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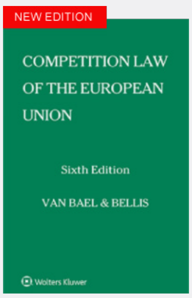
VBB on Competition Law

Issue Highlights



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MERGER CONTROL

European Union level

General Court upholds gun jumping fine on Canon for "warehousing" transaction

On 18 May 2022, the General Court of the European Union ("GC") rejected Canon's appeal of a € 28 million gun jumping fine imposed by the European Commission ("Commission") in 2019. The judgment is the latest in a string of Commission appellate victories regarding violations of merger control procedure. Notably, the judgment expands upon the previous opinions of the Court of Justice of the European Union ("ECJ") on how the EU Merger Regulation's standstill requirements apply to the implementation of multi-step transactions.

Background

Canon acquired control of Toshiba Medical Systems Corporation ("TMSC") from Toshiba through a two-step transaction. In a first step, Toshiba transferred 95% of the shares of TMSC to a special purpose vehicle ("SPV"), for the nominal price of € 800. At the same time, Canon acquired 5% of TMSC's shares for € 5.28 billion, along with a call option on the remaining shares. After executing these transactions, Canon sought and received merger clearance from the Commission. Then, as a second step, Canon exercised its call option and acquired the outstanding TMSC shares from the SPV.

The Commission fined Canon for violating Articles 4(1) and 7(1) of the EU Merger Regulation by implementing a concentration before notifying and receiving clearance (so-called "gun jumping"). The Commission concluded that: (i) the first and second steps constituted a single transaction; (ii) the first step was necessary to Canon achieving a change in control; and (iii) therefore, by executing step one, Canon had partially implemented the transaction before receiving clearance in violation of the standstill requirement. (See VBB on Competition, Volume 2019, No. 6). Canon appealed the decision.

On appeal, the debate revolved heavily around the correct interpretation of the ECJ's preliminary ruling in *Ernst & Young* ("E&Y"). In that case, the target – KPMG Denmark – had severed ties to the international branch of KPMG before notification, as a contractual precondition to being acquired by E&Y. The ECJ considered whether this could be considered gun jumping. It noted that, while it was sometimes appropriate to treat transactions that are connected by condition or closely linked in time as a single concentration, a concentration is implemented only by a transaction that "contributes" to a change in control over the target. Acts that are merely ancillary to a concentration (i.e., lack a direct functional link with its implementation), such as the transaction at issue in *E&Y*, fall outside the scope of the standstill requirement and are not gun jumping. (See VBB on Competition Law, Volume 2018, No. 5.)

"Contributing" to an acquisition of control

Fundamentally, Canon claimed that *E&Y* should be interpreted to mean that the execution of steps that may be necessary to a transaction, but do not themselves confer any control over a target, should be considered merely ancillary and do not constitute implementation. Canon argued that, because it did not acquire control over TMSC in the first step of the transaction (it was undisputed that Canon did not control the SPV), it could not have implemented the concentration prematurely. Likewise, Canon argued, the first step could not constitute even partial implementation, as it did not "contribute" to a change in control. The Commission, it asserted, had erroneously examined only whether the two steps were part of a single transaction, without evaluating whether the first step actually transferred any control to Canon.

The GC rejected these arguments, distinguishing the concept of *acquisition* of control – the act that establishes the existence of a notifiable concentration (i.e., an acquisition of control falling within the EU Merger Regulation) – from *implementation* – the process through which the concentration is brought about. Consequently, if a notifiable concentration is implemented in multiple steps (each of which form part of the concentration),

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each step will be considered to "contribute" to the change of control, and constitute implementation of the concentration, even if no control was transferred in that step.

The GC found that the Commission had correctly concluded that the two transaction steps together constituted a "single concentration", as they formed part of a "single economic project" by Canon to obtain control over TMSC, such that each step could be said to contribute to the concentration. The GC considered the Commission's conclusions to be validly based on several considerations: (i) that the first step was carried out only in view of the second step; (ii) that the purpose of the SPV was to facilitate Canon obtaining control over TMSC (and not purely in Toshiba's interest as the seller); (iii) that Canon alone could determine the ultimate purchaser of TMSC in step two; and (iv) that Canon bore the economic risk of the entire transaction as of step one (as it paid the full purchase price for TMSC).

Distinction from E&Y

The GC distinguished certain facts of *Canon* – where step one had a "direct functional link" with the concentration – from those of the merely "ancillary" first transaction in *E&Y*. First, KPMG Denmark severing its relations with KPMG's international branch was not necessary to E&Y acquiring control (even though it was a contractual pre-condition for the sale). Second, in *E&Y*, the target already operated independently on the market, and therefore when it severed its ties from its international branch, KPMG International did not relinquish any control, while Toshiba gave up control of TMS by transferring the majority of shares to the SPV (also thereby giving Canon a certain degree of influence over TMSC insofar as it could direct who could purchase it). Finally, there was a strong "tripartite" element in play in *Canon* (as Canon, the SPV and Toshiba were all closely involved in the execution of step one and Toshiba would not have relinquished control over TMSC but for the consideration simultaneously paid by Canon), that was not present in *E&Y* (where the acquirer was not directly involved in the target changing its contractual relationship with KMPG International).

Conclusion and implications

It is clear from *Canon* that implementation of a concentration can no longer be assessed based on whether the purchaser has obtained the possibility to exercise decisive influence over the target before clearance (the standard used in other gun jumping cases like *Altice* – see VBB on Competition Law, Volume 2021, Nos. 8-9).

However, it remains unclear exactly where the line is to be drawn between preparatory steps that are merely "ancillary" as in *E&Y*, and those that have a sufficiently direct functional link to the concentration to "contribute" to a change in control (despite not actually involving any acquisition of control) as in *Canon*. While the GC upheld a variety of factors as being relevant to the assessment of whether Canon's first step contributed to a change of control, it did not indicate which are dispositive, nor did it manage to articulate a clear standard that can be readily applied in future cases.

This leaves the Commission with broad discretion to identify "direct functional links" between pre-notification steps that it thinks cross the (rather fuzzy) line. It is clear that "warehousing" type strategies to park shares with a third party before notification – which the Commission never liked – must now be notified at step one. However, it also appears that the Commission could extend this to any other pre-notification activities that it does not like. Parties are advised to consider pre-notification steps carefully, and that any "creative" attempts to find work-arounds to the notification requirements, even without entailing a change in control, are undertaken at their peril given the current uncertainty in this area.

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European Union level

General Court upholds Commission's prohibition of ThyssenKrupp/Tata JV

On 22 June 2022, the GC upheld in full the Commission's 2019 decision to block a joint venture between ThyssenKrupp and Tata Steel ("the JV"). This was the first appeal of a merger prohibition since the GC overturned the Commission's prohibition of CK Hutchison's proposed acquisition of O2 UK in 2020 (see VBB on Competition, Volume 2020, No. 6), which is now on appeal to the ECJ. In that case, the Commission had failed to meet its burden of demonstrating that the acquisition would result in a significant impediment to effective competition ("SIEC") to the requisite standard, so all eyes were on whether the GC would find that the Commission had succeeded in doing so this time.

Background

The Commission had blocked the deal due to concerns that the JV could reduce the number of steel suppliers available to customers and lead to higher prices for various types of steel. Specifically, after a Phase II review, the Commission concluded that the JV would have eliminated an important competitor in the market for **automotive hot dip galvanized steel** ("HDG") products, leading to non-coordinated horizontal effects (i.e., allowing the merged entity to behave independently of market pressure to an appreciable extent) due to the elimination of an important competitive constraint. Furthermore, the JV would have created a dominant position in several markets for **metallic coated and laminated steel products for packaging** ("MCL products") and, in any event, would also have given rise to non-coordinated horizontal effects due to the elimination of an important competitive constraint in those markets. The Commission considered that other factors (such as the role of third country imports and competitive pressure from other suppliers) would not offset the negative effects of the transaction and that the remedies the parties offered were also insufficient to allay its competitive concerns. (See VBB on Competition, Volume 2019, No. 6.)

The parties appealed the prohibition to the GC on numerous grounds, including allegations that the Commission had failed to adequately define the relevant markets, had improperly assessed the existence of a SIEC, had incorrectly rejected the remedies offered by the parties, and had committed various procedural errors.

Market Definition

The parties alleged that the Commission had committed various errors in defining both the relevant markets for MCL and automotive HDG products, including: (i) that it should have conducted a SSNIP (small but significant non-transitory increase in price) test to assess substitutability between products, which they argued is required under the Commission's Market Definition Notice, and (ii) that it should have followed the same steps it had used to define the relevant markets in the nearly contemporaneous *ArcelorMittal/Ilva* case (see VBB on Competition, Volume 2018, No. 5).

The GC rejected the assertion that the Commission was obliged to carry out a SSNIP or any other econometric test to assess substitutability, noting that a variety of other tools and evidence, such as market studies or customer and competitor assessments, could be validly used to determine market definition. It also rejected the assertion that the Commission was bound to use the same market definition methodology it may have used in an earlier case.

SIEC Test

The parties also alleged that the Commission had committed various errors in finding that the JV would lead to a SIEC in the automotive HDG and the various MCL markets. In particular, they alleged that the Commission had failed to meet the test articulated in *CK Hutchison*, of showing that the competitor being eliminated through

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the JV (Tata) was an important competitive force by demonstrating that it stood out from its competitors. The parties argued that Tata did not correspond to any of the situations listed in paras. 37-38 of the Commission's Horizontal Merger Guidelines (being neither a new entrant nor a major innovator). The GC clarified that these situations were provided as examples of circumstances in which market shares may not reflect competitive realities, and that the Commission had conducted a sufficiently detailed analysis to demonstrate that Tata stood out from competitors.

The parties also argued that the Commission had mixed up two different and incompatible theories of competitive harm with regard to their finding of a SIEC in the affected MCL markets. The Commission had concluded that the creation of the JV would give rise to a dominant position as regards tinplate and laminated steel, and that in any event, would also give rise to horizontal non-coordinated effects due to the elimination of an important competitive constraint in these oligopolistic markets. The parties argued that the Commission erroneously applied the same analysis to both theories and to all MCL product markets, and that a market could not be both dominated by a single undertaking and oligopolistic at the same time. In so doing, the Commission had allegedly inappropriately used the SIEC test as a lower catch-all threshold, in the event that it was unable to prove single firm dominance.

The GC noted that under recital 25 of the 2004 EU Merger Regulation, a SIEC is intended to include, but also extend beyond, dominance – such that the two concepts were not mutually exclusive. Moreover, the GC found that, although the Commission's analysis focused on the same factual elements (e.g., market shares, capacity, imports, buyer power), it clearly distinguished between the elements required to find a dominant position and those used to support a finding of non-coordinated horizontal effects for each relevant market.

Remedies

Finally, the parties alleged that the Commission applied a stricter test than was necessary when assessing the sufficiency of the remedies they offered – requiring the remedy to replicate the competition that would be lost as a result of the transaction rather than to simply cure the competitive concerns the Commission had raised. The GC, however, concluded that the Commission had ultimately concluded that the remedies offered would be insufficient to remedy the SIEC and that its position was therefore in line with the requirements of the Remedies Notice.

Conclusion

In sum, while the GC's judgment did not explicitly discuss the outcome in *CK Hutchison*, that case nonetheless loomed large over the proceedings. The parties appeared emboldened to put each legal and factual element of the Commission's assessment to the test on appeal, and the GC took great pains to analyse each argument comprehensively. It is clear that even post-*CK Hutchison*, the Commission still enjoys a wide margin of deference in reaching its conclusions. At the same time, the GC appears to be signalling that this deference is not unlimited and that each point of analysis must be well-supported. That said, as *CK Hutchison* itself is on appeal to the Court of Justice, it remains to be seen how the ultimate outcome of that case will affect the standard of judicial review going forward.

MERGER CONTROL

National level

UNITED KINGDOM

Meta loses its Giphy appeal in the UK CAT – can the CMA ever be successfully challenged on substance?

On 30 November 2021, the UK's Competition and Markets Authority ("CMA") concluded its Phase 2 investigation into Meta's completed acquisition of Giphy (which closed in May 2020), ordering Meta to reverse the deal and sell Giphy to a CMA-approved purchaser (for further details, see VBB on Competition Law, Volume 2021, No. 4 and VBB on Competition Law, Volume 2021, No. 11).

On 23 December 2021, Meta applied to the UK's Competition Appeal Tribunal ("CAT") to quash the CMA's prohibition decision based on six grounds (summarised here). In a judgment delivered on 14 June 2022, the CAT dismissed all of Meta's grounds of appeal apart from a purely procedural ground related to confidentiality redactions (also referred to as "excisions").

It is worth noting that, two weeks later, on 27 June 2022, the Austrian Supreme Court dismissed an appeal by the Austrian Competition Authority, challenging the approval of the transaction subject to remedies, following an in-depth probe by the Austrian Cartel Court. Unlike the CMA – which considered the divestment of Giphy to be the only effective remedy – the Cartel Court decided that the deal could go ahead due to a number of commitments offered by Meta, chiefly granting non-discriminatory access to the Giphy library to competitors for a period of five years.

The CAT Appeal

Meta sought to challenge most of the pillars of the CMA's Phase 2 decision, such as the counterfactual and the market definition relied on by the CMA, and argued that the CMA had acted irrationally and disproportionately with regards to determining the appropriate remedy. The CAT disagreed with all of these points, confirming the CMA's findings and endorsing its ultimate decision to require the full divestment of Giphy as the appropriate remedy.

In particular, the CAT endorsed the CMA's approach to prohibiting transactions based on substantial lessening of dynamic competition (instead of static or potential competition), i.e., by analysing how Giphy could compete with Meta in the future absent the transaction and concluding that the acquisition would impede such dynamic competition. The CAT recognised that this is indeed an "innovative way" to justify the unwinding of an acquisition, and further acknowledged that dynamic competition is "a slippery concept" in general. Nevertheless, the CAT concluded that, as long as the CMA articulates a proper framework for its assessment of a novel theory of harm, this would be enough to justify the CMA's ultimate decision to block a merger based on such a theory, irrespective of how speculative it may be.

The only complaint that the CAT sustained was the second part of the fourth ground of appeal, in relation to redactions of confidential information that formed part of the CMA's findings. The CAT agreed with Meta that the information in question should not have been excised from the confidential version of the CMA's decision (as such excision prevented Meta's legal team from properly understanding the CMA's reasoning and defending Meta's position on that basis). The CAT essentially concluded that the "*redactions applied by the CMA to details forming the reasons for its decision in both the provisional findings and to the decision are difficult to defend*", including because the CMA's approach to disclosure appeared to overly favour the confidentiality concerns of third parties.

Next Steps

It is still to be determined whether (and, if so, when) the case is to be remitted back to the CMA for reconsideration – in particular because the CAT did not rule on the precise course of action that should result from its findings.

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However, the CAT invited Meta and the CMA "*to consider what consequential orders should be made and — more particularly — to identify how and when the question of remittal can be determined*", which means that the point on confidentiality will have to be addressed by the CMA.

A full re-run of Phase 2 is perhaps unlikely to be necessary in *Meta/Giphy*, given that there is only one point of procedure that the CMA will have to address, but what the parties propose to the CAT in terms of next steps remains to be seen and could theoretically still lead to a remittal. However, even in that scenario it is worth noting that the CAT has left open the possibility that the CMA could reconsider and ultimately still re-adopt its Phase 2 final report (again blocking the deal), provided that it addresses the specific procedural failing identified by the CAT (especially given that all other grounds of appeal were unsuccessful).

Conclusion and implications

The judgment underscores that successfully challenging the substantive analysis of a CMA merger decision is very difficult, and therefore the outcome of this case is unsurprising. The CAT process is conducted according to a "judicial review standard", which, in practice, means that it focuses primarily on the completeness and fairness of the CMA's decision-making process (rather than on the facts). The CAT is also generally deferential towards the CMA, and has previously strongly endorsed the CMA's wide margin of discretion – most notably in the 2021 appeal in the prohibited *Sabre/Farelogix* merger (see VBB on Competition Law, Volume 2021, No. 5).

For practitioners, Meta's small, procedural win means that, in the future, the CMA will have to be more careful when redacting third-party sensitive information in confidential versions of its reports, in order to strike an appropriate balance between the parties' rights of defence and third-party confidentiality considerations.

Consequently, the CMA will be less willing to accept third-party confidentiality submissions vis-à-vis the merging parties, and in particular information disclosed under strict confidentiality.

In sum, the CAT has endorsed the CMA's overall assessment of the Giphy acquisition and boosted the CMA's position as a world-leading competition regulator with newly acquired powers, post-Brexit, to challenge global transactions. This is especially true in relation to digital markets, where the CMA's interventionist approach has led to it blocking a number of recent tech deals in Phase 2, including: *viagogo/StubHub* (see VBB on Competition Law, Volume 2021, No. 2), *FNZ/GBST* (see VBB on Competition Law, Volume 2020, No. 11) and *Sabre/Farelogix* (see VBB on Competition Law, Volume 2020, No. 4).

For dealmakers, the key takeaway is that the CMA has been very active in the digital sector and is willing to intervene in situations where merging parties may not expect it, including by taking a very flexible approach to asserting jurisdiction and calling in already-completed deals.

FOREIGN DIRECT INVESTMENT

National level

UNITED KINGDOM

Three months of the UK NSI Act: first "annual" report published

On 16 June 2022, the UK Government published its first – and slightly misleadingly titled – annual report (the "Report") in relation to the operation of the National Security and Investment Act (the "NSI Act"). The Report summarises the functioning of the extremely wide-ranging UK foreign direct investment screening regime that was established under the NSI Act and came into force on 4 January 2022 (with the Report only covering the first three months of its operation, up until 31 March 2022). Some key themes and statistics identified by the Report are as follows:

- A total of 222 notifications were received during the reporting period (which, extrapolated over a year, is slightly below the lower bound of the UK Government's 1,000 – 1,800 annual estimate in its original Impact Assessment). Of those 222 notifications:
    - 196 were mandatory notifications, 25 were voluntary notifications and one was a retrospective validation application; and
    - 17 cases were called-in for further assessment (which, extrapolated again over a year, is slightly below the Impact Assessment's estimate of 70-95 annual call-ins), three of which were ultimately cleared. The remaining 14 cases were still under assessment at the end of the reporting period.
- Only a very small proportion of notifications were rejected (seven out of 178 mandatory notifications, and only one of 22 voluntary notifications), with common reasons for rejection including (i) mandatory notifications that should have been voluntary; and (ii) single notifications covering multiple qualifying acquisitions that should thus have been submitted as two separate notifications.
- As regards timing, it took an average of three working days to inform parties that a mandatory notification had been accepted as complete. For cases that were then called in, these were decided (i) on average within 24 working days; and (ii) in any event, within the 30 working day deadline (with the shortest single assessment period being 11 working days, and the longest being 30 working days).
- Perhaps unsurprisingly, the three economic sectors with the highest number of *mandatory* notifications were: Defence, Military and Dual Use, and Critical Suppliers to Government (with Artificial Intelligence and Data Infrastructure following closely behind) – and these sectors also experienced the highest call-in rates. *Voluntary* notifications were most commonly received in relation to transactions concerning Professional, Scientific and Technical Activities, Data Infrastructure and Other Service Activities.
- During the reporting period, no penalties were issued for NSI Act-related breaches (e.g., closing a notifiable acquisition without prior approval) – and there were also no criminal prosecutions or judicial reviews of decisions under the NSI Act.

Overall, we agree with the Report's assertion that, since "[t]*he data only covers the first three months of operation and we do not yet know whether there will be cycles of greater and lesser relevant activity through the year* [...] [w]*e therefore cannot draw long term trends just from these months' data*" – and, as such, it may be somewhat premature to read too much into the Report's findings.

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The Report further explains that “[w]*e expect that more detail and analysis will be available in future annual reports*”, companies – and their advisers – will be hoping that such future iterations (which will cover years from 1 April – 31 March) are indeed more illuminating. In particular, it will be worth keeping a close eye on the final outcomes of the cases that have been called-in for a more detailed review, since these could serve as a useful indictor of the likely outcome of factually-similar future reviews (in what can otherwise seem a fairly opaque process).

ABUSE OF DOMINANT POSITION

European level

General Court annuls in its entirety the Commission decision fining Qualcomm € 1 billion

On 15 June 2022, the General Court of the European Union ("GC") upheld all of Qualcomm's arguments and therefore annulled the decision of the European Commission ("Commission") fining Qualcomm € 1 billion for abuse of dominant position on the Long-Term Evolution ("LTE") chipsets market. In particular, the GC observed several procedural irregularities that affected Qualcomm's rights of defence. In addition, the GC found substantive irregularities that affected the analysis of the anticompetitive effects, most notably because the Commission failed to account for all relevant surrounding circumstances when assessing Qualcomm's practices.

Background

In 2018, the Commission imposed fines totalling € 997.439 million on chipset producer Qualcomm for abusing a dominant position contrary to Article 102 TFEU (see VBB on Competition Law, Volume 2018, No. 1). The Commission found that Qualcomm abused its dominant position by allegedly making significant payments to a key customer – Apple – on condition of exclusivity, i.e., in exchange for it obtaining *all* the Long-Term Evolution ("LTE") chipsets it needed exclusively from Qualcomm.

The Commission characterised these agreements as exclusivity payments, and found they were capable of having anticompetitive effects in that they had reduced Apple's incentive to obtain its chipset requirements from competing LTE chipset suppliers.

The GC annulled the Commission's decision on the ground that the Commission had made a number of procedural errors that resulted in an infringement on Qualcomm's rights of defence and that the Commission's analysis of the anticompetitive effects was unsubstantiated in view of the evidence available and all surrounding circumstances.

The obligation to record meetings and conference calls with third parties held for the purposes of collecting information relating to the subject matter of the investigation

The GC found that the Commission failed to disclose to Qualcomm certain meetings it had with third parties until *after* its decision had been released, and when it did provide the recordings of these meetings, provided notes that were virtually useless, mentioning no details of the meeting's content. Since Qualcomm neither knew about the meetings nor about what was discussed, it had no opportunity to prepare arguments on what was discussed in those meetings or the reliability of the parties providing that information.

Though adequate records of these meetings were not available, the GC agreed with Qualcomm that it is likely that key assumptions underlying the Commission's decision were established in those meetings (such as market definition, market power, dominant position, etc.). This was particularly likely given the fact that the parties interviewed were adverse to Qualcomm, which meant that Qualcomm would have wanted the opportunity to refute their statements with its own evidence. In failing to notify Qualcomm, the Commission deprived it the opportunity to be heard on any of this evidence.

The impact of the change in scope in the statement of objections on the economic analysis

During its investigation, the Commission contemplated, in its statement of objections, alleging an abuse on the market for LTE chipsets and on the market for Universal Mobile Telecommunications System ("UMTS") chipsets. Qualcomm presented a critical margin analysis ("CAM"), i.e., an economic analysis which sought to demonstrate that a hypothetical competitor as efficient as Qualcomm could have competed with it to supply LTE and UMTS chipsets to Apple. While the Commission decided to

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European level

abandon the infringement on the UMTS chipsets market, it rejected Qualcomm's CAM, which included data relating to both LTE chipsets and UMTS chipsets and the Commission carried out a "revised" CAM.

First, the GC explained that the Commission is free to abandon some or all of the objections it initially made against Qualcomm without providing a supplementary statement of objections. It is only required to communicate a supplementary statement of objections if failure to do so before rendering a decision would result in reliance on new objections or new evidence that the company did not have the ability to defend against.

The GC nevertheless decided that the Commission should have given the opportunity to Qualcomm to adapt its economic analysis to consider the withdrawal of the objections relating to UMTS chipsets. By not hearing the views of Qualcomm in relation to this point, the GC found that the Commission infringed Qualcomm's right to be heard.

An unsubstantiated analysis of the anticompetitive effects

Qualcomm claimed that the Commission made manifest errors of assessment in its analysis of the capability of the payments concerned to have anticompetitive effects.

First, recalling previous case law, the GC explained that the analysis of whether the payments at issue were capable of restricting competition must consider all relevant factual circumstances surrounding the payments. Moreover, the GC added that "*the analysis of the anticompetitive capability cannot be purely hypothetical*", meaning that there must be an actual effect on competition caused by the payments.

Thus, the GC found that the Commission's analysis failed to account for all relevant surrounding circumstances when analysing the capability of these agreements to have anticompetitive effects. In particular, it overestimated the ability of these agreements to reduce Apple's incentive to switch to a different chipset supplier given the fact that there was no suitable alternative for Apple to purchase a very large part of its LTE chipsets from for the period alleged (2011-2015) – entirely for iPhones and for *most* iPads – due to competitors' lack of ability to produce adequate technical alternatives. The GC even noted that the fact that Apple sourced LTE chipsets from Qualcomm "*could fall within competition on the merits, and not an anticompetitive foreclosure effect resulting from the payment*" at issue. The only basis for the Commission's finding of anticompetitive effects on the entirety of the LTE chipset market relied on only two models of iPads from 2014 and 2015. The basis of its argument was that Apple was considering moving its business to Intel for these models, and that Intel was capable of supplying viable alternative LTE chipsets for these iPad models, but Apple was dissuaded from transferring business on account of the agreements.

However, the GC noted that the contested decision did not argue that the agreements had capability of producing anticompetitive effects limited to Apple's 2014 and 2015 iPad market, but instead covered *all* of Apple's requirements during the period concerned for both iPads and iPhones, a conclusion an example limited to two models does not support.

Further, the GC found that the conclusion that Apple's decision not to contract with Intel was influenced by the agreements it had with Qualcomm largely ignored evidence in the Commission's own case file. Specifically, documents and emails from Apple that highlighted technical and scheduling shortcomings of Intel that at the very least undermine the conclusion that the agreements were the main cause of its choice.

Finally, the GC added that, in any event, the Commission did not provide an analysis to support the finding that the payments at issue lessened Apple's incentives to switch to Qualcomm's competitors for LTE chipsets for certain iPad models to be launched in 2014 and 2015.

ABUSE OF DOMINANT POSITION

National level

FRANCE

French Competition Authority accepts Google's commitments to compensate French publishers for the use of journalistic content

On 3 June 2022, the French Competition Authority ("FCA") announced that it accepted Google's commitments related to compensating French publishers for the use of their journalistic content in a range of Google's services. This brings to an end the FCA's investigation into Google's alleged abuse of its dominant position by refusing to display content of publishers who did not authorize the use of their article extracts free of charge. Google's commitments also end the FCA's related investigation alleging that Google failed to comply with the FCA's interim order requiring Google to negotiate with publishers in good faith about proper compensation.

Background

In July 2019, France implemented Directive 2019/790 on Copyright in the Digital Single Market which allows press agencies and publishers to claim compensation for the re-use of their journalistic content by information society service providers. Arguably in compliance with the text of the Directive and implementing legislation, Google announced that it would no longer display article extracts, photographs, infographics and videos within its various services (Google Search, Google News and Discover) unless the publishers grant authorisation to use their content free of charge.

In November 2019, the *Alliance de la Presse d'Information Générale* as well as the *Syndicat des Editeurs de la Presse Magazine* and *Agence France-Presse* lodged complaints before the FCA, alleging that Google's decision to refuse using content of publishers that demanded compensation constituted an abuse of a dominant position.

To end the investigation on the merits, Google offered in December 2019 several commitments. The commitments, however, initially failed to satisfy the FCA, and were revised four times over the course of the investigation to address concerns raised during the market test.

In April 2020, while the investigation on the merits was still pending and the FCA was examining Google's commitments, the FCA imposed interim measures on Google since it considered on a preliminary basis that Google's practices were likely to constitute an abuse of a dominant position by (i) imposing unfair trading conditions that caused serious and immediate harm to the press sector; (ii) discriminating among publishers; and (iii) circumventing the objective of the law. The interim measures required Google to negotiate in good faith with French press publishers and press agencies the terms and conditions governing the use of their content (article extracts, photos, infographics, videos, etc.) on various Google services, in particular Google Search, and to continue to display this content during the negotiation period (see VBB on Competition Law, Volume 2020, No. 4). This decision was upheld by the Paris Court of Appeal (see Paris Court of Appeal, 8 October 2020, RG n°20/08071).

In July 2021, the FCA fined Google € 500 million for allegedly breaching several interim measures, including the requirement to negotiate with the press publishers in good faith and according to objective, transparent and non-discriminatory criteria. Google appealed the decision before the Paris Court of Appeal.

Google's final commitments

The FCA has now finally been satisfied that the commitments submitted by Google will effectively address the FCA's (and the publishers') concerns.

ABUSE OF DOMINANT POSITION

National level

The scope of the commitments is broad to include all publishers protected under the French implementing legislation. They also cover news agency rights that are integrated into third-party publications. This was one of the key improvements in Google's commitments.

To respond to the discrimination concern among publishers, Google commits to "negotiate in good faith" with all press publishers and news agencies upon their request on the remuneration for any reproduction of protected content on its services in accordance with transparent, objective and non-discriminatory criteria and the modalities laid down by the implementing legislation.

Google also commits to share advertising revenue information with a monitoring trustee to allow for a transparent assessment of the compensation offered by Google, and to resolve disputes through arbitration at Google's expense.

Lastly, Google committed to withdraw the appeal against the July 2021 decision fining Google for non-compliance with the interim measures.

Takeaway

Google's commitments end this highly interesting case, in which the FCA developed a novel and highly "creative" theory of harm under Article 102 TFEU in order to protect the interests of French publishers. Google's initial decision not to use content of publishers that demanded compensation appeared to comply with the text of the 2019 Copyright Directive and French implementing legislation which do not appear to require platforms to indiscriminately use all content and pay for it.

In this context, it is particularly noteworthy that the FCA required Google, as part of its commitments, to withdraw its appeal against the fine for allegedly violating the FCA's interim measure. It is questionable whether requiring a waiver of the right to judicial review is compatible with European fundamental rights law, in particular the "right to a fair trial" under Article 47 of the Charter of Fundamental Rights of the European Union. Given the FCA willingness to explore a novel theory of harm, including about when a dominant firm is "sufficiently fair" to other market participants, judicial review would have been a welcome check of the FCA's approach. Moreover, a court case could have led to a reference question to the Court of Justice of the European Union (ECJ) which would have had an opportunity to clarify the scope of Article 102 and Google's obligation uniformly for the entire EU.

Concerns about publishers' rights remain relevant for Google since the German Competition Authority is investigating whether Google's contractual terms unreasonably disadvantage publishers and, in particular, make it disproportionately difficult for them to enforce their ancillary copyright when participating in Google News Showcase.

French Competition Authority, first competition authority to accept commitments from Meta in antitrust proceedings

On 16 June 2022, the French Competition Authority ("FCA") announced that it accepted Meta's commitments related to practices that would have raise competition concerns in the French market for non-search related online advertising. This clarifies the conditions of access to Meta's partnership program, as well as ensuring that Meta's business teams are engaging in appropriate market behaviours.

Background

In 2019, following a complaint from a French online advertising company, the French Competition Authority ("FCA") started an investigation against Meta (formerly Facebook) regarding several practices that could affect competition conditions, on the one hand, between the various advertising intermediation service providers, and, on the other hand, between the French online advertising company and Meta.

ABUSE OF DOMINANT POSITION

National level

As of 2016, Meta made available specific application programming interfaces ("APIs") to some advertisement intermediaries, including the French online advertising company, that it used to improve bidding and campaign success tracking. In 2018, Meta stopped providing these APIs to the online advertising company. In addition, it revoked its "Facebook Marketing Partner" status, which had enabled the online advertising company to increase the quality of its services, gain better access to APIs, and boost its client reputation.

Competition concerns identified

The FCA established the "unavoidable" character of the Meta platform on the market for social networking services, and concluded that Meta is likely to hold a dominant position on the French market of online advertisement not linked to web searches. The FCA then expressed concerns about the following:

- The conditions under which the French online advertising company was deprived of access to the "Facebook Marketing Partner" (now "Meta Business Partner", "MBP") program were characterised by a lack of objectivity, transparency, predictability, and stability of the criteria for access as well as inconsistent treatment in its implementation.

- At the end of 2017, Meta's business team engaged in communications that could have been qualified as disparaging, communications that contributed to the online advertising company's inability to re-enter the Facebook Marketing Program.

- Finally, in 2018, Meta removed the online advertising company from its API "User Level Bidding" allowing companies to optimize its retargeting offer within the Meta advertising ecosystem by utilizing its own bidding and product recommendation capabilities. Again, this gave rise to questions about Meta's API access criteria's openness, objectivity, and non-discriminatory character.

Meta's final commitments

In 2021, Meta requested the benefit of the commitment procedure and offered three initial commitments, namely (i) to "preserve" the objectivity, clarity and non-discriminatory application of the MBP AdTech performance criteria; (ii) to have its sales teams undergo compliance training; and (iii) to develop and make available a "referral feature" to MBP AdTech partners who would have the MBP AdTech badge. The geographic scope of the commitments was limited to advertising technology providers engaged in advertising campaigns targeting users of the Facebook and Instagram services identified by Meta as being in France.

Meta was asked to revise its commitments several times and finally committed to:

- Provide access to MBP to companies operating in the field of AdTech. Meta is also committed to ensuring the criteria for access and retention in this program are objective, clear, and non-discriminatory.

- Provide business teams with compliance training. The commitment applies to all business teams working with advertisers who rely on AdTech service providers that are members of the MBP AdTech program which falls within the scope of the commitments. According to Meta, this would include several thousand employees worldwide. Employees will be required to take the training every year and validate it by correctly answering all the questions of the knowledge test.

- Develop a new "Recommendation Functionality" API for advertising service providers that will allow eligible companies to transmit individualised requests for product recommendations on Facebook-controlled social networks, as well as transmit individualised bid adjustments, for free.

ABUSE OF DOMINANT POSITION

National level

The commitments apply to all advertising service providers who engage in at least one advertising campaign targeting users of Facebook services in France over a 180-day period. However, if a company falls within their scope and satisfies the requirements outlined in the commitments, it may reap the benefits of the MBP AdTech program and use the "Recommendation Functionality" for all its advertising campaigns, without regard to geography.

Takeaway

While the FCA generally considers that the implementation of a compliance programs is no longer a factor that influences the amount of the fine, this case illustrates that compliance programs can be the basis of commitments offered in order to put an end to an investigation.

French Supreme Court rejects appeal and upholds competition law decision against Janssen Cilag for strategies against entry of generic competitors

Please follow this link.

ITALY

Italian Competition Authority imposes fine on Leadiant for excessive pricing

Please follow this link.

SPAIN

Spanish Competition Authority imposes fine on Enel Green Power for discrimination of competitors

On 10 June 2022, the Spanish Competition Authority ("SCA") found that Enel Green Power SL ("Enel"), and its parent company Endesa Generación SA ("Endesa") infringed the Spanish national provision prohibiting abuses of dominant position by taking advantage of its dominant position in the market of access and connection to the electricity transmission network and discriminating between companies of its own group and third-party competitors (the "Decision"). The SCA also imposed a fine of € 4.9 million jointly on Enel and Endesa.

Factual background

The SCA's investigation originated from a series of resolutions by the SCA's Regulatory Supervision Chamber ("RSC") after certain Spanish electricity producers initiated proceedings arguing that Enel unlawfully prevented access to the electricity transmission network. In the resolutions, the RSC upheld the pleas and concluded that Enel had wrongfully performed its obligations relating to its role of single node interlocutor ("IUN"). This role entails arranging and coordinating all requests for grid access via specific nodes, before submitting them to Spain's grid operator Red Electrica de Espana ("REE"). As a result, the RSC annulled the outcome of the initial grid requests and ordered the relevant proceedings to access the Nodes to be re-commenced at the point prior to Enel's improper conduct.

Based on these findings, the SCA then initiated an investigation to assess whether the conduct implemented by Enel constituted an abuse of dominant position pursuant to national competition law.

Findings of the SCA

In its Decision, the SCA found that Enel had abused its dominant position in the market for accessing and connecting to the electricity transmission network at the Tajo de la Encantada and Lastras nodes ("the Nodes") by taking advantage of its IUN role and by unlawfully favouring companies belonging to its own business group.

In its assessment, the SCA made several findings which offer interesting insights.

ABUSE OF DOMINANT POSITION

National level

a) Market definition and dominance

The SCA defined the relevant market as comprising the access and connection to the electricity transmission network at the Nodes. It concluded that each Node can be considered as a separate relevant market, as network access through other Nodes was not a sufficient substitute. Interestingly, the SCA only defined this relevant market, without analysing - for instance - the downstream market related to the supply and distribution of energy, nor the upstream market for the management of the IUN.

Regarding the existence of dominance, the SCA found that Enel had to be considered as holding a dominant position based on its role as IUN. In the SCA's view, IUNs necessarily act as the sole processors of all access requests to a certain Node until the capacity of the Node is exhausted. As a result, this role would inevitably give the IUN a dominant position in the market for access to the transmission network at each specific Node, regardless of the market shares in the supply of electricity at those Nodes at the time of processing the requests (namely, 21% in the node of *Tajo de la Encantada* and 40% in the node of *Lastras*).

b) Abuse of dominant position

On the existence of the abuse, the SCA found that Enel had unlawfully favoured requests for access to the Nodes from affiliated electricity producers over requests of third-party competitors. In the SCA's view, the discriminatory and unequal treatment was shown by the fact that Enel affiliates were able – without meeting the applicable legal requirements – to access the Nodes, whereas requests from third-party companies were deferred on the ground that their requests were deficient. In this regard, it is worth stressing that, under Spanish law, Enel had no right to require the applications be remedied, regardless of whether they were indeed deficient. According to the SCA, the unlawful delaying of the processing of the access request had the effect of improperly allocating capacity requested at the Nodes to Enel affiliates and of denying access to its competitors. As a result, the relevant requests for access were blocked, either entirely or partially, for the *Lastras* and *Tajo de la Encantada* nodes, respectively.

Moreover, the SCA stated that it was irrelevant whether the applicants had consented voluntarily to Enel verifying whether their applications were complete. The SCA recalled that the finding of an abuse of a dominant position does not require the demonstration of anti-competitive intent. However, it found that the facts of the case at stake nevertheless demonstrated that Enel had acted with the clear intention to take advantage of its IUN status, for its own benefit and to the detriment of its competitors.

In addition, the SCA relied on the recent cases of *Servizio Elettrico Nazionale* (Case C-377/20, see VBB on Competition Law, Volume 2022, No. 5) and *Generics* (Case C-307/18, see VBB on Competition Law, Volume 2020, No. 2) to establish that no proof of actual anti-competitive effect on the market was required. Rather, following the case law, the SCA deemed it sufficient to prove a possible or potential effect on competition. In this regard, the SCA found that the above-mentioned conduct led to the actual exclusion of undertakings from the Nodes, as the delay caused by the verification of applications had resulted in the capacity these undertakings sought being allocated to Enel entities. To reach this conclusion, the SCA analysed the counterfactual scenario and concluded that this effect would not have occurred had Enel complied with its obligations as IUN. The SCA apparently considered that this foreclosing effect was sufficient to establish the abuse.

In view of the foregoing considerations, the SCA found that Enel's actions which had exclusionary effects because they allocated node capacity to its own affiliates while denying access to its competitors, violated the general principle of non-discrimination. For this reason, the SCA deemed Enel's conduct to be an abuse of dominance in breach of national competition law, with Enel and its parent company Endesa being jointly and severally liable.

Observations

The Decision is noteworthy for several reasons.

Initially, the SCA, while briefly analysing the definition of market shares of Enel at the Nodes, is not clear as to which upstream or downstream market it is referring. Nonetheless, the SCA's abbreviated discussion of market shares is not determinative, as the SCA proceeds to establish dominance by focusing on node access and the inherent powers of the IUN.

The peculiarly brief analysis and ultimate definition of the market is also noteworthy because it allowed the SCA to sidestep any potential requirement to prove indispensability pursuant to the essential facilities doctrine. *Slovak Telekom* (Case C-165/19, see VBB on Competition Law, Volume 2021, No. 4) suggests that indispensability is relevant for an outright refusal to supply, but not when supply is granted on unfair conditions. The SCA may well have been expected to establish indispensability, as it had found that Enel effectively controlled, and in its conduct, denied access to the Nodes to some of its competitors. However, the Decision seems to lack such analysis.

Additional guidance on the topics explored above may well be provided in the likely action for annulment of the Decision before the Spanish Courts.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Court of Justice partially annuls Commission decision in Optical Disk Drives cartel case but upholds amounts of fines imposed

On 16 June 2022, the Court of Justice of the European Union ("ECJ") issued four judgments in which it partially annulled earlier judgments of the General Court, which had upheld the 2015 Commission Decision in relation to the optical disk drives ("ODDs") cartel case. In that case, the Commission imposed total fines of € 116 million on eight suppliers of ODDs for coordinating their behaviour in relation to procurement tenders organised by two computer manufacturers (Dell and Hewlett Packard) in breach of Article 101 TFEU.

In its decision, the Commission found that the suppliers of ODDs manipulated quarterly procurement procedures by communicating their intentions regarding bidding strategies, by sharing results of procurement tenders and by exchanging commercially sensitive information (such as pricing information but also non-price related information) as well as establishing a network of parallel bilateral contacts with a plan to avoid aggressive competition in those tenders. The Commission considered that this anti-competitive behaviour thwarted customers' attempts to stimulate price competition. The Commission concluded that the eight ODDs suppliers had committed a single and continuous infringement consisting of several separate infringements and fined them for a total amount of € 116 million. In its Statement of Objections addressed to the parties prior to the adoption of the decision, the Commission had characterised the conduct as a single and continuous infringement alone, without reference to its being comprised of separate infringements.

Four of the addressees of the Commission decision appealed against the decision before the General Court, which dismissed their actions. Appeals were subsequently brought before the ECJ seeking to have the General Court's judgments set aside. In its recent judgments, the ECJ set aside the judgments of the General Court and partially annulled the Commission Decision on two grounds, each of which will be discussed below.

First, the appellants argued that the General Court had been wrong to hold that the Commission had provided adequate reasons for treating a single and continuous infringement as necessarily consisting of a series of separate infringements. The appellants argued that, in making reference to separate infringements in its decision without referring to these in the Statement of Objections, the Commission had violated their rights of defence. According to the General Court, because each of the forms of conduct comprising the single and continuous infringement must necessarily be characterised as a separate infringement, the appellants must have understood that the Commission intended to allege against them, not only the single and continuous infringement described in the Statement of Objections, but also several separate infringements consisting of the different bilateral contacts referred to in the Statement of Objections. The ECJ disagreed with that reasoning. The ECJ took the view that the General Court confused the concept of "*conduct*" and that of "*infringement*" and that, by doing so, the appellants could not understand, in the absence of clear indication in the Statement of Objections, that the Commission intended to allege against them, not only the single and continuous infringement, but also several separate infringements consisting of the different bilateral contacts. Applying this finding to the facts, the ECJ found that the Commission had breached the appellants' right of defence since the Statement of Objections did not contain the essential elements being held against them as regards those separate infringements, in particular the legal characterisation envisaged for the forms of conduct alleged against them.

Second, the appellants claimed that the General Court had been wrong to hold that there was no inconsistency in the Commission's finding that the contacts at issue constituted individual infringements and, at the same time, met the criteria for a single and continuous infringement, in breach of the obligation of Article 296

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

TFEU to state reasons. The ECJ agreed and found that the General Court erred in law in holding that the Commission had satisfied its obligation to state reasons to find that the appellants had, in addition to their participation in a single and continuous infringement, also participated in separate infringements.

The other arguments relied on by the appellants, such as the substitution of own reasoning allegedly committed by the General Court, the alleged lack of jurisdiction, the alleged disproportionate nature of the fine and the alleged distortion of evidence by the Commission, were dismissed as unfounded. As regards the issue of fines, despite the finding of the two errors of law discussed above, the ECJ considered that neither the elements relied on by the appellants nor any ground of public policy justified it making use of its unlimited jurisdiction to reduce the amounts of the fines imposed.

PRIVATE ENFORCEMENT

European Union level

Court of Justice clarifies the temporal scope of the Damages Directive

On 22 June 2022, the Court of Justice of the European Union ("ECJ") clarified the temporal application of the Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions ("Damages Directive") to actions for damages brought after its entry into force and relating to infringements of competition law that ceased before its entry into force (Case C-267/20, *Volvo and DAF Trucks*).

Following the decision of the European Commission ("Commission") of 19 July 2016 finding that DAF, Volvo and other truck manufacturers participated in a cartel between 1997 and 2011, an unnamed claimant filed an action for damages against Volvo and DAF before a Spanish commercial court in April 2018. In the context of the proceedings before the Spanish courts, the parties contested the applicability of the Damages Directive, which led a Spanish second-instance court to stay the proceedings and refer a request for a preliminary ruling to the ECJ regarding the temporal application of Articles 10, 17(1) and 17(2) of the Damages Directive.

Distinction between substantive and non-substantive provisions of the Damages Directive

In its judgment, the ECJ recalled that the temporal application of the Damages Directive's provisions depends on the substantive or procedural nature of such provisions.

On the one hand, in accordance with Article 22(1) of the Damages Directive, Member States must ensure that the substantive provisions of the Damages Directive do not apply retroactively. Article 22(2) of the Damages Directive, on the other hand, provides that procedural provisions apply to actions for damages brought before national courts after 26 December 2014.

On that basis, the ECJ analysed whether the provisions of the Damages Directive referred to in the request for a preliminary ruling qualify as substantive or as procedural rules.

Temporal application of rules regarding limitation periods

As regards the temporal scope of Article 10 of the Damages Directive, which provides for a five-year limitation period to bring actions for damages before national courts, the ECJ noted that provisions on limitation periods are considered as substantive law because they affect the persons' subjective right to bring actions for damages before the courts. Article 10 of the Damages Directive can therefore not be applied retroactively.

The provisions of the Damages Directive are nonetheless deemed applicable to situations that continued to produce effects after the expiry of the time limit to transpose the Damages Directive into national law, that is after 27 December 2016. More specifically, an action for damages falls within the temporal scope of the Damages Directive if (i) it was brought after the expiry of the time limit to transpose the Damages Directive into national law and if (ii) the limitation period applicable under the old national rules did not expire before the date of the time limit to transpose the Damages Directive. This is the case even if the action for damages relates to infringements that ceased before the entry into force of the Damages Directive.

With respect to the start of the limitation period in this case, the ECJ recalled that limitation periods only start running when the infringement of competition law has ceased and when the claimant is aware or is reasonably expected to be aware of (i) the existence of an infringement of the competition rules, (ii) the existence of harm, (iii) the causal link between the infringement and the harm and

PRIVATE ENFORCEMENT

European Union level

(iv) the identity of the infringer. The ECJ found that, in this case, the limitation period began to run in April 2017, when the summary of the Commission decision against truck manufacturers was published. According to the ECJ, only at that time, and not at the time of the publication of the press release of the Commission decision on 19 July 2016, had the claimant sufficient knowledge of the infringement to bring a claim for damages before the Spanish courts.

On that basis, the ECJ considered that the five-year limitation period provided for under Article 10 of the Damages Directive was applicable in this case, given that (i) the action was brought on 1 April 2018, which is after the deadline to transpose the Damages Directive into national law in December 2016 and (ii) the action was brought within less than 12 months following the start of the limitation period on 6 April 2017 and was therefore not time barred according to the one-year time limitation applicable under the old Spanish rules.

Temporal application of rules relating to quantification of harm

Furthermore, the ECJ ruled that Article 17(1) of the Damages Directive, which enables national courts to estimate the amount of harm in situations where it is "*practically impossible or excessively difficult*" to quantify the harm suffered by the claimant, does not qualify as a substantive rule. Instead, rules that relate to the burden and standard of proof are classified as procedural rules in line with earlier case law of the ECJ.

Consequently, in accordance with Article 22(2) of the Damages Directive, the ECJ concluded that Article 17(1) of the Damages Directive relating to the quantification of harm suffered by the claimant was applicable to the action brought against DAF and Volvo on 1 April 2018 as the action was brought after 26 December 2014 and after the date of the transposition of the Damages Directive into Spanish law.

Temporal application of rules relating to the presumption of harm

By contrast however, the ECJ decided that Article 17(2) of the Damages Directive, which establishes a rebuttable presumption that cartel infringements cause harm, must be regarded as a substantive rule. This is because that provision can directly affect the civil liability of the infringers, and, thereby, their legal situation.

This means that Article 17(2) cannot apply retroactively. In order to assess whether Article 17(2) applied in this case, it was therefore necessary to determine whether the situation at issue "*arose before the expiry of the time limit for transposition of* [the Damages Directive] *or whether it continued to produce effects after the expiry of that time limit*".

Given that, in this case, the cartel ceased on 18 January 2011, the ECJ concluded that the situation at issue did not continue to produce effects after the expiry of the time limit to transpose the Damages Directive into national law and that, therefore, the rebuttable presumption laid down in Article 17(2) did not apply to the proceedings before the Spanish courts.

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