HERBERT SMITH FREEHILLS

CARTEL INTEL:
UPDATES FROM OUR EMEA NETWORK

In this issue


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Key Contacts

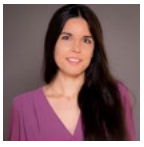
Marcel Nuys
Partner, Dusseldorf and Brussels
T +49 211 975 59065
marcel.nuys@hsf.com

Daniel Barrio
Senior Associate, Brussels
T +32 477 883 657
daniel.barrio@hsf.com

Sean Giles
Senior Associate, London
T +44 203 692 9631
sean.giles@hsf.com

Souzanna Omran
Associate, Brussels
T +32 2 518 1853
souzanna.omran@hsf.com

Kyriakos Fountoukakos
Partner, Brussels
T +44 7920 455 155
kyriakos.fountoukakos@hsf.com



Pilar Carrasco
Senior Associate, Madrid
T +34 91 423 4138
pilar.carrasco@hsf.com

Henar Gonzalez
Partner, Madrid
T +34 91 423 4016
henar.gonzalez@hsf.com

Florian Huerkamp
Counsel, Germany
T +49 211 975 59063
florian.huerkamp@hsf.com

Veronica Roberts
Partner, London
T +44 20 7466 2009
veronica.roberts@hsf.com

Sergio Sorinas
Partner, Paris
T +33 1 5357 7677
sergio.sorinas@hsf.com

Marie Louvet
Of Counsel, Paris
T +33 1 5357 7075
marie.louvet@hsf.com

Jean Meijer
Managing Partner Johannesburg
T +27 10 500 2642
jean.meijer@hsf.com

Sandhya Foster
Director, Johannesburg
T +27 10 500 2643
sandhya.foster@hsf.com

Francesca Morra
Partner, Milan
T +39 02 3602 1371
francesca.morra@hsf.com

Germany

Access to file in cartel proceedings – Court strengthens position of undertakings under investigation

Access to file during a cartel investigation is a crucial tool for businesses under investigation. It helps them to better understand the allegations made by the competition authority and to adapt their defence strategy accordingly. Access to file also forms a fundamental aspect of the rights of defence. However, at least in practice, the German Federal Cartel Office ("**FCO**") has been very reluctant in granting companies access to file during a cartel investigation. This practice has now been fundamentally criticised in a recently published judgment[1] of the Regional Court of Bonn.

Facts of the case

In 2022, the FCO conducted dawn raids at various companies in an industry where it suspected cartel behaviour had occurred. As part of the raid, the FCO *inter alia* copied data stored on servers outside of Germany. According to German law, the FCO may secure data on a separate hard drive to check whether it might be relevant for its investigation. If the authority wants to further explore and ultimately use the secured data in its investigation it is obliged by law to confiscate them first.

In this case, one of the undertakings under scrutiny objected to the FCO securing the data and applied for access to file. The FCO denied that request. On appeal, the Regional Court of Bonn voiced fundamental criticism of the FCO's approach and their refusal of the request.

The Court's critique

The Regional Court of Bonn criticised the FCO for the time it had taken to determine whether the secured data was relevant for its investigation (and therefore whether to confiscate it or return it).

The Court noted that even one year after conducting the dawn raid, the FCO had still not finished its review process. From a legal perspective, this review process is considered part of the dawn raid itself: while the FCO is not physically searching premises, it is still searching the data it copied, ie, technically the dawn raid is ongoing until the data is finally confiscated (or released).

In this regard, the Court recalled that the European Convention on Human Rights ("**ECHR**") requires the FCO to conduct its investigation proportionately and expeditiously. As such, it is necessary that the inspection is started "without delay" and carried out "expeditiously". The Court held that this includes the swift review of data copied on site during the physical dawn raid. While the Court does not say so explicitly, its reasoning strongly suggests that the duration of one year cannot be viewed as being "without delay".

Access to file and the risk of jeopardising the investigation

The German Code on Criminal Procedure ("**GCCP**") provides that defence counsel is authorised to inspect files which would have to be submitted to the Court if charges were brought. The GCCP also provides that if the investigation has not been concluded, defence counsel may be refused inspection of the files or of individual parts of the files insofar as this may jeopardise the purpose of the investigation.

In that regard, the Court made very clear in this case that: (i) the refusal of access to file must remain the exception to the general rule that defence counsel is granted access and (ii) the usual approach by the FCO when it comes to access to file is not in line with this general principle. In particular, the Court noted that the FCO regularly refuses to grant access to file following a search on the basis that evidence seized must first be reviewed by the FCO (which can often take years), as this review forms the basis for any further questioning and searches. The Court held that references to potential further investigation is not in itself a sufficient ground to deny access to file. Instead, it is necessary to produce concrete

1. Landgericht Bonn, judgment of 30. March 2023 – 64 Qs 53/22. While the judgment is dated March 2023 it was published for the first time in January 2024.

evidence that a defendant's access to the file would otherwise jeopardise future investigations.

In this regard the Court made some important observations:

- If the investigation is based on a leniency application, the FCO must show that there is indeed a need for it to undertake further investigative measures that must be kept secret.
- Often the defendant alone will not be able to take effective concealment measures (eg hiding evidence or disguising a cartel) in such a way that could jeopardise the investigation. It would only be plausible to keep involvement in a cartel secret, or conceal aspects of the cartel, if all cartel members were prepared to be silent and cover up the arrangement. In the Court's view, all members to a cartel agreeing to remain silent/conceal an arrangement is an exceptional arrangement as there is always the risk that the other cartel members will apply for leniency and thereby torpedo any joint concealment of a cartel.
- In any event, the FCO cannot deny access to file based solely upon its "experience" with cartel investigations as this does not in itself substantiate a risk of jeopardising the investigation.
- Insofar as the FCO has legitimate concerns that its specific investigation tactics could be jeopardised by granting access to file, the FCO must assess whether these concerns can be mitigated by redacting individual information in the file.

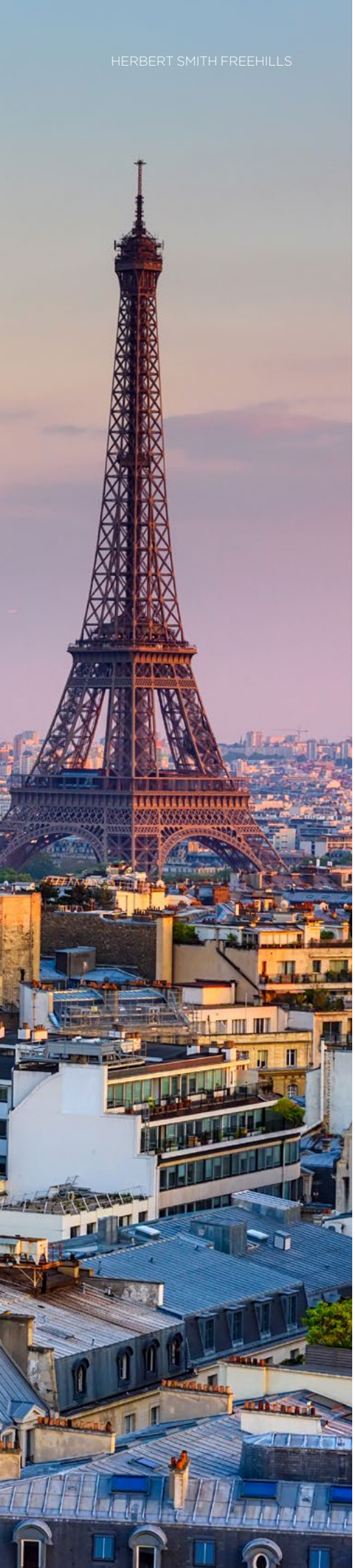
Implications

Rulings by the Regional Court of Bonn on procedural matters are of great importance for the practice of the FCO: since the FCO is located in Bonn, the Court has sole jurisdiction over the FCO and will also decide upon future appeals regarding access to file requests. For businesses that wish to challenge the legality of a dawn raid or individual investigative measures, this judgment will be helpful as it provides a basis to strengthen claims to access the file. Having access to file will often be a fundamental prerequisite for a successful challenge: businesses must understand the evidence that the FCO has on file in order to argue that a dawn raid was not justified. In any case, earlier access to file will often be crucial to determine the strategy of defence even in circumstances where the legality of the initial dawn raid is not subject to challenge.

Snapshot: Other German developments

- The Bundeskartellamt has imposed fines totalling around 4.8 million euros against 14 construction companies and 12 responsible persons for illegal bid rigging in award procedures for construction contracts. In particular, the FCO used its powers to impose so called "liabilities" on new parent companies that have acquired as part of a restructuring process an undertaking involved in a cartel (see here).
- The FCO has decided not to take enforcement action in relation to the German Football Association's joint selling of media rights to individual Bundesliga matches. While the FCO holds that joint selling constitutes an agreement restricting competition, it acknowledges that the joint selling of media rights may lead to advantages for consumers and can therefore be accepted under competition law. The authority explicitly acknowledges that the EU Court of Justice's recent Super League judgment might require the FCO to change its practice when assessing the joint selling of media rights in the future (see here).

France



French Competition Authority imposes fines on trade associations for non-price related cartel conduct

Background

On 29 December 2023, the French Competition Authority ("FCA") fined several trade associations and companies a total of approximately €20 million for the implementation of concerted practices in relation to the commercialisation of containers containing Bisphenol A ("BPA") (Decision N° 23-D-15 of 25 December 2023).[2]

The infringement, which lasted for more than 4 years, occurred against the backdrop of the adoption of Law No 2012-1442 of 24 December 2012 (the "**Law on BPA**") aimed at putting an end to the use and import of BPA in all food containers in France.

BPA is a synthetic industrial chemical that can be found in plastics used to make containers that store food and beverages and commonly used to coat the inside of metal products such as food cans. BPA has been identified as an endocrine disruptor and deemed harmful because of its possible effects on health through its seeping into food.

The Law on BPA provided for a transitional period ending 1 January 2015, during which the simultaneous commercialisation of food containers containing BPA and BPA-free containers would be permitted solely for the purpose of clearing existing stocks.

During that transitional period, the FCA suspected several professional associations – the can manufacturers' trade union and numerous companies active in the food-processing industry (from manufacturers to large food retailers) – to have engaged in concerted practices aimed at circumventing the Law on BPA as applicable to food cans.

The FCA issued a Statement of Objections ("**SO**") to 14 professional associations and 101 undertakings involved in canning. Eventually, the FCA only fined three canning associations and the canning manufacturers' trade union, SNFBM, as well as eleven can manufacturers and agri-food producers.[3] The FCA imposed fines totalling €19,553,400 in aggregate on these entities, with the FCA finding that they implemented a collective strategy intended to prevent manufacturers from competing on the presence, or absence, of BPA in food containers.

Snapshot: Other French developments

- The FCA published its revised procedural notice on the leniency programme (available in French only, here), which consolidates the legal framework applicable since the implementation of the ECN+ Directive into French law in 2021.
- As part of its 2023-2024 roadmap, the FCA has submitted for public consultation a draft notice relating to a new "open door" policy aimed at providing undertakings with informal guidance on the compatibility of their sustainability projects with competition rules. Public consultation closed on 23 February 2024 and the FCA's objective is to publish the final notice as soon as possible.
- The FCA initiated a sector inquiry in February 2024 into the generative AI sector and launched a public consultation to gather comments from stakeholders, which runs until 22 March 2024.

2. The full text of the decision (in French) is available at: https://www.autoritedelaconcurrence.fr/sites/default/files/integral_texts/2024-01/23d15.pdf. The press release (in English) is available at: https://www.autoritedelaconcurrence.fr/en/press-release/bisphenol-food-containers-almost-eu20-million-fines.

3. ie, Ardargh group, Crown group, Massilly, Bonduelle, Cofigeo group, Conserve Italia group, D'Aucy, General Mills group, Andros, Charles & Alice, Unilever.

The infringement

The FCA issued an SO in October 2021 in relation to two suspected infringements: one of which was ultimately deemed not to be established by the *Collège* of the FCA (ie, the FCA's decision-making body). The other infringement, reduced in scope by the *Collège*, was two-fold and consisted of:

(i) preventing manufacturers from communicating about the absence of BPA in their food containers; and

(ii) encouraging manufacturers to refuse to supply BPA-free cans before 1 January 2015 and refusing to stop selling cans containing BPA after this date, despite the demands of the mass retail distribution sector in this regard.

It was established that the practices took place from 6 October 2010 until 21 July 2015, and constituted a single, complex, and continuous infringement of competition law.

The first limb: ban on communication about the absence of BPA in canned goods

Several professional associations published instructions to their members, inviting them to refrain from communicating about the absence of BPA in their products, in order to avoid undercutting sales of products likely to contain BPA.

Various companies also attended several meetings in which they agreed not to use the absence of BPA in their marketing materials during the transitional period. This was done in order to prevent any player active in the supply chain from gaining a competitive advantage (eg by advertising itself as being BPA-free).

In addition, the professional associations implemented a monitoring system to identify and remedy any deviations from the concerted practice. For example, Tetra Pak had made public that it was using cardboard boxes instead of metal cans in its products. In response to this, one of the professional canning associations called Tetra Pak and asked it to refrain from such initiatives so as not to undermine the entire sector.

The second limb: restriction on the commercialisation of BPA-free cans

As part of a collective strategy, the parties were accused of colluding to refrain from commercialising BPA-free cans. More specifically, they were deemed to have refused to supply certain food retailers with BPA-free cans before 1 January 2015 and to have refused to cease the sale of cans containing BPA after this date.

However, the list of parties eventually found guilty by the *Collège* was significantly reduced for two reasons. First, the *Collège* found that all the retailers involved had been seeking to communicate on the absence of BPA and to market BPA-free cans before 1 January 2015 and therefore effectively attempted to abide by the Law on BPA. Second, it appeared that the 10-year statute of limitation provided for by the French Commercial Code[4] had expired for several agri-food manufacturers and trade associations, for which there was insufficient evidence of participation in the infringement after December 2013.

4. Article L.462-7 of the French Commercial Code provide for a 10-year statute of limitation which expires if the FCA does not issue a decision within 10 years after the end of the anti-competitive practices (despite any steps taken in the investigation since then).

For a case of this scale, more than a hundred addressees of the SO, the total amount of the fine was relatively low.

When assessing the amount of the fine, the *Collège* decided to depart from the FCA's 2021 Notice on the method of setting fines as it was not adapted to the diversity of undertakings concerned in this case (for example, this case concerned associations with no relevant turnover and manufacturers of diverse economic strength and impact in the sector). The FCA therefore decided to adopt lump-sum penalties.

The FCA considered that the infringement was particularly serious because the practices had aimed at neutralising a competitive parameter and deprived consumers of the possibility to choose between BPA-free and BPA-containing food containers. The FCA also emphasised the major influence and role played by certain professional associations in the cartel as they represented practically all the players in the sector's supply chain.

However, as a mitigating circumstance applied to all the undertakings involved, the FCA found that the context of the implementation of the Law on BPA may have induced confusion. This is as companies were required to find alternative solutions to BPA-containing cans in a short time frame, which meant that there was a non-negligible risk of destabilising the industry if there were publicity on BPA-free cans.

Finally, some companies and trade associations, considered as leading participants in the cartel, saw their fines increased.

Key takeaways

This decision is a new illustration of the fact that collusion between undertakings in relation to non-price parameters of competition – such as environmental regulations and health – can also infringe competition law and lead to fines.

This is not the first time the FCA has found infringements in relation to non-price parameters. In 2017, the FCA fined undertakings active in the floor coverings sector for, *inter alia*, a non-compete arrangement concerning communication relating to the environmental performance of their respective products.[5]

This decision also echoes the Car Emission Cartel case in which the European Commission (the "**Commission**") fined several car manufacturers for colluding on technical development around nitrogen oxide cleaning. In that case, the Commission held that this restricted competition to develop cleaning technologies beyond the minimum required by law, despite relevant technology being available.[6]

5. FCA, decision 17-D-20 of 19 October 2017. The press release (in English) is available at: https://www.autoritedelaconcurrence.fr/en/communiques-de-presse/19-october-2017-cartel-floor-coverings-sector
6. European Commission, case AT.40178 of 8 July 2021. Available at: https://ec.europa.eu/competition/antitrust/cases1/202330/AT_40178_8022289_3048_7.pdf

Italy

The Italian Competition Authority initiates investigation into suspected anti-competitive conduct in wine bottle sector

Background

The Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato* ("**AGCM**")), has initiated an investigation into glass producers and distributors[7] concerning alleged price increases that have distorted fair competition in the Italian market. The claim first came from a whistle-blower using the newly established platform. of the AGCM (the "**Whistleblower Platform**").[8]

Facts

The investigation was opened on 9 November 2023 and focuses on the possible coordinated increase in prices in the production and distribution of glass wine bottles.

The AGCM is investigating "*assertively restrictive conduct*" as apparently evidenced by various exchanges of emails and letters sent from the undertakings under investigation to their clients. Prices were raised throughout 2022 and in the first part of 2023. According to the AGCM, these emails/letters show similar price variations among competitors, which do not appear justified by the increased cost of raw materials (the reason cited by the companies in their communications with clients).

According to the AGCM, the letters and emails sent by the glass producers/ distributors contained similar communications and contained analogous unjustified and generalised price increases in relation to the supply of glass wine bottles. Certain price increases had retroactive effect. Such conduct, if confirmed following the AGCM's investigation, would be an infringement of Italian competition law insofar as it is an agreement or concerted practice aimed at avoiding fair competitive comparison between operators. The AGCM is also investigating whether the conduct infringes EU competition law given the size of the companies involved and potential for the infringement to affect the whole of Italy and potentially trade between EU Member States.

The investigation is ongoing and is set to be completed on 31 December 2024.

Whistleblowing Platform

The AGCM's Whistleblowing Platform was established just over a year ago (on 27 February 2023). The platform was introduced in line with best practice adopted by numerous National Competition Authorities ("**NCAs**") and the Commission. The introduction of the platform introduced an important new enforcement tool for the AGCM: individuals holding confidential information concerning potential competition law infringements can now interact with investigatory officers without the need to reveal their own identity. This grant of anonymity has proved highly effective: it was used not only in the case mentioned above, but also in a recent investigation concerning automotive fuels – in which Eni, Esso and others were involved – with the case valued at €2 billion.

The Whistleblowing Platform comprises an encrypted system which guarantees the anonymity of the whistle-blower. The relevant individual can provide information and documents directly to the AGCM, as well as details of who has produced relevant documents and the circumstances of their creation.

With this tool, the AGCM aims to strengthen its ability to investigate secret cartels, which are increasingly difficult to discover, and to strengthen the fight against anti-competitive conduct by encouraging third parties to come forward where these third parties may not wish to reveal their identity given their proximity to those involved in the cartel conduct.

Snapshot: Other Italian developments

- The annual competition law entered into force on 31 December 2023 (Law 214/2023) and introduced important novelties with respect to the powers of the AGCM:
  - AGCM has been appointed as the national authority to implement and monitor the EU Digital Markets Act (Regulation 2022/1925);
  - In merger control cases, AGCM will have 90 days for the Phase 2 instead of the previous 45 days.
- During the recent energy crisis, companies in the energy sector have been requested to pay an extraordinary contribution based on their profits (art. 37 of the legislative decree of 21 March 2022, n. 21). AGCM has been entrusted with monitoring compliance. The monitoring activity has recently been completed and no evidence of breach of the prohibition has been found; therefore, AGCM has not opened any infringement investigation.

7. Berlin Packaging Italy, Bormioli Luigi, O-I Italy, Verallia Italia, Vetreria Cooperativa Piegarese, Vetreria Etrusca, Vetri Speciali, Vetropack Italia and Zignago Vetro.
8. The conduct was reported by various wine producers and associations (Berlin Packaging Italy, Bormioli Luigi, O-I Italy, Verallia Italia, Vetreria Cooperativa Piegarese, Vetreria Etrusca, Vetri Speciali, Vetropack Italia and Zignago Vetro, and Bottega S.p.A).

Spain

The Spanish National Court annuls fines imposed on four Spanish banks

The National Court has recently annulled[9] fines imposed by the Spanish National Markets and Competition Commission (*Comisión Nacional de los Mercados y la Competencia*, the "**CNMC**") on four Spanish financial institutions for their alleged involvement in an anti-competitive practice consisting of fixing the prices of financial derivatives used to hedge risk in syndicated loans above market conditions.[10]

The fines, amounting to €91 million, were annulled after the National Court upheld appeals brought by the banks claiming that the CNMC had failed to produce sufficient evidence of the continuity of the infringement.

The CNMC's decision

On 13 February 2018, the CNMC imposed €91 million in fines on Caixabank SA, Banco Santander SA, Banco Sabadell SA, and Banco Bilbao Vizcaya Argentaria SA. This followed the CNMC's conclusion that these banks had carried out a single and continuous infringement of the Spanish Competition Act ("**LDC**") and EU competition law[11] which involved fixing the price of derivatives used to hedge interest rate risks connected to syndicated loans in project finance between 2006 and 2016.

The CNMC considered that the banks were competitors in the offering of financial derivatives as it was not mandatory for customers to deal with the same bank that had granted the syndicated loan. Risk hedging contracts were also entered into separately between the banks and the customers, ie unconnected from the loan arrangements.

The CNMC found that the banks had entered an anti-competitive arrangement that entailed setting the same interest rate for the financial derivatives irrespective of market conditions. According to the CNMC, that conduct restricted competition between banks and distorted competition by offering customers an anti-competitive and misleading price (particularly as customers had believed the price was set by reference to market conditions).

Snapshot: Other Spanish developments

- The Spanish National Court has upheld the CNMC's decision in relation to a milk cartel. In July 2019, the CNMC imposed fines totalling €80.6m on eight companies and two associations for their involvement in the cartel between 2000 and 2013. The National Court has recently upheld fines imposed on some parties (namely Calidad Pascual, Central Lechera Galicia, Grupo Lactalis Iberia, Nestle and Schreiber Food España). However, appeals by Comercial Alimentaria Peñasanta, Danone, Puleva and Asociación de Empresas Lácteas de Galicia were partially upheld on the grounds that certain conduct was time barred.

9. Judgment of the National Court dated 28 December 2023, appeal no. 131/2018. Available here.
Judgment of the National Court dated 28 December 2023, appeal no. 188/2018. Available here.
Judgment of the National Court dated 28 December 2023, appeal no. 197/2018. Available here.
Judgment of the National Court dated 28 December 2023, appeal no. 201/2018. Available here.
10. See decision of the CNMC in case S/DC/0579/16 DERIVADOS FINANCIEROS. Available here.
11. Article 101 TFEU.

The National Court's judgments

The sanctioned banks appealed against the CNMC's decision before the National Court, arguing that they could not be considered competitors in the offering of financial derivatives and, therefore, that their conduct regarding the engagement of financial derivatives could not be classified as anti-competitive. The appellants pointed out that the syndicated loans and the financial derivatives are a single product or, at the very least, complementary products, and that it is therefore justifiable for the same banks that granted a syndicated loan to also offer risk hedging for that loan. The appellants also argued that the banks were not competing against each other in the offering of financial derivatives as it is not possible for syndicated loans and financial derivatives to be offered separately by different institutions. The appellants cited economic reports according to which the cost of financial derivatives is lower if engaged together with the syndicated loan.

The National Court did not share the appellants' views. While the National Court acknowledged that it may be advantageous for investors to engage financial derivatives with the same banking institutions that granted a syndicated loan, it held that this does not mean that the banks are not competitors in the marketing of financial derivatives. In the National Court's view, the banks compete in the marketing and sale of financial derivatives as those derivatives can be engaged with entities other than those that granted the syndicated loans. A further factor that led the National Court to conclude that the financial institutions are competitors is that the customer and each bank offering a derivative sign bilateral agreements to engage those products.

The appellants also argued, contrary to the CNMC's findings in its decision, that the anti-competitive conduct could not be qualified as continuous, and the infringement was therefore time-barred. This is as the LDC[12] provides for a four-year limitation period for the CNMC to investigate very serious anti-competitive infringements. In this case, the National Court pointed out that, in accordance with existing case law, the onus is on the CNMC to prove that the sanctioned entities took part in the anti-competitive conduct during the entire period of the alleged infringement (ie, from 2006 to 2016). The National Court stressed that the finding of a single and continuous infringement from 2006 up to 2016 requires that the CNMC prove that the sanctioned companies effectively took part in the anti-competitive conduct during the entire 10-year period. However, the National Court concluded that, in this case, the CNMC failed to provide enough evidence to prove the continuity of the infringement and indicated that the mere suspicion that this was the case does not suffice to constitute evidence of the infringement.

In particular, the National Court held that while there was abundant evidence of anti-competitive practices in relation to a transaction that took place on 2 February 2012, no equivalent evidence existed that showed the practices occurred from February 2012 through to 2016. The National Court therefore concluded that, by the date on which the disciplinary proceedings started (ie, 15 April 2016), the four-year limitation period had lapsed. As a result, the National Court declared that the alleged infringements were time-barred when the CNMC opened the proceedings, and therefore annulled the CNMC's decision.

Commentary

The National Court's judgments provide companies with welcome legal certainty as to the scope of the CNMC's powers. In particular, the judgments confirm that the onus is on the CNMC to provide enough evidence – and not just mere suspicion – of an entity's involvement in alleged anti-competitive conduct during the entire period of the infringement. The judgments make clear that proving a single, continuous infringement requires solid evidence from the CNMC – otherwise, cases will not survive appeal.

12. Article 68.1.

European Union

Commission's €880.5 million fine on Scania upheld by EU court

On 1 February 2024, the Court of Justice of the EU ("**CJEU**") issued a judgment[13] dismissing in its entirety the appeal lodged by several companies in the Scania group ("**Scania**"), a producer of trucks used for long-haulage transport. The CJEU upheld the €880.5 million fine imposed on Scania by the Commission for its participation in the trucks cartel between 1997 and 2001.

In particular, the CJEU held that: (i) the Commission had not breached the principle of impartiality in the context of the hybrid settlement procedure by using the same case team; (ii) it is well-established case law that an infringement of Article 101 TFEU can result from an isolated act or series of acts, or continuous conduct – and a single continuous infringement can be established where various actions form part of an overall plan to distort competition; and (iii) the Commission was not time-barred from imposing a fine.

The hybrid settlement procedure involves the Commission adopting a settlement decision and that of a standard (non-settlement decision) over a staggered period of time. This means that the settlement procedure and settlement decision do not cover all the parties prosecuted for a cartel.

Background

In January 2011, the Commission carried out dawn raids at the premises of truck manufacturers, in particular MAN, Volvo/Renault, Daimler, Iveco, DAF and Scania. In November 2014, the Commission issued an SO.

MAN, Volvo/Renault, Daimler, Iveco, DAF (the "**Settling Parties**") approached the Commission requesting to settle the case under the settlement procedure provided by EU Regulation 773/2004.[14] In July 2016, the Commission issued a decision (the "**Settlement Decision**"),[15] under the settlement procedure, finding that the Settling Parties had infringed Article 101 TFEU by participating in a cartel in the market for the manufacturing of medium and heavy trucks. The Commission granted full immunity to MAN and imposed a combined fine of €2.93 billion to the rest of the Settling Parties.

13. Judgment in Case C-251/22 P, *Scania and Others v Commission*, ECLI:EU:C:2024:103
14. Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 101 and 102 TFEU (OJ 2004 L 123, p.18), as amended by Commission Regulation (EC) No 622/2008 of 30 June 2008 (OJ 2008L 171, p.3) ('Regulation No 773/2004')
15. Case AT.39824-*Trucks*, Commission Decision of 19/7/2016

Scania did not settle with the Commission. The Commission therefore continued its investigation into Scania under the standard (non-settlement) procedure. In September 2017, the Commission imposed a fine of €880.5 million on Scania for infringing Article 101 TFEU by participating in the trucks cartel from January 1997 to January 2011 (the "**Infringement Decision**".)[16]

In the Infringement Decision, the Commission found that Scania and the Settling Parties had participated in a single and continuous infringement of Article 101 TFEU. More specifically, Scania and the Settling Parties had a common plan with the single anti-competitive aim of restricting competition on the market for medium and heavy trucks in the EEA. This aim was achieved through numerous collusive contacts that reduced the levels of strategic uncertainty between the parties as regards future prices and gross price increases and as regards the timing and the passing on of costs in relation to the introduction of trucks complying with environmental standards. According to the Commission, Scania and the Settling Parties had exchanged competitively sensitive information also on target market shares, current net prices and rebates, gross price lists, even before entering into force, truck configurators, orders and stock levels.

In December 2017, Scania appealed the Infringement Decision before the General Court ("**GC**"). In February 2022, the GC issued its judgment[17] dismissing Scania's appeal in its entirety (the "**GC Judgment**"). In particular, the GC held that the Commission had not breached Scania's rights of defence or the presumption of innocence by using the 'hybrid' procedure. According to the GC, the Commission had established to the requisite legal standard that the information exchanges at stake constituted a single and continuous infringement of Article 101 TFEU. In April 2022, Scania lodged appealed the GC Judgment to the CJEU.

The CJEU's findings

On 1 February 2024, the CJEU issued its judgment in which it dismissed the appeal in its entirety.

The principle of impartiality

The CJEU began its analysis by referring to its case law on the principle of impartiality, as part of the right to good administration. The right to good administration[18] provides that every person has the right, inter alia, to have his or her affairs handled impartially by the institutions of the EU.[19] Therefore, the EU institutions must not show bias or prejudice when assessing a matter, in the context of any administrative procedure.

Scania had submitted that the decision to use a hybrid procedure where some parties settled, placed an additional burden on the Commission to ensure impartial examination, an aspect which had not been assessed by the GC. According to the CJEU the GC had correctly pointed out that the Commission was entitled to use a hybrid procedure and that the Commission must ensure that it complies inter alia with the duty of impartiality, throughout the hybrid procedure.

The CJEU dismissed Scania's ground of appeal, noting that as the GC observed, the Commission had not shown "*bias or personal prejudice towards Scania, in particular as a result of having participated in the adoption of the settlement decision, 'in infringement of the principle of impartiality'*".[20]

In addition, contrary to Scania's view that using the same case team for both the Settlement and the Infringement decision breached the principle of impartiality, the CJEU found that a change in the Commission team handling the file throughout the hybrid procedure would rather run counter to the principles of good administration. According to the CJEU: "*The mere fact that the same Commission team was responsible for the various successive stages of the investigation leading to the adoption of the settlement decision and then of the decision at issue cannot, by itself, give rise to doubt as to the impartiality of that institution in the absence of any other objective evidence*".[21] However, Scania hadn't submitted such evidence before the GC.

The geographic scope of the infringement

Scania argued that the Commission and the GC had erred when concluding that the geographic scope of the infringement extended to the entire EEA as a result of Scania's participation in meetings which took place in Germany.

The CJEU noted that according to well-established case law an infringement of Article 101 TFEU can result not only from an isolated act but also from a series of acts. If those different actions form part of an 'overall plan' and have an identical object to distort competition, the Commission is entitled to impute responsibility for all those actions as an infringement considered as a whole. The Court also noted that to establish participation in the implementation of a single infringement in these circumstances, the Commission must show that the company concerned intended through its own conduct to contribute to the common objectives pursued by the participants, and that it was aware of the offending conduct (planned or implemented) or could have reasonably foreseen such conduct and was prepared to take the risk.[22]

Single and continuous infringement

Scania claimed that the GC had erred in its findings on single and continuous infringement based on a scheme comprising three levels of contacts. More specifically, Scania argued that the GC had included in its assessment exchanges that were not anti-competitive and had erroneously concluded that the objective of the German meetings was identical to the meetings pursued at the top management level.

16. Case AT.39824-*Trucks*, Commission Decision of 27/9/2017
17. Judgment in Case T-799/17, *Scania and Others v Commission* C-251/22 P, ECLI:EU:C:2024:103
18. Protected by Article 41 of the EU Charter of Fundamental Rights.
19. Case C-251/22 P, paras. 69-70; judgment in case C-883/19 P, *HSBC Holdings and Others v Commission*, EU:C:2023:11, para. 76 and the case-law cited.
20. Case C-251/22 P, para. 74
21. Ibid para. 79
22. Ibid paras. 94-95

The CJEU dismissed Scania's argument and recalled that under EU case law: "*in order to establish the existence of a single and continuous infringement, it is sufficient for the Commission to show that the various forms of conduct in question form part of an 'overall plan', without it being necessary for each of those forms of conduct, in itself and taken in isolation, to be capable of being classified as a separate infringement of Article 101(1) TFEU*". The Court held that to establish a single and continuous infringement it is usually necessary to take into account the various links between the different elements of the infringement. Therefore, contact that would not itself be sufficiently serious to be an infringement can nevertheless be a natural link in a larger body of infringing conduct.[23]

Time limitation on the fine imposition

Scania also claimed that the Commission was time-barred from imposing fines since the conduct of Scania's top-level management ended on 23 September 2004 – such that the five-year limitation period under EU law had expired by the date of the Infringement Decision. The CJEU observed that, in the light of its analysis of the grounds put forward by Scania, it must take as read the conclusion of the Commission, and subsequently that of the GC, that the infringement at issue ended on 18 January 2011, so that the five-year limitation period only began to run from that date and that the Commission's power to impose a fine was therefore not time-barred.[24]

Practical Implications

The judgment is important for various reasons:

- The CJEU enhanced the credibility of hybrid cartel investigations, comprising both the settlement and standard procedure, clarifying that they do not put the application of the presumption of innocence at risk. What is more, the CJEU stated that the same case team on the part of the Commission should be responsible throughout the hybrid procedure, as engaging different teams would "*run counter to the principle of good administration*".
- The ruling enhances the EU leniency framework, by assisting to increase transparency and reduce legal uncertainty. This is a welcome development considering that the Commission deems its leniency programme indispensable for the prosecution of illegal cartels, while the applicants seek to safeguard their protection in the context of administrative procedure or subsequent litigation.
- The judgment also shed light on the time limitation on the Commission's power to impose fines against cartelists. According to the Court, in the context of a single and continuous infringement, the date of the latest conduct serves as the starting point for the limitation period on the fine imposition. The ruling is particularly important for participants to cartels facing hundreds of damages actions lawsuits across Europe: following this ruling, it will not be easy for them to rely on arguments that the Commission is time-barred.

Snapshot: Other EU developments

- The Commission carried out unannounced inspections at the premises of companies active in the tyre industry in several Member States, on suspicion that the companies coordinated prices, including via public communications, in the market for new replacement tyres for passenger cars, vans, trucks and busses sold in the EEA. The Commission was accompanied by Member State Competition Authorities.
- The Commission sent an SO to Norwegian salmon producers Cermaq, Grieg Seafood, Bremnes, Leroy, Mowi and SalMar on suspicion that they have breached EU competition rules by exchanging commercially sensitive information, relating to sales prices, available volumes, sales volumes, production volumes and production capacities, as well as other price-setting factors.
- In the context of an action for damages and a preliminary ruling from the Spanish Supreme Court the Advocate General issued a non-binding Opinion that legal documents addressed to a parent company established in one Member State are not properly delivered when served on a subsidiary of that company in another Member State.
- The GC upheld most of the Commission's findings against JPMorgan Chase and Crédit agricole in the Euro Interest Rate Derivatives cartel case. The GC upheld the Commission's fine of €337 million on JPMorgan Chase, while it reduced the fine imposed on Crédit agricole to €110 million, due to the nature of its participation.

23. Ibid paras. 133-135

24. Ibid paras. 140-141

South Africa

Competition Appeal Court dismisses alleged forex cartel case against most respondents

Introduction

On 8 January 2024, the Competition Appeal Court ("**CAC**") delivered its most recent judgment in the context of the Competition Commission's ("**CC**") ongoing attempt, over seven years, to prosecute 28 local and international banks that it alleges colluded with each other for a period of at least seven years (from 2007 to 2013) to manipulate the USD/South African Rand (ZAR) exchange rate for their own benefit and in contravention of the South African Competition Act ("**Competition Act**").[25]

The CAC ultimately upheld the majority of the respondent banks' appeals against an earlier order of the Competition Tribunal ("**Tribunal**"), and therefore the CC's case was dismissed against most of the respondent banks, save for five (two others have settled and three others were involved in a leniency application).

This followed earlier decisions of the Tribunal (in 2019) and the CAC (in 2020) in which various exceptions and objections to the CC's initial referral (in 2017) had been upheld, and which required the CC to improve its pleadings in a new referral affidavit. While the Tribunal (in 2023) found that the CC had substantially complied with these requirements – by pleading facts that established jurisdiction over, and made out, a case that called for an answer from, all 28 local and international banks – the CAC disagreed and dismissed the CC's case against the majority of the respondent banks.

Through this litigation, the CAC has made various findings that clarify, among other things, the following legal principles: (a) competition authorities may assert jurisdiction over firms that have no presence or activities in South Africa if there are adequate 'connecting factors', which is an onerous requirement to meet; and (b) the Competition Act has extra-territorial application to a single overarching conspiracy that occurred (at least in part) outside of South Africa if it can be established that: (i) each respondent pursued a common anti-competitive objective, intentionally and regularly contributed by its own conduct to the common objectives pursued by all of the participants, and was actually aware of (or could reasonably foresee) the conduct planned or put into effect by other respondents in pursuit of the same objectives, and (ii) it was foreseeable that this single overarching conspiracy would have a direct or immediate, and substantial effect in South Africa.

25. Section 4(1)(b)(i) and (ii).

The most recent decision of the CAC is a significant setback for the CC's efforts to prosecute a single overarching conspiracy to manipulate the USD/ZAR exchange rate. The CC has applied for leave to appeal this decision to the Constitutional Court.

Multiple attempts to plead a sustainable case

The CC first referred its complaint to the Tribunal in February 2017, pursuant to an investigation initiated by the CC in 2015. This first referral alleged that, from at least 2007 to 2013, and pursuant to bilateral and/or multilateral conspiracies, or alternatively a single overarching conspiracy, various banks had conspired and colluded to manipulate the USD/ZAR currency pair (including through the conduct of their foreign exchange traders on Bloomberg instant messaging platforms).

The first referral elicited a flood of objections from the respondent banks, who objected to the referral on various grounds, including that the referral (i) failed to disclose a cause of action; (ii) did not establish personal jurisdiction over those respondent banks who were either local *peregrini* (banks with some presence in South Africa by way of a local branch or a representative office) or pure *peregrini* (banks which had no business activities or presence in South Africa); and (iii) failed to establish the Tribunal's jurisdiction over the impugned conduct based on the effects doctrine (since the Competition Act applies only to "*economic activity within or having an effect in South Africa*").

The Tribunal handed down its decision on 12 June 2019. Applying common law principles, the Tribunal found that it was not able to exercise personal jurisdiction over pure *peregrini*. It therefore constrained the CC, in relation to the pure *peregrini* respondents, to seek an order declaring the conduct of these respondents to be anti-competitive. The Tribunal considered that it would not be within its powers to impose an administrative penalty on these parties. Regarding local *peregrini*, the Tribunal found that, because an order requiring the payment of a penalty against such banks could be enforced, it would be possible to impose an administrative penalty for conduct that contravenes the Competition Act (calculated with reference to South African turnover only). In both instances, however, the CC would still need to establish subject matter jurisdiction by pleading the facts necessary to meet the qualified effects test, namely that it was foreseeable that the impugned conduct would have a direct or immediate, and substantial effect in South Africa.

In the circumstances of this case, the Tribunal found the CC's first referral to be defective as it had attempted to plead multiple versions of the case simultaneously. The Tribunal ordered the CC to file a replacement referral, in which it should set out the facts necessary to sustain a cause of action on the basis of a single overarching conspiracy (being the version of the case that the CC elected to pursue before the Tribunal). To assist the CC, the Tribunal's order set out in some detail the particular facts that the CC was required to plead in order to sustain this cause of action against each respondent (including, for example, the traders alleged to represent each bank, the date on which they joined and left the conspiracy, etc.).

Certain of the respondent banks appealed the Tribunal's decision to the CAC. In its decision of February 2020, the CAC found that the common law position on personal jurisdiction ought to be developed in light of the realities of international commerce and the egregious nature of cartels. It therefore confirmed the order of the Tribunal regarding the need for more specific facts to be pleaded but permitted the CC to pursue its case against all of the respondent banks (ie including both local and pure *peregrini*) provided that the CC could plead facts to establish the necessary "*connecting factors*" for personal jurisdiction over the pure *peregrini*. This might include, for example, linking pure *peregrini* to South Africa by virtue of them conducting business with local South African banks.

On 1 June 2020, the CC filed its new referral with the Tribunal in purported compliance with the 2020 CAC order. The new referral ultimately sought to make out a case that 28 banks[26] had, by way of a single overarching conspiracy, colluded to manipulate the USD/ZAR currency pairing. The CC, in the new referral, alleged that: (i) the respondent banks had participated in an overall plan to pursue a common anti-competitive objective, namely the manipulation of the USD/ZAR currency pairing to their own benefit; (ii) each respondent bank had made an intentional contribution by its conduct (through the conduct of traders in its employ) to the economic objectives pursued by all the participants in the single overarching conspiracy; and (iii) each respondent bank was aware of the conduct planned or put into effect by the other respondent banks in pursuit of these objectives.

Again, the respondent banks submitted a number of objections, dismissal applications and reviews on the basis that the new referral failed to comply with the 2020 CAC order, including because the CC had still not pleaded sufficient facts to make out a case of a single overarching conspiracy, nor to establish personal or subject matter jurisdiction over the respondent banks. The new banks that had been included as respondents in the new referral also objected to their involvement in the case at this late stage, in circumstances where the CC had not initiated a complaint or pursued an investigation against them.

In March 2023, the Tribunal found that the revised referral "*read holistically*" complied with the requirements of the 2020 CAC order. It was satisfied that the single overarching conspiracy, as pleaded by the CC in its new referral, established a *prima facie* cause of action that the respondents were required to answer, and established both personal and subject matter jurisdiction over the respondent banks. In relation to the pure *peregrini*, the Tribunal considered it sufficient that these banks were alleged to have participated in the single overarching conspiracy along with South African banks, thereby establishing the requisite "*connecting factors*" to South Africa as contemplated by the 2020 CAC order. In relation to the subject matter jurisdiction, the Tribunal held that on the basis of "*common sense*" and "*logic*" it was foreseeable that South African customers would suffer as a result of the alleged conduct, either directly as investors in a given transaction or in the prices of goods and services for export and import purposes, and further that that was sufficient to find that the conduct had (or has) an effect in South Africa. The Tribunal therefore ordered all the respondent banks to file their substantive answers to the CC's revised referral. Most of the respondent banks appealed the decision of the Tribunal to the CAC.

26. Including eight local South African banks, eight local *peregrini* and 12 pure *peregrini*. An additional five respondents were cited in the new referral without the CC first having initiated a complaint or pursued an investigation against them. The CC belatedly filed a conditional joinder application in respect of these additional respondents.

The 2024 CAC decision

The CAC upheld the appeals of all but four of the respondent banks that had appealed the 2023 Tribunal order. The CAC dismissed the CC's case against a number of the respondent banks on the following bases:

- it was insufficient to establish personal jurisdiction simply by alleging that a pure *peregrini* respondent was a participant in a single overarching conspiracy to manipulate the ZAR that also involved local South African banks. In many cases, the CC had failed to plead the necessary facts to establish sufficient "*connecting factors*" to South Africa;
- for a number of the respondents, including certain of those for which there was no dispute about personal jurisdiction (eg the local South African banks), the CC had failed to plead sufficient facts to establish that they could plausibly have been involved in the conspiracy alleged by the CC;
- the CC could not pursue a complaint against holding companies or other group entities simply on the basis that they are related to the entities alleged to have actually engaged in the conduct; and
- the CC was not competent to add new respondent banks, as it had attempted to do, following the CAC's 2020 decision (both because the order did not permit this and because the CC had not initiated a complaint against those firms before so involving additional respondent banks).

The CAC recognised that, in prosecuting a single overarching conspiracy, it is not necessary for the CC to demonstrate that each of the respondent banks participated in all of the activities of the conspiracy, nor that they participated in the conspiracy from its commencement, nor that their participation was identical to that of other parties. However, on the terms of the single overarching conspiracy alleged by the CC, it would have to establish that each of the respondent banks (i) pursued a common anti-competitive objective, (ii) intentionally and regularly contributed by its own conduct to the common objectives pursued by all of the participants, and (iii) was actually aware of (or could reasonably foresee) the conduct planned or put into effect by other respondent banks in pursuit of the same objectives.

The CAC emphasised that its 2020 judgment required the CC to establish personal jurisdiction over the pure *peregrini* by pleading adequate connecting factors between these banks and the jurisdiction of the Tribunal. The CAC emphasised that this is an onerous requirement and found that reference to occasional participation in an online chatroom without any additional evidence, and where there was no link to any South African bank, is inadequate to meet the test established by the CAC. Ultimately, the minimum facts that would be necessary to support the CC's allegations were found to be distinctly lacking for a number of the respondents.

For the four respondents whose appeals were not upheld, the CAC considered that sufficient facts had been pleaded by the CC to justify the referral and the need for the matter to proceed to trial. This will include a more detailed assessment of whether the alleged conduct of traders located primarily outside of South Africa, who are alleged to have manipulated specific trades in the USD/ZAR currency pair, in fact had a substantial and lasting effect on South African customers and/or the South African economy.

Conclusion

Although the litigation in this matter has had a long and torturous history, it has also been noteworthy at least in so far as the CAC has provided legal certainty concerning the requirements to establish personal and subject matter jurisdiction, particularly in instances where the alleged conduct involves a single overarching conspiracy that occurred (at least in part) outside of South Africa. It remains to be seen whether the Constitutional Court entertains the CC's appeal and further develops the principles that have been developed by the CAC.

Snapshot: Other South African developments

- The CAC found that there was no legal or factual basis that *prima facie* Mercantile Bank, The Standard Bank of South Africa and Access Bank had engaged in collusion (or an abuse of dominance) when they had closed the bank accounts of various entities in the Sekunjalo Group in quick succession for regulatory reasons, following allegations of corruption against members of the group and its controlling shareholder. The Sekunjalo Group petitioned the Constitutional Court of South Africa for leave to appeal the CAC's decision, but this was refused on the basis that the application bears no reasonable prospects of success. This outcome safeguards the ability of banks to terminate relationships with clients who are found to be of high risk without risking a competition contravention and is particularly important in light of South Africa's recent Financial Action Task Force greylisting.

United Kingdom

Labour markets in the spotlight: UK competition authority expands fragrance cartel investigation

Much has been made in the past 18 months of the application of competition law to employment matters. Continuing a theme of heightened focus on this area, the UK's Competition and Markets Authority ("**CMA**") recently announced that it is investigating suspected employment related anti-competitive practices in the fragrance sector.

The CMA has been investigating suspected competition law breaches in relation to the supply of fragrance products since March 2023. In January of this year, the CMA announced that it is expanding the scope of its investigation to cover suspected anti-competitive "no-poach" arrangements concerning staff recruitment.[27]

A so-called no-poach agreement is where businesses agree not to approach or hire each other's employees – in essence coordinating their employment strategy. Recent years have seen competition authorities across the globe scrutinise such arrangements and similar employment practices: competition authorities in the UK and US have each published guidance on competition issues within employment; in the EU, various NCAs have investigated allegations of anti-competitive conduct concerning employment practices.

Approach of the CMA

Labour markets have not typically been a focus of CMA cartel enforcement, which has traditionally centred on collusive conduct concerning the supply of goods or services.

However, in its Annual Plan for 2023-2024[28], the CMA highlighted UK labour markets as a key area of focus for competition enforcement. The Annual Plan reflects steps taken in early 2023 when the CMA published guidance on the application of competition law to labour markets, specifically on:

- "*no-poach*" agreements, where businesses agree not to approach or hire each other's employees;
- wage-fixing agreements, where businesses who compete for the same types of employees fix salaries; and

27. See: https://www.gov.uk/cma-cases/suspected-anti-competitive-conduct-in-relation-to-fragrances-and-fragrance-ingredients-51257

28. See: https://www.gov.uk/government/publications/cma-annual-plan-2023-to-2024

Snapshot: Other UK developments

- The CMA has published its provisional approach to implementing the new Digital Markets competition regime. See our briefing here.
- In a January 2024 ruling, the Court of Appeal confirmed that the CMA can require overseas companies to produce documents in its competition law investigations. See our briefing here.

- information sharing about the terms and conditions of employees' contracts.[29]

It should be noted that the CMA's guidance in this area remains brief and high-level. Further insight into how the CMA approaches enforcement of such breaches is expected, not least as the CMA now has three ongoing investigations targeting alleged collusion by employers.

In addition to the investigation in the fragrances sector, the CMA is currently pursuing two standalone investigations into alleged anti-competitive conduct relating to labour markets, with both probes focusing on the rates paid to workers in the TV production and broadcasting sectors. The first investigation was launched in July 2022 and focuses on freelancers and employed labour involved in sport content production.[30] The other, launched in October 2023, centres on non-sports broadcasting.[31]

In addition to the investigations mentioned above, the seriousness with which the CMA is pursuing potential anti-competitive conduct in labour markets is underscored by speeches made by its Chief Executive, Sarah Cardell. Cardell recently stated that a "*couple more*" labour market investigations can be expected in 2024 as anti-competitive conduct in this area is "*potentially quite widespread*"[32] having previously confirmed that the CMA's focus would be on those cases and sectors which "*particularly during a cost of living crisis, can directly impact household budgets*".[33]

Employment law vs competition law

The CMA's three open investigations progress against the backdrop of a broader focus on labour markets in the UK. In a report published in January 2024, the CMA's Microeconomics Unit, which conducts economic research on the CMA's behalf, examined employer market power in the UK, ie, the ability of firms to pay workers less than the value of their contribution to their firm's output, which as a result "*may also distort labour supply and production decisions, reducing economic efficiency and possibly worsening consumer outcomes*".[34]

The CMA's report found that while aggregate employer market power has not increased in the UK in recent decades, large differences across workers, firms and labour markets persist, which has the potential to power lower wages and employment.[35]

The report considered a number of practices, including non-compete clauses, ie, agreements between an employer and employee that limit which firms an employee can join or whether they can start a competing firm of their own. The report highlights that approximately 26% of workers in the UK are subject to such provisions,[36] and that such non-compete clauses are not limited to managerial and scientific occupations, but are widespread across all occupations, industries and incomes.

Importantly, in a speech delivered following the publication of the report, Sarah Cardell confirmed that non-compete clauses generally fall outside the scope of competition law and "*typically fall*" under employment law instead.[37] This is perhaps unsurprising – competition law typically focuses on anti-competitive arrangements between enterprises rather than individuals.

29. See: https://www.gov.uk/government/publications/avoid-breaking-competition-law-advice-for-employers
30. See: https://www.gov.uk/cma-cases/suspected-anti-competitive-behaviour-relating-to-the-purchase-of-freelance-services-in-the-production-and-broadcasting-of-sports-content
31. See: https://www.gov.uk/cma-cases/suspected-anti-competitive-behaviour-relating-to-freelance-and-employed-labour-in-the-production-creation-and-slash-or-broadcasting-of-television-content-excluding-sport
32. See: https://globalcompetitionreview.com/article/cardell-cma-working-new-labour-market-probes
33. See: https://www.gov.uk/government/speeches/the-cmas-research-on-competition-and-uk-labour-markets
34. See: https://www.gov.uk/government/publications/competition-and-market-power-in-uk-labour-markets, para 1.1
35. ibid para 1.11.
36. ibid para 2.7.
37. See: https://www.gov.uk/government/speeches/the-cmas-research-on-competition-and-uk-labour-markets

Similar scrutiny abroad

These recent developments form part of a broader trend not unique to the UK. In fact, labour markets across the globe are increasingly subject to scrutiny from competition authorities and legislators.

In Europe, various NCAs are also active in this area. In January 2024, the competition authorities of Sweden, Denmark, Finland, Iceland and Norway issued a joint statement examining anti-competitive conduct in the labour market.[38] The competition authorities of Portugal, the Netherlands, Hungary, Romania, Greece, Poland and Spain have also recently launched enforcement investigations into labour markets.[39]

The Commission is also showing interest in enforcement in this field. In 2023, it announced dawn raids on companies in two Member States active in the online food delivery sector in relation to suspected anti-competitive no-poach agreements and the alleged exchange of commercially sensitive information.

Meanwhile, in the US, employment issues are by no means new to the US competition enforcement agenda. In 2016, the Federal Trade Commission ("**FTC**") and Department of Justice ("**DOJ**") put human resource professionals on notice of the illegality of no-poach and wage-fixing agreements with the publication of their joint 2016 Antitrust Guidance for Human Resource Professionals, signalling that the agencies would criminally investigate and prosecute "*naked*" no-poach and wage-fixing agreements between competing employers.[40] To date, there have been six criminal investigations of such arrangements, only one of which resulted in successful prosecution.

More recently, the FTC has proposed a wholesale ban on non-compete clauses in employer-employee contracts.[41] The proposed remit is broad, extending to independent and unpaid contracts as well as any provision which has the "*effect*" of a non-compete clause, such as an NDA which limits an employee's ability to move to a competitor. The prohibition would also make unenforceable any existing contractual clause not in compliance with the proposed rules. Following an extensive consultation, the FTC is expected to vote on whether to adopt the measure in April this year.

The US also demonstrates how regulators' focus on labour markets can intersect with competition law tools beyond cartel enforcement. The FTC's and DOJ's new merger guidelines, published in December 2023, take an interest in labour market dynamics.[42] Under the revised guidelines, it is made clear that authorities should be able to challenge a merger which results in the substantial lessening of competition for workers within the relevant industry, even where there is no harm to the consumer.

Conclusions

The CMA's recent activity is a reminder that businesses should be aware of the competition law considerations of the agreements they enter into concerning employees, and the information they share about their employees with other competitors. Companies, and in particular human resource departments, should be conscious that competition law applies to these forms of collusive conduct which may otherwise fall outside of the typical scenarios covered by competition law compliance trainings.

Given high level nature of the CMA's existing guidance, the absence of significant decisional practice in this area, and the increased intervention of the CMA and other competition authorities in labour markets, businesses may wish to seek further guidance to ensure that their employment practices comply with competition law.

It is expected that the global trend for competition authorities to use cartel enforcement to address labour market dynamics will continue to intensify. In many jurisdictions, competition authorities are increasingly focusing on the potential for competition law infringements to arise in relation to parameters of competition beyond traditional price/price-related elements.

38. See: https://www.konkurrensverket.se/globalassets/dokument/informationsmaterial/rapporter-och-broschyrer/nordiska-rapporter/nordic-report_2024_competition-and-labour-markets.pdf
39. For instance, Portugal's competition authority is currently investigating a suspected cartel between competing laboratory groups, which covers alleged no-poach agreements. See: https://www.concorrencia.pt/en/articles/adc-issues-statement-objections-laboratories-and-business-association-involvement-cartel
40. See: https://www.justice.gov/atr/file/903511/download
41. See: https://www.ftc.gov/legal-library/browse/federal-register-notices/non-compete-clause-rulemaking
42. See: https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf

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