800.

[20] According to Article 8(1) of the Brussels I bis Regulation, "A person domiciled in a Member State may also be sued: (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."

[21] *See, e.g.*, *Tibor-Trans* (Case C-451/18) EU:C:2019:635 (the "Tibor-Trans Judgment"), para. 25.

[22] Tibor-Trans Judgment, paras. 32–37.

[23] The Brussels I bis Regulation allows a Member State to centralize antitrust litigation in a single specialized court. *See, e.g.*, *Sanders and Huber* (Cases C-400/13 and C-408/13) EU:C:2014:2461, paras. 44–46.

where the claimant purchased the goods or, when the claimant purchased goods in several places that do not fall within the jurisdiction of a single national court, a court of the seat of the claimant's registered office.

In the Court's view the latter option is consistent with the objectives of proximity and predictability of the rules governing jurisdiction, while the place of the claimant's registered office "fully guarantees efficacious conduct of potential proceedings."[24] The judgment also affirms that the Brussels I bis Regulation governs both the jurisdiction of a Member State and the allocation of local territorial jurisdiction within that Member State.

Broader impact

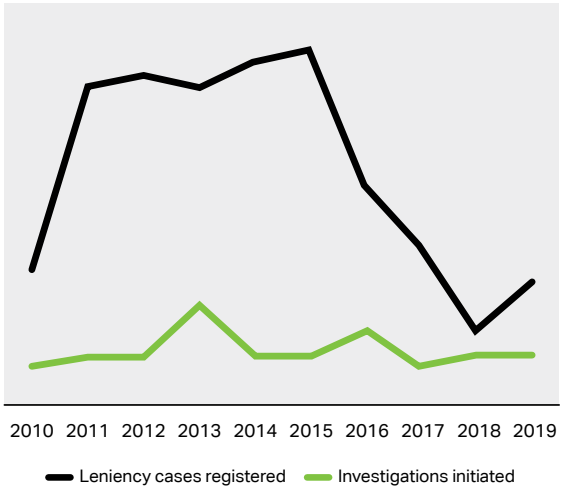
The Volvo judgment gives claimants another option to seek damages at the seat of the claimant's registered office. It follows the landmark 2019 judgment in *Skanska* where the Court ruled that an acquirer company may be held liable for private damages caused by a cartel participant even after the cartel participant was subsequently liquidated, provided that the acquirer took over the assets that constituted the business.[25]

The Court's preliminary ruling docket includes other follow-on damages disputes concerning issues such as the group entities liable for competition law infringement,[26] the substantive product scope of a Commission infringement decision,[27] the quantification of damages,[28] and disclosure of potentially damaging materials from the Commission's investigation.[29] These rulings will shed further light on the application of the Damages Directive, which has given rise to private follow-on damages actions since its adoption in 2014.[30]

There is a risk that interpreting private enforcement rules in a claimant-friendly manner may deter future leniency and immunity applicants from approaching the Commission to self-report competition law infringements for fear of being exposed to unrestrained private litigation. This could prejudice the Commission's leniency and settlement regime, which is critical to the Commission's ability to detect cartels.

Over the 2010-2017 period, 23 out of 25 cartels investigated by the Commission were the result of leniency applications; only two resulted from Commission's own detection work.[31] At the same time, according to the European Court of Auditors (the "ECA"), the annual number of leniency cases reported to the Commission has significantly decreased since 2015 (see **Figure 2** below).

Figure 2 - Evolution of Commission Leniency Cases 2010-2019[32]



[24] Volvo Judgment, para.42.

[25] *Skanska Industrial Solutions and Others* (Case C-724/17) EU:C:2019:204. The Court's ruling was based on the conclusion that the principle of economic continuity should apply not only in public, but also in private antitrust enforcement. *See also* Cleary Gottlieb's EU Competition Law Newsletter of March 2019.

[26] *See* footnote 19.

[27] *See Daimler* (Case C-588/20), case pending.

[28] *See Volvo and DAF Trucks* (Case C-267/20), case pending; and *Tráficos Manuel Ferrer* (Case C-312/21), case pending.

[29] *See PACCAR and Others* (Case C-163/21), case pending.

[30] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance, OJ L 349, 5.12.2014, pp. 1–19 (the "Damages Directive").

[31] *See* the European Court of Auditors' Special Report 'The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight,' 2020 (the "ECA Special Report"), para. 32.

[32] ECA Special Report, page 19.

For these reasons, the ECA could not rule out that companies involved in a cartel would refrain from submitting a leniency application because it would expose them to private damages actions.[33] Similar concerns have been raised by Germany's Federal Cartel Office, the Bundeskartellamt, which is reportedly looking into protecting leniency applicants from follow-on damages claims in order to increase the attractiveness of the leniency program.[34]

News

Commission Updates

The Commission Publishes Draft Revised Distribution Rules

On July 9, 2021,[35] the Commission published its long-anticipated proposed update of the Vertical Block Exemption Regulation[36] (the "Draft Revised VBER") and the corresponding draft Vertical Restraints Guidelines (the "Draft Revised Guidelines").[37] This is an important milestone in the Commission's VBER evaluation process, that commenced in October 2018, and is set to conclude by May 31, 2022 when the current VBER expires. While the Commission may still make adjustments to the existing drafts to reflect public comments, it is anticipated that most of the proposed changes will be incorporated in the final regulation and guidelines.

Limited fundamental changes to the vertical analytical framework

From their entry into force in 2010, the current VBER and Guidelines have been essential points of reference for businesses to self-assess whether vertical arrangements (including resale and distribution agreements) are compatible with the prohibition on anticompetitive restraints under Article 101 TFEU. Their analytical framework is based on two main pillars:

— Vertical agreements are likely to be procompetitive and should thus be shielded from the application of Article 101 TFEU provided the parties' relevant market shares do not exceed 30% and the agreements do not contain any "hardcore" restrictions, such as, in particular, resale price maintenance and territorial or customer resale restrictions, or long-term non-compete clauses; and

— Vertical agreements that do not meet these cumulative conditions are not presumed illegal, but require an individual assessment under Article 101 TFEU.

In line with the current VBER, the Commission's proposed draft documents continue to provide a safe harbor (or block exemption) for all vertical arrangements that: (i) do not contain what are referred to as "hardcore" restrictions; and (ii) do not fall within the scope of any other block exemption regulation; on condition that the relevant market shares of each of the buyer and the seller do not exceed 30%.

Subject to the revisions and exemptions discussed below, the Draft Revised VBER continues to mention a number of "hardcore" restrictions that deprive an agreement from the protection of the block exemption. These include:

[33] ECA Special Report, para 35.

[34] *See* GCR, 'Mundt touts immunity from damages for leniency applicants,' September 10, 2021.

[35] *See* Commission Press Release, "Commission invites interested parties to provide comments on draft revised Vertical Block Exemption Regulation and Vertical Guidelines," July 9, 2021 .

[36] *See* Draft Revised VBER.

[37] *See* Draft Revised Guidelines.

— Resale price maintenance;[38]

— Passive (and in certain cases also active) resale restrictions that, directly or indirectly, have the object of restricting the territory into which, or of the customer groups to whom, the buyer (*i.e.*, distributor) may sell products or services (subject to the exceptions listed below);[39]

— Restrictions on a component supplier's ability to sell components as spare parts to end-users or to repairers or other service providers not entrusted by the component buyer with the repair or servicing of its goods.

The Draft Revised VBER also maintains a list of "excluded restrictions" that do not benefit from the block exemption: (i) any non-compete obligation that is indefinite or exceeds five years; (ii) any post-termination restriction on manufacture, purchase, sale or resale of goods or services; (iii) any ban on members of a selective distribution system selling brands of particular competing suppliers; and (iv) broad most-favored nation ("MFN") clauses (prohibiting sellers from offering more favorable conditions on competing platforms).

The Draft Revised VBER continues to differentiate between three distribution models to which the safe harbors may apply: (i) exclusive distribution;[40] (ii) selective distribution;[41] and (iii) other distribution systems (referred to as "free distribution").[42]

Key adjustments

The Draft Revised VBER and Vertical Guidelines make a number of important adjustments to the existing rules, in part to reflect the significant growth in online sales by manufacturers directly and through online intermediation services. As summarized in the table below, the primary changes to the existing rules relate to dual distribution, MFN (or pricing parity) clauses, dual pricing and other protections of brick-and-mortar sales, online customer and territorial resale restrictions, online intermediation services and agency, and broader exemption for resale restrictions in exclusive and selective distribution models.[43]

[38] *See also* Draft Revised Guidelines, paras. 170, 176, and 178.

[39] Subject to permissible dual pricing and online sales restrictions.

[40] Article 1(g) of the Draft Revised VBER for the first time introduces a definition of an exclusive distribution system as "a distribution system where the supplier allocates a territory or customer group exclusively to itself or to one or a limited number of buyers, determined in proportion to the allocated territory or customer group in such a way as to secure a certain volume of business that preserves their investment efforts, and restricts other buyers from actively selling into the exclusive territory or to the exclusive customer group."

[41] A selective distribution system is already a defined term in the current VBER. Under a selective distribution system, a supplier agrees to supply only distributors selected on the basis of specified qualitative and/or quantitative criteria. Purely qualitative selective distribution is generally considered to fall outside Article 101(1) TFEU if it meets the three conditions set out by the Court in *Metro v Commission* (Case 26/76) EU:C:1877:100. First, the nature of products or services require a selective distribution system (*e.g.*, for high-technology, high-quality, or luxury goods). Second, resellers are chosen on the basis of objective criteria of a qualitative nature, applied in a uniform and non-discriminatory manner. Third, the criteria must be limited to what is necessary to operate the distribution system.

[42] A detailed assessment for each distribution model is provided in paras. 203–224 of the Draft Revised Guidelines.

[43] For more detailed assessment, *see* Cleary Gottlieb's Alert Memorandum "EC Seeks Comments on Draft Revised Distribution Rules," July 22, 2021.

Area of Exemption	Current VBER	Draft Revised VBER
Sales Restrictions	Block exemption covers: — Restriction on active sales to a territory or customer group reserved to the supplier or a single exclusive distributor; — Restriction on selective distributors' sales to unauthorized distributors within a selective distribution system; — Restriction on wholesalers' sales to end-users; and — Restriction on buyers' sales of components to customers who would use them to manufacture the same type of goods as those produced by the supplier if such components are supplied to buyers for incorporation.	In addition, block exemption is also applicable to: — Restriction on active sales to a territory or customer group reserved to a limited number of semi-exclusive distributors (*i.e.*, to more than one exclusive distributor); — Passing-on of an active sales restriction to downstream distributors; and — Restriction on exclusive and free distributors' active and passive sales to unauthorized distributors within a selective distribution system.
Online Sales Restrictions (*e.g.*, dual pricing)	No exemption.	Block exemption applies where restriction or dual pricing system is reasonably necessary to incentivize investments and reasonably relates to the costs incurred for each distribution channel.
Dual Distribution (supplier competing with distributor downstream)	Not specifically addressed.	Qualifies for block exemption, except in relation to: — Reciprocal vertical agreements; — Online intermediation services; — Information exchanges between parties with a combined retail share >10%; and — Vertical agreements that have the object of restricting competition between a competing supplier and buyer.
MFN/Parity Clauses	Not specifically addressed.	Qualifies for block exemption, except wide retail MFNs.

Notably, one week after the publication of the revised draft vertical rules, the Commission closed its investigation into non-retail MFNs[44] used by airline ticket distribution systems Amadeus and Sabre.[45] Non-retail MFNs are imposed by suppliers of online intermediation services, requiring sellers to offer the same or better conditions on the intermediation service's platform for goods or services sold to companies that are not end-users (such as retailers) as the seller offers directly or in other channels.[46]

The Commission was initially concerned that certain terms in Amadeus' and Sabre's agreements may restrict airlines' and travel agents' ability to use alternative suppliers of ticket distribution services, which may restrict market entry and increase airlines' distribution costs.[47] The closure of the investigation is consistent with the Draft Revised Guidelines under which non-retail and input MFNs may be better-positioned to withstand scrutiny than wide-retail MFNs, such as clauses preventing hotels from posting lower prices on rival hotel booking portals.[48]

The Commission will finalize the new vertical rules by May 2022. The ongoing consultation process may lead to additional changes, although we expect these to be clarifications rather than fundamental shifts from the current draft proposals. Companies will likely have to re-assess their distribution arrangements after adoption of the new block exemption.

The Commission publishes Staff Working Document on Market Definition Notice

On July 12, 2021, the Commission published a Staff Working Document (the "SWD") summarizing the findings of its evaluation of the 1997 Market Definition Notice[49] (the "Notice"). The Notice governs the definition of the relevant product and geographic market, a competition law concept that defines the extent of competition between companies and in practice is the denominator used for calculating market shares. Companies' market shares serve as a proxy for their market power and are an important tool of the Commission's analysis in merger cases and competition investigations.

The Commission's evaluation, which was launched in March 2020, is aimed at assessing whether the Notice is still fit-for-purpose. The SWD is based on contributions gathered in a public consultation,[50] exchanges with national competition authorities, experts and stakeholder groups, and research on best practices. The SWD concludes that, while not fully up-to-date, the Notice is still a relevant tool that is providing clarity and transparency to companies and other stakeholders.

Globalization

Following the Commission's merger prohibition decision in *Siemens/Alstom*,[51] concerns were raised about the Commission unduly discounting the global nature of competitive threats, particularly

[44] MFN clauses require a party to offer the same or better conditions to its counterparty than those it offers in any other sales or marketing channel (*e.g.*, other platforms) or via the party's direct sales channel (*e.g.*, its own website). *See* Draft Revised Guidelines, paras. 238 and 333; Explanatory Note, p. 3. The conditions may concern prices, inventory, availability or any other terms or conditions of offer or sale. The MFN obligation may be express, or it may be applied by other direct or indirect means, including the use of differential pricing or other incentives or measures whose application depends on the conditions under which the buyer of the online intermediation services offers goods or services to end-users using competing suppliers of online intermediation services as in paras. 239 and 334.

[45] *See* Commission Press Release "Antitrust: Commission closes investigation into airline ticket distribution services," July 19, 2021.

[46] *See* Draft Revised Guidelines, paras. 239 and 334.

[47] For more details on the Commission's investigation into airline ticket distribution services, see Cleary Gottlieb's EU Competition Law Newsletter of November 2018.

[48] In April 2015, the French, Italian and Swedish NCAs (coordinated by the EC) found Booking.com's wide MFN clauses to be anticompetitive. The three NCAs accepted commitments from Booking.com to replace wide with narrow MFNs (*see Booking.com and Expedia*, Decision 15-D-06, Autorité de la concurrence, Decision of 21 April 2015; *Booking.com*, Autorità Garante della Concorrenza e del Mercato, Decision of 21 April 2015; *Booking.com*, Decision 596/2013, Konkurrensverket Decision of 15 April 2015). Booking.com subsequently extended these commitments to the German FCO also. However, the FCO continued its proceedings against Booking.com and ultimately prohibited the use of narrow MFNs, as upheld by the Federal Court of Justice on May 18, 2021.

[49] Commission Notice on the definition of relevant market for the purposes of Community competition law.

[50] A summary report of the stakeholder consultation and the stakeholders' contributions to the consultation are available at the Commission's website: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12325-Evaluation-of-the-Commission-Notice-on-market-definition-in-EU-competition-law/public-consultation_en.

[51] *Siemens/Alstom* (Case COMP/M.8677), Commission decision of February 6, 2019. The calls for reform of EU merger control rules after Siemens/Alstom were reported in our EU Competition Law Newsletter of February 2019.

from suppliers active in certain Asian countries. The SWD rejected this criticism and concluded that the Notice allows the Commission to factor in market dynamics.[52] According to the SWD, the Commission has more frequently relied on wider geographic market definitions as globalization has intensified and that, while not explained in the Notice, competitive pressure from imports is fully taken into account.[53]

Digitalization

The SWD recognizes that the increased scrutiny of technology markets has brought about novel challenges, including defining markets for multi-sided platforms, "digital ecosystems," data, and online sales channels. While a number of stakeholders had downplayed the importance of the market definition assessment in these contexts, the SWD underlines that market definition is a foundation of any competitive assessment.[54] The SWD acknowledges that the Notice does not fully address the impact of digitalization, including the use of the SSNIP ("small but significant non-transitory increase in price") test, data, and products with zero monetary prices.[55] Nevertheless, it stresses that these issues are likely to further evolve, complicating the task of providing exhaustive and future-proof guidance in a potential updated Notice.[56]

Next steps

The Commission will analyze if and how the Notice is to be revised to address the identified issues.[57] An updated Notice is expected to be issued in the course of 2022.

[52] SWD, p. 44.

[53] *Ibid*., pp. 42–43

[54] *Ibid*., pp. 26–27.

[55] *Ibid*., pp. 38; 54–55.

[56] *Ibid*., p. 68. Other areas of concern identified by the SWD include the use and purpose of the SSNIP test, quantitative techniques, the calculation of market shares, and non-price competition (including innovation).

[57] *See* Commission Press Release IP/21/3585 "Competition: Commission publishes findings of evaluation of Market Definition Notice," July 12, 2021.

AUTHORS

Julie De Vrieze
T: +32 2 287 2044
jdevrieze@cgsh.com

Jon Polanec
T: +32 2 287 2165
jpolanec@cgsh.com

Maud Lesaffre
T: +32 2 287 2025
mlesaffre@cgsh.com

Lewis Reed
T: +32 2 287 2079
lreed@cgsh.com

David Pérez de Lamo
T: +32 2 287 2067
dperezdelamo@cgsh.com

Andris Rimsa
T: +32 2 287 2172
arimsa@cgsh.com

EDITOR

Niklas Maydell
+32 2 287 2183
nmaydell@cgsh.com

PARTNERS AND COUNSEL, BRUSSELS

Antoine Winckler
awinckler@cgsh.com

Patrick Bock
pbock@cgsh.com

Maurits Dolmans
mdolmans@cgsh.com

Christopher Cook
ccook@cgsh.com

Romano Subiotto QC
rsubiotto@cgsh.com

Mario Siragusa
msiragusa@cgsh.com

Wolfgang Deselaers
wdeselaers@cgsh.com

Till Müller-Ibold
tmuelleribold@cgsh.com

Nicholas Levy
nlevy@cgsh.com

Niklas Maydell
nmaydell@cgsh.com

F. Enrique González-Díaz
fgonzalez-diaz@cgsh.com

François-Charles Laprévote
fclaprevote@cgsh.com

Robbert Snelders
rsnelders@cgsh.com

Esther Kelly
ekelly@cgsh.com

Thomas Graf
tgraf@cgsh.com