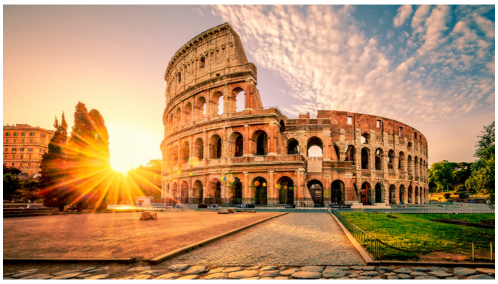
HERBERT SMITH FREEHILLS

CARTEL INTEL:

UPDATES FROM OUR OFFICES AROUND THE GLOBE

In this issue



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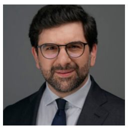

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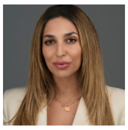

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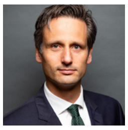

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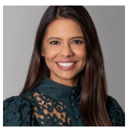

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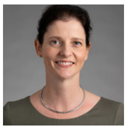

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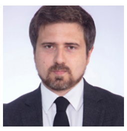

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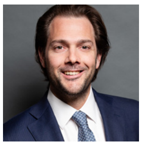
Introduction

Welcome to the 12th edition of Cartel Intel!

As always, cartel enforcement activity continues to be a hot topic across EMEA and beyond – and, going forward – we really do mean beyond. In a change to our previous format, we will now be including updates from beyond our EMEA offices.

In this edition, we are proud to present updates from our Australia team on criminal prosecutions for cartel conduct, our Hong Kong team on the implications of dawn raids at domestic premises and joint raids carried out with other regulators and our New York office has an update on the US courts' reversal of a cartel conviction.

We also have regular updates from our European offices. Our Spain and UK office cover updates on courts overturning competition authorities' infringement decisions, fines and director disqualification proceedings. Our France team discusses a revisited decision which found the investigative authority's evidence insufficient to conclude cartel conduct and our German office explores a new enforcement tool and its effects. The UK and Italy teams both discuss pharma sector decisions; while our EU update is on the Commission's focus on antitrust in labour markets.



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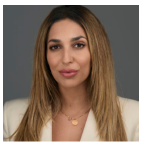

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France

First ever application of Article 101 TFEU to below-the-threshold mergers based on the CJEU's *Towercast* decision

On 2 May 2024, the French Competition Authority (the "**FCA**") issued a decision whereby it examined, *ex post*, several concentrations falling below national and European merger control notification thresholds in application of the European Court of Justice's (the "**CJEU**") *Towercast* judgment (16 March 2023) upon suspicion of a collusion between the three main players in the meat-cutting sector in France[1] ("**Decision No. 24-D-05 of 2 May 2024**"). Ultimately, the FCA dismissed the case.

Background

Against the backdrop of a decline in activity, increased costs and regulatory constraints, the three major players in the meat-cutting sector in France sought to restructure their activity. To that end, in 2015 they carried out 21 cross-business transfers (assets and/or customers or suppliers) which, from a merger control perspective, met neither the European nor the national turnover thresholds and were therefore not examined. The purpose of the transactions was to streamline each of the player's geographic position to improve their competitiveness on the French territory.

Following a preliminary investigation by the Department of Competition, Consumption and Fraud Prevention, the FCA opened an investigation in June 2016 and conducted dawn raids in 2017.

The alleged cartel conduct

The FCA's Investigation Services claimed that the cross-divestments between the three companies were in fact the backdrop for the implementation of an overall plan aimed at geographically allocating markets and customers.

The FCA's Investigation Services notably relied on the various meetings that occurred between the companies to organise the divestments (confidentiality agreements, numerous emails, letters of intent and memorandums of understanding).

The application of the Towercast decision to agreements under Article 101 TFEU

The novelty brought about by the FCA decision revolves around the FCA's application of the *Towercast* ruling, handed down by the CJEU on 16 May 2023. In this decision, the CJEU concluded that National Competition Authorities ("**NCAs**") were entitled to examine, under the provisions of Article 102 TFEU, concentrations falling below national and European merger control notification thresholds, and not referred to the European Commission (the "**Commission**") pursuant to Article 22 of the EU Merger Regulation (the "**EUMR**"), where the implementation of such transactions could lead to an abuse of dominance.

The FCA went one step further in the present case and resorted to the *Towercast* precedent to examine the concentrations at hand, which were not examined *ex-ante*, under the provisions of Articles 101 TFEU and L.420-1 of the French Commercial Code.

The defendants claimed that the application of the *Towercast* precedent was limited to cases where an abuse of dominance could arise from the implementation of a transaction. However, the *Collège* (**decision-making body of the FCA**) held, based on the CJEU's reasoning in *Towercast* and the direct effect of Article 101 TFEU, that although the EUMR excludes the application of Regulation 1/2003 on the implementation of Articles 101 and 102

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

TFEU, this does not rule out the possibility for an NCA (which, by hypothesis, does not fall within the scope of the EUMR) to carry out an *ex post* control of a merger on the basis of Article 101 TFEU.

The FCA therefore reviewed the transactional agreements under Articles 101 TFEU and L.420-1 of the French Commercial Code.

Although not referred to by the *Collège* in the present decision, it is not unprecedented for a competition authority to review a non-notifiable concentration under Article 101 TFEU. In 1987, the CJEU had confirmed that Article 85 TEC (now Article 101 TFEU) applied to the acquisition by Philipp Morris of a non-controlling stake in a competing tobacco manufacturer, insofar as it could enable Philip Morris to hold an influence over the commercial behaviour of the competing manufacturer and therefore distort competition.

The FCA dismissed the case for lack of anti-competitive object or effects

The *Collège* dismissed the existence of an overall plan between the companies as it considered that the discussions between the parties, on a bilateral basis for each transfer, were in fact necessary preparatory steps for the business divestments and had no other aim than the completion of the transactions.

It found that – although the reciprocal sales agreements constitute an agreement between undertakings – the anti-competitive nature of such agreements still ought to be established based on Articles 101 TFEU and L. 420-1 of the French Commercial Code. In this case, the agreements were found to have neither an anti-competitive object nor anti-competitive effects.

- As regards the absence of an anti-competitive object, the *Collège* acknowledged that the confidentiality agreements signed between the three companies provided a framework that was highly likely to prevent the exchange of commercially sensitive information. The *Collège* further emphasised that at no point throughout the negotiations were the three companies able to access sensitive information about one another, and that the exchanges were only bilateral and justified by the purpose of the transactions.
- As regards the absence of anti-competitive effects, the FCA considered that the evidence put forward by the investigation services were scattered and disparate and therefore insufficient to show any actual or potential anti-competitive effects of the business transfers.

The FCA therefore dismissed the case.

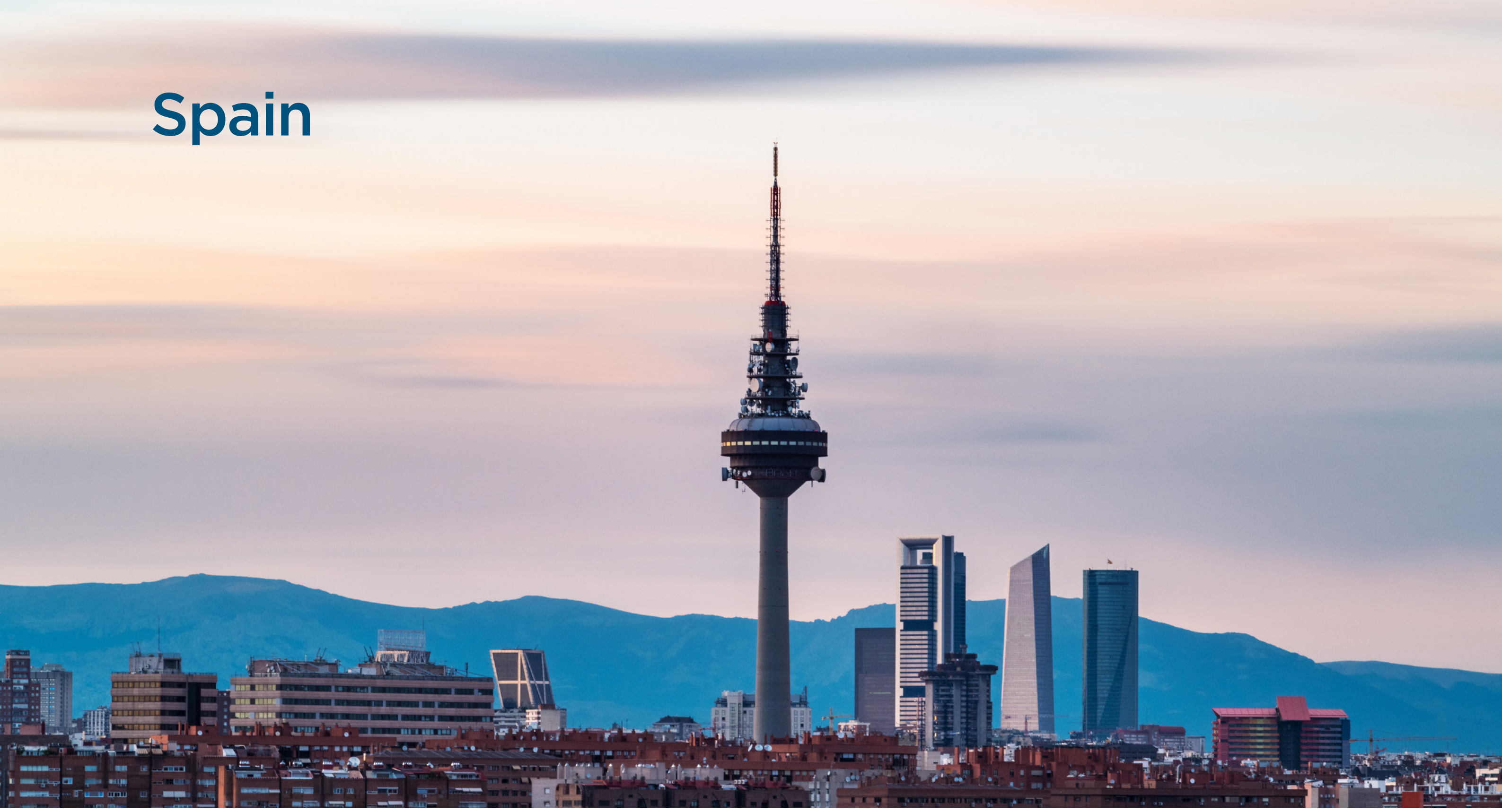
Snapshot: Other French developments

The FCA published a notice providing informal guidance to companies with questions on the compatibility of their sustainability-oriented projects with competition rules.

The scope of the notice includes sustainability agreements within the meaning of the European Commission's new Guidelines on the Applicability of Article 101 TFEU to Horizontal Co-operation Agreements, but also all competition-related issues, with the exception of merger control and State aid.

It provides practical information on how a request may be submitted to the FCA and the factors upon which the assessment will be based.

Spain



The Spanish National Court annuls the fines imposed by the CNMC on companies and their corporate officers for their involvement in several bid-rigging cartels in the railway electrification sector

The National Court has recently annulled the fines imposed by the Spanish National Markets and Competition Commission (*Comisión Nacional de los Mercados y la Competencia*, the "**CNMC**") on several companies and their corporate officers for their alleged involvement in bid rigging cartels in the markets for the construction, supply, installation and maintenance of electrification systems for high-speed railway lines, conventional railway lines and electromechanical equipment on high-speed railway lines.[2]

The National Court totally or partially upheld the administrative appeals lodged by some of the sanctioned companies because it concluded that the CNMC had failed to provide sufficient evidence of the involvement of those companies in the sanctioned conducts and/or of the enduring nature of those conducts. The National Court also upheld the appeals lodged by the companies' officers because it considered that the CNMC had failed to provide enough evidence that they met the criteria required to be sanctioned by the CNMC for infringing competition rules. In addition, the National Court considered that the CNMC did not submit a statement of reasons that was sufficient to justify the amount of the fines imposed on some of the sanctioned officers.

The CNMC's decision

On 14 March 2019, the CNMC issued a decision by which it imposed fines on 15 companies (Cobra, Elecnor, Siemens, SEMI, Inabensa, Alstom, CYMI, Isolux, Electrén, Comsa, Indra, Neopul, TELICE, EYM and CITRACC) totalling EUR 118 million. In particular, the CNMC considered that the sanctioned companies had committed three single and continuous infringements of Article 1 of the Spanish Competition Act and Article 101 of the Treaty on the Functioning of the European Union (the "**TFEU**"), consisting of bid rigging of public and private tenders in the markets for the construction, supply, installation and maintenance of electrification systems for high-speed railway lines, conventional trains and electromechanical equipment on high-speed lines. The CNMC also imposed fines totalling EUR 666,000 on 14 corporate officers for their involvement in those alleged anti-competitive practices.

In the CNMC's view there were three different infringements:

- First, an infringement allegedly consisting of bid rigging in public tenders for the construction, supply, installation and maintenance of high-speed railway line electrification systems, which took place between 2008 and 2016.
- Second, an infringement allegedly consisting of bid rigging in all the tenders launched by Spain's national railway operator, from 2002 until 2016 for the maintenance of the electrification on conventional railway lines.
- Finally, an infringement allegedly consisting of bid rigging in public and private tenders for the construction, supply, installation and maintenance of electromechanical equipment on high-speed railways, which took place between 2012 and 2015.

> **Snapshot: Other Spanish developments**
>
> The CNMC recently announced an investigation of several companies for potential rigging of tenders launched by AENA (the company responsible for the management of Spanish airports) for the lease of facilities intended for fixed-base operators at airports. The CNMC has already conducted dawn raids at the premises of several companies operating in this market. This new investigation is further proof of the CNMC's interest in investigating bid-rigging practices.

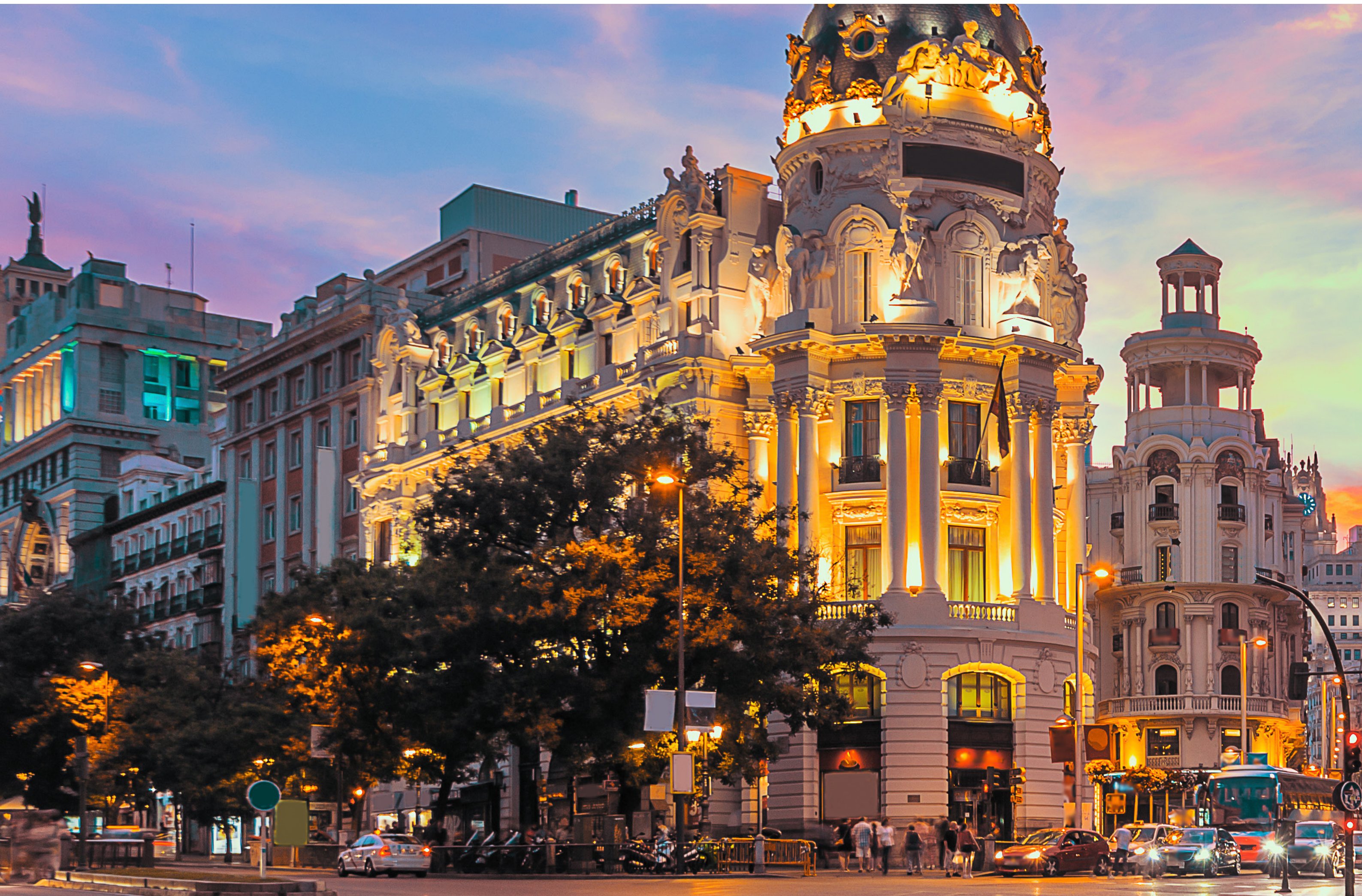
2. See the CNMC decision dated 14 March 2019 in case S/DC/0598/2016 *ELECTRIFICACIÓN Y ELECTROMECÁNICAS FERROVIARIAS*.

The CNMC concluded that the common denominator among the different sanctioned conducts was that they all had the objective of creating the appearance of the existence of competition among the sanctioned companies taking part in the tenders, when, in reality, they had previously agreed to share the tendered contracts. According to the CNMC, the sanctioned entities had made fraudulent use of a legal instrument widely accepted in the practice of public and private contracting – consortia agreements – to simulate normal competition in the bidding procedures and thus mask a series of agreements to share public contracts. According to the CNMC, there was no objective need to create those consortia agreements.

The National Court's judgments

Some of the sanctioned companies and their corporate officers appealed against the CNMC's decision before the National Court, seeking the annulment of the decision and fines. The National Court upheld the appeals lodged by some of the sanctioned companies as it considered that the CNMC had failed to provide sufficient evidence of their involvement in the sanctioned conducts and/or of the enduring nature of those conducts:

- The National Court upheld the appeal lodged by Sacyr and, consequently, annulled its fine because it considered that the CNMC had failed to provide sufficient evidence to demonstrate that Sacyr was aware of the existence of the anti-competitive conducts carried out by the other sanctioned companies. The National Court pointed out that simply showing that Sacyr had been part of some consortia agreements with other sanctioned companies did not suffice as evidence that Sacyr had knowledge of, and had an involvement in, an anti-competitive practice. The National Court also stressed that, in this case, there was no record of Sacyr's attendance at any meeting or of Sacyr's involvement in email exchanges with the other sanctioned companies.
- The National Court partially upheld the appeals brought by Cobra, CYMI, SEMI and Inabensa, and annulled the CNMC's decision only with regard to the alleged infringement related to conventional railway lines. The Court considered that there was no evidence of those companies' involvement in the infringement for a period exceeding three years and, therefore, concluded that the alleged infringements were time-barred when the CNMC opened the proceedings.
- The National Court also upheld the appeals lodged by EYM and ELECNOR on grounds that the CNMC failed to provide enough evidence of their involvement in the alleged infringements. The National Court concluded that there was no evidence of ELECNOR's involvement in the infringement relating to electromechanical equipment on high-speed lines. The National Court also considered that the CNMC had not properly evidenced that EYM had taken part in a bid rigging cartel in relation to high-speed lines as the company was not mentioned in the documents which the decision was based on. Finally, the National Court also annulled the fine imposed on EYM for its involvement in the cartel related to conventional railway lines due to the lack of reasoning for the amount of the fine.



The National Court also upheld the appeals lodged by all the appellant corporate officers based on two primary reasons: (i) the CNMC did not prove that the sanctioned individuals were "directors" and/or "legal representatives" as required by case-law to be sanctioned for infringing competition rules; or (ii) the CNMC did not provide adequate reasons to justify the amount of the fines imposed on those individuals.

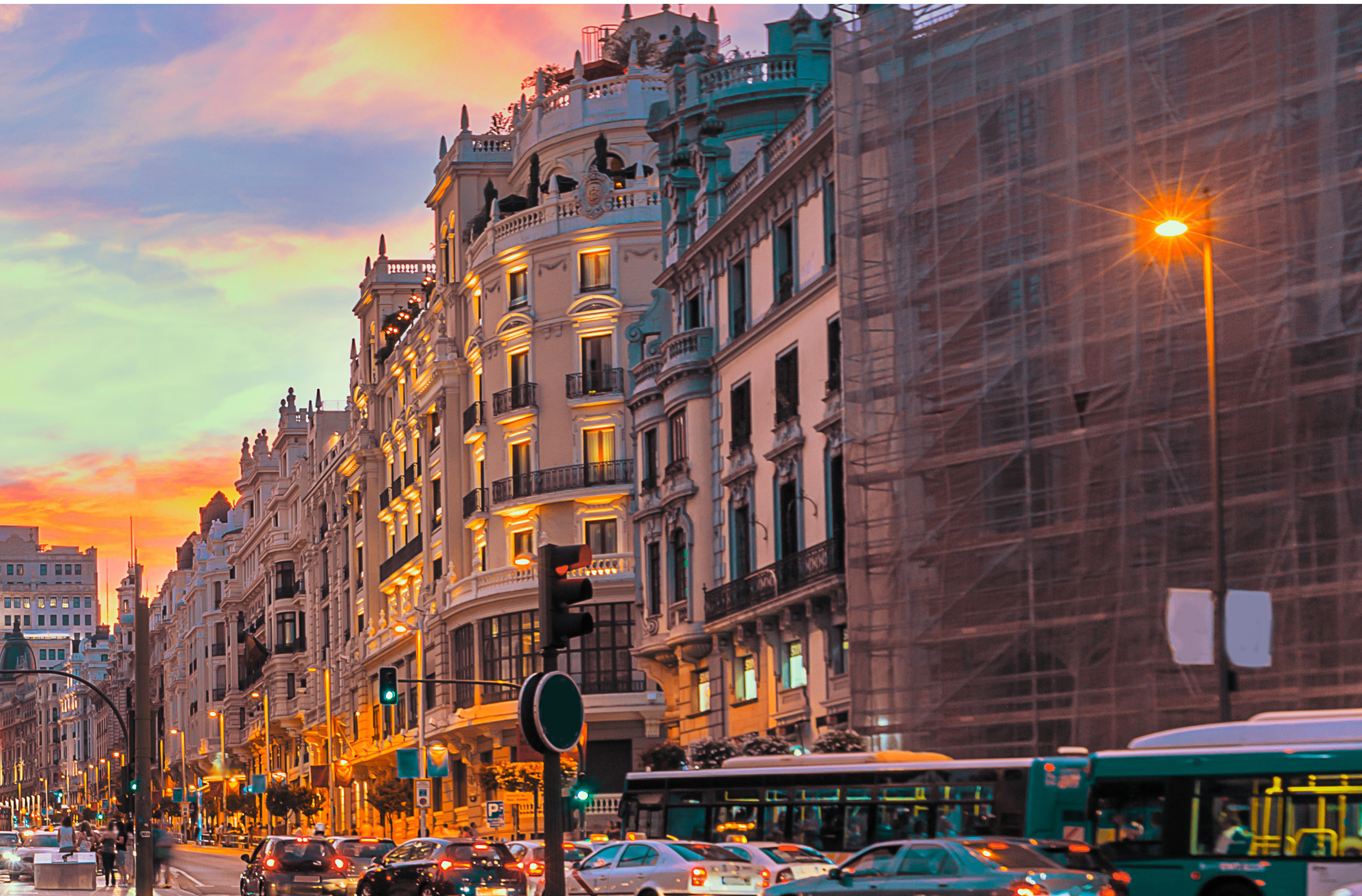
On the first reason, the National Court pointed out that merely having the title of corporate officers, without any evidence of the functions performed by them, or of their autonomy or responsibilities, does not suffice for them to be considered as part of a company's management body. The National Court highlighted that the CNMC did not indicate in this case the extent to which the sanctioned individuals had passed decisions that guided, conditioned, or directed the company's actions in carrying out the alleged anti-competitive conducts.

As for the second reason, the National Court concluded that determining the amount of the fine imposed on the individuals based on the criteria applied to the sanctioned company to which they belonged contravenes the principle of personal liability, which prevents someone from being sanctioned as a result of the actions of others.

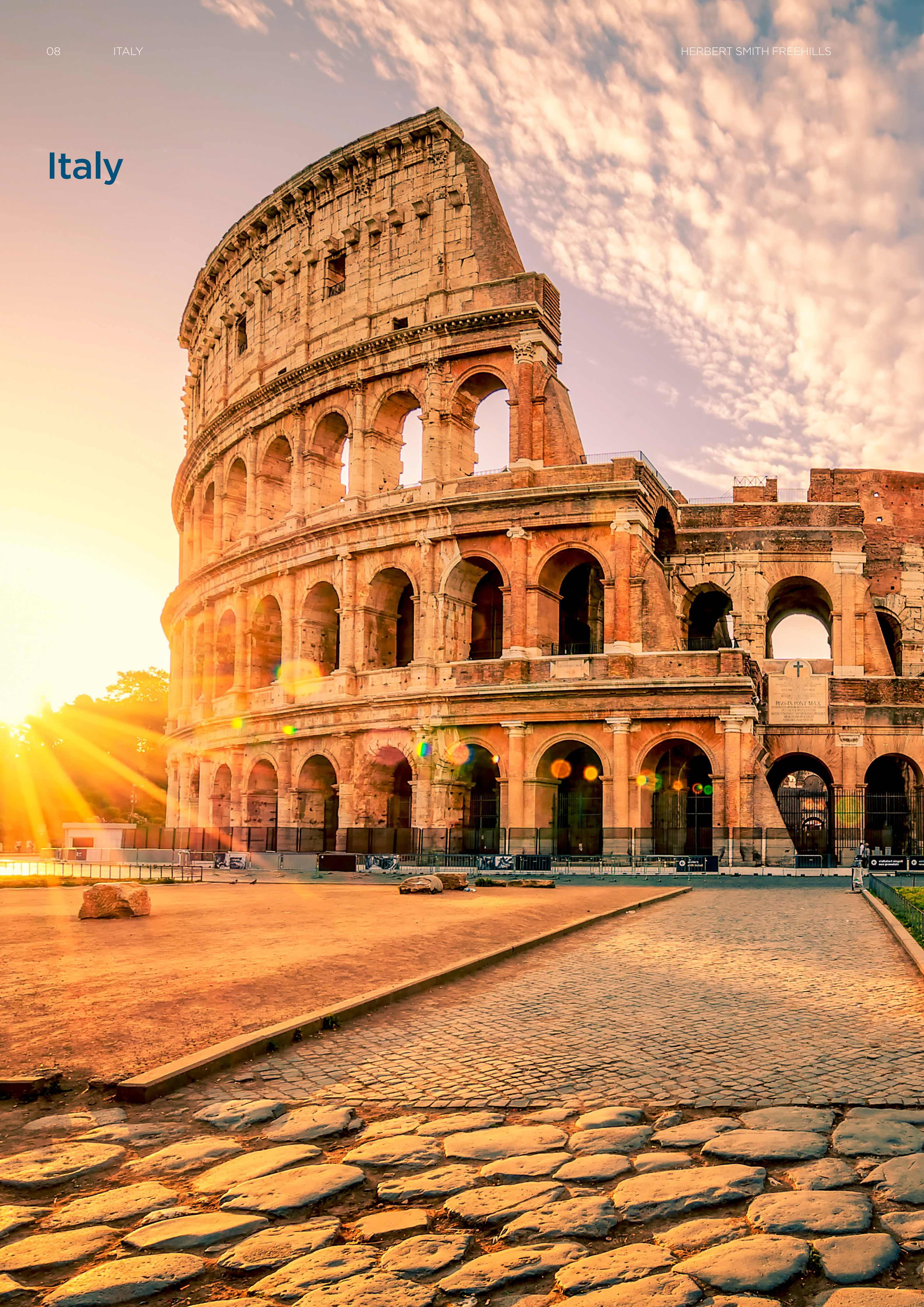
Commentary

The judgments provide companies with legal certainty as they highlight the need for the CNMC's decisions to be properly reasoned and based on clear and specific evidence that demonstrates the involvement of companies and corporate officers in the sanctioned conducts.

Furthermore, the judgments stress that the CNMC must clearly establish the liability of individuals, and the onus is on the authority to prove that individuals meet the criteria required by case-law to be sanctioned for infringing competition rules.



Italy



The Italian Competition Authority commences an investigation into suspected anti-competitive conduct in the pharma sector

Background

The Italian Competition Authority (*Autorità Garante della Concorrenza e del Mercato* ("**AGCM**")) has opened an investigation against pharma companies after the exchange of information with the Italian Authority for Pharmaceuticals for an alleged infringement of Article 101 TFEU.

Facts of the case

On 6 June 2024, following a dawn raid carried out on 28 May 2024 by AGCM at the premises of Biogen Italia S.r.l., Novartis Farma S.p.A. and other undertakings, AGCM opened an investigation against pharmaceutical companies for an alleged agreement restricting competition in the market for an active ingredient (ranibizumab), intended for the treatment of major eye diseases.[3] On the same date, the Dutch Competition Authority (*Autoriteit Consument & Markt*, the "**ACM**") conducted parallel inspections at the premises of Samsung Bioepis NL B.V.

Since 2022, AIFA – the Italian Medicines Agency – informed theAGCM about the fact that Byooviz was not brought on the market. Byooviz is a drug based on the active principle ranibizumab, which is developed and marketed by the Samsung Bioepis and Biogen. It is a biosimilar of Lucentis. Lucentis is developed by Genentech and marketed in Italy by the Novartis Group. Patent protection for Lucentis expired in 2022.

Biosimilars are typically marketed at a significantly lower cost than their originators but are still profitable. Therefore, pharma companies usually have an incentive to bring their biosimilars as soon as possible on the market. In fact, pharma companies tend to negotiate the price of the biosimilar with AIFA well in advance before the expiry of the patents of the originator in order to enter the market as soon as possible. In this case, it seems that the ranibizumab molecule is still highly profitable: the opening of the investigation decision highlights that Lucentis generates an annual turnover of almost €50 million in Italy.

This is why AGCM alongside AIFA found it suspicious that Byooviz was not launched in Italy.

AGCM collected public information on an agreement between Samsung Bioepis and Biogen on the one side, and Genentech on the other side, regarding the marketing of Byooviz.

The alleged infringement

AGCM alleges that there might be a coordination of commercial strategies between the involved undertakings to delay the entry of Byooviz into the Italian market.

According to AGCM, the reason for delaying the market entry could be related to the license agreement which Byooviz entered into with Genentech in September 2021. Samsung Bioepis and Biogen obtained an early entry into the US market. At the same time, they committed to postpone the entry into other markets (including Italy) Genentech and Novartis allegedly benefited from the maintaining of a monopoly condition even after the expiry of the patent over Lucentis.

AGCM has stressed the fact that, if confirmed, these dilatory conducts in the market entry of a biosimilar competing with the originator have negative repercussions on the potential savings for purchases by the National Health Service, and are detrimental for patients and taxpayers in terms of breadth of supply and lower prices.

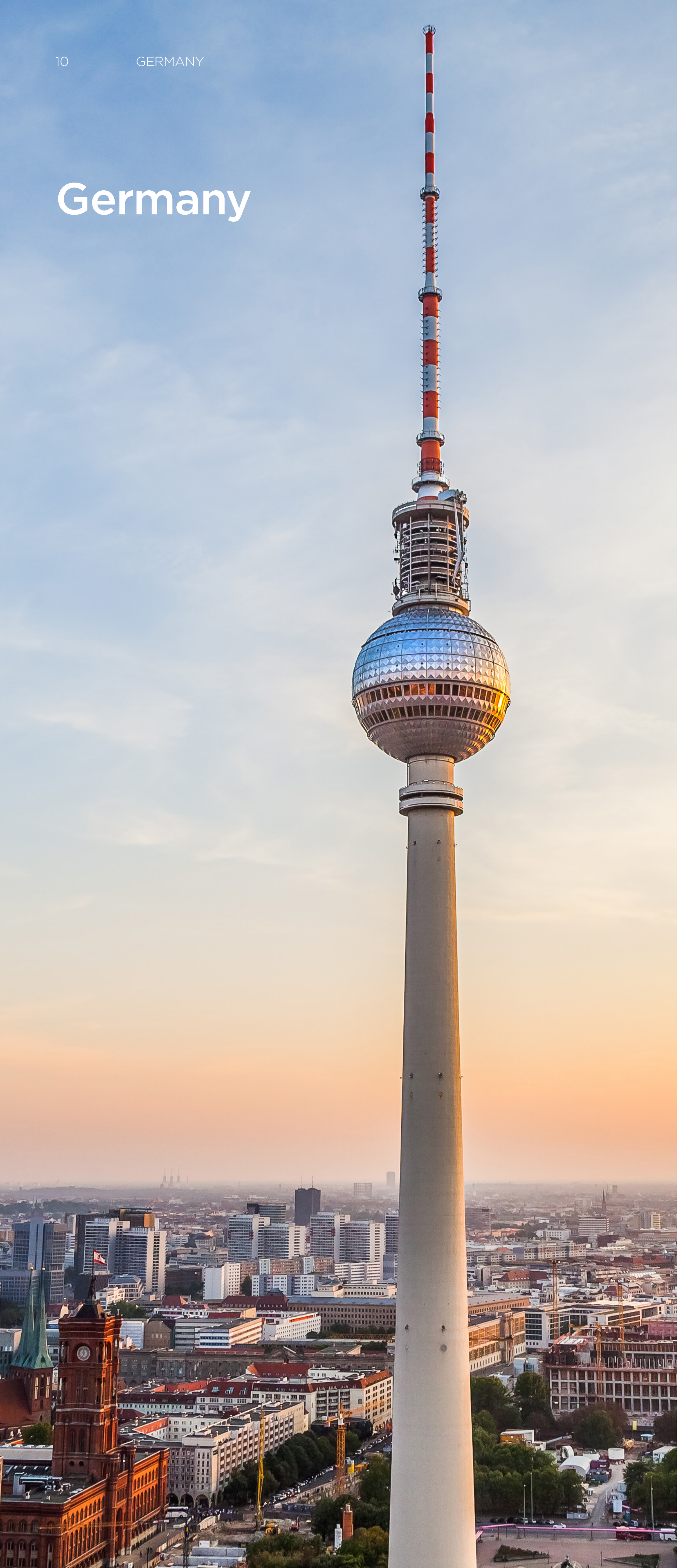
Not the first case involving Lucentis

The drug Lucentis was at the centre of another well-known case which saw Novartis and Roche sanctioned in 2013 for over EUR 180 million by the AGCM for a cartel that had the aim of hindering the spread of the use of a very cheap drug, Avastin, in the treatment of the most common eye disease among the elderly and other serious eye diseases, to the advantage of the much more expensive product, Lucentis, by artificially differentiating the two products. The case had a very long and complex journey, which ended last year with the Council of State confirming the sanction imposed by AGCM.

Snapshot: Other Italian developments

In June 2024, the AGCM started proceedings against seven companies active in the maintenance and repair of vehicles for an alleged cartel on the public tenders called by AMA (the municipal company for the environment, based in Rome). The proceedings started upon a claim from AMA which referred to possible anti-competitive conducts in the three procedures launched between March and May 2023 for the assignment of the maintenance service on chassis cabs and mechanical assemblies of vehicles. In particular, the modalities of participation showed a lack of competition in all three tenders and unsatisfactory results for the contracting authority. AGCM suspects collusion also on the tender procedure launched by AMA in December 2023, following the annulment of the first three competitive procedures. The seven companies may therefore have infringed the Italian Competition Law. The proceedings must be completed by 31 December 2025.

3. Samsung Bioepis co. Ltd., Samsung Bioepis NL B.V., Biogen Inc., Biogen Italia S.r.l., Genentech Inc., Novartis AG, Novartis Europharm Ltd. and Novartis Farma S.p.A.



Germany

German Federal Cartel Office uses new investigative powers for the first time and imposes fine on account of vertical price-fixing

The Federal Cartel Office (the "**FCO**") has imposed a fine of EUR 783,900 on a specialist producer for protective clothing. The case combines different typical features of vertical cartel cases. Moreover, it is the first time that the authority has made use of its power to issue a request for information in fine cases; a power which was introduced in 2021.

Facts of the case

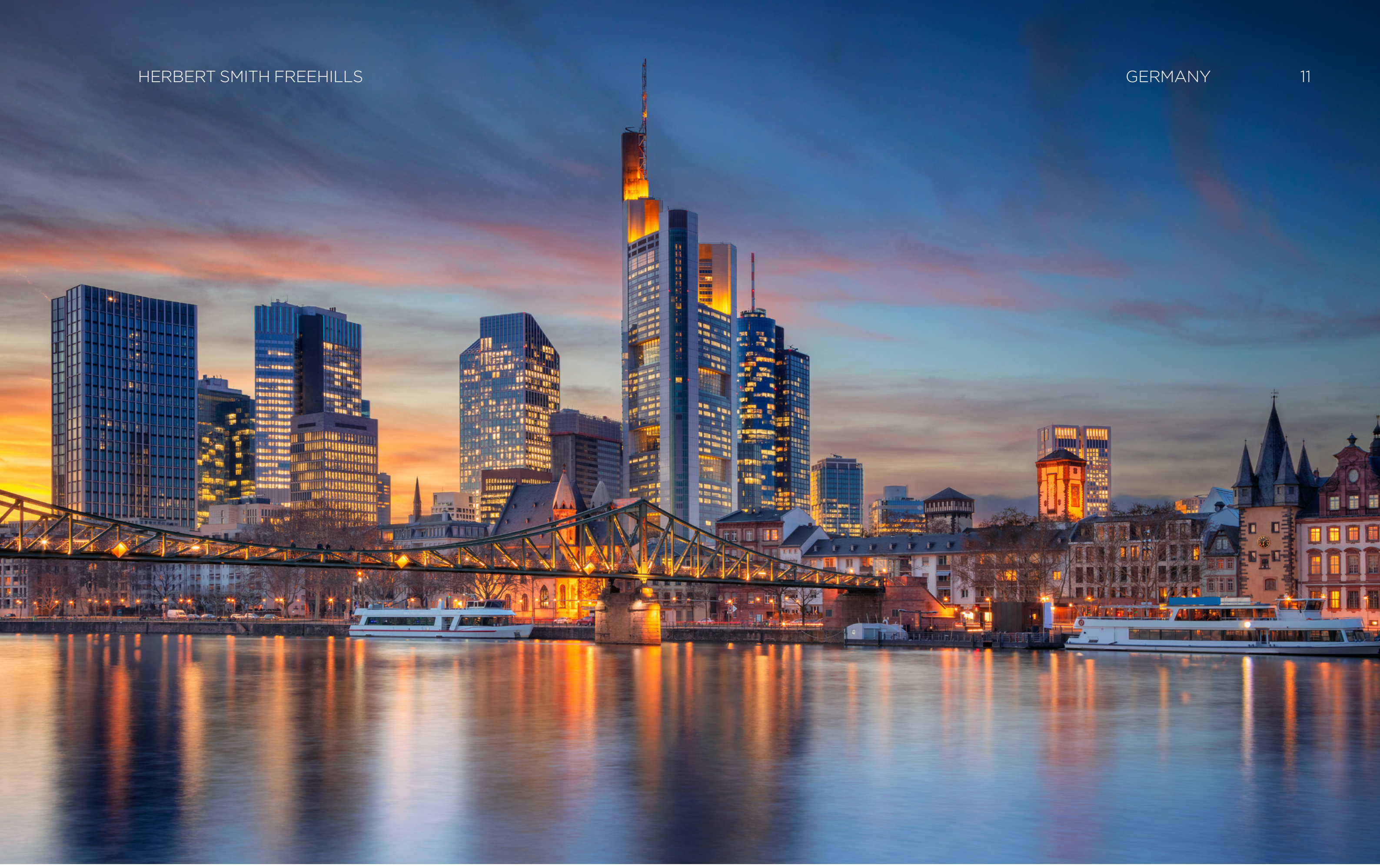
Pfanner Schutzbekleidung GmbH ("**Pfanner**") sells high-quality, high-priced, functional and protective clothing via specialist retailers in Germany. The company was accused of having restricted the pricing of specialist retailers cooperating with it in the sale of trousers, jackets, shirts and protective footwear as well as helmets and accessories (eg protective goggles, visors, lamp holders, hearing protection or communication systems). The proceedings were triggered by an application for cooperation from a specialist retailer.

Pfanner and some of the specialist retailers agreed on different practices regarding the resale prices for Pfanner's products:

- Resale prices were to be set by the respective specialist retailer in such a way that they correspond as closely as possible to the recommended retail price (RRP) and in any case were not significantly lower than this.
- Retailers were to refrain from offering monetary discounts; instead, during special promotions, when a high-priced Pfanner product was purchased, a small, low-priced product (eg a T-shirt or protective goggles) was to be added as a discount in kind in order to maintain the price level of articles as far as possible.
- In addition to the shop prices, this also applied to the internet presence and online shops of the respective retailers.

Pfanner implemented a comprehensive, and in part meticulous, monitoring system to ensure that retailers observed its pricing policy:

- The understanding on which the agreement was based was regularly expressed when retailers were newly included in Pfanner's distribution system ("*no price dumping allowed*").



- Retailers who came across offers from other retailers that deviated significantly from the RRP contacted Pfanner with a complaint about this, which often led to a corresponding intervention.
- Pfanner also carried out independent checks of the retailers' retail prices. This monitoring was systematised and centralised at times.
- If retailers who were not direct business partners of Pfanner (sub-retailers) sold at cheaper prices, Pfanner conducted test purchases and used the product code to trace back which direct reseller had sold the product. In most cases, the intermediary was then contacted with a request to refrain from reselling the product under these conditions or to inform its sub-dealer that the product may not be sold below the RRP.

In the case of repeated and frequent, or very pronounced, "*price dumping*" or of an explicit refusal to continue selling at the RRP, sanctions such as a delivery stop or delivery delays were imposed.

The imposed fine took Pfanner's cooperation with the FCO into account.

No dawn raid – but new tool to adopt request for information in penalty proceedings

For the first time, the FCO used its new investigative powers under Section 82b of the Act against Restrains of Competition. The provisions authorise the FCO to request information and evidence from companies (and under certain conditions also from company employees) – without a search – by means of an order. The addressees are obliged to answer all questions of fact truthfully and to provide all requested documents. So far, the FCO only had this power in purely administrative proceedings. In 2021 a reform expanded it to cases where a fine is ultimately imposed.

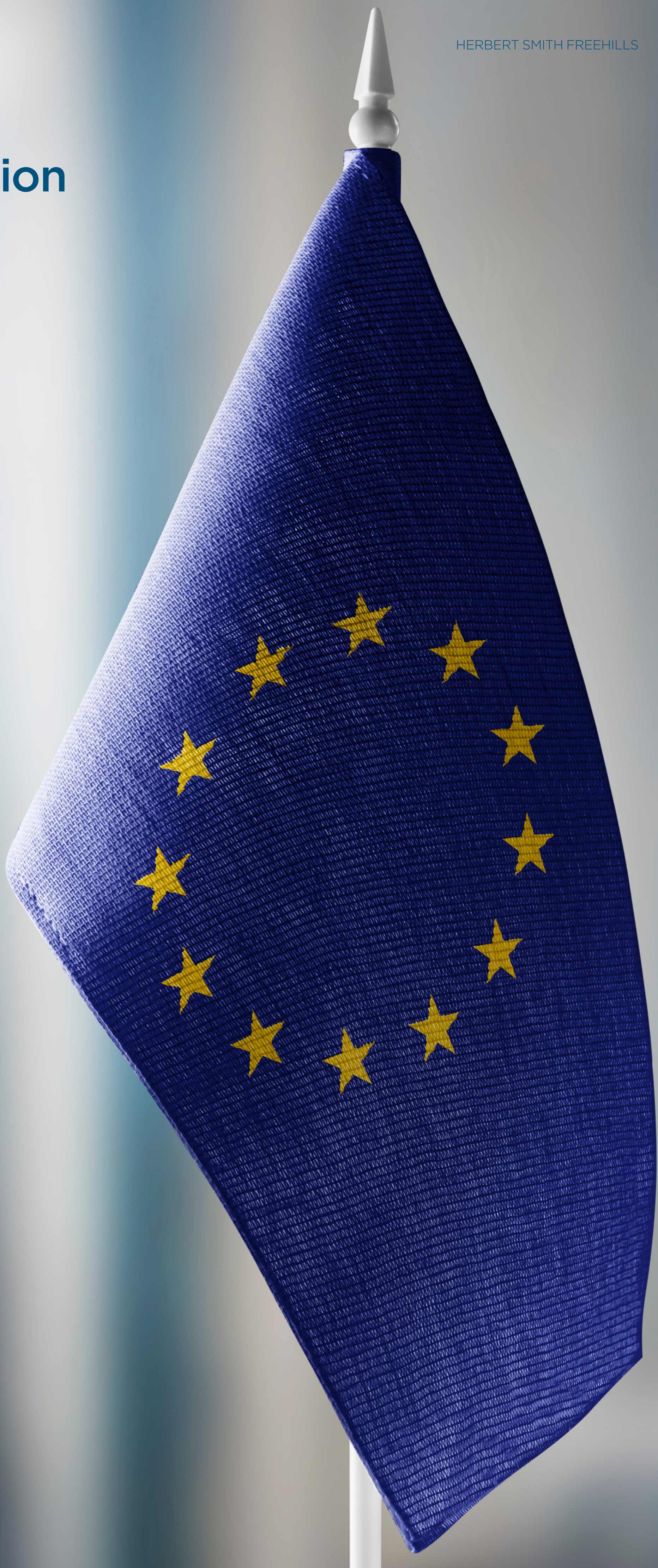
Practical implications

The case illustrates that the FCO does not need to conduct a dawn raid to find sufficient evidence to impose a substantial fine. This will facilitate the FCO's enforcement in particular where the main suspect of the violation is not located in Germany – as was the case with Pfanner, which had its business seat in Austria. It is likely much simpler for the FCO to get another national authority to serve the relevant entity with a request for information than obtaining a search warrant for a dawn raid in another country. In that sense, the decision is a warning shot for undertakings headquartered outside Germany, but with a distribution network in Germany: now the FCO has an efficient tool to obtain evidence for a fine without having to conduct a dawn raid in a foreign country.

Snapshot: Other German developments

- The FCO has declared that it will not intervene against a new sustainability initiative in the plant sector. A cooperation proposed to jointly introduce a multi-use system for flowerpots. The FCO did not see any material concerns as to the aim and structure of the proposed project: the project pursued a sensible aim in the reduction of plastic waste and its structure complied with, and was well within the confines of, the existing competition law framework (See Press Release here, only German version available).
- The Regional Court of Bonn (which is the local court for the FCO) clarified in a judgment of 8 April 2024 that the initial suspicion required for a search warrant for a cartel-related dawn raid must be based on concrete facts. Vague indications or mere presumptions are not sufficient. However, the court also clarified that no stricter requirements arise from EU law in this respect.

European Union



European Commission publishes Policy Brief on antitrust in labour markets; no-poach and wage-fixing agreements under further scrutiny

On 3 May 2024, the European Commission ("**Commission"**) published a Competition Policy Brief on the function of competition in labour markets, in particular focusing on restrictive no-poach and wage-fixing agreements.[4]

In brief, the Commission considered that wage-fixing and no-poach agreements generally qualify as by object restrictions under Article 101 (1) TFEU. Such agreements have, by their very nature, the potential to restrict competition. While any pro-competitive effects of such agreements must be considered if demonstrated and significant, they will most likely be assessed sceptically as net efficiencies are uncertain and less restrictive means of achieving them are generally available. Most of the cases are likely to be dealt with by National Competition Authorities ("**NCAs**") due to the geographic scope but the Commission has expressed its intention to actively investigate anti-competitive cases in labour markets in the context of the European Competition Network (the "**ECN**").

Background

Over the last few years, restrictive labour market agreements have been on the radar of many competition authorities worldwide. The Commission has addressed the harm that wage-fixing and no-poach agreements may cause in two recent Guidelines.[5] The Commission has also recently conducted unannounced inspections at the premises of undertakings active in the online ordering and delivery of food, groceries, and other consumer goods for suspected no-poach agreements.

That said, case practice has not been developed at EU level yet as labour markets are often national, regional or local, and relevant anti-competitive agreements are mainly handled by NCAs. In this Policy Brief, the Commission explains that labour market agreements should be assessed under EU competition law and provides further guidance on the relevant analysis.

Assessment of labour market agreements under competition law

Wage-fixing and no-poach agreements can be detrimental to competition

The Commission starts its analysis by providing the definitions of the relevant labour market agreements. Wage-fixing agreements are arrangements pursuant to which employers agree to fix wages or other types of compensation or benefits. No-poach agreements comprise of all arrangements in which employers agree not to hire each other's employees, including passive or active hiring.

According to the Commission, wage-fixing agreements set wages at the level of a monopsony market where the labour demand is decreased, with the side effect of reducing output and increasing downstream prices to the detriment of consumers.

No-poach agreements are also likely to reduce labour market dynamism with resulting negative effects on employee compensation, firm productivity, and innovation. The Commission explains that no-poach agreements reduce wages, because competing firms have less incentives to increase wages to attract new employees or motivate the existing workers to stay. No-poach agreements are typically secret, and therefore employees are unaware of them and unable to negotiate ex ante compensation for the reduced future job prospects. They prevent efficient allocation of productive employees to productive firms. Declining job reallocation rates have been linked to declining productivity and hence slower GDP growth. Lastly, no-poach agreements may have negative effects on innovation as employees do not switch to the employers where they are most valuable.

Wage-fixing and no-poach agreements qualify as restrictions by object

The Commission recalls the settled case-law of the Court of Justice of the EU (**CJEU**) according to which restrictions by object are those that "*reveal a sufficient degree of harm to competition by their very nature*" so that there is no need to examine their effects.

The Commission underlines that according to this well-established case law, the concept of restriction by object should be interpreted restrictively. The CJEU has provided a template to assess whether an agreement indeed "*reveals a sufficient degree of harm*". In particular, the Court listed a few criteria that one should consider to assess whether a possible infringement is a restriction by object: **(i)** the content of its provisions (ie, its written or unwritten terms), **(ii)** its objectives and **(iii)** the "economic and legal context of which it forms a part", including: **(a)** the nature of the goods and services affected and **(b)** the real conditions of the functioning and structure of the market(s) in question.[6]

The Commission then conducts an assessment of wage-fixing and no-poach agreements under these three criteria:

i. Concerning the content of these labour market agreements, the Commission explains that they are akin to a buyers' cartel since wage-fixing falls within the language of Article 101(1)(a) TFEU as a form of purchase price fixing and no-poach falls within the language of Article 101(1)(c) TFEU as a form of supply-source sharing. Past Commission practice and EU case-law have treated purchase price fixing and supply-source sharing as restrictions of competition by object.

ii. Concerning the objectives of the agreements, the Policy Brief states that undertakings involved in wage-fixing or no-poach agreements might justify their actions by claiming that they serve a legitimate purpose, such as to safeguard a company's investment in training its employees, or to protect the company's non-patent intellectual property (**IP**) rights and trade secrets. However, even if the restriction of competition also has legitimate objectives, this does not as such exclude it from qualifying as a restriction by object. The Policy Brief asserts that the same objectives may be achieved by means which are not or less problematic (such as non-disclosure agreements, obligations to stay with an employer for a minimum amount of time, the repayment of proportionate training costs, gardening leaves, etc.).

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4. Commission Competition Policy Brief, issue 2, May 2024: "Antitrust in Labour Markets"

5. Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements ("Horizontal Guidelines"), OJ C 259, 21.7.2023, pp. 1-125, paragraph 279, and Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons, OJ C 374, 30.9.2022, pp. 2-13, paragraph 17, example 2

6. Case C-67/13 P – *Cartes Bancaires*, paragraph 53, recently confirmed in Case C-124/21- *International Skating Union*, paragraph 106, Case 333/21 – *European Superleague*, paragraph 166, Case C-680/21 – Royal Antwerp Football Club, paragraph 93, and case-law cited.

iii. Lastly, the Commission recalls that if restrictions come within one of the categories listed in Article 101 TFEU, the analysis of economic and legal context must be limited to what is strictly necessary. In this case, the Commission takes into account that labour is a fundamental factor of production, and the ability of talent is a key competitive parameter. The Commission also considers that parties entering into the labour market agreements suggests in itself that there is a talent scarcity.

The Commission further explains that the analysis focuses on whether the relevant wage-fixing or no-poach agreement reveals a "sufficient degree of harm" to the competitive process of the labour market concerned, and it is not necessary to conduct a similar analysis in downstream product markets. Moreover, once the parties compete for labour it is not necessary that they also compete in any product market.

Efficiencies or justifications available

The Commission clarifies that wage-fixing and no-poach agreements can qualify as ancillary restraints or be exempted under Article 101 (3) TFEU provided that certain strict conditions are met.

More specifically, a wage-fixing or no-poach agreement may qualify as an ancillary restraint if it meets four cumulative conditions:

- there is a main non-restrictive transaction eg, a research joint venture or a supply agreement;
- the restraint is directly related to that transaction, ie, subordinate to its implementation and inseparably linked to it;
- the restraint is objectively necessary for the main transaction's implementation and
- the restraint should be proportionate to the main transaction. The restraint would be proportionate if there are no less restrictive means of ensuring the existence of the same relationship. This includes, for instance, other equally effective means of protecting non-patent IP rights or the investment in employee training, such as non-disclosure or other confidentiality agreements, possible obligations on the employees to reimburse proportionate training costs, national labour-law-compliant non-compete clauses, gardening leaves, etc. The parties to the relevant agreements would also need to show that the scope and duration of the clause is proportionate, eg, it does not cover all employees but is strictly limited to only a necessary number of employees, and is limited in time and geographical scope.

According to the Commission, it seems difficult to argue that wage-fixing agreements may have pro-competitive effects and thus be excluded under Article 101 (3) TFEU. No-poach agreements may, in principle, have pro-competitive effects as they may solve the so-called "investment hold up problem", ie, protect firms' incentives to invest into employees' trainings without concerns that they will later leave for another company, and protect non-patent IP rights. That said, net efficiencies are at best uncertain as there are usually less restrictive ways of achieving the same result.

Practical implications

The Policy Brief indicates the Commission's intention to scrutinise wage-fixing and no-poach agreements concluded between businesses. The Commission explains that labour agreements can by their very nature restrict competition as they risk reinforcing the market power that employers enjoy and cause harm to employees, while softening downstream competition and ultimately leading to higher prices and lower quality. Moreover, the Commission clarifies that labour agreements are analysed in the context of their impact on the relevant labour market, regardless of whether parties also compete in the product market.

Although certain pro-competitive effects may be produced, wage-fixing and no-poach agreements are unlikely to meet the requirements for an exemption under Article 101 (3) TFEU as most of the time there are other less restrictive means of achieving the same results. Therefore, companies contemplating on including such clauses in their agreements should be particularly vigilant and ensure that they keep up with competition compliance.

Although the Commission has not yet adopted a decision concerning wage-fixing and no-poach agreements, it is actively investigating leads and recently carried out unannounced inspections in this area. In addition, despite the fact that labour agreements are mainly handled by NCAs, the Commission can bring its own cases and has a coordinating role within the ECN.

Snapshot: Other EU developments

- The Commission fined Mondelēz International, Inc., one of the world's largest producers of chocolate and biscuit products, EUR 337.5 million for breaching EU competition rules by hindering the cross-border trade of chocolate, biscuits and coffee products between Member States. In particular, the Commission found that Mondelēz had engaged in several anti-competitive agreements or concerted practices, by limiting the territories or customers to which certain wholesale customers (traders/"brokers") could resell Mondelēz' products, and by preventing exclusive distributors active in certain Member States from replying to sale requests from customers located in other Member States, without prior permission from Mondelēz.
- In the context of a referral for a preliminary ruling from the Belgian appeal court, the Advocate General issued a non-binding Opinion that some FIFA rules on transfer of football players restrict competition by their very nature as they limit the possibility for players to switch clubs and, conversely, for (new) clubs to hire players, in a situation where a player has terminated his or her contract without just cause. These rules may only be justified if proven necessary for one or more purposes that are legitimate and strictly necessary.
- In the context of a referral for a preliminary ruling by a Czech Court, hearing an action for damages brought by shopping portal Heureka, against Google, the CJEU ruled that the Czech rules on limitation are incompatible with EU law. According to the Court the limitation period applicable to actions for damages for an infringement of EU competition law cannot begin to run unless that infringement has come to an end and the injured party knows of the fact that the behaviour concerned constitutes such an infringement.

United Kingdom

Pharmaceutical companies successfully overturn UK competition authority "pay-for-delay" decision

On 23 May 2024, the Competition Appeal Tribunal ("**CAT**") overturned the Competition and Markets Authority's ("**CMA**") infringement decision (the "**CMA Decision**") against pharmaceutical companies Alliance Pharmaceuticals, Lexon, Medreich and Focus (owned by private equity firm Cinven and then Advanz Pharma).[7] The CAT quashed the CMA's finding that the companies had unlawfully implemented a market sharing arrangement which the CMA had sought to characterise as a "pay for delay" arrangement (the Market Exclusion Agreement, or "**MEA**").[8]

In an outright victory for Alliance Pharmaceuticals, Lexon, Cinven and Advanz Pharma (the "**Appellants** "), the CAT found that the CMA had failed to prove the existence of the MEA – meaning that the CMA's decision (and associated penalties) have been overturned. The outcome for Medreich as the only non-appealing party is less victorious, as the £4.62 million fine it paid in 2022 (having benefitted from a reduction through the CMA's leniency regime) will still stand.[9]

The CAT's judgment provides a number of important lessons for both businesses and the CMA for future enforcement action.

Background to the case

The CMA found that Alliance and Lexon had entered into the MEA, which lasted for 5 years, in relation to the supply of anti-nausea drug prochlorperazine. For the duration of the MEA, the price paid by the NHS for prochlorperazine increased by over 700%.

There was no written MEA relied upon by the CMA. However, the CMA claimed that the MEA was implemented through two distribution agreements that Alliance and Lexon each entered into with Focus, a distributor specialising in generics. The CMA placed significant weight on certain terms in those distribution agreements, including the approach to pricing adopted in the Alliance/Focus agreement and a profit share clause in the Lexon/Focus agreement under which Lexon would receive a share of any profits made by Focus from selling Alliance's prochlorperazine product. The CMA alleged that Lexon agreed not to enter the market and compete with Alliance for the supply of prochlorperazine tablets in return for the transfer of value resulting from the profit share arrangement with Focus. Medreich, who had jointly developed the Lexon prochlorerazine product, was also found to have participated in the MEA and received a portion of the profit share payments received by Lexon. Following the commencement of the CMA's investigation, Medreich applied for leniency and received a reduction in its fine in return for admitting its participation in the infringement and providing evidence to the CMA.

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7. Decision of the Competition and Markets Authority, Competition Act 1998: Prochlorperazine, case 50511-2, CMA decision of 3 February 2022.
8. Further background to the CMA's case is discussed in Edition 8 of Cartel Intel.
9. In line with the Supreme Court's ruling in *R (on the application of Gallaher Group Ltd and others) (Respondents) v The Competition and Markets Authority (Appellant)* [2018] UKSC 25, See HSF briefing here.

The CMA imposed fines on the four companies totalling over £35 million. The CMA also issued proceedings in the High Court for director disqualification orders against seven directors across all the companies. The disqualification proceedings were considered by the CAT alongside the appeal (with the Medreich director challenging the disqualification order even though Medreich did not appeal against the CMA's infringement decision).

The Appellants appealed on broadly similar grounds, namely that:

a. the CMA wrongly sought to characterise the Appellants' rational and independent commercial strategies as conduct implementing and/or evidencing the MEA;

b. certain findings of fact on which the CMA based inferences of the existence of the MEA were not supported by the evidence; and

c. the CMA failed to properly assess all the available evidence and properly consider exculpatory evidence, instead of choosing to cherry-pick a narrow set of ambiguous documents supporting its case.[10]

The CAT's judgment

The CAT found in the Appellants' favour, concluding that the CMA had not proven the existence of the MEA to the requisite standard ie on the balance of probabilities. The CAT agreed with the Appellants that the distribution agreements between Alliance-Focus and Lexon-Focus were entered into for independent commercial reasons and not in order to implement the alleged MEA. It therefore annulled the infringement decision, and also dismissed the director disqualification proceedings.

Acceptance of alternative explanation for the distribution agreements

The CAT emphasised that whilst circumstantial evidence and inferences can play an important role in proving cases involving anti-competitive agreements (given that such agreements may not be formally recorded or kept secret), any inferences must be properly deduced from evidence that does exist, and alternative explanations must also be properly considered.

The CMA had argued that the decision by Alliance to enter into a fixed price distribution agreement with Focus was based on enabling Focus to make very high profit margins on sales of the Alliance product, which in turn allowed it to transfer significant sums to Lexon, which gave effect to the alleged MEA. Combining this with the profit share clause in the Lexon/Focus distribution agreement, pursuant to which Lexon benefitted from the same 75% profit share arrangement on sales by Focus of both Lexon's prochlorperazine product and any other manufacturer's equivalent prochlorperazine product (including the Alliance product), the CMA inferred the existence of the MEA.

However, the parties submitted that the distribution agreements instead reflected independent commercial strategies. Alliance argued that its distribution agreement with Focus was part of its unilateral strategy to de-brand its product and to use a specialist generics distributor to help it to compete with the various competitors it anticipated would enter the market (including Lexon). A fixed price distribution agreement was consistent with the approach it had adopted for other products, focussing on a modest but consistent revenue stream. Similarly, Lexon explained the profit share arrangement as being consistent with other agreements it had previously entered into with Focus in respect of other products, and the CAT accepted that it was "*not unreasonable, nor was it unusual and it was in line with the profit share split on other Focus-Lexon projects*".[11] The CAT acknowledged that Focus agreeing to become the exclusive distributor for both Alliance and Lexon was "*odd*", but noted that this would be to Focus' commercial advantage and concluded that "*the fact that Focus has entered into "unusual" and "odd" arrangements for its own commercial purposes does not mean there was a MEA, to which Focus was not a party, between Alliance and Lexon.*"[12]

Following a detailed review of the documentary evidence relied upon by the CMA as well as considering additional witness evidence provided by the Appellants, the CAT concluded that the Appellants' alternative explanations for the distribution agreements were compelling, and the inferences drawn by the CMA were not supported by its evidence.

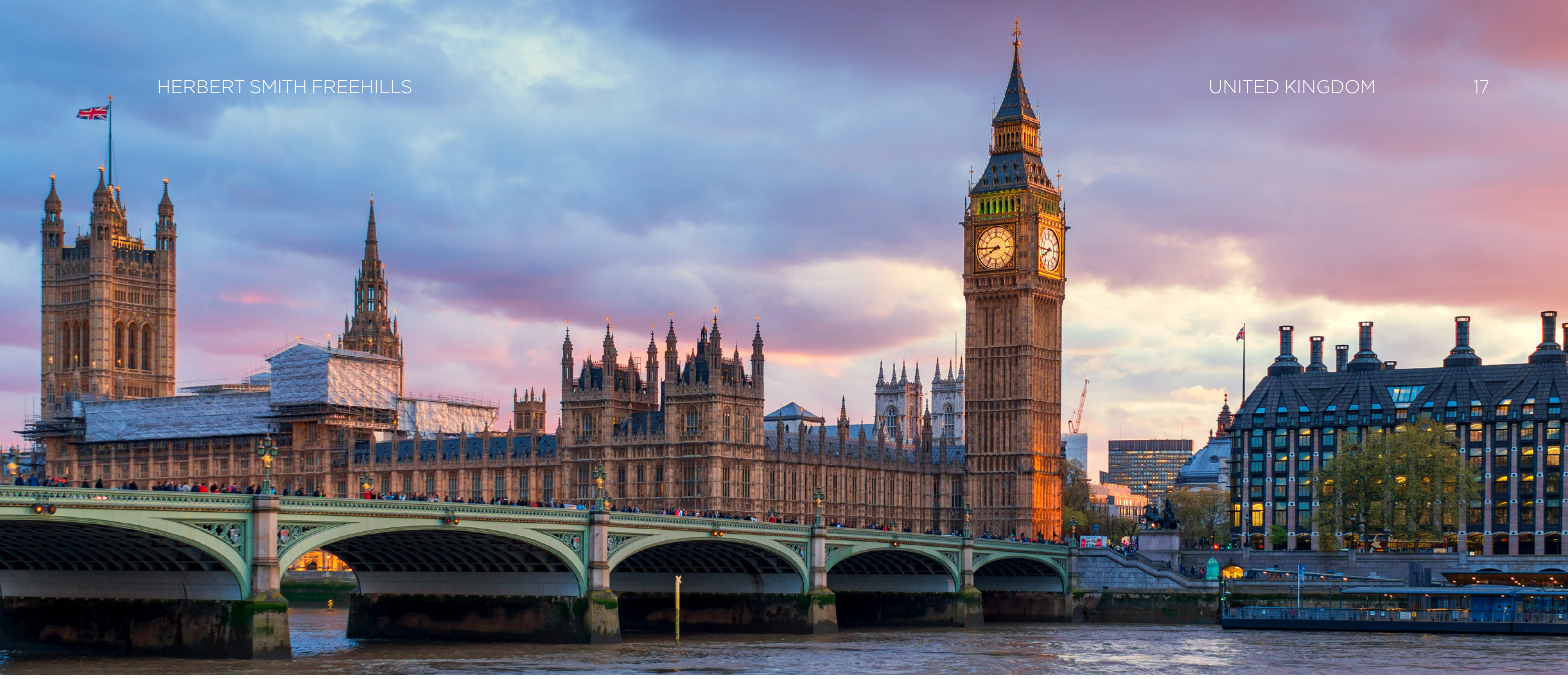
Snapshot: Other UK developments

- In February 2024, the CMA opened an investigation under Chapter 1 of the Competition Act 1998 into suspected breaches of competition law by 8 housebuilders, relating to concerns of illicit information sharing. This investigation follows on from the CMA's housebuilding market study, which concluded in February 2024.
- In March 2024, the CAT allowed appeals against the CMA's decision imposing fines totalling £106m on pharmaceutical companies found to have engaged in an anti-competitive market sharing agreement. The CAT agreed with the CMA's infringement finding on the facts, but held that the appeals must nonetheless be allowed because the CMA did not fully put its case to a witness during cross-examination at trial. The CMA has said that it will appeal against the CAT's judgment. See CAT judgment here and the CMA press release here.
- In May 2024, the Digital Markets, Competition and Consumers Act received Royal Assent. This significant piece of new legislation has three main strands: (i)introducing a new UK digital markets regime, which will see the most powerful technology firms with strategic market status having their conduct regulated by the CMA and being subject to a new mandatory merger reporting requirement; (ii) changes to the UK's competition law regime, including introducing a new merger control threshold and strengthening the CMA's enforcement powers (including tougher penalties for failing to comply with statutory information requests); and (iii) enhanced consumer protection rights and substantial strengthening of the CMA's powers in respect of consumer protection legislation, including enabling the CMA to enforce legislation directly against companies rather than going through the courts. See our briefing here.

10. *Advanz Pharma Corp. Limited and others, Cinven Capital Management (V) General Partners Limited and others, Lexon (UK) Limited and another and Alliance Pharmaceuticals Limited and another v Competition and Markets Authority* [2024] CAT 36, judgment of 23 May 2024 (the "**Judgment**"), paragraphs 15-18.

11. See Judgment, paragraphs 269-270.

12. See Judgment, paragraph 271.



CAT criticism of the quality of the CMA's evidence and decision not to lead witness evidence at trial

The use of oral evidence to contextualise, support or discredit documentary evidence was key to the outcome of this case.[13] The CAT's statements on the quality of evidence put before it by the parties are notable. It was critical of the CMA's decision not to lead witness evidence to support its case at trial, and concluded that: "[w]*hen the documentary and witness evidence is looked at in the round, it does not demonstrate on the balance of probabilities that there was a MEA*".[14]

In contrast, the CAT was impressed by the Appellants' witnesses and noted their credibility and reliability. The CAT also gave more weight to evidence given by the directors under oath at the hearing compared to previous, contradictory statements they had made to the CMA during the early stages of its investigation: "[w]*e prefer his evidence, given on oath to us at the hearing, to what he said at interview*".[15]

As a result, the CAT accepted the evidence of current and former Alliance directors that they had entered into the distribution agreement as part of a unilateral commercial strategy rather than to implement the alleged MEA.

The CAT specifically complimented the witnesses for distinguishing "*their personal recollection from matters which they had learned subsequently or had worked out from looking at documents*" and found that they had displayed a strong sense of "*solid business integrity*".[16] By contrast, the documentary evidence relied on by the CMA was found not to evidence any infringement, given that some of the evidence was exculpatory while the rest was consistent with the parties' explanations of the commercial purpose of the distribution agreements.

Analysis and key takeaways

This judgment offers a good example of the willingness of the CAT to engage in a detailed review of all available evidence on a merits-based appeal against a CMA infringement decision. Whilst the CMA has successfully defended a number of appeals against infringement decisions in the pharma sector, in particular in relation to excessive pricing, it has had notably less success in the context of appeals against fines imposed for anti-competitive agreements (with the notable exception of the *Nortriptyline* information sharing case).

The CAT was clearly critical of the CMA's approach and its failure to lead witnesses that could potentially have challenged witness evidence put forward by the appellants. The judgment also serves as a lesson for the CMA as to the importance of how it characterises the infringing conduct in its decisions – with the CAT emphasising that the CMA must prove its case by reference to the relevant elements required by competition law to establish the particular allegation of infringement. In this case, the CAT noted that the CMA's case was that the parties had engaged in cartel conduct in the form of a "pay for delay" arrangement, rather than basing the case on allegations of unlawful exchange of information, or pursuing an excessive pricing case.[17]

For companies, the Judgment provides a useful reminder of the importance of internal documents in demonstrating competition compliance, and in particular maintaining a proper record of decision-making processes and the commercial rationale for entering into agreements – especially when dealing with competitors and distributors. The CAT placed substantial weight on contemporaneous documentary evidence as well as the recollection of witnesses when reaching its decision.

For those active in the pharmaceutical sector, it is also notable that the judgment offers a clear acknowledgment by the CAT of the counter-intuitive spike in price which can occur when a drug first comes off patent due to the way drug pricing works in the UK.[18] In such circumstances, price increases alone may not be a sufficient basis for drawing an inference of collusion.

Finally, it is worth noting that Medreich did not join the appeal and so the fine it paid to the CMA in 2022 will stand, despite the fact that the infringement has now been found never to have occurred.

13. See Judgment, paragraph 26.
14. See Judgment, paragraph 391.
15. See Judgment, paragraph 36.
16. See Judgment, paragraph 36.
17. See Judgment, paragraph 211.
18. See Judgment, paragraphs 55-61.

Australia

Australian Competition and Consumer Commission obtains conviction for cartel conduct against individuals, only its third such conviction since criminalisation of cartel conduct in 2009.

Overview

Cartel conduct in Australia is prohibited under the Competition and Consumer Act 2010 (the "**CCA**"). In 2009, amendments made to the CCA strengthened cartel laws by adding to the existing the civil penalty provisions for cartel conduct and establishing criminal offence provisions. As a result, since 2009, cartel conduct has been punishable by significant fines and imprisonment of individuals. However, it is not until recently that the Australian Competition and Consumer Commission (the "**ACCC**") has obtained criminal convictions against *individuals* under these provisions.

Earlier this year, Bingo Industries Ltd ("**Bingo**") and its then-CEO Daniel Tartak, and Aussie Skips Bin Services Pty Ltd and Aussie Skips Recycling Pty Ltd (together, "**Aussie Skips**") and then-CEO Emmanuel Roussakis, were convicted in the Federal Court of Australia (the "**Court**") of the criminal offence provisions concerning cartel conduct.[19] The conduct concerned price fixing of certain waste disposal services in Sydney. HSF acted for Bingo in the matter.

The decision represents only the fifth proceedings against individuals for criminal cartel conduct in Australia, and third resulting in prosecution (though the ACCC has obtained a number of convictions against corporations in the past). It serves as a compelling reminder to corporate Australia of the seriousness with which the courts approach cartel conduct, and the Court's willingness to hand down significant monetary fines and terms of imprisonment.

Legislative framework

Part IV of the CCA prohibits a range of anti-competitive conduct, including cartel conduct. The CCA prohibits corporations from making, or giving effect to, contracts, arrangements, or understandings that contain a cartel provision.[20]

A cartel provision is defined in section 45AD of the CCA as a provision of a contract, arrangement or understanding, between competitors, to:

- fix prices,
- divide markets,
- rig bids, or
- restrict outputs.

A cartel provision concerning price fixing (as was the case here) must have the *purpose or effect* of price fixing, whereas the other forms of cartel conduct need only have the *purpose* (of dividing markets, rigging bids or restricting outputs, as the case may be).

Cartel conduct in Australia is a serious offence. The maximum penalty for an offence committed against each of sections 45AF(1) and 45AG(1) was, at the time of the offences,[21] a fine not exceeding the greater of:

- AUD 10,000,000; or
- three times the total value of the benefits obtained that are reasonably attributable to the commission of the offence (if that amount can be determined); or

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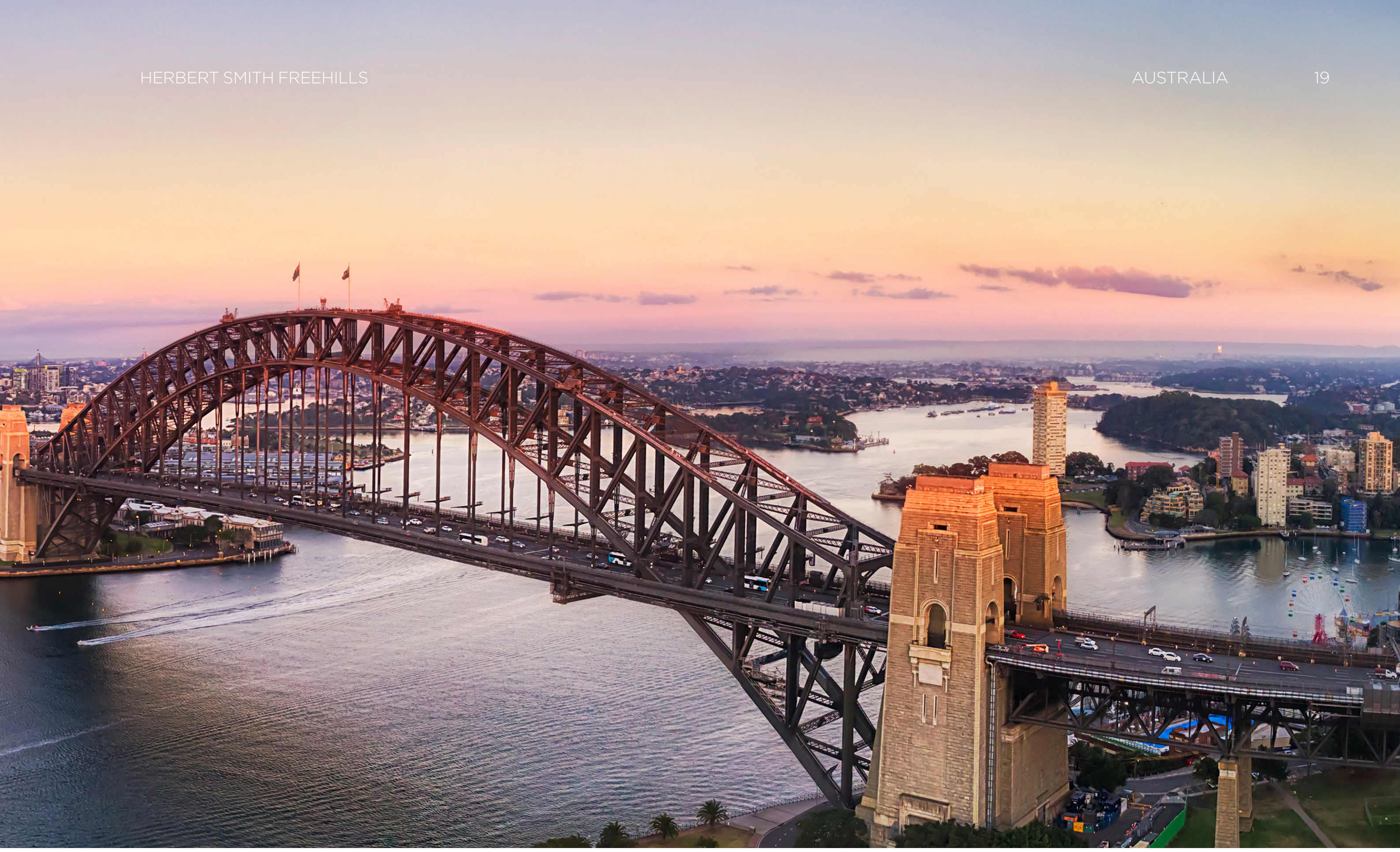
19. Commonwealth Director of Public Prosecutions v Bingo Industries Pty Ltd; Commonwealth Director of Public Prosecutions v Tartak [2024] FCA 121 and Commonwealth Director of Public Prosecutions v Aussie Skips Bin Services Pty Ltd; Aussie Skips Recycling Pty Ltd; Roussakis [2024] FCA 122.

20. Sections 45AF and 45AG CCA contain the criminal offence provisions, and sections 45AJ and 45AK CCA contain the civil penalty equivalents.

21. From November 2022, the CCA was amended to increase and introduce penalties in relation to a number of provisions, including to increase the maximum penalty for cartel provisions. The maximum penalty is now a fine not exceeding the greater of AUD 50,000,000, three times the value of the benefits obtained that are reasonably attributable to the commission of the evince (if that amount can be determined), or 30% of the corporation's adjusted turnover during the breach turnover period for the offence.



- if the court cannot determine the total value of those benefits, 10% of the corporation's annual turnover during the 12-month period ending at the end of the month in which the corporation committed, or began committing, the offence.

For individuals, the maximum civil penalty at the relevant time was AUD 500,000 per contravention,[22] and the maximum criminal sanctions were, and remain, a term of imprisonment not exceeding 10 years or a fine not exceeding 2,000 penalty units (at the time being AUD 420,000),[23] or both (section 79(1) of the CCA).

Facts of the case

Bingo and Aussie Skips are providers of waste disposal services in Sydney. At the time of the offences, Bingo was the largest provider of collections services and processing services for building and demolition waste in the Sydney metropolitan region. Aussie Skips was the second biggest provider.

In May 2019, Mr Tartak (then-CEO of Bingo) and Mr Roussakis (then-CEO of Aussie Skips), engaged in a series of communications (including in person meetings and messages via WhatsApp), and made arrangements concerning the prices at which the companies would provide waste collection and processing services.

As found by the Court, the agreement relevantly entailed that from 1 July 2019:

- Bingo and Aussie Skips would increase their prices for waste collection by approximately 25% and 20%; and
- Bingo and Aussie Skips would increase their prices for waste processing, by at least AUD 60/tonne and AUD 35/m^2, and AUD 50/tonne and AUD 27.50/m2 respectively.

The price increases were occurring in circumstances where the government was introducing a new levy from 1 July 2019. The new prices were advised to customers in letters sent in May 2019 after the communications between Mr Tartak and Mr Roussaki, and came into effect from 1 July 2019. However, by September 2019, the arrangements were abandoned.

In January 2020, the ACCC commenced an investigation into the price changes that had occurred in the market in 2019. That investigation led to the commencement of the criminal proceedings.

The Court's decision

Both companies, and the two CEOs, pleaded guilty to all charges.

His Honour Justice Wigney found that the conduct had the effect of suppressing and distorting the price competition in respect of waste collection and processing services in the Sydney metropolitan region, and that as a result of the arrangement, "*there was a real chance that some customers of Bingo and Aussie Skips would pay more than they otherwise would have for collections services in Sydney*" and likewise for Aussie and that the conduct had the effect of suppressing and distorting the price competition in respect of waste collection and processing services in the Sydney metropolitan region (at [121]).

Bingo was fined **AUD 30m** (where the maximum fine was AUD 40.2m, being 10% of its annual turnover in the preceding 12-month period, and the value of the benefits could not be determined).
Mr Tartak was sentenced to **two 18-month terms of imprisonment**, for an effective term of two years (to be served by way of intensive corrections order meaning that provided the terms of the order were maintained there would be no actual imprisonment), fined **AUD 100,000**, and

22. From November 2022, the maximum civil penalty is AUD 2.5 million per contravention.
23. A penalty unit at the time of the offences was AUD 210 (currently it is AUD 275).
24. *Commonwealth Director of Public Prosecutions v Joyce* [2022] FCA 1423 and *Commonwealth Director of Public Prosecutions (DPP) v Alkaloids of Australia Pty Ltd* [2022] FCA 1424.
25. *Director of Public Prosecutions (DPP) (Cth) v Vina Money Transfer Pty Ltd* [2022] FCA 665.

disqualified from managing corporations for a period of five years.

Aussie Skips was fined **AUD 3.5m** (where the maximum was AUD 10,000, being greater than 10% of annual turnover, as the value of the benefits could not be determined). Mr Roussakis was sentenced to **18 months imprisonment** (to be served by way of intensive corrections order), fined **AUD 75,000**, and disqualified from managing corporations for a period of five years.

In handing down these sentences, Justice Wigney had regard to the matters set out in section 16A(2) of the *Crimes Act 1914* that the Court must take into account so far as they are relevant and known to the Court. Notably, the Court considered the following matters (amongst others):

- The serious nature of cartel conduct, which is "*extremely destructive of*" competition, "*should be emphatically condemned and deterred by the imposition of appropriately stern penalties*" (Bingo [98], Aussie Skips [100]).
- While the nature and scope of the cartel arrangements were limited, affecting only a particular geographic area and lasting for not more than three months, the market was substantial and lucrative, and the participants were the largest market players (Bingo [104], Aussie Skips [106]-[107]).
- This was not a case where the cartel arrangements were made and given effect to by lower level management, but involved the CEOs (Aussie Skips [113], Bingo [109]).
- It could readily be inferred that the conduct had an adverse impact on at least some consumers, as it suppressed and distorted price competition in the relevant markets (Bingo [119]-[121], Aussie Skips [137]-[139]).
- The absence of a compliance framework and culture of compliance was a factor that counted against Bingo and Aussie Skips in sentencing (Bingo [109], Aussie Skips [146]).

Justice Wigney emphasised that general deterrence is a particularly significant consideration in sentencing for cartel offences (Bingo [161], Aussie Skips [192]). This is so for two reasons: first, cartel conduct is notoriously difficult to detect, investigate and prosecute, and second, it is an economic crime involving the balancing of benefits and risks, such that a deterring sentence should heavily influence any assessment of risk by a would-be offender.

Having weighed up the relevant factors, the Court then applied discounts of 30% to Bingo's sentence and 40% to Mr Tartak's sentence having regard to their respective early pleas and cooperation (at [189] and [269]), and 25% to each of Aussie Skips and Mr Roussakis' sentences having regard to their respective early pleas (at [226] and [285]).

Note that at the time of writing, Aussie Skips has appealed the AUD 3.5m penalty.

Practical implications

The decision represents only the fifth case commenced by the ACCC against individuals seeking criminal prosecutions for cartel conduct, and only the third in which a conviction was obtained.

The ACCC's first two criminal cartel cases against individuals resulted in a not guilty verdict by a jury (against Country Care in 2021), and charges being withdrawn prior to any trial (against ANZ, Citigroup, Deutsche Bank and senior executives, in 2022). In 2022, the ACCC achieved successful sentences for criminal cartel conduct, following guilty pleas, in two separate matters involving executives or directors of Alkaloids of Australia Pty Ltd[24] and Vina Money.[25] The sentences in those cases included similar terms of imprisonment as those ordered here, but the fines ordered in those cases were in the order of AUD 2m and AUD 1m for the corporate defendants respectively, and AUD 50,000 and AUD 500-AUD 1,000 for the individuals in the respective cases.

The decision drives home three key points that individuals and companies across all sectors should bear in mind:

1. Cartel conduct is taken very seriously in Australia. This is demonstrated through the considerable sentences handed down in this case, and is further underscored by the November 2022 increase in maximum penalties, described above.
2. The are real benefits available to individuals and corporations in the form of considerable sentencing discounts, achievable through early guilty pleas and cooperation with the authorities.
3. Ensure your business is up to date in providing effective compliance training, including around competition law, and fosters a culture of compliance.

Snapshot: Other Australian developments

- The ACCC is currently reviewing its immunity and cooperation policy for cartel conduct. The policy sets out a framework for businesses and individuals to disclose cartel conduct to the ACCC in exchange for immunity from enforcement. A consultation draft released in May includes proposed changes such as excluding an immunity seeker's lawyers from interviews, and amending the requirements for corporations to be eligible for immunity by requiring corporations to take measures to mitigate the risk of future non-compliance. The ACCC is expected to finalise amendments later this year.
- An ongoing class action against traders from Barclays Bank, JPMorgan Chase Bank, Citibank, UBS (represented by HSF) and Natwest Markets is expected to proceed to mediation, following a process for the temporary registration and closure of the class. The class action alleges that the traders were involved in a cartel to coordinate the manipulation of forex benchmark rates, control the pricing of spreads and triggering client stop loss and limit orders. All five banks deny the allegations. There have only been 10 class actions alleging cartel conduct in Australia, which has had a class action regime since 1992, representing just 1.2% of all class actions filed (as at 2023).[1] It will be instructive to see how this case develops, and whether private enforcement of competition law, in particular cartel conduct, through class actions might start to garner more favour in the Australian context, as is the case in other jurisdictions, such as the US and UK.

Hong Kong

Hong Kong Competition Commission pursues first dawn raid on domestic premises through cross-authority joint operation

Background

In April 2024, the Competition Commission of Hong Kong (the "**HKCC**") announced that it had conducted unannounced inspections at around 40 different premises in conjunction with Hong Kong's anti-corruption authority, the Independent Commission Against Corruption (the "**ICAC**").[26] 20 individuals were arrested in connection with a renovation syndicate thought to be '*engaging in corruption and tender-rigging in relation to building maintenance*'. The individuals included project contractors, project consultants, middlemen, and members of property management companies.

This is one of the largest scale dawn raid operations by the HKCC to date. The investigation was prompted by a corruption complaint made by members of the public to the ICAC about building maintenance. In-depth enquiries by the ICAC uncovered the building maintenance tendering syndicate. In parallel, the HKCC received intelligence of alleged anti-competitive conduct in relation to the building maintenance projects, which prompted its investigation.

Increased use of joint operations

This joint operation fits into a broader enforcement trend: the HKCC is increasingly working with other authorities and conducting joint operations. Over the past two years, there have been a number of raids conducted jointly with, or otherwise supported by, other agencies:

- With assistance from the Hong Kong Police Force (**HKPF**), the HKCC conducted two visits in relation to the funeral industry. First, in August 2023, the HKCC conducted a surprise visit to a forensic medicine centre after receiving intelligence that funeral service providers had engaged in market sharing.[27] Second, in January 2024, the HKCC executed search warrants in the office of a trade association and various funeral premises for further investigation.[28]
- In November 2022, the HKCC conducted an anti-crime joint operation in a fish market with multiple authorities, including the HKPF, Marine Department and Immigration Department (among others).[29] During its initial visit, the HKCC

Snapshot: Other Hong Kong developments

The HKCC continues to pursue one of its enforcement priorities by targeting exploitation of public funding and subsidies. In June 2024, the Hong Kong Competition Tribunal granted its first order against undertakings which were involved in manipulation of bids for a Covid relief program. During the investigation, and for the first time, HKCC deployed data screening techniques to identify suspicious patterns that might be indicative of anti-competitive conduct, showing its readiness to embrace technology for efficiency.

26. https://www.compcomm.hk/en/media/press/files/Joint_operation_PR_EN.pdf

27. https://www.compcomm.hk/en/media/press/files/Funeral_Undertaker_PR_EN.pdf

28. https://www.compcomm.hk/en/media/press/files/Funeral_Service_PR_EN.pdf

29. https://www.compcomm.hk/en/media/press/files/PR_joint_operation_1127_EN.pdf

did not exercise its investigatory powers, but later conducted further inspections, executing search warrants in the same market (in December 2022[30] and June 2023[31]). The June 2023 operation was especially large, with 352 workers being questioned.

- In January 2022, the HKCC and the Organised Crime and Triad Bureau of the HKPF conducted a joint raid on two office premises of a property management company in relation to suspected anti-competitive conduct in the tender exercise conducted for a building maintenance project.[32]

In the press release for this January 2022 operation, the HKCC stated that it would "*continue to maintain close liaison with other law enforcement agencies and related authorities*", clearly signalling its intention to continue collaborating with other government authorities.

The significance of the trend towards joint operations conducted by the HKCC should not be overlooked.

First, different authorities have varying powers. When raids are undertaken jointly, the subjects concerned can be subject to a wider range of powers. For example, the HKCC does not have the power to arrest individuals during a search. However, if the ICAC is exercising its powers in relation to a suspected infringement of the Prevention of Bribery Ordinance, it could deploy its powers of arrest.

In other areas, the HKCC's powers may be broader – for example, the HKCC has the power to require an individual to provide documents, passwords, or information during the course of a dawn raid. Conversely, in the context of a HKPF or ICAC investigation, targets are generally protected by the right to silence, privilege against self-incrimination, and are not under an obligation to proactively assist the authorities. Procedural uncertainties are amplified by the fact that the HKCC's *Guidelines on Investigations* have not been updated since their publication in 2015 and do not consider joint dawn raids or joint operations.[33] Therefore, the cross-reliance on authorities' differing powers means that the risks arising from a joint operation can be greater and more difficult for businesses and individuals to control.

Second, the use of joint operations by the HKCC will likely allow it to conduct operations more effectively and efficiently; this is reflected in the increased scale of the operations that have been conducted jointly between the ICAC and the HKPF. In the long run, this may also mean that the HKCC will be able to conduct more raids or otherwise engage in more investigations and enforcement activity.

First domestic dawn raid

The April 2024 joint operation also included searches in the residences of the individuals concerned. This was the first time the HKCC confirmed that it has raided domestic premises. While such raids are still relatively rare around the world, as employees work from home more frequently, occurrences are increasing.

The HKCC has general powers to enter and search *any* premises where there are reasonable grounds to suspect that there are, or are likely to be, documents that may be relevant to an investigation by the HKCC.[34] Home raids are therefore permissible, but are not specifically considered under the current *Guidelines on Investigations*.

Whilst many undertakings have put in place protocols relating to dawn raids in the workplace, risks increase when domestic raids are conducted.

First, a home raid is likely to be more stressful for the employee, and presence of family and absence of work colleagues can give rise to different dynamics. This may mean that the employee is less able to react calmly and rationally.

Second, the undertaking is less able to adhere to any internal protocols it has in place for dawn raids. This could hamper the business' ability to make informed decisions about next steps, including leniency.

Practical implications

While the HKCC will continue to flex its enforcement muscles in the future, guidance from the authority considering the unique issues which arise from joint operations and home raids remains scant.

In the absence of official guidance from the HKCC, it is important that undertakings adequately train their employees to be "dawn raid ready", regardless of which authority is responsible for the raid, and whether the raid takes place at the workplace or at domestic premises.

30. https://www.compcomm.hk/en/media/press/files/Whitewhale_PR_EN.pdf
31. https://www.compcomm.hk/en/media/press/files/Fishmarket2023_PR_EN.pdf
32. https://www.compcomm.hk/en/media/press/files/PR_Joint_operation_EN.pdf
33. https://www.compcomm.hk/en/legislation_guidance/guidance/investigations/investigations.html
34. With a court warrant, section 48 of the Ordinance.

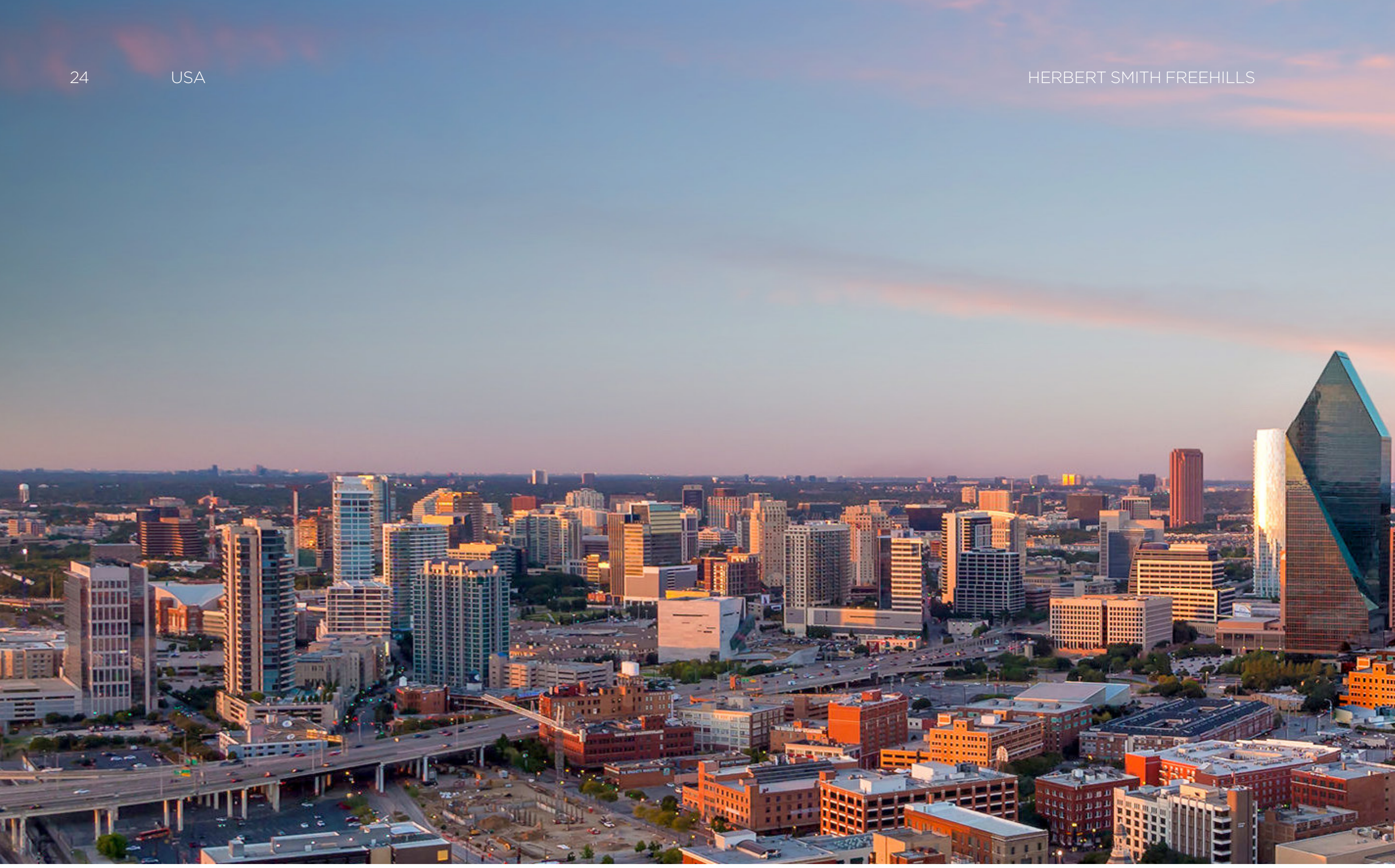
USA

The Fourth Circuit's decision in *United States v. Brewbaker* marks significant setback for the US Department of Justice in criminal enforcement

In *United States v. Brewbaker*, 87 F.4th 563 (4th Cir. 2023), the US Court of Appeals for the Fourth Circuit (the "**Fourth Circuit**") reversed a conviction for an illegal bid-rigging conspiracy on the grounds that the per se rule cannot be applied to "hybrid restraints", ie, where the parties are alleged to have been in both a horizontal *and* vertical relationship. The decision imposes a "purely horizontal" test for the application of the per se rule. The US Department of Justice ("**DOJ**") has described the case as presenting issues of "*exceptional importance to the criminal enforcement of the antitrust laws*. " The DOJ is currently seeking review by the US Supreme Court in what would be an issue of first impression. If the decision of the Fourth Circuit stands, it represents a significant setback for the DOJ's criminal enforcement efforts.

Section 1 of the Sherman Antitrust Act of 1898 (the "**Sherman Act**") is the primary federal antitrust tool for combatting cartel conduct. It prohibits unreasonable contracts, combinations, and conspiracies in restraint of trade. There are two ways to assess whether a restraint is unreasonable: the rule of reason and the per se rule. The rule of reason is the default rule. It requires the court to undertake a fact-intensive inquiry into, *inter alia*, the relevant market, the history and nature of the alleged restraint, and the effects on competition. The government must establish the restraint's actual competitive impact on a relevant market.

Under the per se rule, certain activities are deemed to be categorically unreasonable restraints – regardless of the actual impact on competition or the intent of the actors – because they would always or nearly always tend to restrict competition and decrease output. The US Supreme Court has limited per se analysis to price fixing, bid rigging and market allocation. Most criminal enforcement actions by the DOJ involve alleged per se violations of Section 1. The Fourth Circuit's decision in *Brewbaker* stands for the proposition that only *purely*



horizontal conduct can be subject to the per se rule, and that the full relationship of the alleged conspirators must be taken into account when assessing whether it is purely horizontal.

Background

The DOJ indicted Contech Engineered Solutions LLC ("**Contech**") and a former sales manager at Contech, Brett Brewbaker ("**Brewbaker**"), alleging violations of Section 1 and with mail and wire fraud (and conspiracy to commit mail and wire fraud). Contech was a manufacturer of corrugated steel and aluminium pipe and plate. Both Contech and its local distributor and exclusive dealer in North Carolina, Pomona Pipe Products ("**Pomona**"), bid on contracts with the North Carolina Department of Transport (the "**NCDOT**"). The indictment alleged that beginning in 2009, Brewbaker set about to arrange that Contech would lose each bid against Pomona. He did this by asking Pomona for its bid price in advance and then adding a small percentage on top.

Contech and Brewbaker filed a motion to dismiss the indictment, arguing that the rule of reason, not the per se rule, should govern their conduct, because the complaint alleged a restraint between Contech as supplier and Pomona as distributor – a vertical restraint – and it is commonplace for manufacturers to avoid undercutting their distributors. Contech and Brewbaker supported their motion with an affidavit from a professor of economics. The affidavit took the position that the Contech-Pomona arrangement was a classic "*dual distribution*" arrangement, in which a manufacturer simultaneously supplies its distributor and competes with its distributor in a relevant market. Moreover, the affidavit argued that bid rigging within the kind of dual distribution arrangement at issue would not have the effect of "*always or almost always*" harming competition, as required for application of the per se rule.

The district court denied the motion. It did not consider the affidavit regarding the competitive impact of the arrangement or any other exhibits submitted by the defendants. Instead, the court held that it was prohibited from considering any extrinsic evidence because the indictment alleged a bid-rigging agreement between horizontal competitors that is subject to the per se rule. Contech subsequently pleaded guilty. Brewbaker was found guilty of violating Section 1, among other charges. He appealed.

Fourth Circuit decision

On 1 December 2023, the Fourth Circuit reversed Brewbaker's conviction under Section 1 Sherman Act. The Fourth Circuit rejected the district court's conclusion that the indictment adequately alleged a per se restraint of trade for two reasons: *first*, the indictment alleged a restraint with both horizontal *and* vertical aspects (a "hybrid restraint"), which does not fall into any of the categories of restraints that have been condemned as *per se* unlawful; and *second*, there was evidence that the arrangement could have pro-competitive effects.

On the first point, the Fourth Circuit noted that the Supreme Court has applied the per se rule only to those categories of restraints where economic analysis has showed that the restraints are associated with "*manifestly anticompetitive effects*" and lack "*any redeeming virtue*." Moreover, the Fourth Circuit held that courts must "*consider the restraint in context – including how the parties are related*" before applying the per se rule. Based upon the facts alleged in the indictment, the Fourth Circuit concluded that the DOJ had alleged *both* a horizontal relationship (as competitors for NCDOT bids) and a vertical relationship (as Pomona was Contech's exclusive dealer) between Contech and Pomona. Since the Supreme Court has never classified a "hybrid restraint" as subject to the per se rule, the court concluded that the rule of reason presumptively applied to the conduct.

On the second point, the Fourth Circuit noted that the per se rule may only be applied to a *new* category of restraint where the restraint in question has "*manifestly anticompetitive effects*" and lacks "*any redeeming virtue*." The Fourth Circuit agreed with the defendants' economist that the relationship between Contech and Pomona was a dual distribution arrangement. The court held that the restriction of *intra*brand competition through the price-fixing

arrangement between Contech and Pomona could nevertheless have a salutary effect on *inter*brand competition by increasing Pomona's sales of Contech's aluminum. Since the Fourth Circuit could not "*predict with confidence*" that the arrangement would invariably lead to anticompetitive effects, the application of the per se rule was held to be unwarranted.

The Fourth Circuit denied the DOJ's request for rehearing and rehearing *en banc* in February 2024.

Practical implications

Antitrust defendants have already begun citing *Brewbaker* to challenge per se analysis. Under *Brewbaker* (which is binding precedent only in the Fourth Circuit), the per se rule only applies to "purely horizontal" agreements between entities, ie, where the entities are *only* related as competitors; it does not apply to "hybrid" relationships where the alleged conspirators are in both a horizontal and vertical relationship. Moreover, *Brewbaker* requires the court to consider "*the parties' broader relationships*" when classifying a restraint. The DOJ claims that this rule presents no "*idle concern*" because it upends established precedent and provides an "*easy get-out-of-jail-free card*" to potential conspirators, given the ubiquity of firms with both horizontal and vertical relationships.

The DOJ is currently seeking review of the decision by the Supreme Court.

Snapshot: Other US developments

- On November 20, 2023, the DOJ filed a statement of interest in *In re RealPage Rental Software Antitrust Litigation*, No. 3:23-md-3071 (M.D. Tenn.). This civil antitrust case concerns price-fixing claims against RealPage and landlords who use the pricing algorithm of RealPage. The plaintiffs allege that RealPage, a software company, illegally combines the landlords' decision-making on housing prices. The DOJ's statement of interest argues that the defendants' use of the pricing algorithm constitutes a *per se* violation of Section 1 of the Sherman Act. The DOJ has submitted similar statements of interest in other civil cases in support of its theory, eg, in *Cornish-Adebiyi, et al. v. Caesars Entertainment, Inc., et al.*, No. 1:23-cv-02536 (D.N.J.) and *Duffy v. Yardi Systems Inc.*, No. 2:23-cv-01291 (W.D. Wash.). The DOJ has announced in multiple public statements that it has active investigations targeting the use of artificial intelligence and pricing algorithms as *per se* price fixing.
- The DOJ has continued its focus on wage-fixing and no-poach agreements in labour markets, which the DOJ has argued are market allocation agreements subject to *per se* analysis. While the DOJ's general legal theory has survived at the motion to dismiss stage, it has repeatedly failed to achieve conviction, including in *United States v. DaVita Inc.*, No. 1:21-cr-00229 (RBJ) (D. Colo.), *United States v. Patel*, No. 3:21-cr-00220 (VAB) (D. Conn.), *United States v. Manahe*, No. 2:22-cr-00013 (JAW) (D. Me.). Moreover, in November 2023, the DOJ voluntarily dismissed the indictment in *United States v. Surgical Care Affiliates, LLC*, No. 3:21-cr-0011-L (N.D. Tex.). Notwithstanding these setbacks, the DOJ has reaffirmed its commitment to criminal enforcement of collusion in labor markets.
- The DOJ announced that it had entered into deferred prosecution agreements (**DPAs**) with two pharmaceutical companies to settle criminal antitrust allegations of price fixing. The DPAs not only required the companies to pay over $250 million in criminal penalties, but included what the DOJ referred to as "extraordinary remedial measures," *ie*, measures that "force[d] the companies to divest a business line that was central to the misconduct." Since a change in policy in 2019, the DOJ has increasingly pursued DPAs (rather than alternatives such as trial or plea agreements). The latest DPAs are significant because of the combination of large criminal fines and full divestiture, which has historically been more common in the merger review context.

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