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VBB on Competition Law

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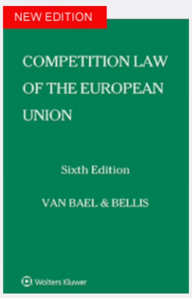

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MERGER CONTROL

European Union level

Court of Justice confirms ex-post application of abuse of dominance rules to non-notifiable mergers

On 16 March 2023, the Court of Justice (ECJ) issued a preliminary ruling in case C-449/21, *Towercast SASU v. Autorité de la concurrence and others* ("Towercast") finding that concentrations that are not subject to any *ex-ante* notification requirement under national or EU merger control rules may nonetheless be subject to an *ex-post* abuse of dominance review by a national competition authority pursuant to Article 102 TFEU.

The ruling arose from a question posed to the ECJ by the Paris Court of Appeal, which was considering a complaint to the French Competition Authority (FCA) lodged in 2017 by Towercast, a television transmission service provider. Towercast's rival, TDF Infrastructure (TDF), had acquired Itas, the only other competitor active on the market, in a deal that did not trigger either EU or French national merger control notification requirements. Towercast complained that by acquiring Itas, TDF had abused its already dominant position in violation of Article 102 TFEU.

Specifically, Towercast sought to rely on the ECJ's judgment in the 1973 *Continental Can* case, in which the Court held that a company could abuse a pre-existing dominant position under Article 102 by further strengthening this position through an acquisition. The FCA, however, took the view that *Continental Can* was no longer relevant. That case was decided before the introduction of a comprehensive merger control regime at EU level, which implemented EU competition law (including Article 102) in the context of merger control. Because the EU Merger Regulation (EUMR) had introduced a system for the *ex-ante* review of concentrations, the FCA concluded that it could not also continue to apply Article 102 in an *ex-post* assessment of a merger and rejected the complaint. On appeal, the Paris Court asked the ECJ whether it was possible for the FCA to apply Article 102 to concentrations falling outside EU or national merger control notification thresholds.

The ECJ confirmed the position taken by Advocate General Kokott in her opinion, in which she took the view that Article 102 could indeed still be applied in this context (see VBB on Competition Law, Volume 2022, No. 10). The ECJ noted that, although the EUMR gave exclusive *ex-ante* merger control powers to the Commission, this legislation had not rendered the *ex-post* application of Articles 101 and 102 void with regard to all concentrations not captured by the EUMR. As a consequence, the ECJ concluded that concentrations that are not subject to *ex-ante* review under the EUMR or national merger control thresholds may be subject to a review under Art. 102.

Consistent with *Continental Can*, the ECJ stated that an infringement of Art. 102 would require the national competition authority to establish that the acquirer already held a dominant position on the relevant market and that its acquisition of another undertaking on that market substantially impeded effective competition on that market. Effectively, the market would be left with "only undertakings whose behaviour depends on the dominant undertaking." Unlike under an ex-ante merger control review, it would not be sufficient to merely show that the acquisition strengthened the already dominant position.

Notably, this ruling in favor of the continued application of *Continental Can* runs counter to a recent decision of an Italian Administrative Court in 2022 (see VBB on Competition, Volume 2022, No. 5). More broadly, the Commission has already increased the reach of the EU merger control process by expanding the use of Art. 22 EUMR to accept a merger referral from Member States lacking original jurisdiction which ask that the Commission review the transaction at issue (see VBB on Competition Law, Volume 2022, No. 7). This ruling is notable as it confirms yet another tool that competition authorities may use to review transactions falling outside of the

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European Union level

normal merger control process. Given the high bar to finding an abuse of dominance, it is not yet clear whether this process will be used often in practice, although the Belgian Competition Authority has already indicated that it intends to review Proximus' acquisition of rival Edpnet in light of the ECJ's *Towercast* ruling.

ABUSE OF DOMINANT POSITION

European Union level

Commission's initiative on Article 102 TFEU guidelines acknowledges the central role of an effects-based approach in abuse of dominance cases, while retracting from a consumer welfare-based, rigorous economic effects analysis

On 27 March 2023, the European Commission ("Commission") launched a new legislative and policy initiative which aims to replace the Commission's 2008 guidance on its enforcement priorities in Article 102 cases involving allegedly exclusionary conduct (the "2008 Guidance Paper") with formal Article 102 Guidelines that would be binding on the Commission and should, in principle, provide greater legal certainty to market participants ("Guidelines"). In the context of this initiative, the Commission has also made a few, but highly relevant and immediately applicable changes to the 2008 Guidance Paper which foreshadow the approach in the forthcoming Guidelines. A policy brief provides useful explanations for the modifications to the 2008 Guidance and the proposed Guidelines ("Policy Brief").

The initiative to adopt Article 102 Guidelines marks a significant step in EU antitrust law. It is an acknowledgement of the recent case-law of the EU Courts, which has created solid support for an effects-based analysis across all Article 102 cases alleging anti-competitive foreclosure.

Yet, the – immediately effective – changes to the 2008 Guidance Paper also signal that the Commission is to some extent retracting from the ambitious goal of creating a coherent and predictable analytical framework for exclusionary 102 cases that is solidly grounded in the consumer welfare model and committed to a rigorous analysis of economic evidence. These changes provide a first (though not necessarily promising) indication on the direction of travel, as the Commission embarks on the Guidelines project.

The Troubled History and Ultimate Validation of the 2008 Guidance Paper

The 2008 Guidance Paper marked the Commission's first attempt to introduce a consistent, evidence-based effects analysis in exclusionary abuse of dominance cases. It was based on the central theme that conduct should be considered a competition law violation only if it excluded equally efficient competitors. It thus moved away from a largely formalistic approach which the European Court of Justice ("ECJ") had upheld on several occasions and on which the Commission had relied in its enforcement practice.

This was a controversial move at the time. The compromise was to adopt only a non-binding policy paper on enforcement priorities, rather than legally more meaningful guidelines, and there were at times rumours that even the policy paper should be retracted as it set the bar for finding an infringement too high, beyond what was required by the case-law.

Reflecting this controversy and compromise, the Commission's 2009 *Intel* decision based the finding that Intel's loyalty rebates infringed Article 102 TFEU on a formalistic *per se* approach, as supported by Hoffmann-La Roche and other judgments. The decision nevertheless included an as-efficient competitor ("AEC") test, which applied the 2008 Guidance Paper and purported to show that Intel's loyalty rebates were capable of excluding equally efficient rivals, but emphasized that this was done solely "for completeness" and without legal relevance for the outcome of the case.

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European Union level

The ECJ, however, subsequently annulled the Intel decision, declaring that the Commission's legal reasoning was insufficient and that the Commission was required to address, through an economic analysis, Intel's arguments about the lack of capability of its rebates to foreclose (Case C-413/14 P).

Subsequent ECJ judgments such as *Servizio Elettrico Nazionale and Others* (C-377/20) and *Unilever* (C-680/20) have solidified support for the effects-based approach to exclusionary conduct cases, and repeatedly emphasized that conduct that may eliminate less efficient rivals will normally not be considered a competition law violation. They have thus broadly validated the principles promoted in the 2008 Guidance Paper for both pricing and non-pricing conduct.

Amendments to the 2008 Guidance Paper and the Future Guidelines

The ECJ's endorsement of a more disciplined effects-based approach has created unease within the enforcement community. This is clearly reflected in the Policy Brief's warning that "an overly rigid implementation of the effects-based approach could set the bar for intervention at a level that would render enforcement [...] unduly burdensome or even impossible." Consistent with these concerns, the changes to the 2008 Guidance Paper signal that the Commission, as it contemplates the adoption of legally more meaningful Guidelines, seeks to protect the flexibility to use a less rigorous approach in Article 102 cases.

This is highlighted in the Policy Brief, which explains that the focus on economics-based consumer welfare goals should be replaced with a range of policy goals which would include consumer welfare, but also much more amorphous objectives such as protecting fairness, a level playing field, plurality, and democracy. How these additional objectives can be made operational in competition analysis and determine case outcomes, however, remains unclear.

The most notable changes in the 2008 Guidance Paper include:

- The notion of anti-competitive foreclosure is widened to encompass situations where the dominant undertaking's conduct is capable of adversely impacting the competitive structure of the market, without a need to show that market access for competitors has been undermined and that the dominant undertaking is able to profitably raise prices.

- When examining whether an as efficient competitor likely would be foreclosed, the Commission no longer commits that it "will" examine economic data, but merely "may" do so. Related statements in the Policy Brief suggest that the Commission generally would not run an AEC test where it is not compelled by the case law to do so, such as in the case of exclusivity rebates. Of course, Intel compels the Commission to objectively examine an AEC test submitted by the defendant. Thus, the changes signal that the Commission would take a more legalistic approach and, where possible, rely on a presumption of unlawfulness while putting the burden of proving the absence of the capability to foreclose on the defendant. Along the same lines, the Commission is no longer willing to commit that it would likely not intervene if a data-driven AEC test shows that equally efficient competitors are not excluded by the dominant firm's pricing conduct.

- Taking advantage of the judgments in *Slovak Telekom* (Case C-165/19 P) and *TeliaSonera* (Case C-52/09), the Commission explains that, when a dominant firm supplies its customers while imposing allegedly unreasonable supply conditions (known as "constructive" refusal to supply), there can be an Article 102 infringement even if the product or service supplied is not "indispensable." In other words, the strict conditions of the *Bronner* case law to identify an unlawful refusal to supply are only relevant in cases of an outright refusal.

ABUSE OF DOMINANT POSITION

European Union level

These changes find some support in the relevant case law. But they deviate from the more ambitious and coherent approach the Commission was willing to promote in 2008.

Observations

The Commission itself acknowledges that EU case-law on exclusionary abuse of dominance has now reached a level of maturity and clarity which calls for the adoption of guidelines that are legally binding on the Commission. From that perspective, the Commission's initiative is a welcome development.

Yet, the recent changes to the 2008 Guidance Paper send a clear signal that the Commission is retracting from the Guidance Paper's aspiration to consistently follow an effects-based approach grounded in solid competition economics to distinguish lawful from unlawful conduct. Thus, the forthcoming Guidelines will – and, in fact, must – acknowledge that an effects-based test is required in Article 102 cases. But they likely will also seek to retain maximum flexibility, within the confines of relevant case-law, on what an effects-based analysis actually means.

Critics have welcomed the Commission's changes to the 2008 Guidance Paper, claiming that they will make the enforcement of Article 102 TFEU less demanding and more "workable." But this view misses the very point of the role of guidelines. Guidelines are not a tool to make competition law enforcement "workable" by maintaining maximum flexibility in finding an infringement whenever a competition authority "does not like" market outcomes. Instead, they should make enforcement predictable and consistent with a clearly identified policy goal. The ECJ has repeatedly emphasized that EU competition law protects equally efficient rivals against anti-competitive foreclosure and in principle does not protect less efficient competitors. Thus, if there is evidence that a dominant firm's conduct is not likely to eliminate equally efficient competitors (even though it may affect those that are less efficient), it should be very demanding for a competition authority to nevertheless establish an infringement.

Solid guidelines must enable market participants to distinguish *ex ante* between unlawful and lawful conduct, and to anticipate how they can engage in competitive conduct that will most likely not result in enforcement action and the risk of quasi-criminal fines. It remains to be seen to what extent the forthcoming Guidelines will effectively serve this purpose. There will probably be Guidelines in a few years, but there is a risk that the useful guidance that they will provide to market participants will in fact be limited.

INTELLECTUAL PROPERTY/LICENSING

National level

UNITED KINGDOM

UK Court issues landmark ruling in FRAND royalty rates dispute

On 16 March 2023, Justice Mellor J. of the England and Wales High Court issued a landmark judgment in case HP-2019-000032 between *InterDigital* and *Lenovo*, the second ever UK ruling to define global fair, reasonable and non-discriminatory ("FRAND") royalty rates. The case was brought before a UK Court because the UK is one of two jurisdictions (the other being China) that so far has asserted competence to decide on FRAND terms without the consent of both parties.

In essence, the case concerned the question whether InterDigital's offer to Lenovo was FRAND and, if not, what terms would be FRAND.

In his judgment, Justice Mellor awarded InterDigital a lump sum of USD 138.7 million for Lenovo's use between 2007 and 2023 of InterDigital's standard essential patents ("SEP") contained in the 3G, 4G and 5G technology standards. Converted to a per-unit royalty rate, the adjudged compensation amounts to USD 0.175, only slightly more than Lenovo's best offer of USD 0.16 per unit (totalling approx. USD 80 million) and significantly less than the USD 0.498 per unit (totalling USD 337 million) which InterDigital had been seeking.

To reach this conclusion, Justice Mellor relied on two primary methods. First, he assessed the "*comparable case*" and derived the relevant FRAND terms by looking at existing licences which InterDigital had previously concluded with implementers. Second, Justice Mellor undertook a "*top-down*" analysis whereby the rates derived from the comparable case were cross-checked against an aggregate royalty for all the patents included in the relevant standard, portioned according to the patent proprietor's share. That analysis, however, was an ancillary issue since, as explained below, InterDigital had failed to support its comparable case.

The "comparable case" analysis

To support its royalty rate determination, InterDigital relied on 20 licence agreements out of 72 available licence agreements. Justice Mellor rejected the other agreements as comparable licences for several reasons, including that they concerned businesses that were "*dramatically*" smaller than that of Lenovo and had been concluded with licensees likely acting out of "*a fear of litigation costs*" rather than "*a rigorous valuation of the portfolio*".

Furthermore, Justice Mellor did not consider these agreements to reflect market conditions since, at the same time, InterDigital had granted discounts of up to 85% to larger implementers such as Apple and Samsung. According to Justice Mellor, if the biggest players were granted large discounts detached from objective parameters, then the licence agreements concluded with smaller players could not be based on a fair market valuation and, therefore, could not be relied upon to support InterDigital's comparable case. Justice Mellor ruled that only discounts that relate directly to "*time value of money considerations*" (e.g., the accelerated receipt of royalties and the advantage of receiving a lump-sum payment) were consistent with the non-discriminatory leg of FRAND, while volume discounts and other benefits provided to avoid litigating against giant implementors were not. In the end, Justice Mellor dismissed the rates implied by InterDigital's comparable analysis (i.e., USD 0.498 per unit) as "*inflated and discriminatory*".

Additional Take-Aways from the FRAND Determination

In determining FRAND terms, Justice Mellor also took position on several other important issues in holding that:

INTELLECTUAL PROPERTY/LICENSING

National level

- Patent coverage, age, relevance, value of cash, early adoption, and predictability of future sales are all relevant considerations in adjusting a royalty rate under the "*comparable licence*" methodology.

- Under FRAND terms, royalty per unit should not depend on the final price of the product incorporating the SEP (e.g., a phone) since this mainly reflects the features and brand status of the end product.

- Judicial statements in other cases can serve as useful guidelines as to the appropriate aggregate royalty figures for a particular generation of technology, not least important when undertaking a "*top-down*" analysis.

- Although a range of rates may be FRAND, the range put forward by InterDigital of USD 0.65 – USD 3.00 was too wide and would lead to licensing discrimination. Justice Mellor held that the task of the Court was to arrive at a narrower range or even a single rate.

- Importantly, Justice Mellor ruled that a willing licensee will not seek to benefit from applicable limitation periods by holding out but pay due consideration for past use regardless, in this case potentially including post-judgment interest.

Finally, in deciding the appropriate remedy, Justice Mellor noted that InterDigital had acted as an unwilling licensor by making supra-FRAND offers. In contrast, Lenovo was found, for the most part, to have complied with its obligations and to have conducted itself in a manner that did not disqualify it from being a beneficiary of InterDigital's undertaking to the European Telecommunications Standards Institute ("ETSI"). Importantly however, Justice Mellor held that *even if* Lenovo had behaved as an unwilling licensee, it retained the ability to remedy previous noncompliance by committing to the Court's FRAND determination.

This approach should be contrasted with that of the *Bundesgerichtshof*, the German Federal Court of Justice, which in its *Sisvel v Haier* judgments (see VBB on Competition Law, Volume 2020, No. 5) attached more importance to the implementor's conduct before and during negotiations when determining the appropriate injunction.

STATE AID

European level

European Commission envisages new aid measures to foster the green transition

On 9 March 2023, the European Commission ("Commission") adopted two pieces of legislation in the field of State aid aimed, in particular, at favouring the EU's green energy transition. More specifically, the Commission adopted the *Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia* [1] ("TCTF"), which prolongs in part the measures envisaged in the previous Temporary Crisis Framework of 23 March 2022, and which provides at the same time for new compatible aid measures. On the same day, the Commission also approved a set of targeted amendments to the General Block Exemption Regulation (GBER)[2] , in order to grant support to key sectors in line with the Green Deal Industrial Plan.

In the Commission's view, the crisis caused by Russia's aggression against Ukraine and its weaponisation of energy supplies exacerbated the urgency for the EU to reduce its dependence on fossil fuels and accelerate the transition towards a net-zero economy. In light of this, the new TCTF sets out the possibility for Member States to design a number of aid measures to support undertakings facing the current crisis, and to foster the green transition. In particular, on the one hand, the TCTF specifies the criteria for the compatibility of aid schemes that Member States may implement to mitigate the negative consequences of the war in the EU (e.g., support for the additional costs of higher energy prices). On the other hand, it paves the way for strategic investments in renewable energy and energy storage, as well as for industrial decarbonisation projects.

In the same vein, the Commission approved certain targeted amendments of the GBER, which are expected to enter into force following the publication in the Official Journal of the EU in the next few weeks. Among others, these amendments are intended to increase aid in the area of environmental protection and energy, to block exempt aid measures aimed at regulating prices for energy, and to increase the notification thresholds for environmental aid, as well as for Research, Development and Innovation aid.

In addition to the above, the importance of the role that the green transition plays in the current Commission's policy agenda emerges from two relatively uncommon provisions contained in the TCTF. First, the TCTF will exceptionally allow direct aid to incentivize the production of the specific equipment and components needed for the transition towards a net-zero economy [3]. Second, for the same goods, the Commission will also be able to approve higher incentives compared to those set out in the TCTF, in particular when companies could receive a foreign subsidy to make an equivalent investment in a third country, and thus divert such investment away from the EU. This mechanism of "matching aid" will therefore allow the EU to "level the playing field" with third countries in favouring investments for the production of these products.

In conclusion, both the TCTF and the Green Deal GBER amendments will significantly increase the possibility for public spending to sustain the transition of the EU towards a net-zero economy, and they will fuel the global race for dominance in the energy technologies of the future.

1 Communication from the Commission Temporary Crisis and Transition Framework for State Aid measures to support the economy following the aggression against Ukraine by Russia, C/2023/1711.

2 Communication to the Commission Approval of the content of a draft for a Commission Regulation amending Regulation (EU) No 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty and Regulation (EU) 2022/2473 declaring certain categories of aid to undertakings active in the production, processing and marketing of fishery and aquaculture products compatible with the internal market in application of Articles 107 and 108 of the TFEU.

3 (i) Batteries, solar panels, wind turbines, heat-pumps, electrolysers, and equipment for carbon capture usage and storage, (ii) the key components designed and primarily used as their direct input, as well as (iii) the critical raw materials necessary for the production of (i) and (ii).

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

National level

UNITED KINGDOM

CMA's annual plan: You can't always get what you want (but sometimes you get what you need)

On 23 March 2023, the UK Competition and Markets Authority published its annual plan for 2023 to 2024 ("Annual Plan"). The Annual Plan outlines the CMA's areas of focus for the next 12 months (starting 1 April 2023) and, taking on a new approach in this year's plan, also maps out the authority's medium-term priorities for the next three years, giving businesses an indication of which areas and sectors the CMA is likely to be active in.

Notably, the CMA ties the priorities of the Annual Plan to its current 'prioritisation principles', which it uses to guide its activity. These principles are: impact (the likely effects of CMA intervention); risk (the likelihood of a successful outcome); resources (the strain that intervention places on resources); and strategic significance (whether intervention fits with the CMA's broader strategy and/or with other CMA objectives). It is this latter principle that the CMA highlights as being of particular importance when reading the principles through the lens of the Annual Plan. Against this backdrop, and in consideration of its immediate and medium-term priorities, it is clear that the CMA will be asking itself the most important question of all: 'to intervene, or not to intervene'?

The CMA identifies the following three key outcomes it hopes to help deliver through its work over the medium and long-term, signposting its activity.

(1) People getting great choices and fair deals

- Active in areas of essential spending such as the accommodation sector, including housebuilding.

- Address pressure selling and false or misleading pricing practices. This encompasses online choice architecture, for example, search results and the ranking of options online.

- Focus on the healthcare industry and in particular (i) defending appeals against its decisions, including excessive pricing in the supply to the NHS of certain medicines, (ii) ensuring that private healthcare providers are providing patients with clear and consistent information in line with the Private Healthcare Order, and (iii) ensuring that sectors such as vets and dentists are not subject to anticompetitive mergers.

- Commits to clamping down on cartels and other collusive behaviour in labour markets and in public procurement. Notably, on the same day the Annual Plan was published, the CMA issued its first major cartel fine since early 2022, fining 10 construction companies nearly GBP 60 million for rigging bids for demolition and asbestos removal contracts involving both public and private sector projects. As part of its decision, the CMA also secured the disqualification of three directors of the firms involved in the cartel, demonstrating once again that the regulator is unafraid to utilise this powerful personal enforcement tool (see VBB on Competition Law, Volume 2021, No. 3).

(2) Competitive, fair-dealing businesses can innovate and thrive

- Intervene in proposed deals that it views could adversely affect competition by stifling innovation across several markets.

- Continue to launch market investigations in the digital space and monitor the activity and behaviour of tech firms (see market studies/investigations here).

- Encourage effective competition in emergent markets.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

National level

(3) The whole UK economy can grow (productively and) sustainably

In practice, this points to new key areas of focus for the CMA:

- Committing to promoting environmental sustainability, while at the same time ensuring that competition law does not unnecessarily impede or prevent companies from pursuing sustainability initiatives. This objective confirms its recently published Draft Sustainability Guidance, which outlined a more permissive approach to the assessment of sustainability agreements that aim to reduce greenhouse gas emissions (see VBB on Competition Law, Volume 2023, No. 2). It also affirms the CMA's focus on possible 'greenwashing' as it impacts consumers and sectors.

- Strengthening its newly established Digital Markets Unit to operate the proposed statutory pro-competition regime for digital markets once the Digital Markets, Competition and Consumer Bill is adopted this year.

- Supporting effective trading between the four nations of the UK, monitoring and reviewing the effectiveness of the operation of the Subsidy Control Act 2022, and continuing to provide independent advice to public authorities on their assessments of the most potentially distortive subsidies.

PRIVATE ENFORCEMENT

European Union level

Court of Justice confirms that the date of publication of the European Commission's decision in the EU Official Journal is an appropriate starting date for the limitation period applicable to claims for private damages filed by consumers

On 6 March 2023, the European Court of Justice ("ECJ") issued an order in Joined Cases C-198/22 and C-199/22 (*QJ and IP v Deutsche Bank AG*), upholding a national rule under which the limitation period for professionals and consumers alike to bring a private damages action starts to run as of the publication of the European Commission's ("Commission") decision in the EU Official Journal ("OJ").

In 2013, the Commission adopted a settlement decision finding that several banks, including Deutsche Bank, participated in a cartel between 2005 and 2008 in the market for Euro interest rate derivatives ("settlement decision"). A summary of the settlement decision was published in the OJ on 30 June 2017.

In 2020, two consumers who had taken out mortgages with Euribor-based interest rates filed actions for damages against Deutsche Bank before a commercial court in Barcelona. In both cases, Deutsche Bank argued that the actions were time-barred and therefore moved to have the actions dismissed. In line with Article 10(3) of the Damages Directive, Spanish law provides for a five-year limitation period in actions for damages for harm caused by a competition law infringement. Before the Spanish transposition, however, a one-year limitation period applied to such actions. In Deutsche Bank's view, the one-year limitation period applied to the actions, because the Damages Directive entered into force after the end of the infringement period. The claimants disagreed, and the referring court made a reference to the ECJ for a preliminary ruling, essentially asking it to determine the starting point and the duration of the applicable limitation period.

Starting date of the limitation period

In its reference to the ECJ, the referring court suggested that the date of publication of the Commission's summary decision in the OJ may not be an appropriate starting point with respect to consumers. In this regard, the ECJ found that the publication of the Commission's summary decision in the OJ is an objective, precise, transparent and predictable starting point for limitation periods applicable to private damages claims, from the perspective of both the undertakings that were found to have committed a competition law infringement and from that of the injured parties. Importantly, this conclusion is not affected by the circumstance that the injured party is a consumer. Accordingly, the ECJ found that Article 101 TFEU and the principle of effectiveness do not preclude a national rule according to which the limitation period starts as of the publication of the Commission's summary decision in the OJ. Whilst it could not be excluded that the claimants had become aware of the indispensable elements to bring a claim (well) before the publication of the summary decision in the OJ (which is for the referring court to determine), the ECJ preliminarily concluded that the limitation period started to run on the date of publication of the summary of the Commission's settlement decision in the Euribor cartel in the OJ, namely on 30 June 2017.

Duration of the limitation period

The ECJ ruled that the five-year limitation period mandated by Article 10(3) of the Damages Directive applied to the case before the referring court. To reach this conclusion, it largely relied on its judgment in Case C-267/20 (*Volvo and DAF Trucks*) (See, VBB on Competition Law, Volume 2022, No. 6). The claimants had become aware of the

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elements indispensable to bring their claim on 30 June 2017. This date being posterior to both the time limit for transposing the Damages Directive (i.e., 27 December 2016) and to the date of entry into force of the Spanish rules implementing the Damages Directive (i.e., 27 May 2017), the limitation period started to run after the entry into force of the Spanish rules transposing the Damages Directive, such that the new regime's five-year limitation period applied.

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