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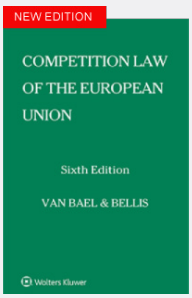
VBB on Competition Law

Issue Highlights



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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

European Union level

General Court upholds Commission's jurisdiction to review Illumina/Grail merger

On 13 July 2022, the EU General Court ("GC") issued a decision upholding the right of the European Commission ("Commission") to accept merger referrals from national competition authorities even if the transaction at issue was not reviewable by the referring jurisdiction. The ruling confirms the Commission's use of Art. 22 of the EU Merger Regulation ("EUMR") to review mergers that fall below both EU and national turnover thresholds, potentially opening any deal – regardless of size – to EU scrutiny.

Background

For the past year, the fate of the *Illumina/Grail* deal has been closely watched as the first test case of the Commission's new approach to accepting referrals under Art. 22 EUMR. This provision of the EUMR allows the Commission to examine transactions that do not meet the EU notification thresholds – meaning that the Commission would not ordinarily have jurisdiction – but that affect trade between Member States and threaten to significantly affect competition in the Member State making the referral to the Commission. Until last year, the Commission had discouraged Member States with their own merger control regimes from referring cases that do not meet their domestic notification thresholds.

However, in March 2021, the Commission issued a Guidance paper outlining a new approach to Art. 22, whereby it would encourage Member States to refer transactions that threatened competition, even if national notification thresholds were not met. This new approach is intended to close a perceived enforcement gap whereby certain anticompetitive transactions are not subject to merger control anywhere in Europe because the target company has not yet generated sufficient turnover to meet merger filing thresholds. The Commission considers such gap cases to occur, in particular but not only, in innovation-heavy pharmaceutical and technology industries.

Illumina is a leading supplier of next-generation sequencing systems for genetic testing. Grail is a start-up company that has developed an early-stage cancer detection test, which relies on Illumina's sequencing systems. Illumina's acquisition of Grail fell below the merger notification thresholds of the EU and of its Member States, and Illumina therefore did not notify the deal anywhere in Europe. Roughly a month after announcing its new Art. 22 policy, the Commission accepted the referral of *Illumina/Grail* from France – later joined by Belgium, Greece, Norway and Iceland – although none of these countries had jurisdiction to review the deal themselves. (See VBB on Competition Law, Volume 2021, No. 4). Illumina challenged the Commission's decision to accept jurisdiction before the GC.

The General Court's Decision

On appeal, Illumina made three main claims: (i) that the Commission could not accept a referral under Art. 22 where the referring Member State had a merger control regime but lacked jurisdiction to review the deal; (ii) that the Commission accepted the referral request belatedly in violation of the principle of legal certainty; and (iii) that the Commission's exercise of Art. 22 violated Illumina's legitimate expectations and legal certainty. The GC sided with the Commission and the referring Member States on each of these pleas.

The GC conducted a close read of the Art. 22 text and observed that it was broadly drafted to allow the Commission to accept "any" transaction that met the conditions of affecting trade between Member States and significantly affecting competition within the referring Member State. The GC concluded that while the legislative history showed that the aim of the mechanism, in part, was to enable countries without merger control regimes to refer transactions, successive iterations of the EUMR had shown an intent for Art. 22 to apply irrespective of whether the referring state has a national

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merger control regime and regardless of whether its own notification thresholds are met.

The GC also rejected arguments put forward by Illumina that once a Member State had delineated its merger control authority by instituting a national merger regime, it was no longer able to avail itself of the Art. 22 referral mechanism for deals falling outside of its own notification thresholds. The GC noted that, from an EU law perspective, Member States are competent over any transactions that lack an EU dimension (i.e. that are not notifiable at EU level), and it is not in the EU's purview to examine how Member States apply their own merger control rules or to determine that a Member State, by virtue of its national law, has waived the ability to exercise a referral right under EU law.

Having established that the Commission had jurisdiction to take up the *Illumina/Grail* referral, the GC also rejected Illumina's remaining pleas. In particular, it is noteworthy that the GC rejected Illumina's assertion that France had submitted its referral request to the Commission past the Art. 22 deadline, which begins to run once a deal has been notified or otherwise "made known" to the referring Member State. The GC concluded that France having merely been aware of a transaction was insufficient to start the referral clock, and that it being "made known" required active transmission of the file to the Member State with sufficient information for the State to assess whether or not a referral might be warranted. The practical implication of this conclusion is that the only way for merging parties to start the clock on any potential referrals (and definitively avoid the risk of a referral late in the deal-making process) is to formally inform every Member State that might wish to refer a transaction – even if there is no obligation to notify there. Otherwise, parties run the risk that a transaction may only "become known" to a Member State at or after closing, potentially leading to a retroactive EU review.

Conclusions

For the *Illumina/Grail* deal itself, the parties appear to face an uphill battle to convince the Commission that the remedies they have offered will be sufficient to allay concerns and achieve a clearance decision. Making the situation all the more complicated, the parties closed the deal while the Commission's review was still pending, in violation of the standstill provisions. This triggered a gun jumping investigation, in which the Commission has now issued a Statement of Objections and that may well result in substantial fines.

Illumina has announced that it intends to appeal the GC's decision to the European Court of Justice, though there is little reason to anticipate that that court will reach a different outcome. While the GC's ruling is not unexpected given the broad language of Art. 22, most of the business world was hoping for a different outcome given the legal and logistical difficulties of managing merger control risk and process under the Commission's new referral policy. For deals of any size that might raise competition concerns (or merely the threat of a complaint), the Commission's new approach to Art. 22 referrals removes the clarity previously afforded by national and EU merger notification thresholds.

The merger control landscape post-*Illumina/Grail* will be fraught with significant uncertainty as the Commission can exercise largely unfettered discretion to call in deals it simply does not like, regardless of size. Rather than reform EU merger control legislation to better handle the tricky problem posed by acquisitions of low turnover but innovation heavy targets in a more predictable way, the Commission has essentially asked Europe to simply trust that it will use its largely unlimited jurisdictional powers for the greater good (however the winds of politics may define this). We can only hope that it will exercise this newfound power judiciously and sparingly. In the

meantime, companies large and small will need to adjust deal-making and risk management to account for the possibility of an EU review, potentially even after a deal has already closed globally.

FOREIGN DIRECT INVESTMENT

National level

UK Foreign Investment Review Regime fully flexes its muscles

The first prohibition decision under the UK National Security and Investment Act 2021 ("NSIA") was issued on 20 July 2022 blocking the licensing of UK developed vision sensing technology to a Chinese player, Beijing Infinite Vision Technology Company.

The licensing agreement related to SCAMP-5 and SCAMP-7 vision sensing technology developed by the University of Manchester. SCAMP is a "low-power, high-speed machine vision device using cutting image sensors to execute a variety of vision algorithms" (see more details here).

According to the final order published by the UK Department for Business, Energy and Industrial Strategy ("BEIS"), the relevant national security risk arises because this technology has a dual-use application and it may potentially be used "to build defence or technological capabilities which may present national security risk to the United Kingdom". As expected, the order is very brief (less than one page) and does not provide a detailed reasoning.

It is interesting to note that the first NSIA prohibition came in only a day after the Secretary of State for BEIS conditionally approved the acquisition of UK-based defence firm Meggitt by US engineering and aerospace corporation Parker-Hannifin. The deal was investigated under the old UK national security regime (pursuant to the Enterprise Act 2002 which is the predecessor of the NSIA) which involved a detailed report by the UK Competition and Markets Authority and a couple of public consultations. This approval was subject to a robust remedies package to mitigate both national security and competition concerns which had been identified during the investigation.

Both recent reviews represent clear examples of UK governmental departments becoming increasingly involved in transactions which potentially impact UK security interests, and utilising new powers (for more details on the NSIA, see VBB on Competition Law, Volume 2021, No. 12).

ABUSE OF DOMINANT POSITION

European Union level

Advocate General Rantos suggests expanding the *Intel* principles to non-pricing strategies by dominant firms

On 14 July 2022, Advocate General ("AG") Rantos delivered his Opinion in the *Unilever* case, proposing that the *Intel* analytical framework should equally apply to non-pricing practices of dominant firms. If followed by the CJEU, this approach would require a full analysis of all relevant evidence, including economic evidence, in Article 102 cases to determine whether allegedly exclusionary practices are capable of foreclosing equally efficient rivals, irrespective of whether alleged exclusion is driven by pricing or non-pricing strategies.

Background

In 2017, the Italian Competition Authority ("ICA") found that Unilever abused its dominant position by implementing an exclusionary strategy in the market for single-wrapped ice-cream, primarily through the use of exclusivity clauses in its agreements with retailers (see VBB on Competition Law, Volume 2017, No. 12). The ICA rejected as legally irrelevant Unilever's economic studies which sought to demonstrate that the practices were not likely to exclude at least as efficient competitors from the market.

The appeals court rejected Unilever's appeal, holding that the *Intel* analytical framework applied only to exclusionary pricing practices and that the ICA therefore was not required to consider the economic evidence submitted by Unilever. On further appeal, Unilever persuaded the Italian Council of State to refer the question on the standard of proof in exclusionary conduct cases to the CJEU.

The Intel *framework should be equally applicable to non-price exclusivity obligations*

In Intel, the CJEU held that the Commission is "*required to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market*," if the dominant firm has submitted "*during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects*." (See VBB News, 2017).

In AG Rantos' view, there are compelling reasons to consistently apply the same framework in all exclusionary conduct cases, irrespective of the nature of the restriction imposed by the dominant firm. The AG first observes that several key statements of the CJEU in *Intel* made no distinction between rebates incentivizing exclusivity and direct exclusivity obligations. He also notes that, according to the CJEU, an assessment of the dominant firm's arguments concerning objective justifications or efficiency advantages can only be made after an analysis of the ability to foreclose at least equally efficient competitors, which – again – would apply regardless of the type of conduct at issue.

This interpretation of *Intel* is corroborated, according to the AG, when considering fundamental principles of Article 102 TFEU, whereby "*not every exclusionary effect is necessarily detrimental to competition*."

AG Rantos concludes that Article 102 TFEU, as clarified by *Intel*, should be broadly understood as preventing a dominant company from engaging in (pricing and non-pricing) practices capable of excluding competitors that are at least as efficient in terms of quality, innovation and choice of products offered.

AG Rantos further finds – consistent with *Intel* – that a dominant firm's right of defence would be infringed if a competition authority would automatically exclude economic evidence submitted by the dominant firm. The submission of evidence demonstrating that conduct was not capable of foreclosing equally efficient rivals imposes an obligation on competition authorities to objectively examine all evidence in order to meet their burden of proving anticompetitive effects. They can

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disregard such evidence only if they can at least show that the methodology used in economic studies "*does not contribute to the demonstration that the challenged conduct is not capable of excluding equally efficient competitors*."

Takeaway

AG Rantos' opinion provides a welcome development in the Article 102 TFEU space by proposing that the analytical framework developed in *Intel* applies equally to non-price exclusivity strategies as well as mixed strategies. If the CJEU follows AG Rantos' well-reasoned opinion, dominant firms would have clearer guidance on circumstances that may allow them to enter into exclusivity arrangements without incurring material antitrust risks.

Nevertheless - and contrary to post-*Intel* complaints by some officials - *Intel* and an extension of Intel to non-price conduct will not prevent competition authorities from bringing Article 102 cases alleging foreclosure of a dominant firm's rivals. Exclusivity arrangements continue to be presumptively unlawful, and defending allegations of unlawful foreclosure through exclusivity arrangements can remain challenging. In this context, it is noteworthy that AG Rantos emphasizes that evidence showing that rivals continued to successfully compete while the dominant firm used exclusivity arrangements, although potentially relevant, is not in itself exculpatory and does not shift the burden of proof to competition authorities. The bar has been raised for competition authorities, but dominant firms will have to continue to carefully consider when and how they want to use exclusivity arrangements.

ABUSE OF DOMINANT POSITION

National level

Spanish administrative court finds that "proposed" rates which are subject to adjustments and negotiations cannot be considered abusive

In a recently published judgment dated 17 February 2022, a Spanish administrative court (the "Court") partially reversed a decision of the Spanish Competition Authority ("SCA") which had fined two Spanish copyright management organizations ("CMOs") for applying discriminatory and abusive rates. The Court concluded – contrary to the SCA – that rates that the CMOs had merely proposed but had not unilaterally "imposed" on their customers could not be considered abusive, even if certain radio station customers had voluntarily agreed to pay the rates.

The SCA Decision

In a 2015 decision, the SCA had found AGEDI and AIE, two Spanish CMOs, had abused their dominant position by implementing a discriminatory tariff system, thereby placing some customers at a competitive disadvantage, and by applying unfair tariffs. Both CMOs had established a tariff system consisting of general tariffs and of tariffs negotiated through agreements with radio station associations such as AERC and FORTA. The tariff system resulted in significant differences between tariffs payable by different radio stations, depending on whether they were commercial or private stations, and on whether they were association members or independent. The SCA also faulted the CMOs for establishing (unfair) minimum tariffs for smaller radio stations that did not reflect the actual use of their repertoire. The SCA imposed fines of €1.2 million on AGEDI and €1.6 million on AIE.

The Court Judgment

Although the Court largely upheld the SCA decision, it disagreed with the SCA's decision to consider as abusive tariffs that the CMOs had merely proposed but not yet finalized and to include them in the calculation of the fine. The Court recognized that the proposed tariffs increased the tariffs without an accompanying increase in the scope of the services provided by AGEDI and AIE. It also acknowledged that the proposed rates had become actual rates, as certain radio stations had voluntarily agreed to pay them. In the Court's view, however, the term "imposed" in Article 102 TFEU (and its national equivalent) assumed that the dominant firm's customers had been required or "forced" to pay allegedly excessive or unfair prices. As the new rates were still subject to modification, review, or even reduction, and the radio stations could have opted out of them but chose not to, the Court concluded that they had not been "imposed."

Take-away

Although the judgment, in large part, illustrates how difficult it is to apply a coherent framework to allegedly discriminatory and unfair/excessive prices, the court's finding that merely "proposed" rates (even if voluntarily accepted by customers) do not infringe Article 102, provides dominant firms greater flexibility when negotiating prices. The Court suggests that dominant firms could even include potentially excessive prices in their negotiations strategies, as long as they make it clear that they do not represent a last "take it or leave it" offer and that they are willing to negotiate. If customers accept the offer at this point, the agreed upon price could not be considered "excessive" under Article 102. Of course, antitrust risks remain if only some customers agree to the initial proposal – if some customers accept the initially proposed price whereas others negotiate lower prices, the dominant firm might be confronted with price discrimination claims.

CARTELS AND HORIZONTAL AGREEMENTS

National level

Belgian Competition Authority fines four tobacco manufacturers for exchanging sensitive information through wholesalers

In a recently published decision dated 13 April 2022, the Belgian Competition Authority (the "BCA)" imposed total fines of €36 million on four tobacco manufacturers on account of anticompetitive concerted practices. The four companies concerned are British American Tobacco Belgium NV (a subsidiary of British American Tobacco PLC), Établissements L. Lacroix Fils NV (a subsidiary of Imperial Brands PLC), JT International Company Netherlands BV (a subsidiary of Japan Tobacco Inc) and Philip Morris Benelux BVBA (a subsidiary of Philip Morris International Inc).

The investigation started on 8 May 2017 and the BCA carried out surprise inspections in June 2017. The BCA found that the manufacturers repeatedly exchanged commercially sensitive information through wholesalers. Manufacturers sent information on their future prices to wholesalers and received similar information from their competitors via wholesalers without objecting to the practice, which allowed them to limit the risks of normal competition. The infringement took place between 2011 and 2015. The BCA considered that the infringement started when confidential information was first received without opposition (not when it was first sent), and that it lasted as long as the price lists were applied that could have been determined with knowledge of competitors' prices due to the infringement.

While the BCA accepts that price lists can be sent between manufacturers and wholesalers as part of their negotiations, if found that it was not the case here. The BCA stressed that information on future public prices and wholesale prices is strategic information, especially since price competition is the main form of competition in this sector due to severe restrictions on tobacco advertising. However, the BCA noted that there was no evidence that the infringement led to an increase in prices for consumers.

As a result, the BCA found the conduct of the tobacco manufacturers to be contrary to Article IV.1 of the Belgian Code of Economic Law and Article 101 TFEU. Philip Morris Benelux BVBA received the highest fine (€16 million), followed by JT International Company Netherlands BV (€7.2 million), Établissements L. Lacroix Fils NV (€7 million) and British American Tobacco Belgium NV (€5.7 million). Interestingly, the BCA did not fine the wholesalers that transmitted the price lists between manufacturers. The BCA did not consider the infringement to constitute a "hub and spoke" cartel, where the company (the "hub") passing on the information to competitors (the "spokes") is at the core of the infringement. The BCA wrote that "*the form of indirect cooperation that is the subject of this case must be distinguished from hub & spoke cartels which typically involve a more active involvement of the hubs*".

On a side note, these tobacco manufacturers had already been fined in the Netherlands for similar conduct. In a decision of 27 May 2020, the Dutch Competition Authority ("ACM") imposed fines on four major tobacco manufacturers, which belong to the same corporate groups as the parties to the Belgian proceedings. The ACM found that these manufacturers had violated Dutch and EU competition rules by coordinating the prices of the cigarettes they had marketed in the Netherlands from mid-July 2008 until the end of July 2011. The BCA noted in its decision that the ACM "*reached this decision based on similar facts and conduct as those at issue in the current proceedings before the BCA*".

INTELLECTUAL PROPERTY/LICENSING

European Union level

General Court upholds the Commission's decision to reject a complaint alleging the infringement of competition law by essential patent holders

On 13 July 2022, the General Court of the European Union (the "General Court") dismissed an action for annulment lodged by two associations representing Italian and European operators in the lighting industry sector (jointly, "Design Light & LED" or the "complainant") in Case T-886/19.

Background: the complaint

The action originated from the decision of the European Commission (the "Commission") to reject the complaint submitted by Design Light & LED, alleging violation of EU competition law by Philips (the "Decision"). The Decision was based on the low probability that an infringement could be established and the disproportionate resources that would be needed to investigate into the alleged infringement compared to the Union interest in that case.

In essence, in its complaint, Design Light & LED claimed that Philips infringed Articled 101 and 102 TFEU. Notably, it claimed that Philips held a dominant position on the relevant market because of its wide portfolio of patents relating to the LED technology and its alleged high market share. According to the complainant, Philips implemented a number of abusive practices in relation to its patent licensing program. Specifically, it allegedly (i) forced downstream producers to join its program using misleading arguments, including that their conduct violated its patents, which turned out to be either invalid or close to their expiry date; (ii) imposed excessive conditions by requesting royalties based on the value of the product incorporating the licensed technology; (iii) imposed royalties the amount of which allegedly varied among the different licensees; and (iv) requested excessive information to the potential licensees relating to their customers and details on the sales broken down by country or product. Finally, the complainant alleged that Philips' conduct would disincentivise the licensees from carrying out R&D activities and cause them to increase the prices of the final products.

As regards the complaint concerning Article 101 TFEU, Design Light & LED claimed that Philips concluded anticompetitive multilateral cross-licence agreements with certain suppliers, pursuant to which it had forgone the right to collect royalties where the licensees purchased their components from such suppliers.

The General Court's judgment

The General Court upheld the Decision by the Commission to dismiss the complaint. Having first recalled the Commission's discretionary power in assessing complaints for infringements of competition law, the Court examined the different pleas set forth by the complainant and found that the Commission had not committed any manifest errors of assessment or errors in law.

With respect to the allegedly abusive practices, the General Court reasoned as follows.

First, as regards the use of patents, the General Court stated that Philips' conduct was not aimed at intimidating or otherwise threatening the potential licensees. In fact, in its communications, Philips was found to have requested to discontinue the use of the patented technology and referred to the possibility of concluding a licence agreement based on the patent licensing program. In this context, Philips specifically indicated the relevant patents and products concerned.

Contrary to the complainant's arguments, the General Court thus concluded that Philips' conduct amounted to the legitimate exercise of its exclusive right linked to an intellectual property right ("IPR") and to receive adequate remuneration for the use of its technology. Indeed, consistent with the case law, the Court ruled that the exercise of such right – even where the undertaking is dominant – cannot *per se* amount to an abuse within the meaning of Article 102. In this regard, the General Court relied on *Huawei v ZTE* (Case C-170/13, see VBB

INTELLECTUAL PROPERTY/LICENSING

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on Competition Law, Volume 2015, No. 7) to state that this principle holds true also in the case of essential patents. As a matter of fact, the patent holder is entitled to bring an action for infringement, provided that it has previously informed the patent user that it has violated its patents and as long as the patent holder submits a licence proposal at "FRAND" (fair, reasonable and non-discriminatory) terms. The alleged infringer could invoke the abusive nature of such action only if it sends a counterproposal by a specific deadline. However, in the case at hand, the presumed infringers did not submit any such counterproposals.

Second, regarding the issue of royalties, the General Court accepted that their amount could lawfully be calculated based on the turnover of the sales of the finished products as this constituted an objective criterion. It also found that the Commission was right – based on the available evidence – to exclude any alleged discrimination, as it found that an exception to the obligation to pay the royalties was legitimately provided for in cases where the use of the patents was already subject to remuneration in the context of cross-licence agreements with relevant suppliers.

Third, in relation to the alleged violation that Philips unnecessarily requested the provision of certain sensitive information, the General Court confirmed the Commission's Decision to disregard this allegation since the complainant had not adduced evidence in this respect. Further, the Court added that, in any event, the information was provided to Philips' IP division and that it had implemented effective measures to prevent such information from being shared with its other internal divisions.

Conclusion

Based on the above, the General Court confirmed the Commission's Decision to reject the complaint at issue and dismissed the action in its entirety. This case is particularly noteworthy as it clarifies important practical issues, such as the rights of IPR holders holding essential patents to defend their own rights, as well as the methodology for calculating the royalties.

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