HERBERT SMITH FREEHILLS

CARTEL INTEL:

UPDATES FROM OUR EMEA NETWORK

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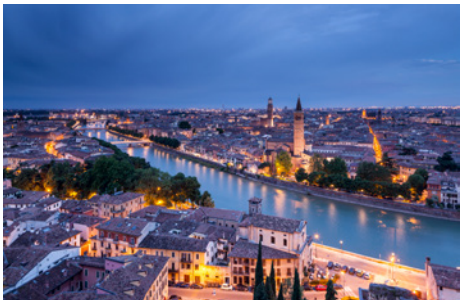
July 2023

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France

Ellisphere decision highlights benefits of French leniency regime[1]

On 12 April 2023, the French Competition Authority ("**FCA**") fined Ellisphere, a company active in data collection and financial risk assessment, €3.5 million for engaging in collusive practices for more than 30 years. The other party involved in the collusive conduct, Bureau Van Dijk ("**BvD**"), was acquired by Moody's Corporation ("**Moody's**") in October 2017, which subsequently applied for leniency and was fully exempted from any financial penalty.

Background

BvD and Ellisphere are active in the economic intelligence sector and sell subscriptions to databases such as Diane, Astrée, Amadeus and Orbis providing business information about French and foreign companies (including financial data, information on the identity of administrators and managers, etc.). The two companies have developed specific and complementary skills, Ellisphere focusing on the collection of information on French companies while BvD developed software for data collection.

The cartel conduct

As a result of their interrelated activities, Ellisphere and BvD entered into cooperation agreements as of 1989, by which they explicitly agreed on: (i) a common pricelist for the products they coedited; and (ii) a customer allocation scheme. These contracts were renewed on a regular basis since then. A steering committee was also set up to monitor price revisions and to ensure that the previously agreed rules were upheld.

As an illustration of the anticompetitive object of these contracts, the FCA referred to the following provisions:

- **Evidence of price-fixing**: *"The parties undertake to sell Amadeus and Orbis at the prices defined in annex 2 and 3. Any revision of the price will be done by an addendum to this contract or by exchange of mails accepted by the parties.",*
- **Evidence of customer allocation**: *"In each country, a client will be attributed to the concerned Information provider or BvD according to the following criteria:*
  - *if the contract is subscribed following a trial installation, to the company having made the exhibition.*
  - *if the contract is subscribed without a trial installation, to the company having obtained the contract.".*

1. The full text of the decision (in French) is available here and the FCA's press release (in English) is available here..

Snapshot: Other French developments

- The French Competition Authority warns against companies taking advantage of the inflation by making "excessive profits". Benoît Coeuré, head of the FCA, reminded companies that the authority has the means to impose severe sanctions (see press report in English, here)
- On 16 February 2023, the Paris Court of Appeal overturned a decision issued by the FCA fining a pharmaceutical company €444 million for disparagement. The Court considered that the information that was regarded as disparaging by the FCA was in fact in the interest of public debate. (Judgment available in French only.)
- In a ruling (available in French only) handed down on by the Paris Court of Appeal on 5 April 2023, it was held that agents of the FCA may not, during a dawn raid, request that additional mailboxes be handed over to them post completion of the dawn raid. The Court held that undertakings would otherwise not be able to benefit from the guarantees relating to seized documents set out by the provisions of the French Code of Commerce governing dawn raids.

In July 2019, Moody's submitted a leniency application to the FCA, following a marker application to the European Commission. The Commission issued a non-proceeding letter in January 2021, whereby it stated it would not take any further action in light of the FCA's handling of the matter. In May 2021, after providing the relevant information to evidence the anti-competitive conduct, Moody's was granted conditional eligibility for total immunity from a fine by the FCA.

Comment

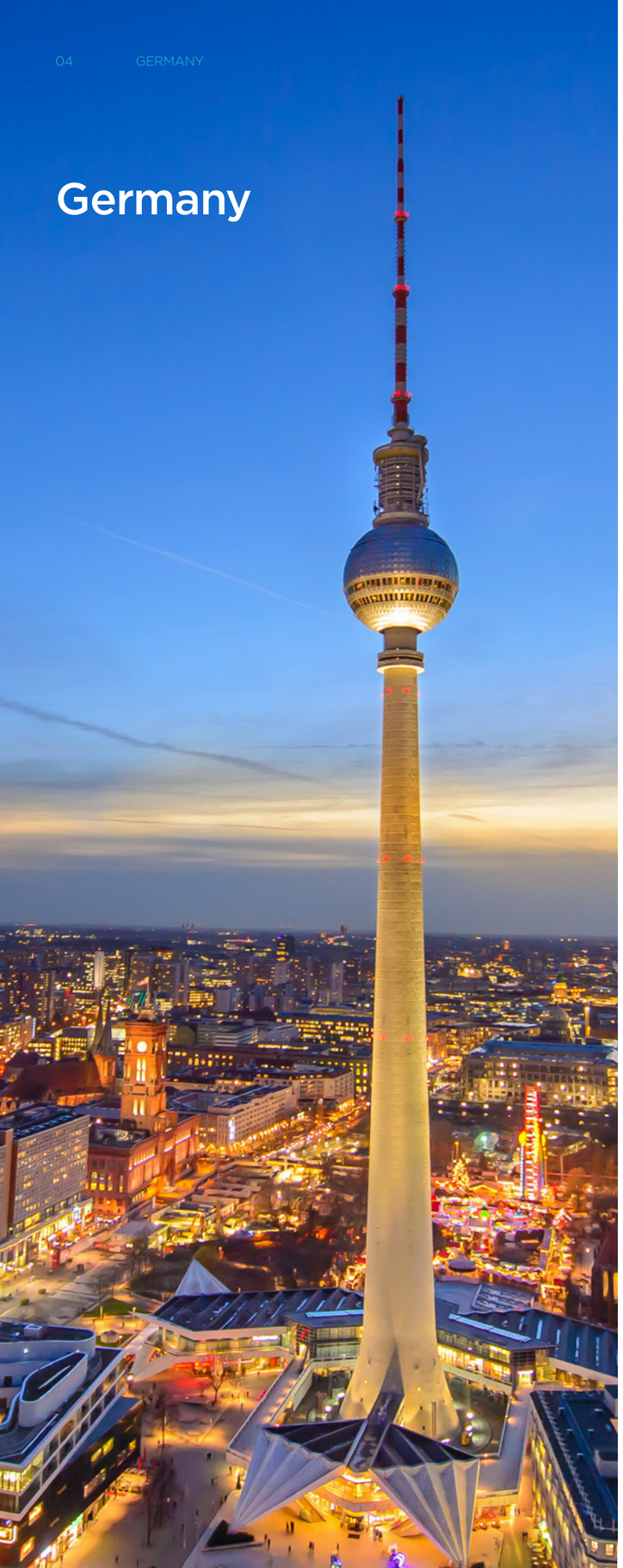
This case is the first application of the FCA's leniency program following the transposition of Directive 2019/1 of 11 December 2018 ("**ECN+ Directive**"), which aimed at harmonising various procedural aspects of competition law across Member States in the European Union.

The changes in the FCA leniency programme resulting from the transposition of the ECN+ Directive are not substantial, but the procedure has been significantly simplified. In lieu of the report by a case handler and the leniency notice issued by the College of the FCA (ie, the FCA's decision-making body), the Chief Case Handler (*Rapporteur general*) now interacts directly with the applicant. Based on the information provided, the Chief Case Handler determines whether the applicant is eligible for partial or full exemption from a financial penalty. This contributes to reducing the administrative burden for applicants which, in turn, spurs companies to resort to leniency procedures.

The FCA granted full immunity from financial penalties to Moody's in light of the extent and level of detail of the information provided by Moody's (which mainly comprised contracts, addendums, steering committee minutes, emails and letters exchange between the parties).

Ellisphere opted for the settlement procedure and decided not to contest the objections raised by the FCA. Ellisphere was eventually fined €3.5 million, after benefitting from a reduction under the FCA's settlement procedure, which amounted to 7% of its worldwide turnover.

This case illustrates the potential benefits that can flow from making a leniency application following the acquisition of a company and of the importance of detecting potentially anti-competitive practices in the context of a transaction due diligence process (with Moody's successfully obtaining full immunity).



Germany

The German "Beer Saga" – Higher Regional Court adopts €50m fine against Carlsberg

In 2014, the Federal Cartel Office ("**FCO**") imposed fines amounting to c. €338 million in its proceedings concerning illegal price fixing agreements for beer.[2] The fines were imposed on a veritable "who's who" of German breweries, including Veltins, Warsteiner, Bitburger, Krombacher, Radeberger, Cölner Hofbräu P. Josef Früh and Carlsberg. AB InBev successfully applied for leniency and did not receive a fine.

The FCO concluded that in 2006 and 2007 the companies had exchanged information and agreed prices for their draught and/or bottled beers.

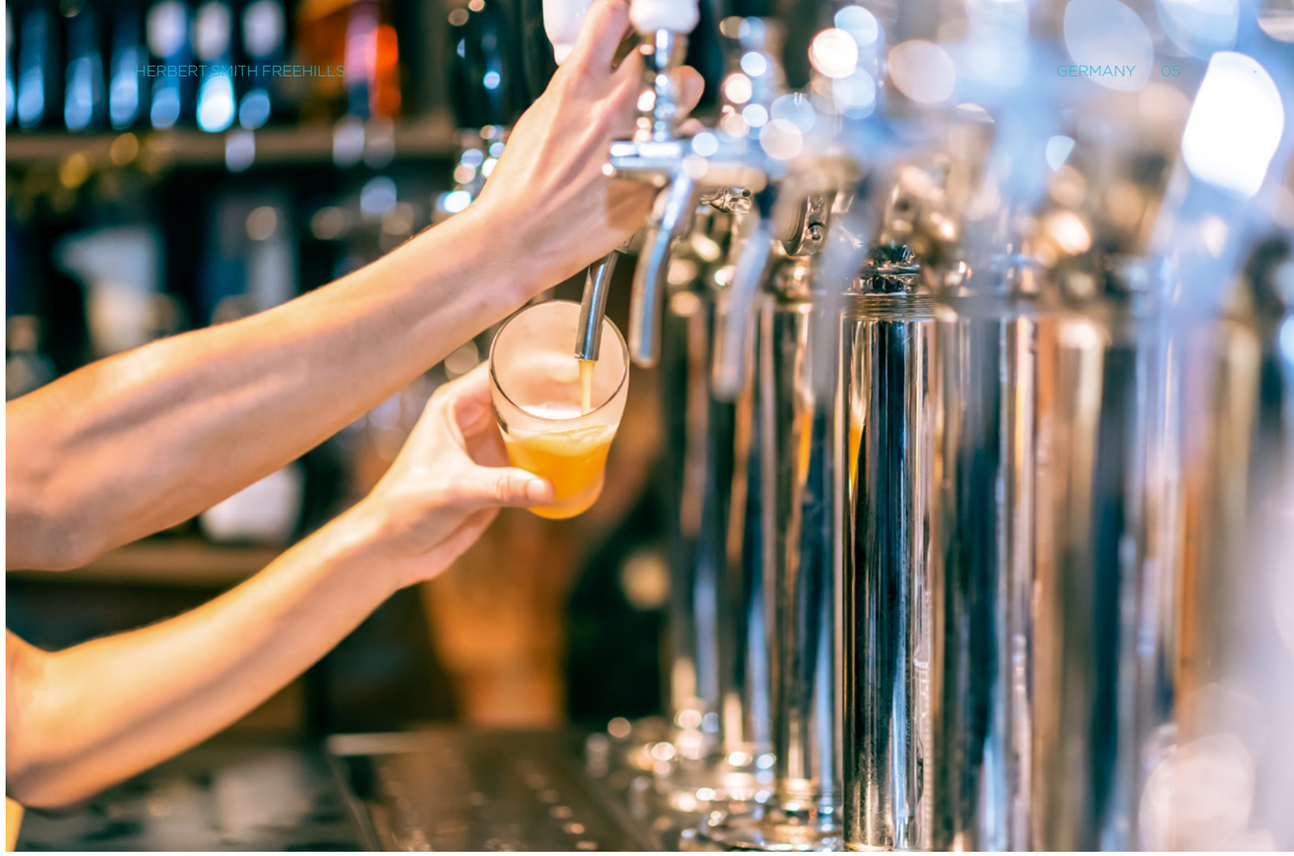
German Beer Basics: *Pils vs Kölsch*

While most of the brewers reached settlements with the FCO, Carlsberg and a group of regional *Kölsch* brewers appealed the decision to the Higher Regional Court of Düsseldorf. *Kölsch* is brewed according to the "*Kölsch Konvention*", one of the most strictly defined beer styles in Germany. According to the Konvention, it is a pale, highly attenuated, hoppy, bright (ie, filtered and not cloudy) top-fermenting beer.

But the difference between Kölsch and Pils in this case in not just a matter of taste. For the *Kölsch* brewers, the Higher Regional Court found that the factual evidence presented by the FCO for their involvement in the anti-competitive information exchange or outright price fixing was insufficient. In particular, the Court doubted the credibility of one of the main witnesses. It therefore completely acquitted the Kölsch brewers[3] - a novelty in a cartel fine case – and its judgment was later upheld by the Federal Supreme Court ("**FSC**").

Most Pils breweries, on the other hand, settled the case with the FCO. Only Carlsberg appealed the decision. It achieved a major victory at the Higher Regional Court in April 2019, when the Court held that the offence was time barred. Carlsberg's victory was short-lived, however, as the FCO successfully appealed the judgment before the FSC, which overturned the judgment

2. See press releases of 2 April 2014 (here) and 13 January 2014 (here).
3. Judgment of 8 September 2021 – V-4 Kart 4/16 OWi (see here (in German))



in July 2020 and referred the case back to the Higher Regional Court. In May 2023, the Higher Regional Court found Carlsberg to be guilty of a violation of Article 101 TFEU[4] and its German equivalent (s.1 of the Act against Restraints of Competition ("**ARC**")) and imposed a fine of €50 million.[5]

At the heart of the case lies a very important practical question: how should undertakings that engage in anti-competitive information exchange be penalised under German law?

The Higher Regional Court's 2019 decision...

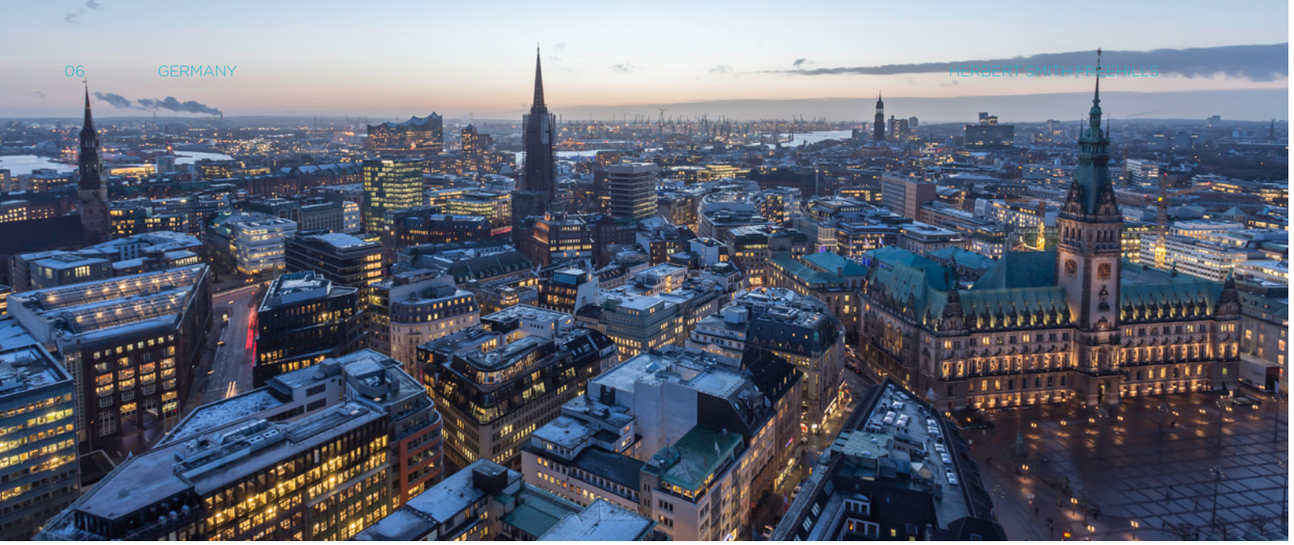
In its 2019 decision, the Higher Regional Court confirmed the FCO's findings that Carlsberg's representatives had attended a meeting in March 2007, during which sensitive information had been exchanged: AB InBev announced that it would raise its prices for a beer crate by 50 cents. The other participants discussed whether a price increase in such "small steps" would be sufficient or whether a more large-scale increase by one euro per crate was more appropriate. They also debated whether such an increase would be realistic without the buy-in of Krombacher, the most popular German beer brand, which was not represented at the meeting. After March 2007 the brewers further discussed and agreed on price increases in bilateral meetings, in particular with Krombacher. However, Carlsberg did not participate in these meetings. For Carlsberg, the meeting in March 2007 had been a "one-off".

Based on these facts the Higher Regional Court concluded that the meeting in March 2007 did not amount to a concerted practice (and thus was not an infringement of competition law). In the eyes of the Court, the results of the meeting remained open and lacked an ultimate decision on how to proceed. In particular, with Krombacher not being present in the meeting, the Court could not establish a concerted practice because it could not find a causal link between the information exchange and Carlsberg's conduct on the market. Instead, the Court sought to construe the meeting as an attempt to reach an agreement on prices, which in itself constituted a concerted practice. However, given that this attempt had no lasting impact on the market and because the 10-year limitation period (which began in March 2007) expired before the Higher Regional Court could deliver a judgment. Accordingly, the Court terminated the proceedings against Carlsberg.

Snapshot: Other German developments

- The German Government has referred a proposal for reform of the ARC to Parliament, that would, *inter alia*, substantially increase the powers of the FCO to order a disgorgement of economic benefits for any violation of competition law (a non-official English translation of the proposal by the University of Düsseldorf is available here).
- The FCO has ensured that the animal welfare initiative "Initiative Tierwohl" (a sustainability initiative among the big German supermarket retailers) abolishes a compulsory premium due to competition law concerns (see here).

4. Treaty on the Functioning of the European Union.
5. Decision of 2 May 2023 – V-6 Kart 1/20 (OWi) (see here) (in German))



... and the FSC's 2020 return

The FSC overturned the Higher Regional Court's 2019 judgment for two main reasons. Firstly, the FSC held that the concept of a concerted practice does not require that undertakings actually agree on a certain behaviour - it suffices that the undertakings reduce the level of uncertainty that is normally associated with competition.

Secondly, the FSC confirmed that the exchange of sensitive information has to translate into a practice on the market in order to count as a concerted practice. However, the FSC also concluded that under German law there is an empirical principle (*Erfahrungssatz*), under which undertakings are regarded as normally taking into account information exchanged with their competitors.

The *Erfahrungssatz* is obviously modelled after EU case law, in particular the European Court of Justice's ("**ECJ**") decisions in Hüls[6] and T-Mobile.[7] However, in contrast to the position of the EU courts, there is no (rebuttable) presumption that undertakings take into account information exchanged with their competitors. The FSC considers such a "hard" presumption to be irreconcilable with the constitutionally guaranteed presumption of innocent.

Instead, the FSC's view is that the *Erfahrungssatz* should serve as a statement of probability which the deciding Court needs to take into account and further investigate to test whether it becomes a certainty based on the specific facts of the case. In this sense, the *Erfahrungssatz* is one – although an important one – of several pieces of circumstantial evidence that the Court must investigate.

Against this background, the FSC held that the Higher Regional Court failed to consider that, based on general empirical knowledge, undertakings take account of the information exchanged with their competitors. The FSC referred the case back because it could not be excluded that – if the Higher Regional Court had properly applied the *Erfahrungssatz* - the Court might have concluded that the information exchange in March 2007 did in fact have an impact on the market and that this concerted practice had not ended before April 2009. Consequently, the 10-year limitation period would not have begun in March 2007.

The Higher Regional Court's re-assessment

In its decision of early May 2023, the Higher Regional Court (taking due account of the FSC's position) found that Carlsberg was involved in a concerted practice as a result of its participation in the March 2007 meeting. At the time of writing, only the press release of the judgment has been published,[8] but it is clear that this time the Court has found that the information exchange has had an impact on Carlsberg's market behaviour: "[t]*he then managing director of Carlsberg Deutschland Holding GmbH used the knowledge gained from the meeting on March 12, 2007 and was able to align the market behaviour of the brewery, also on the basis of the non-public information experienced there.*"

Interestingly it seems that the Court also dealt with an argument that Carlsberg has raised throughout the proceedings to deny that the exchange had consequences on the market. According to Carlsberg, the decision for its own price increases in Germany had been taken in June 2007 in response to its parent company's request to increase revenue in Germany. Carlsberg therefore claimed that its market behaviour in Germany was determined independently and hence unrelated to the discussions with competitors in March 2007.

It seems from the press release that the Higher Regional Court is not persuaded by this argument. For the Court, it suffices that the German Carlsberg management was "*able to act more confidently vis-à-vis the Danish parent company*" based on the discussions with competitors and to implement the price increase more easily and more firmly vis-à-vis its customers.

This illustrates how difficult it will be for undertakings to defend themselves against allegations of a concerted practice: If the "practice" is already concerted because one of the participants is in a position to act "more confidently", then it is a hard to imagine a situation where an exchange of information does not amount to a concerted practice. Ultimately, and in practice, this could of course come very close to a "hard" presumption of illegal conduct that the FSC has explicitly rejected for valid constitutional reasons.

It therefore remains all the more important for undertakings to be extremely careful in their contacts with competitors. Should other parties unilaterally disclose sensitive information, a clear and unequivocal response rejecting such information remains essential. Trying to convince a Court at a later stage that the exchange had no impact on market conduct can prove very difficult indeed – with the potential result of high fines even for one-off exchanges or receipt of information.

6. Case C-199/92 *Hüls AG v Commission* ECLI:EU:C:1999:358.
7. Case C-8/08 *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit* ECLI:EU:C:2009:343.
8. Press Release of 2 May 2023 (only available in German, here).

Italy

The Consiglio di Stato rejects appeals in 'big four' accountants bid ridding case

By its decisions of 23 April 2023,[9] the Consiglio di Stato (the Italian Supreme Administrative Court) ("**Supreme Court**") rejected an appeal by KPMG and KPMG Advisory seeking the revocation of earlier decisions of the Supreme Court concerning a bid ridding case involving the 'big four' accountancy firms (KPMG, Deloitte, Ernst & Young, PWC).

Background

On 18 October 2017,[10] the Italian Competition Authority ("**ICA**") imposed EUR 23 million fines on the "big four" for an infringement of Article 101 TFEU, having manipulated bids in the context of a EUR 66 million tender held by CONSIP, the Italian state procurement agency, to provide support and technical assistance to state audits of schemes co-funded by the European Union.

In particular, the ICA's investigation concluded that the collusion was implemented through a "chessboard" participation in the tender lots whereby the firms agreed a market sharing plan through which each firm submitted higher discounts in the lots "assigned" to it, without overlapping on the lots of interest of the other firms, or submitted bids that were completely unsuitable to win the lot. In this way, the "big four" effectively removed any competition in the context of the tender by dividing lots between them, and neutralised competition from firms outside of the bid rigging arrangement.

The case was commenced following a complaint by CONSIP. The subsequent ICA investigation identified a number of documents and correspondence evidencing the collusion. According to the ICA, the bid rigging concerned all lots of the tender and the ICA found that the concerted practice inevitably affected the result of the tender process to the detriment of CONSIP both in terms of pricing and quality.

Snapshot: Other Italian developments

- The ICA has published guidelines on its settlement procedures (available in Italian only).
- The ICA published updated turnover thresholds for the Italian merger control regime.
- A new notification form for the incorporation and acquisition of state-owned companies has been published.

In 2018, the first instance administrative court, the Tribunale Amministrativo Regionale ("**TAR**"), partially accepted the companies' appeals and ordered the ICA to recalculate the fines it originally imposed.[11]

As a result, in December 2018 the ICA reduced the fines for all the players. At the same time, both the "big four" and the ICA appealed the TAR decision before the Supreme Court, which, in October 2020[12], upheld the ICA's appeal and reinstated its original penalty decision (the "**Supreme Court Decision**").

In relation to KPMG Advisory, TAR's judgment was that there was insufficient evidence of its involvement in the cartel. The Supreme Court Decision, however, upheld the findings of the ICA and the fines for KPMG Advisory were reinstated.

The Supreme Court's revocation decisions

KPMG and KPMG Advisory appealed the Supreme Court Decision, seeking revocation of its decision, including on the basis that KPMG Advisory was not involved in the cartel and could not be jointly or severally liable with KPMG.

Under the Italian procedural rules, revocation is an extraordinary challenge which can be brought only in the cases listed under articles 395 and 396 of the Civil Procedural Code, including in the case of factual errors resulting from the documents of the proceedings.

In its appeal decision (the "**Appeal Judgment**"), the Supreme Court clarified certain principles with respect to the nature of an "error" for which revocation can be sought.

In particular, the Supreme Court pointed out that, in order to be relevant, the error must:

- derive from a pure and simple erroneous or omitted perception of the merely factual content of the evidence, which has led the Court to decide on the basis of a false factual assumption;
- relate to an issue which is not disputed and an issue not expressly considered by the decision (on the contrary, if an issue was disputed by the parties, and this was considered by the Court, then there cannot be a mistaken factual perception). In other words, the erroneous assessment of the historical facts or their relevance to the decision is excluded from the scope of an action for revocation;
- have a causal relationship with the judgment itself (ie, the factual error must be a decisive element of the decision against which an action for revocation is sought).

The Appeal Judgment held that none of these conditions were met in respect of the Supreme Court Decision. It was held that the appeal brought by KPMG related to the evidential value of facts which could, in principle, constitute an error of assessment by the Court; however, revocation is not an available remedy for the erroneous evaluation of historical facts or of their relevance to a decision.

More significantly, in the Appeal Judgment the Supreme Court underlined that, according to the case precedent, the Court is free to draw its opinion from the proof or evidential conclusions that it considers most reliable and suitable. The Appeal Judgment concluded that it is not necessary for the Court to give an account of its

9. Case No. 4651/2023 and 4714/2023, published on 9 and 10 May 2023 respectively.
10. Case I769 - *SERVIZI DI SUPPORTO E ASSISTENZA TECNICA ALLA PA NEI PROGRAMMI COFINANZIATI DALL'UE*, decision No. 26815/2017.
11. In relation to KPMG Advisory, the TAR upheld its appeal as it did not find sufficient evidence of KPMG Advisory's involvement in the cartel.
12. No. 5884/2020 and following published on 6 October 2020.

examination of all the arguments and evidence submitted during the proceedings, and it is sufficient to set out - in a concise but logically adequate manner - the factual and legal elements on which its decision is based and the evidence deemed appropriate to support the judgment. As a consequence, all arguments, theses and observations which, although not expressly examined in a decision, are incompatible with the conclusion must be considered implicitly disregarded.

Therefore, the fact that certain circumstances were not expressly mentioned in the Supreme Court Decision is not a sign of an error by the Court for which an action for revocation can be sought.

Similarly, in its Appeal Judgment, the Supreme Court concluded that the grounds on which KPMG Advisory had challenged the Supreme Court Decision were based on grounds which had been taken into account in the Supreme Court's Judgment.

In particular, in concluding that KPMG and KPMG Advisory were both involved in the cartel and could be jointly and severally liable, the Supreme Court had evaluated the relationship between the two, including:

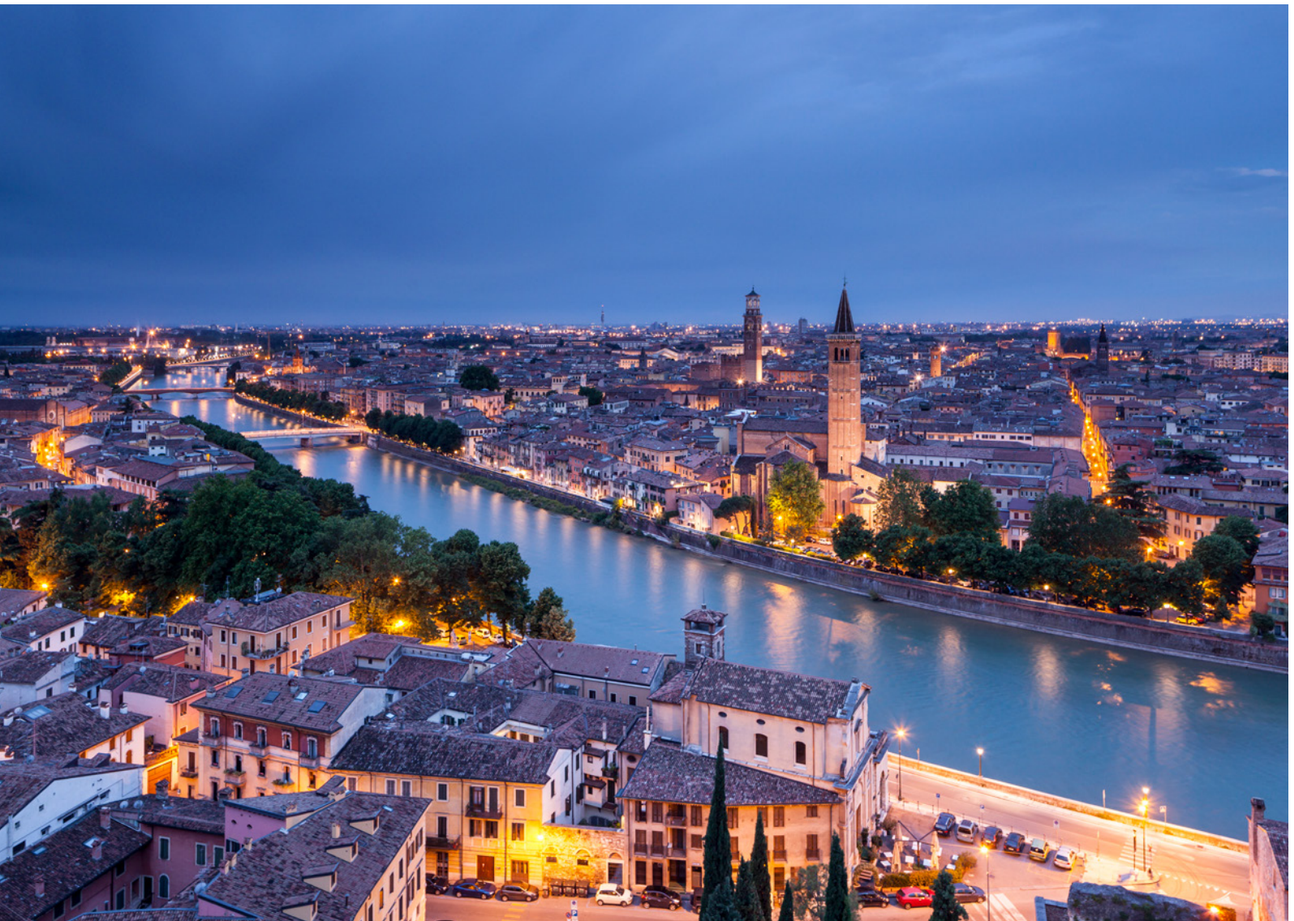
- the use of the same brand and common resources and communication strategy;
- the use of the same tender office;
- the fact they both companies were represented by natural persons who managed the tender process for both firms;
- the coordination between the two companies was also aimed at avoiding incompatibilities between audit activities and advisory activities.

Comment

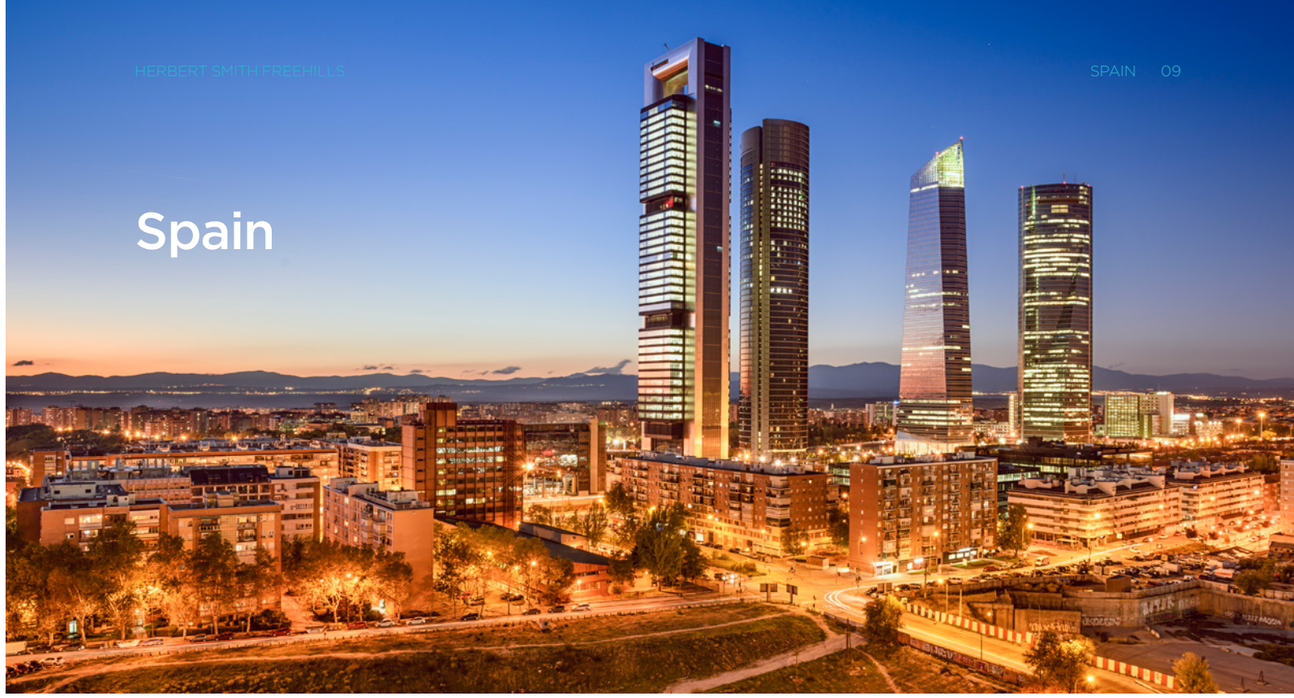
The Supreme Court has through its Appeal Judgment emphasised that revocation is an extraordinary tool which may only be pursued in specific circumstances prescribed by the Italian Civil Procedural Code, and not to simply challenge the legal assessment of the Court.

In addition, the Supreme Court confirmed the approach taken in the Supreme Court Decision on the concept of "single economic entity", according to which several companies may be one single undertaking (ie, even if entities have separate legal personality, they form part of the same single economic entity if they do not independently determine their own course of conduct but do so jointly having regard, inter alia, to the economic, organisational, legal links between the two entities and other factual circumstances).

In this case, the Supreme Court concluded that KPMG and KPMG Advisory formed part of the same economic unit and, therefore, single undertaking within the meaning of Article 101 of the TFEU, such that the ICA may issue a decision imposing a single fine.



Spain



Supreme Court annuls findings of dawn raid due to competition Authority's failure to disclose Legal basis for Inspection

The Spanish Supreme Court[13] has upheld the judgment of the Spanish National Court (*Audiencia Nacional*)[14] annulling an unannounced inspection carried out by the Spain's National Markets and Competition Commission (*Comisión Nacional de los Mercados y la Competencia*, the "**CNMC**").

The dawn raid was carried out at the premises of ALTADIS, a tobacco company in the context of a cartel investigation.[15] The Supreme Court upheld the National Court's findings that the CNMC failed to inform ALTADIS about whether they had applied for judicial authorisation to carry out the raid, contrary to the principles of loyalty, good faith and transparency required in administrative proceedings. It was held that knowledge of the relevant legal basis for the raid was crucial to enabling the company to consent to the dawn raid.

The National Court's judgment

On 15 February 2017, the CNMC's Director for Competition issued a search warrant to conduct a dawn raid at ALTADIS's premises to investigate whether it had infringed Article 1 of the Spanish Competition Act ("**LDC**") and/or Article 101 of the TFEU. The CNMC inspectors conducted their inspection between 20 February and 2 March 2017. The CNMC ultimately concluded that ALTADIS had infringed competition law and fined them €11.4 million.

ALTADIS appealed against the search warrant and the inspection itself, first before the Council of the CNMC, which dismissed the appeal, and then before the National Court. In its appeals, ALTADIS claimed that the CNMC's dawn raid was illegal because the CNMC inspectors did not inform ALTADIS about whether they had applied for judicial authorisation to conduct the inspection. Under the Spanish competition rules, a company must give its informed consent for a dawn raid to be carried out unless the CNMC has obtained judicial authorisation. ALTADIS argued that whether the CNMC had requested and/or obtained judicial authorisation to conduct the inspection was an essential component in the company's ability to provide its consent to the inspection (since, if the CNMC had obtained judicial authorisation, ALTADIS would have been legally compelled to acquiesce to the dawn raid). As the company was not presented with this information, ALTADIS was unable to give its informed consent for the dawn raid to take place.

The National Court's judgment concluded that withholding a relevant piece of information from the inspected company – such as, in this case, whether the inspectors had sought judicial authorisation for entry and, ultimately, whether a judicial search warrant authorising the dawn raid had been issued – was not in line with the standards of loyalty, good faith and transparency required in administrative proceedings. In particular, the National Court concluded that the evasive response provided by the head of the inspection unit when the company queried the existence of judicial authorisation (ie, "*that no order denying the search had been issued*") was clearly inconsistent with the required standards of loyalty, good faith and transparency.

The Supreme Court's judgment

The State Attorney (*Abogado del Estado*) filed a cassation appeal against the National Court's judgment arguing, among other issues, that in this case there was a judicial authorisation for the raid and that knowledge of the existence of judicial authorisation was irrelevant for the inspected company to give its consent to the inspection (since consent is not required where there is judicial authorisation). In the State Attorney's view, ALTADIS would have given its consent to the inspection if it had it known of the existence of a judicial warrant (ie, the absence of knowledge did not alter its decision to consent). In addition, the State Attorney argued that the inspectors' response stating that "*no order denying the search had been issued*" was in any event evidence that judicial authorisation existed. The Supreme Court rejected this submission, however, pointing out that "*there is no trace in the administrative file of the court-issued search warrant invoked by the State Attorney,*" and that the State Attorney did not provide a copy of the warrant during disclosure in the context of the appeal.

13. Judgment of the Supreme Court dated 28 February 2023, appeal no. 7650/2021. Available here.
14. Judgment of the National Court dated 20 May 2021, appeal no. 506/2017. Available here.
15. See decision of the CNMC in case S/DC/0607/17 TABACOS. Available here.

The Supreme Court pointed out that, in accordance with Article 18.2 of the Spanish Constitution, there are only two situations in which the CNMC can lawfully carry out inspections at companies' premises: (i) when the inspected company gives its prior consent, or (ii) when judicial authorisation has been given to conduct the inspection. The Supreme Court emphasised in its judgment that the company's consent "*must be completely free from any defect that clouds an exact understanding of what is being done and the utmost will to so perform and must also be free from any element that could cause or constitute error, coercion, intimidation or deceit.*"

Snapshot: Other Spanish developments

- The Andalusian Competition Authority has imposed sanctions on seven companies engaged in road operation for bid rigging. (Decision available in Spanish only.) In addition to the fines imposed, the Andalusian Competition Authority has banned the sanctioned companies from participating in public tenders and, in line with changes to administrative rules, expressly determining its scope and duration directly in its decision (see previous edition of Cartel Intel).
- The National Court has partially upheld several appeals filed by cable companies against the CNMC's decision in cartel case S/DC/0562/15 CABLES BT/MT. In particular, the National Court concluded that the CNMC failed to demonstrate the companies' involvement in the cartel conduct during certain periods, such that the CNMC's finding that there was single continuous infringement was unsound. As a result, the National Court declared that past infringing conducts are time barred. (See judgments of the National Court in appeals no. 49/2018, 86/2018, 4/2018, 24/2018, 50/2018).

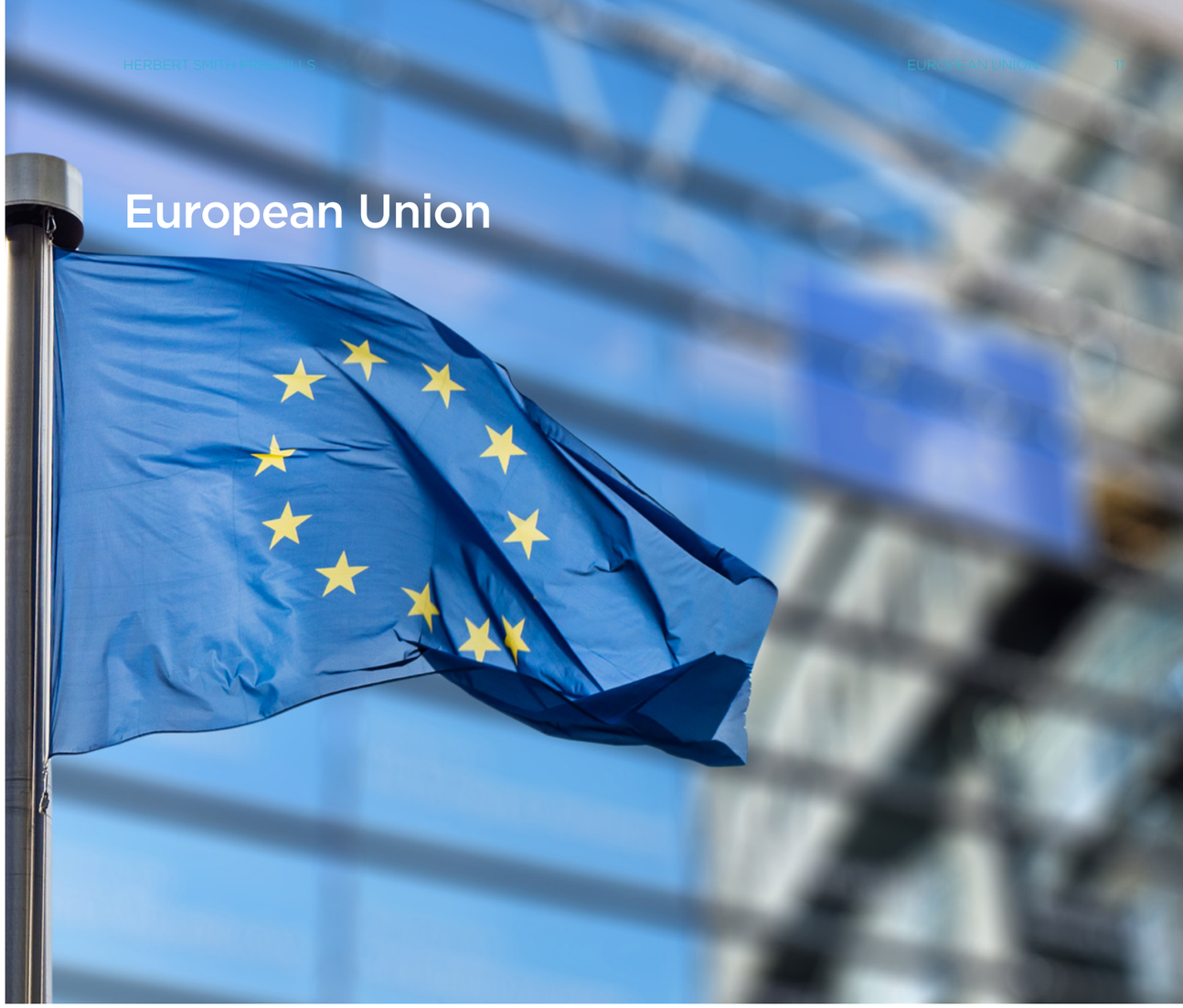
The Supreme Court found that the CNMC inspectors' response to questions raised by the companies' advisers regarding the existence of a judicial search warrant (quoted above) was evasive, incomplete and unclear, which concealed relevant information necessary for the company to give its consent. Furthermore, the Supreme Court stated that it does not share the State Attorney's conclusions that the inspectors' evasive response could be construed as confirmation of the existence of judicial authorisation. In the opinion of the Supreme Court, the fact that no order denying the search had been issued does not necessarily mean that authorisation has been given; an entry denial order might not exist simply because such a search warrant had not been requested.

Based on the above, the Supreme Court dismissed the appeal. The Supreme Court concluded that since Spanish law provides more generally that consent given in error, or subject to coercion, intimidation or deceit is void,[16] then by extension consent obtained as a result of concealing relevant information necessary for making an informed decision whether to grant consent is likewise void.

Commentary

The Supreme Court's judgment represents a significant development in the way the CNMC conducts unannounced inspections and strengthen the rights of defence of inspected businesses. The case underscores that businesses subject to an inspection by the CNMC should ask the inspectors confirm whether the CMNC has requested and obtained judicial authorisation before consenting to an inspection. If no judicial authorisation was obtained, or if a request for authorisation was rejected, the company may have grounds to withhold its consent to the inspection.

16. As provided for in article 1265 of the Spanish Civil Code.



European Union

Damages Directive: EU Court rules on scope of binding nature of National Competition Authority decisions

The Court of Justice of the EU ("**CJEU**") has held[17] that while the Damages Directive[18] (which harmonises rules for cartel litigation in the EU) does not apply to National Competition Authority ("**NCA**") infringement decisions that pre-date its entry into force, such decisions may nevertheless be used as evidence of cartel conduct.

The judgment provides important clarification on the interpretation of Regulation 1/2003,[19] a key component of the EU competition law procedural framework. Specifically, the judgment provides useful guidance on the evidential 'hoops' that claimants need to jump through in respect of NCA decisions issued prior to the date a Member State transposed the Damages Directive into national law.

Background

The case concerns several exclusive contracts for the supply of fuel in Spain. The claimants (known as "**KN's heirs**" in the judgment) are the owners of a service station built by KN. Repsol SA, the defendant, is the main Spanish company active in the manufacture of energy products derived from refining crude oil. Between 1987 and 2009, KN (or KN's heirs) and Repsol, concluded five exclusive contracts for the supply of fuel in connection with the operation of the service station. These contracts provided that the remuneration of the service station operator consisted of a commission which they could charge on the fuel retail price recommended by Repsol.

In 2001, following a complaint by the Association of Service Station and Supply Unit Proprietors of Spain against several refining companies, including Repsol, the Spanish Competition Court found that Repsol had infringed competition law by fixing fuel retail prices through its contractual relations with certain Spanish service stations. This judgment became final in 2001 (the "**2001 Judgment**"). In 2009, the Spanish Competition

17. See case C-25/21, *Repsol Comercial de Productos Petrolíferos*, EU:C:2023:298, available here (the "**Judgment**").
18. 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 (hereinafter "**Damages Directive**") available here.
19. Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (now Articles 101 and 102 TFEU) ("**Regulation 1/2003**") available here.

Commission also confirmed that Repsol continued to infringe competition rules in the context of its exclusive contracts with KN's heirs. This decision (the "**2009 Decision**") was upheld by the Spanish courts and became final in 2015. In the context of a supervisory procedure, the Spanish Competition Commission delivered three decisions in which it found that Repsol had continued to disregard the competition rules until 2019.

KN's heirs brought an action before the Madrid Commercial court (the "**Referring Court**") seeking the declaration of nullity of the contracts concluded with Repsol pursuant to Article 101(2) TFEU[20] and seeking damages for the harm caused as a result of the infringement. To demonstrate the existence of this infringement, KN's heirs relied on the 2001 Judgment and the 2009 Decision. The Referring Court considered that it would have to carry out its own analysis of the contractual relationship that is the subject of the dispute in order to show that the infringement established in the context of public enforcement (ie, the 2001 Judgment and 2009 Decision) coincided with the infringement alleged in the context of the private action brought by KN's heirs. Therefore, in 2020, the Referring Court stayed the proceedings and referred a number of questions to the CJEU seeking clarification on the scope of the binding effect of the NCA decision.

The CJEU's judgment

- *The applicability of Article 9(1) of the Damages Directive*

The CJEU started by referring to Article 9(1) of the Damages Directive according to which " [...] *an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before the national courts under Article 101 or 102 TFEU or under national competition law*".

The CJEU subsequently analysed the material and temporal scope of the Damages Directive. It stated that the material scope of the Damages Directive, including Article 9(1) is limited to actions for damages brought for infringements of competition law and does not extend to other types of action concerning infringements of competition law provisions, such as a declaration of nullity brought under Article 101(2) TFEU (which KN's heirs also sought).[21]

Regarding the temporal scope of Article 9(1), the CJEU reiterated that in order to determine the temporal applicability of a provision of the Damages Directive it is first necessary to establish whether the provision in question is "substantive" within the meaning of Article 22 of the Damages Directive. Article 22 provides that national measures transposing the Damages Directive into national law do not apply retroactively. In this regard, the CJEU held that because Article 9(1) "*establishes an irrefutable presumption as to the existence of an infringement of competition law*"[22] it must be viewed as pertinent to establishing civil liability for an infringement and thus "substantive" within the meaning of Article 22. Therefore, the CJEU held that Article 9(1) does not apply retroactively.

The CJEU added that it should be ascertained whether the situation at issue in the main proceedings arose before the expiry of the time limit for the transposition of the Damages Directive into national law or whether it continued to produce effects after the expiry of that time limit. More specifically, under Article 9 of the Damages Directive, the date on which the NCA's decision became final is the point at which the relevant infringement is deemed irrefutably established for the purposes of a damages claim. Indeed, the review of an NCA's procedure by an independent court, leading to a final decision, protects the parties' rights and, ultimately, supports the legitimacy of competition enforcement.

The CJEU pointed out, in relation to this case, that the Damages Directive was not transposed into Spanish law within the prescribed transposition period (ie, by 27 December 2016). The relevant decisions of the Spanish Competition authority became final before the date of expiry of the transposition period. Therefore, the Damages Directive is inapplicable to both the action for declaration of nullity and the action for damages.

- *Binding effect of NCAs' final decisions and the principle of effectiveness*

The CJEU consequently had to assess the case based only on the law in place pre-Damages Directive, ie, Article 101 TFEU, Regulation 1/2003 and the principle of effectiveness (ie, the principle that EU Member States must ensure domestic remedies and procedures do not in practice make it impossible or excessively difficult to exercise rights conferred by EU law). In this context, the CJEU recounted that EU competition law produces direct legal effects in relations between individuals and directly creates rights for individuals which national courts must protect.[23] The Judgment emphasises that actions for damages before national courts for infringements of EU competition rules ensure the full effectiveness of the prohibition of anticompetitive practices as laid down in Article 101 TFEU.[24]

The CJEU highlighted that - under Article 2 of Regulation 1/2003 - in any national or EU proceedings the burden of proving an infringement of Article 101 TFEU lies with the party or the authority alleging the infringement. Regulation 1/2003 does not, however, contain any provisions on the effect of a final decision of an NCA for actions seeking damages or a declaration of nullity. In the absence of specific EU rules, domestic laws of EU Member States to lay down the relevant detailed rules to in a manner that complies with the principle of effectiveness.

The CJEU cited with approval the Opinion of AG Pitruzzella in this case, and considered that "*the enforcement of Article 101 TFEU would be rendered excessively difficult if the final decisions of [an NCA] were to be accorded no effect whatsoever in civil actions*".[25] Thus, to ensure the effective application of Article 101 TFEU, in civil actions, a final NCA decision finding an infringement of EU competition law "*establishes the existence of that infringement until proof to the contrary is adduced, which it is for the defendant to do, provided that its nature and its material, personal, temporal and territorial scope correspond to those of the infringement found in that decision.*"[26] In such cases, the competition infringement is not deemed to be irrefutably established but the burden of proof is on the defendant to demonstrate that there was in fact no infringement or no effect on the claimant. However, the standard of proof would seem particularly high for defendants.

Where the facts of the infringement subject to a damages claim only partially coincide with a final decision of an NCA (eg, in circumstances where the damages litigation relates to additional/separate facts outside the scope of the NCA decision), the NCA's findings can be relied upon solely as an indication of the existence of the facts to which those findings relate. The CJEU concluded that it is for the Referring Court to assess the facts of the case and ascertain whether the claim brought by KN's heirs falls (in whole or in part) within the scope of the 2001 Judgment and 2009 Decision by reference to the nature of the material, personal, temporal and territorial scope of the alleged infringements.

- *Nullity under Article 101(2) TFEU*

Last, the CJEU held that if an applicant succeeds in establishing the existence of an infringement for the purposes of an action for damages before a national court, it is for that court to determine (in accordance with national law) the scope and effect of the automatic nullity provided by Article 101(2) TFEU. The CJEU recounted that an agreement should be considered void as a whole, only if the relevant infringing provisions cannot be severed.[27]

Concluding remarks

The CJEU's ruling provides helpful clarification on the burden of proof applicable in relation to damages claims related to infringements which took place prior to the entry into force of the Damages Directive.

The Judgment clarifies that the provisions in the Damages Directive which render infringement decisions as *prima facie* evidence of an infringement before Member State courts do not apply retroactively. Helpfully (for claimants), however, the Judgment does enable claimants before national courts to rely on NCA decisions to bring damages actions (or actions for nullity) unless – and until – the defendant is able to prove that there was no infringement.

The CJEU's ruling is relevant for many cases where an NCA's decision was concluded before the introduction of the Damages Directive, but which were, for example, appealed and became final after the transposition of the Directive, ie after 2016. Consequently, companies contemplating pursuing damages claims based on infringements pre-dating the Directive but established by final NCA decisions after the transposition of the Directive, will benefit from the "irrefutable presumption" of the existence of those infringements. By contrast, damages claims based on NCA decisions prior to the transposition of the Directive will not benefit from an irrefutable presumption – ie, while claimants can seek to rely on such decisions as evidence of an infringement, it remains open for a defendant to adduce evidence to the contrary (and thus rebut the existence of an infringement).

According to the CJEU's ruling applicants are also entitled to benefit from the principle of effectiveness, even if the NCA's decisions became final before the transposition of the Directive. Applicants may still establish the competition infringement as per the relevant NCA's decisions, as long as the material, personal, temporal and territorial scope of the NCA's decisions and the subject-matter of the civil action coincide. The national Court will need to conduct a thorough factual assessment of the business practices at issue. The burden of proof will thus lie with the defendant, who will most likely find it particularly challenging to rebut the claims.

In case of only a partial overlap of the scope of the NCA's decisions with the subject matter of the civil claim, claimants can still rely on the NCA's findings, which will however only serve as an "indication" of the infringement alleged. In this case, the standard of proof would seem higher for the applicants as they would need to prove that the scope of the infringement was wider than the NCA concluded, and their specific business practice was also covered by the anticompetitive practice.

Snapshot: Other EU developments

- The Commission has carried out unannounced inspections across a number of sectors this month, including fragrances sector (March 2023), the fashion sector (April 2023), and the synthetic turf sector (June 2023). In each case, the Commission was accompanied by Member State competition authorities and coordinated raids with the UK, Swiss and US authorities in relation to raids in the fragrance sector.
- Advocate General ("**AG**") Sánchez-Bordona of the CJEU issued an Opinion (which is not legally binding, but which may be persuasive on the CJEU) finding that a public authority is not inevitably bound by a competition authority's decision to prohibit a company from participating in public procurement procedures. A public authority may allow a company disqualified from public procurement on competition law grounds to participate so long as they state reasons for inclusion.
- Red Bull issued proceedings before the CJEU reportedly seeking to challenge the validity of dawn raids carried out on its premises by the Commission for suspected competition law breaches.
- The Commission concluded that it had insufficient grounds to continue to pursue an investigation in relation to Alcogroup concerning alleged participation in a cartel concerning the wholesale price for ethanol. The Commission closed its antitrust investigation as a result, but continues to investigate other alleged cartel participants.

20. Article 101(2) of the TFEU provides that infringing agreements are automatically void.
21. Paragraph 31 of the Judgment.
22. Ibid. paragraph 38
23. See paragraph 50 of the Judgment, and case C-724/17, *Skanska Industrial Solutions and Others*, EU:C:2019:204, para. 24
24. See paragraph 52 of the Judgment.
25. Ibid., paragraph 61.
26. See paragraphs 62 of the Judgment.
27. See paragraph 73 of the Judgment. See also Case C-234/89 *Delimitis* EU:C:1991:91.

United Kingdom

Construction services: Competition and Markets Authority imposes fines and secures director disqualifications

Company directors continue to be held accountable for competition law breaches, with the Competition and Markets Authority ("**CMA**") recently announcing that it secured the disqualification of three directors of construction companies found to have engaged in cover bidding.[28]

The move means that 2023 could see a record 11 disqualifications in a single year,[29] with the CMA reiterating that "*Company directors must understand that they have personal responsibility for ensuring that their companies comply with competition law, and that disqualification may follow if they fail to do so.*"[30]

The CMA also confirmed that it has imposed fines of nearly £60 million on 10 construction firms for bid rigging in relation to 19 construction contracts. The CMA's infringement decision follows the announcement of its Statement of Objections and settlement in June 2022.[31] While the infringement decision itself is not yet published, the CMA's press releases provide further details on the cartel conduct and the enforcement action taken by the authority.

Case overview

The CMA found that 10 UK-based construction companies had engaged in bid rigging over a five-year period in relation to 19 contracts for demolition work in London, the Southeast and the Midlands. This included both private and public sector contracts and the CMA notes that affected contracts included the development of Bow Street Magistrates Court, Selfridges (London), properties belonging to Coventry and Oxford Universities and an office block in London.

The construction companies were found to have agreed to submit 'cover bids', that is bids that are deliberately priced to lose the tender. In a change to the details provided in its press release confirming the issuing of the Statement of Objections, the CMA stated that five (not seven as indicated previously) of the firms were involved in arrangements whereby a designated "loser" firm received compensation from the winning bidder in exchange for the submission of a cover bid. The CMA found that in at least one instance the compensation was higher than £500,000 but varied from bid to bid.

The CMA imposed the following fines on the companies involved: Brown and Mason (£2.4 million), Cantillon (£1.9 million), Clifford Devlin (£423,615), DSM (£1.4 million), Erith (£17.6 million), JF Hunt (£5.6 million), Keltbray (£16 million, McGee (£3.8 million), Scudder (£8.3 million) and Squibb (£2 million).

28. The CMA's press release is available here. The infringement decision is available here (the "**Infringement Decision**").
29. If the CMA is successful in securing the seven disqualifications sought in the prochlorperazine case (see here and our update in the previous edition of Cartel Intel).
30. Michael Grenfell, the CMA's Executive Director for Enforcement, quoted in the CMA's press release (see footnote 1).
31. Which we covered in the seventh edition of Cartel Intel (here).

Seven of the firms (Brown and Mason, Cantillon, Clifford Devlin, DSM, John F Hunt, Keltbray, McGee and Scudder) benefitted from reduced fines as a result of admitting their involvement in the cartel and entering into a settlement agreement with the CMA. The CMA's settlement process is intended to streamline the process of issuing an infringement decision in circumstances where companies under investigation admit to infringing competition law and indicate that they are willing to pay a financial penalty. In applying its policy to this case, the CMA reduced the settling firms' penalties by 20% as a result of their admissions and cooperation with the investigation.[32]

Leniency applicants

Scudder and McGee also benefitted from larger discounts to their fines (70% and 40% respectively) under the CMA's leniency programme through which a business involved in a cartel can seek immunity or significant penalty reductions in return for reporting cartel activity and assisting the CMA's investigation. Scudder and McGee each separately reported the cartel conduct to the CMA (Scudder in March 2019 and McGee in October 2020).

Full immunity from fines (so-called 'Type A' immunity) is available to leniency applicants who report cartel activity to the CMA where the CMA does not have a pre-existing investigation and where the conditions set out below (the "**Leniency Conditions**") are met:

- accept participation in the cartel (and thus infringement of competition law);
- provide the CMA with all information, documents and evidence available in relation to the cartel (save for privilege materials);
- maintain continuous and complete cooperation throughout the CMA investigation until its conclusion (including the conclusion of any appeals);
- refrain from further participation in the cartel activity (if it is ongoing at the time of report), except as the CMA may direct; and
- not have taken any steps to coerce another business to participate in the cartel conduct.

Type A immunity provides guaranteed corporate immunity from financial penalties and guaranteed immunity from criminal prosecution for all current/former employees and directors of the leniency applicant. Directors of companies which benefit from Type A immunity are also afforded protection from director disqualification proceedings, with the CMA's policy not to seek disqualification of current or former directors in respect of the activities to which the grant of immunity relates. This does not preclude, however, a criminal court from imposing a Director Disqualification Order in the event a director is prosecuted under the UK's criminal cartel offence.[33]

Where full immunity is not available (eg, because the CMA was already investigating the cartel), the first applicant to report the cartel can benefit from full immunity from fines or reductions in fines of up to 100% ('Type B' immunity/leniency), subject to satisfying the Leniency Conditions. 'Type C' leniency is available for subsequent leniency applicants, or applicants which did coerce other businesses to participate in cartel conduct (but otherwise satisfied the remainder of the Leniency Conditions).[34]

It can therefore be inferred from the fines received by Scudder and McGee that neither party was eligible for Type A immunity, which suggests that they reported the conduct after the initiation of the CMA's investigation (and it is possible that they were unaware of the CMA's investigation at the point of applying for leniency). The higher reduction for Squibb reflects that it was 'first' in seeking leniency.

Director disqualifications

In addition to fines, the CMA secured disqualifications of four directors: two directors of Cantillon (one former and one current), one director of Brown and Mason, and one director of Erith. Notably, each of the directors benefitted from reduced disqualification periods as they voluntarily agreed to the disqualification via undertakings (see the 8th edition of Cartel Intel for more on the CMA's disqualification powers).

Notwithstanding this, the disqualification lengths are not insignificant – with the Erith director being disqualified for 5 years and 10 months and the former and current Cantillon directors being disqualified for 7.5 years and 4.5 years respectively. The CMA announced on 25 May that the Brown and Mason director had been disqualified for a period of 7 years. This case therefore joins a long line of recent decisions in which the CMA has secured director disqualifications following investigations into suspected breaches of competition law.

It is noteworthy that Cantillon and Brown and Mason directors were subject to disqualification given the CMA's indication that Cantillon itself benefitted from reduction in penalties by entering a settlement with the CMA. The CMA has a general discretion to decide not to pursue disqualification of directors but unlike the leniency regime, the CMA's approach to director disqualification is not formalised as part of the settlement procedure. Instead, the CMA's guidance is that it may separately settle the pursuit of any director disqualification by means of accepting an undertaking from the director(s) to be disqualified[35] – a process the CMA appears to have followed in this case.[36]

Analysis and key takeaways

The announcement of the infringement decision signals the end of a four-year long investigation, with the CMA having commenced its initial investigation in March 2019.

32. See paragraph 6.145 of the Infringement Decision.
33. See paragraph 2.10 and footnote 10 of CMA guidance on applications for leniency and no-action in cartel cases (OFT1495), available here.
34. Unlike Type A immunity, reductions in fines or immunity/protection for directors is discretionary for Type B leniency applicants. The grant of Type C leniency is at the CMA's discretion.
35. See paragraph 14.33 of the CMA's guidance on the CMA's investigation procedures in Competition Act 1998 cases (CMA8), available here.
36. The CMA followed a similar process in its Nortriptyline investigation, whereby it obtained disqualification undertakings from two companies that had settled with the CMA (see case page here).

The case highlights the various routes through which businesses that discover they have been involved in cartel conduct can seek to mitigate their exposure to fines. The CMA's settlement procedure provides a complementary route to its leniency programme to reduce penalties (and provide protections for directors) in appropriate cases. The two programmes are distinct but not mutually exclusive – companies can (such as Scudder and McGee in this case) benefit from both leniency and settlement discounts.

Clearly, however, the most effective way to minimise liability for an infringement is to pursue Type A leniency (if available) with a view to obtaining full immunity from fines. As this case underlines, however, it is of paramount importance to provide information to the CMA prior to the CMA commencing its own investigation. If this is not possible, then businesses will only be eligible for Type B or Type C leniency – and/or settlement – none of which guarantee full immunity from fines or protection for company directors.

The disqualifications in this case also underscore the differing processes (and interests) for the treatment of directors and businesses in the context of a CMA investigation where Type A immunity is unavailable: while Cantillon was able to benefit from reduced fines via settlement, this did not prevent the CMA from seeking director disqualification. Similarly, Erith did not settle nor obtain leniency, and so faced higher than most of the companies involved – but the disqualified Erith director was able to reduce the length of their disqualification by voluntarily agreeing an undertaking.

The construction sector has seen a number of CMA investigations in recent years – many of which leading to the CMA issuing infringement decisions and obtaining director disqualifications. As of May 2023, the CMA currently has no other open cases in the building and construction or engineering sectors. With dawn raids "back" after a pandemic-induced hiatus, new investigations are much more likely and with no construction cases ongoing, could the sector be in the CMA's sights? Businesses, as ever, should ensure that their dawn raid procedures are kept under review and updated to reflect post-Covid working habits – with the CMA able to seize physical documents and those stored on cloud servers.

Snapshot: Other UK developments

- The CMA imposed fines of £880,000 on Leicester City FC after it admitted participation in alleged anti-competitive conduct concerning Leicester City-branded clothing.
- The CMA provisionally finds that five banks infringed competition law as a result of exchanging competitively sensitive information concerning UK government bonds.
- The Digital Markets, Competition and Consumer Bill, which proposes includes a range of proposed reforms to the CMA's investigatory powers, was laid before parliament. See our briefing here.
- The CMA announced that it has expanded its investigation into the production of and broadcasting of sports content to include the BBC and Sunset & Vine Productions.
- The CMA launched an investigation into a suspected cartel in the supply of fragrances, in coordination with authorities in the US, EU and Switzerland.
- The CMA published its Annual Plan for 2023/2024, noting "cartels in public procurement" as an area of focus.

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