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VBB on Competition Law

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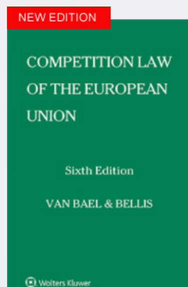

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vbb@vbb.com
www.vbb.com

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Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

MERGER CONTROL

National level

FRANCE

French authorities fine metal recycling companies for non-compete and no-poach agreements in merger

On 6 January 2023, the Directorate-General for Competition, Consumer Affairs and Fraud Control of the French government (DGCCRF) announced its decision to fine three metal recycling companies a total of € 148,000 for entering into non-compete and no-poach agreements in the context of a merger.

The French authorities reaffirmed that non-compete and no-poach agreements can be found illegal if (i) they are not necessary to complete the transaction; (ii) they constitute the main object of the agreement in question; or (iii) their geographical, material or temporal scope is disproportionate.

In this case, the non-compete and no-poach agreements were concluded for a period of three years and covered the whole national territory, which exceeded the territory in which the seller offered its services. The French authorities found that, because of their wide territorial scope and their reciprocal nature, the non-compete and no-poach agreements went beyond what was necessary to complete the merger and therefore amounted to a market sharing agreement.

Accordingly, in a settlement procedure, the DGCCRF fined the three companies € 37,600, € 90,000 and € 21,000 respectively, and required them to commit not to apply the non-compete and no-poach agreement.

GERMANY

***Meta/Kustomer* - Higher Regional Court Düsseldorf provides guidance on when a target has "significant domestic activities" under the *transaction value* threshold for merger notifications in Germany**

On 23 November 2022, in appeal proceedings lodged by Meta against a decision of the German Federal Cartel Office ("FCO") relating to its acquisition of Kustomer, the Higher Regional Court of Düsseldorf (the "Court") provided guidance on the interpretation of the criterion of "significant domestic activities" of the target. This criterion is one of the criteria that may trigger a merger notification requirement in Germany under the "*transaction-value* threshold." The *transaction value* threshold, which was introduced in 2017 as an alternative notification threshold, applies if the target does not meet the turnover threshold of € 17.5 million in Germany, but if the total value of the transaction exceeds € 400 million and the target is "active in Germany to a significant extent."

The FCO considered that Meta's acquisition of Kustomer, a US-based company providing customer relationship management services and software whose turnover in Germany did not meet the turnover threshold, was required to be notified under the *transaction value* threshold. Although the target's data processing activities take place outside Germany and the vast majority of its customers are located outside Germany as well, the FCO noted that the target's services include the processing of data of several German companies' customers. According to the FCO, this was sufficient for the target to have "significant domestic activities" in Germany. The FCO therefore required the parties to notify and ultimately cleared the transaction without conditions in February 2022.

The parties nonetheless appealed the notification requirement. The Court sided with the parties and held that the processing of data of German companies which are not the target's customers does not in itself amount

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MERGER CONTROL

National level

to “significant domestic activities” of the target within the meaning of the *transaction value* threshold. The Court specified that, insofar as Kustomer is engaged in the processing of data of German companies or consumers outside of Germany and for non-German customers, this does not amount to domestic activity. This is because the customers or users of the target’s data processing services are not the German companies or consumers whose data is being processed, but rather only those companies with which the target has a contractual relationship, the vast majority of which are domiciled outside of Germany. Domestic activity is performed only to the extent that the target provides services or products to customers or users that are domiciled in Germany. As the target had only a few customers domiciled in Germany which represented only a small proportion of the target’s total activity the Court held that these domestic activities did not qualify as “significant.” The Court concluded that the FCO had incorrectly considered that transaction was subject to a notification requirement and was not entitled to charge an administrative fee for its review of the transaction.

These court proceedings show that it may be difficult to determine with certainty whether the target has “significant domestic activities” and the *transaction value* threshold applies, and that the FCO tends to apply a rather broad interpretation of this criterion. In fact, the Court has allowed the parties to appeal its decision on points of law to the Federal Supreme Court, as it considers that the interpretation of the criterion of “significant domestic activities” involves an important point of law which is not yet resolved. In particular, the Court indicated that an issue to be clarified is whether, for the purpose of establishing significant domestic activities of the target, the acquirer’s plans for the target’s future activities, in particular in relation to the achievement of turnover in Germany, should be considered, even if the target’s current business plans do not envisage significant activities in Germany.

FOREIGN DIRECT INVESTMENT

National level

ITALY

Italy's highest administrative court clarifies Foreign Direct Investment screening principles while upholding veto against acquisition in agri-food sector

On 9 January 2023, the Italian highest administrative court (*Consiglio di Stato*, "COS"), emphatically confirmed that the Italian President of the Council of Ministers (informally also referred to as Prime Minister) enjoys a very wide margin of discretion in the application of the national foreign direct investment ("FDI") screening mechanism, *i.e.*, the so-called "Golden Powers", limiting appreciably the effectiveness of a potential judicial challenge against the Prime Minister's decisions.

Moreover, the COS held that blocking an acquisition, especially by Chinese State-owned enterprises, is justified even when remedies are offered citing difficulties in ensuring compliance.

On 21 October 2021, the President had issued a decree blocking the acquisition of the Dutch agri-food company Verisem B.V., including its five Italian subsidiaries, by Syngenta Crop Protection AG, a Swiss company indirectly controlled by the Chinese State-owned enterprise ChemChina. ChemChina's challenge had been rejected at first instance.

In its judgment rejecting the appeal, the COS repeatedly emphasised that the Prime Minster enjoys a wide margin of discretion in relation to most aspects of the FDI regime, including the strategic nature of the target, the definition of the national interest and whether the acquisition affects such interest.

The COS pointed out that the assessment of these aspects is not only related to industrial policy but also to international politics and security. While the Italian legislative framework lists certain sectors (including the agri-food supply chain) as subject to the FDI regime, the notion of strategic asset is ultimately linked to the national interest, which in turn depends on prospective geopolitical determinations; it is not an objective concept.

Interestingly, the COS was not convinced by the argument that the same indirect buyer (i.e., ChemChina) already controlled another Italian leading company in the automotive sector.

Finally, the COS confirmed that the Prime Minister is not required to inform the parties of his or her intention to block a transaction prior to his or her final decision.

ABUSE OF DOMINANT POSITION

European Union level

Court of Justice of European Union upholds finding of abuse of dominance by Lithuanian national railway company

On 12 January 2023, the Court of Justice of the European Union ("ECJ") upheld the General Court's judgment fining the Lithuanian national railway company, Lietuvos geležinkeliai AB ("LG"), € 20 million for abusing its dominant position in the Lithuanian freight market (Case C-42/21 P).

Background

In its decision of 2 October 2017, the European Commission found LG to hold a dominant position in the management of railway infrastructure in Lithuania. LG also provides rail transport services in the country and was found to be dominant in the provision of rail transport services for oil products as well.

One of LG's major customers, Orlen Lietuva AB ("OL"), owned a refinery in Lithuania near the Latvian border. In 2008, following a dispute with LG, OL considered redirecting its freight to a Latvian seaport instead of a Lithuanian seaport, using the services of the Latvian national railway company, Latvijas dzelzceļš ("LDZ"), instead of LG.

In October 2008, LG dismantled 19 kilometres of track connecting Lithuania and Latvia, close to OL's refinery. The removal of the track meant that OL had to use a much longer route to reach Latvia, and harmed LDZ's competitive position vis-à-vis LG. LDZ's entry into the Lithuanian market was rendered significantly more difficult. OL was prevented from using the services of LDZ, and as such, the removal of the track was found to constitute an abuse of dominant position.

The Commission imposed a fine of approximately € 28 million on LG which then brought an action before the General Court seeking annulment of the Commission's decision and a reduction of the fine. In its judgment of 18 November 2020, the General Court dismissed the appeal brought by LG and exercised its unlimited jurisdiction to re-evaluate and reduce the fine to approximately € 20 million, taking into consideration the gravity of the infringement (in terms of its nature and geographic extent and LG's position on the relevant markets) and duration of the infringement.

ECJ judgment

LG appealed to the ECJ, which upheld the judgment of the General Court. LG argued that the General Court should have applied the test set out in *Bronner v Mediaprint* (Case C-7/97) – *i.e.*, that in order to prove an abuse consisting of the refusal of access, it must be shown that the service/infrastructure is indispensable and that the refusal to grant access to it would eliminate all competition in the relevant market and is not objectively justifiable. The ECJ held that the *Bronner* test did not apply as (i) removal of the train tracks did not correspond to a refusal of access but to a destruction of infrastructure; (ii) the tracks were financed by public funds and owned by the state instead of being funded and built by LG for its own business needs; and (iii) LG was under a regulatory obligation to grant access to the Lithuanian rail network and was not at liberty to refuse access.

The removal of the train tracks was found to constitute an independent form of abuse. In order to prove the abuse, it was sufficient to show (subject to any objective justification) that the conduct was such as to restrict competition and constitute an impediment to market entry.

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ABUSE OF DOMINANT POSITION

European Union level

Key takeaways

The ECJ judgment illustrates the Commission's willingness, now sanctioned by the ECJ, to extend the scope of the concept of abuse, and not limit it to specific categories of conduct. This means that companies, and in particular those with a strong position on the market, need to tread very carefully and assess their conduct continually so as not to fall foul of ever-evolving EU competition laws.

Additionally, the judgment clarifies the scope of application of the *Bronner* test. Special sectors like rail, where the infrastructure has not been built by incumbents and incumbents are subject to a regulatory obligation to grant access to the infrastructure, will not be tested pursuant to *Bronner* standards. Instead, conduct in such sectors will be assessed more broadly on its effects on competition in the market.

Court of Justice of European Union clarifies in *Unilever* the imputability of antitrust violations to parties under contractual coordination and extends the scope of *Intel* to exclusivity clauses

On 19 January 2023, the Court of Justice of the European Union ("ECJ") delivered its judgment in the *Unilever* case (Case C-680/20) concerning the allegedly exclusionary strategy implemented by Unilever in Italy and consisting of the imposition by Unilever's distributors of exclusivity clauses in their (downstream) contracts with the retailers obliging these only to sell Unilever products in return for rebates and commissions. Retailers were thus incentivised to continue obtaining their supplies exclusively from Unilever and its network of distributors.

The Italian Competition Authority ("ICA") had imposed a fine on Unilever for abusing its dominant position on the national market for the distribution of individually packaged ice cream to retailers. In the appeal proceedings, the Italian supreme administrative court made a request for a preliminary ruling from the ECJ which resulted in the January 2023 judgment.

Imputability of conduct of distributors to producer

First, the ECJ held that abusive conduct materially committed by independent legal entities can be imputed to the dominant entity as a consequence of the special responsibility held by dominant entities pursuant to Article 102 TFEU not to allow their behaviour to impair genuine and undistorted competition. According to the ECJ, such responsibility also extends to an antitrust infringement caused by conduct the implementation of which had been delegated to third parties required to carry out the instructions of the dominant company. In such a case, the conduct had been determined unilaterally by that entity, which was thus (solely) liable for it. According to the ECJ, under this approach, the distributors are instruments of the territorial implementation of the dominant firm's commercial policy. The ECJ added that this is specifically the case if the relationship between producer and distributor is governed by standard distribution contracts that were drawn up entirely by the producer and oblige the distributors to include specific clauses in their downstream contracts which they cannot deviate from.

Importantly, the ECJ specified that such imputability is not conditional on the distributors forming part of the firm that holds a dominant position or on the existence of a "hierarchical link" that would result from systemic and consistent guidelines provided to the distributors to define their business decisions.

Effects analysis in exclusivity cases

Second, the ECJ reviewed the type of assessment which competition authorities are required to carry out when considering exclusivity clauses. The ECJ also looked at the relevance of the economic evidence submitted to them during the investigation. In *Unilever* the review focused on the "as efficient competitor" test ("AEC test").

In this regard, the ECJ first noted that competition authorities are not required to prove that the investigated conduct *actually produced* anti-competitive effects, but

ABUSE OF DOMINANT POSITION

European Union level

it is sufficient form them to establish the conduct's *ability* to restrict competition on the merits. However, this should rest on tangible evidence which shows that the practice under analysis was *actually capable* of producing such effects, despite the lack of any such effects.

With specific regard to exclusivity clauses, after acknowledging the strict approach established in *Hoffmann-La Roche* (Case 85/76), the ECJ applied the *Intel* jurisprudence (Case C-413/14 P), on an exclusivity-inducing rebate scheme. In the ECJ's view, both rebates and exclusivity clauses are capable of being objectively justified and their harmful effects can be counterbalanced or outweighed by efficiencies. As a consequence, competition authorities are required (i) to assess the actual capability of such clauses of excluding competitors as efficient as the dominant entity from the market if, during the investigation, that company had disputed on the basis of supporting evidence the specific capacity to exclude as efficient competitors; and (ii) to examine the ability of such clauses to restrict competition if, during the investigation, the dominant undertaking had maintained that there are justifications for its conduct.

Therefore, if, during the investigation, the dominant company produced evidence proving that the practice is unable to create restrictive effects, the competition authority is obliged to analyse it and cannot exclude its relevance without setting out the reasons why the evidence should be disregarded. Significantly, as in *SEN* (C-377/20), the ECJ explicitly linked this principle to the fundamental right for the defendant to be heard.

The ECJ also held that the AEC test constitutes just one of the possible methods for assessing the existence of exclusionary effects. Accordingly, competition authorities are not obliged to use this test (even though they cannot disregard it if it was applied during the investigation). Interestingly, the ECJ did not rule out the relevance of the AEC test for non-pricing practices "*since the consequence of the practice in question can be quantified*". With specific reference to exclusivity clauses, the ECJ suggested that the AEC test could be used to determine whether a hypothetical competitor (with a cost structure similar to that of the dominant company) would be able to offer its products or services otherwise than at a loss (or with an insufficient margin) if it had to bear the compensation or losses suffered by the distributors for switching the supplier.

Key takeaways

This judgment is highly significant since it clarifies two important aspects of the assessment of exclusivity clauses. First, dominant companies can be held liable for competition infringements even if the illegal clauses formed part of contracts to which they were not a party. Thus, even if there is no finding that the producer and distributors formed a single economic entity, contractual coordination may result in the dominant producer's liability if such coordination leaves no leeway for the members of the distribution network to depart from the producer's instructions.

Second, while (like in *Intel*) the ECJ formally subjects the effects-analysis of exclusivity clauses to the submission of evidence by the investigated party, competition authorities must now examine the effects of such clauses, as well as the existence of any objective justification, since – from a practical perspective – it is very likely that the defendant will produce evidence in that regard.

Third, the judgment does not express any preference as to what economic evidence is required to successfully dispute the establishment of an abuse. Any economic evidence proving the inability of the conduct to produce anticompetitive effect submitted by the investigated party (whether in accordance with an AEC test or based on other economic analysis) cannot be immediately dismissed by the competition authority but must be carefully examined. Following this judgment, the European Commission and national authorities are now clearly required to carry out a more detailed scrutiny of the exclusionary effects of allegedly abusive conduct, and that applies to both pricing and non-pricing practices.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Court of Justice of European Union dismisses HSBC appeal in Euro interest rate derivatives cartel case, and gives guidance on presumption of innocence in hybrid settlements

On 12 January 2023, the Court of Justice of the European Union ("ECJ") dismissed an appeal lodged by HSBC against a General Court judgment partially upholding the Commission's decision in the *Euro interest rate derivatives* ("EIRD") cartel case. In 2013, the European Commission adopted a decision under its settlement procedure against four banks for participating in a cartel in the EIRD sector in breach of Article 101 TFEU (the "settlement decision").

Three other banks, including HSBC, decided not to settle and the investigation continued under the standard cartel procedure. In December 2016, the Commission issued a decision in which it fined HSBC € 33.606 million for its participation in the infringement. On appeal, the General Court annulled the fine imposed on HSBC, but largely upheld the Commission's finding that HSBC had participated in the infringement. HSBC lodged a further appeal before the ECJ based on several grounds.

In its principal ground, HSBC argued that the Commission's adoption of the 2013 settlement decision had infringed the principle of impartiality and the presumption of innocence in so far as it made reference to HSBC before the adoption of a decision under the standard procedure. According to HSBC, this prejudged its liability and irremediably undermined its right to be heard under the standard procedure. The General Court had dismissed that claim, holding that the alleged irregularities committed by the Commission in the settlement decision could lead to the annulment of the decision adopted against HSBC *only if* it were established that, but for those irregularities, the decision adopted under the standard procedure would have been different in content.

In its recent judgment, the ECJ disagrees with the legal test applied by the General Court. According to the ECJ, an infringement by the Commission of the principle of impartiality and of the presumption of innocence in a hybrid settlement constitutes a serious infringement capable of vitiating the entire procedure. Thus, the General Court could not shy away from its obligation to examine the content of the settlement decision and had to ascertain whether that decision observed the above principles or whether it prejudged HBSC's liability.

Applying this test to the facts, the ECJ examined the content of the settlement decision and found that the Commission had taken sufficient drafting precautions to avoid any premature judgment as to HSBC's participation in the infringement. Moreover, it found that the references to HSBC made in the settlement decision were necessary for the characterisation of the liability of the settling parties and for a proper understanding of the facts of the case. HSBC's plea was dismissed on that basis.

While HSBC did not prevail on the facts, the judgment is significant in that, as a result of the ECJ applying a stricter legal test than the General Court, the Commission will need to pay particular care to referencing non-settling parties in any settlement decision. Likewise, the EU courts will be obliged to examine carefully the content of such decisions on appeal in order to determine whether these principles were observed.

PRIVATE ENFORCEMENT

European Union level

Court of Justice of European Union rules that national courts may order disclosure of evidence in damages proceedings stayed pending a Commission investigation

On 12 January 2023, the European Court of Justice of the European Union ("ECJ") delivered a judgment in Case C-57/21, *RegioJet*, in which it clarified the provisions governing the disclosure of evidence contained in 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 of the Member States and of the European Union ("Damages Directive"). The ECJ held that a national court may order the disclosure of evidence in damages proceedings linked to an alleged infringement of competition law, even if these proceedings were stayed pending an investigation by the European Commission ("Commission") concerning the same alleged infringement, provided the disclosure of evidence is necessary and proportionate for the purpose of the damages action.

Background

In November 2016, the Czech Competition Authority decided to stay its *ex officio* investigation against the national Czech railway company České dráhy concerning a possible abuse of a dominant position following the Commission's opening of a formal investigation against České dráhy for the same conduct.

In parallel, in 2015, RegioJet, which is active in rail passenger transport services, had brought an action for damages before the Czech civil courts to seek compensation from České dráhy for the harm caused by its alleged infringement of competition law. In that context, in 2018, the Czech courts ordered the disclosure of evidence connected to the damages action and subsequently decided to stay the proceedings until the closure of the Commission's investigation into České dráhy's conduct. In 2019, the Czech Supreme Court was asked to handle an appeal against the 2018 order of the Czech lower courts to disclose evidence connected to the damages proceedings and, in this context, referred several questions to the ECJ for a preliminary ruling regarding the interpretation of the Damages Directive.

The ECJ's Judgment

The ECJ held that the disclosure of evidence in an action for damages caused by an alleged breach of competition law is allowed even though the national proceedings was stayed due to the opening of an investigation by the Commission into the same conduct, provided that (i) the request for disclosure is sufficiently circumscribed and substantiated, necessary and proportionate for the purposes of the action pursued; and (ii) the request does not unduly interfere with an ongoing investigation by a competition authority into an infringement of competition law. The national courts must therefore thoroughly assess the proportionality of the request in order to prevent 'fishing expeditions'.

In addition, the ECJ affirmed that a national court can never order the disclosure of evidence covered by the blacklist of Article 6(6) of the Damages Directive (*i.e.*, leniency statements and settlement submissions). By contrast, a national court may order the disclosure of evidence that features on the grey list of Article 6(5) of the Damages Directive (*i.e.*, information prepared by the parties during competition proceedings) only when the competition proceedings are definitely closed. In that regard, the ECJ held that a stay of proceedings by a national competition authority does not amount to a closing of these proceedings within the meaning of Article 6(5) of the Damages Directive and that, therefore, evidence mentioned in the grey list could not be disclosed at that stage of the procedure.

PRIVATE ENFORCEMENT

European Union level

The ECJ added that national legislation which restricts, until the definitive closing of the competition proceedings, the disclosure of information 'prepared' specifically for the proceedings of the competition authority and all information 'submitted' for that purpose was incompatible with the Damages Directive, which only temporarily restricts the disclosure of information 'prepared' for the competition proceedings and not all information 'submitted' in that context.

This judgment is in line with the ECJ's judgment of 10 November 2022 in Case C-163/21, *PACCAR & Others* (*see*, this Newsletter, Volume 2022, No. 11), as it confirms that (i) national courts must thoroughly review requests for disclosure and assess whether there is a link between the evidence requested and the claim for damages and whether the evidence was identified with sufficient precision; and (ii) national legislation must not provide for a more limited disclosure of evidence than that provided for by the Damages Directive.

The judgment can be found here.

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Brussels
Glaverbel Building
Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone :+32 (0)2 647 73 50
Fax :+32 (0)2 640 64 99

Geneva
26, Bd des Philosophes
CH-1205 Geneva
Switzerland

Phone :+41 (0)22 320 90 20
Fax :+41 (0)22 320 94 20

London
5, Chancery Lane
London
C4A 1BL
United Kingdom

T +44 (0)20 7406 1471

VAN BAEL & BELLIS

www.vbb.com