VAN BAEL & BELLIS

VBB on Competition Law | Volume 2023, Nº 6

June 2023

VBB on Competition Law

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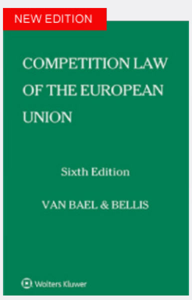

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vbb@vbb.com
www.vbb.com

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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

European Union level

Commission issues record-breaking €432 million gun jumping fine on Illumina for acquisition of Grail

On 12 July 2023, the European Commission ("Commission") imposed its largest gun jumping fine to-date against Illumina for closing its acquisition of Grail while the Commission's merger control review was still pending. Due to Illumina's blatant and intentional defiance of the EU Merger Regulation's ("EUMR") mandatory standstill provision, the Commission imposed the maximum fine allowed under the competition rules – 10% of Illumina's global annual turnover. The Commission also fined Grail a symbolic fine of €1,000, marking the first time a gun jumping fine was imposed on the target of an acquisition.

Although the *Illumina/Grail* case came before the Commission under unusual jurisdictional circumstances, the hefty fine comes as no surprise. The Commission accepted jurisdiction to review the *Illumina/Grail* case on referral from several EU Member States under a novel application of Art. 22 EUMR (a decision Illumina unsuccessfully challenged before the General Court (see VBB on Competition Law, Volume 2022, No. 7). Illumina begrudgingly complied with the Commission's instruction to notify the deal at EU level. However, while the deal was still under review, Illumina publicly announced its intention to close without waiting for the Commission's approval, and then proceed to do so. The Commission, which later described this disregard for its merger control procedures as "unprecedented," immediately launched a gun jumping investigation.

In concluding this investigation by imposing the maximum fine allowed under the EUMR, the Commission is sending a clear signal that it will not tolerate violations of EU merger control rules, especially ones as flagrant as in this case. In particular, the Commission observed that Illumina appeared to have strategically weighed the risk of non-compliance against the potential commercial advantages of closing the deal (even if the acquisition were later to be prohibited) and the break-up fee that would result if it failed to close. The Commission has indicated that a high fine is warranted to deter such deliberate gamesmanship. It seems that Illumina set aside such a sum early on in expectation of potentially receiving a high fine, thus it is questionable whether even a record-breaking penalty will deter future would-be gun jumpers under the same commercial circumstances.

This is the first time the Commission has imposed the full statutorily allowed amount for a gun jumping fine. Before *Illumina/Grail*, the highest gun jumping fine the Commission had imposed was €124.5 million on Altice for its acquisition of PT Portugal (see VBB on Competition Law, Volume 2021, No. 8&9). Even though the Altice fine appeared staggeringly high at the time, it amounted to only roughly 1% of Altice's considerable annual turnover. In this case, it appears that the Commission could find no mitigating factors to warrant a lower fine, and indeed appeared regretful that it could not impose more than the 10% cap.

Finally, this is also the first time the Commission has also issued a gun jumping fine against a target company. In imposing a symbolic fine, the Commission noted that Grail was aware of, and indeed played an active role in, the infringement.

MERGER CONTROL

National level

BELGIUM

Belgian Competition Authority imposes interim measures on Proximus following acquisition of failing rival's assets in Towercast-inspired investigation

On 22 June 2023, the Belgian Competition Authority (the "BCA") imposed interim measures on incumbent telecommunications operator Proximus in the context of its acquisition of the assets of near-bankrupt broadband communications service provider EDPnet. This acquisition did not meet the thresholds for the application of Belgian or EU merger control rules. However, the European Court of Justice ("ECJ") confirmed, in a ruling of 16 March 2023 in the Towercast case, that competition authorities can apply the rules on abuse of dominance to acquisitions that do not meet the thresholds for a review under the merger control rules (see VBB on Competition Law, Volume 2023, No. 3).

In *Towercast*, the ECJ held that – in line with its 1973 judgment in *Continental Can* – a national competition authority could apply Art. 102 TFEU in such cases. The authority would be required to establish that the acquirer already holds a dominant position on the relevant market and that the acquisition would substantially impede effective competition on that market, leaving that market with only undertakings whose behaviour depends on the dominant undertaking.

Interestingly, Proximus's acquisition of the assets was decided by the Entreprise Court of Ghent (the "Court") in the judicial reorganisation procedure of EDPnet. The Court found that, although the three offers received were comparable in that they ensured the continuity of EDPnet's activities, Proximus' offer was the highest, at €22.7 million. In its decision imposing interim measures, the BCA noted that the Court "did not take into account" the *Towercast* judgment handed down five days earlier and that the BCA is "not bound" by the judgments of judicial courts.

On the merits of the request for interim measures, the BCA found that Proximus was likely dominant and that by eliminating its only competitor on the relevant wholesale market for high-speed access over copper/fibre networks, Proximus might make purchasers on this wholesale market dependent on its behaviour. The BCA also found that, by acquiring EDPnet, Proximus might eliminate a close competitor to its Scarlet and Mobile Vikings brands and be in a position to hinder the entry and development of a fourth mobile operator, Citymesh/Digi, on the retail market for fixed broadband access for residential customers and very small businesses, a segment on which Proximus' Scarlet and Mobile Vikings brands are focused.

The measures imposed by the BCA require Proximus to (i) maintain the viability and ability to compete of EDPnet; (ii) keep its activities and those of EDPnet entirely separate; and (iii) create a Chinese wall that shields the confidential information of EDPnet from access by Proximus. The measures came at the request of the BCA's chief prosecutor and are based on a preliminary finding that Proximus abused its dominant position by acquiring EDPnet. Their application will be monitored by an independent trustee.

This is the first application of the *Towercast* judgment by a national competition authority, though it is probable that other authorities will follow the BCA's lead. As it arises in the context of a bankruptcy, the interim measures requiring Proximus to maintain viability of the target may well require Proximus to invest a significant amount of its own funds until a final decision is reached on whether the acquisition may proceed.

ABUSE OF DOMINANT POSITION

European Union level

Meta – Court of Justice confirms that abuse of dominance assessment can consider violations of data protection laws

On 4 July 2023, the ECJ handed down its highly anticipated judgment in Case C-252/21 *Meta v Bundeskartellam*t on the interplay between EU competition law and the EU's General Data Protection Regulation (the "GDPR"). The ECJ held that competition authorities can analyse a dominant firm's GDPR compliance (or non-compliance) when assessing an alleged abuse of dominant position and prohibit a dominant firm from engaging in certain data processing activities to end an Art. 102 infringement. The ECJ does emphasise that competition authorities assessing the lawfulness of data processing activities must seek to cooperate with data protection supervisory authorities to avoid conflicting GDPR compliance assessments, but the effectiveness of this mechanism might be limited in practice.

Background

In 2019, the Bundeskartellamt – the German Cartel Office ("FCO") – found that Meta had collected data from services affiliated with Facebook (e.g., Instagram and WhatsApp), as well as third-party websites and applications, and linked these data with users' Facebook accounts, without obtaining users' valid consent in accordance with the GDPR. Although users authorised the linking of their data when clicking the sign-up button, the FCO found that users could not be considered to have given their consent "freely", as required by the GDPR, in light of Meta's dominant position and the fact that consent to data processing was a prerequisite for using Facebook. It concluded that this violation of GDPR rules constituted an abusive "manifestation of Meta's market power" and therefore infringed Art. 102 TFEU.

On appeal, the Higher Regional Court of Düsseldorf requested a preliminary ruling from the ECJ on the FCO's finding that Meta abused its dominant position under national competition laws in light of its data processing practices. In addition to a number of questions on the interpretation of the GDPR, the German court also asked the ECJ whether: (i) in the context of an investigation of an alleged abuse of dominance, a competition authority is entitled to examine whether data processing practices comply with the GDPR, and to subsequently issue an order to end non-compliant practices; (ii) a competition authority may conduct such an analysis pending a parallel investigation by the relevant data protection supervisory authority; and (iii) users can effectively and freely give consent for data processing to a dominant undertaking.

The ECJ's Judgment

The ECJ confirmed that, in the context of examining an alleged abuse of a dominant position, a competition authority may also examine whether the dominant firm complies with rules other than competition laws, such as the data protection rules laid down by the GDPR. Non-compliance with the GDPR can be at least a strong indication that the dominant firm's conduct is not consistent with "*normal competition*." In addition, as the ability to access and process personal data has become an important parameter of competition and non-compliance with the GDPR can hinder the maintenance and/or growth of competition, excluding GDPR considerations from a competition law assessment could undermine the effectiveness of competition law enforcement.

The ECJ also emphasised that a competition authority's finding of non-compliance with non-competition-related rules is purely for the purpose of establishing, and putting an end to, a competition law violation. National competition authorities cannot replace supervisory authorities established by the GDPR, nor do they have GDPR enforcement powers. Moreover, in their assessment of GDPR compliance, competition authorities must not depart from previous decisions of competent supervisory authorities and must consult and cooperate with such authorities.

ABUSE OF DOMINANT POSITION

European Union level

Lastly, the ECJ confirmed that users may validly consent to the processing of their personal data by a data controller even if that data controller holds a dominant position. Nonetheless, the existence of a dominant position impacts users' freedom of choice and creates an imbalance as between them and the data controller. This imbalance is an important factor in determining whether users' consent was, in fact, validly and – most importantly – freely given. In accordance with Art. 7(1) of the GDPR, the data controller must prove free consent in the relevant case.

Observations

The FCO's 2019 decision finding an abuse of a dominant position by Meta has been the subject of much debate, as it was the first instance of a competition authority identifying an such an abuse on the basis of an infringement of data protection rules.

The *Meta* judgment has (largely) ended this debate, with the ECJ confirming an expansive interpretation of the powers of national competition authorities, allowing them to analyse non-competition rules and incorporate findings of non-compliance in their competition law analysis. While this outcome is certainly welcomed by the enforcement community, a number of concerns remain.

For example, although the ECJ highlights the "duty of sincere cooperation" between the competition and relevant non-competition authorities, this might not be a particularly effective mechanism to ensure consistency with and substantive input from the data protection agencies in practice. According to *Meta*, a competition authority must contact the relevant specialised supervisory authority, but if that authority does not react or simply replies that it will not be assessing the conduct at issue, the competition authority – without any demonstrated expertise in data protection law – has the final say on the GDPR's interpretation and application. There is, unfortunately, no requirement for the competition authority to request, and wait for, substantive input on potentially challenging GDPR issues from an expert agency.

The *Meta* judgment itself demonstrates the highly specialised nature of the interpretation and application of the GDPR. The majority of the questions referred to the ECJ concerned specialised issues about the application of the GDPR, requiring the ECJ to opine on technical details regarding, for example, the processing of sensitive data and making data public. Leaving this task to potentially any competition authority in the EU raises risks of inconsistencies and of questionable interpretations of the GDPR.

Finally, although *Meta* was focused on data protection, there are no limiting principles in the judgment that would confine its impact to digital markets and data protection rules. Whilst the ECJ does flag that access and ability to process personal data constitute an important parameter of competition, the same can presumably be said about many other regulatory frameworks governing business conduct – such as compliance with tax laws, labour market regulations, or environmental rules. Indeed, non-compliance with such regulatory frameworks could be perceived as constituting "*methods different from those governing normal competition in products or services*" and create competitive advantages for a dominant firm.

The ECJ also does not set out any standards – e.g., with respect to the matter's scope, gravity, or closeness to competition-related policy goals – that would help structure the analysis of non-competition rules in a competition law context. Thus, there is a considerable risk that competition authorities (or courts in the context of private litigation) may be called upon to police compliance with non-competition regulatory rules in the context of their Art. 102 enforcement powers.

ABUSE OF DOMINANT POSITION

National level

GERMANY

Continued focus on the passenger rail services sector: German competition authority orders Deutsche Bahn to cease abusive practices against third-party mobility platforms

On 26 June 2023, the German FCO ordered the state-owned German rail incumbent Deutsche Bahn ("DB") to cease the abuse of its dominant position in relation to mobility platforms and ordered DB (along with other measures) to make DB's real time traffic data available to rival mobility platforms.

DB is a vertically integrated company active, among other things, in railway network operation, rail transport and ticketing. According to the findings of the FCO, DB has a market share of over 90% in long-distance passenger rail transport, is a market leader in local rail passenger transport, and – with its website "bahn.de" and its app "DB Navigator" – owns a strong mobility platform. Third-party mobility platforms offer route planning information combining different means of transport, such as flights, trains, car sharing, buses, and rental bikes. Unlike DB's website and app, which only offer information about DB train services, third-party websites and apps also offer the opportunity to book tickets with competing passenger train service providers.

The FCO found that DB abused its dominant position on the transport and infrastructure market to restrict third-party mobility platforms by: (i) not providing non-discriminatory real-time access to traffic data controlled by DB, including data on train delays and cancellations; (ii) imposing advertising bans; (iii) providing price specifications and prohibiting discounts; and (iv) refusing to remunerate mobility platforms for the sale of DB tickets. The FCO prohibited these practices and ordered DB to comply with the following measures:

1. *Access to real-time traffic data controlled by DB*

DB must provide continuous and non-discriminatory access to its real-time traffic data, including on delays, train cancellations or cancelled or additional stops, the reasons for delays or cancellations, additional journeys or replacement services, current track information or track changes and major disruptions. The FCO reasoned that this information is essential for third-party platforms to provide multi-transport journey information. This obligation under competition law goes further than the requirements under the recently amended EU Regulation on Rail Passengers' Rights, which the FCO did not consider sufficient to remedy the competition concern.

2. *Advertising bans*

DB may no longer prohibit third-party platforms from using "DB" or rail-specific terms such as "DB Bahn", "ICE" or "bahn.de" or the combination of these terms with other search terms as keywords for their search engines. Existing advertising bans may no longer be enforced and must be deleted.

3. *Discounts*

DB may no longer prohibit third-party platforms from offering indirect or direct discount campaigns and from issuing vouchers or bonus points in relation to DB tickets booked on the third-party platforms, unless such discounts would in specific cases lead to overcrowded trains, delays, and further disruptions in rail passenger transport.

ABUSE OF DOMINANT POSITION

National level

4. Remuneration

DB must remunerate third-party mobility platforms for the sale of tickets and for booking and payment processing, based on negotiations between DB and the third-party platforms. The FCO stated that commissions must meet "minimum competition-law standards" and cannot be below long-run average incremental costs.

The FCO's decision is not yet final. DB has one month to appeal to the Higher Regional Court of Düsseldorf and has already announced its intention to do so.

Proceedings against other national rail incumbents in the EU

The FCO's decision against DB must be considered in the context of recent proceedings at EU and EU Member State levels, aimed at preventing national rail incumbents from trying to limit opportunities for rival passenger train operators, by reducing the viability and attractiveness to consumers of rival mobility platforms (which display and sell tickets for incumbents as well as new entrants).

With its decision of 18 April 2023, the Italian Competition Authority accepted commitments of the Italian rail incumbent Trenitalia in relation to its data and ticketing policy (see VBB on Competition Law, Volume 2023, No. 5).

At the EU level, the investigation by the European Commission into the Spanish rail incumbent Renfe's alleged abuse of its dominant position on the Spanish passenger rail transport market is ongoing (see VBB on Competition Law, Volume 2023, No. 5). In order to address the Commission's concerns, Renfe has offered a number of remedies, including to make available, on a non-discriminatory basis, all current and future content and real-time data displayed on any of its own online channels to third-party ticketing platforms. On 26 June 2023, the Commission invited stakeholders to provide feedback on Renfe's proposed commitments.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Commission's new rules on horizontal agreements to govern cooperation between competitors

In June 2023, the Commission adopted new rules on horizontal agreements, which as from 1 July 2023 replace the existing rules that date from 2010/2011. These rules govern the compatibility with EU competition law – specifically Art. 101 TFEU – of certain types of agreements and forms of cooperation between competing undertakings. The new rules consist of two revised Horizontal Block Exemption Regulations ("HBERs"): (i) No. 2023/1066 on Research and Development ("R&D BER"); and (ii) No. 2023/1067 on Specialisation Agreements ("Specialisation BER"). They also include revised Guidelines on several types of horizontal cooperation agreements ("HGL").

The HBERs establish a "safe harbour" that exempts certain R&D and production agreements from Art. 101(1) TFEU's prohibition on restrictive agreements. Agreements can only benefit from the safe harbour if the conditions set out in the relevant HBER, including the applicable market share thresholds, are met. The HGL provide guidance on the compatibility with EU competition law of various forms of cooperation between competitors. As summarized in greater detail below, the new rules bring about changes relating to each of the following agreement types:

- R&D Agreements
- Production Agreements ("Specialisation Agreements")
- Exchange of Information (including the use of pricing algorithms)
- Sustainability Agreements
- Agreements between parents and their JVs
- Purchasing Agreements
- Commercialisation Agreements
- Standardisation and Standard Terms Agreements.

A more detailed analysis of these new horizontal rules is being provided in several VBB Client Alerts. The first VBB Client Alert on the new rules for purchasing agreements is available here and the second one on information exchange is available here.

R&D Agreements

Together with the adoption of the new R&D BER, the Commission has also revised the chapter on R&D agreements ("R&D guidance") as part of the new HGL. This guidance applies to the assessment under Art. 101 TFEU of R&D agreements that do not meet the conditions – and thus do not benefit from the safe harbour – of the R&D BER.

After a contentious consultation period, during which the Commission proposed tightening the application of the R&D BER to include thresholds applicable to competition for innovation, whilst industry sought to loosen the criteria, the final text of the new R&D BER and revised R&D guidance largely replicates the conditions and criteria that were already set out in the previous rules. Moderate changes and clarifications include the following: (i) if the parties' market shares in the preceding calendar year are not representative of their market position, market share must now be calculated as an average of the shares for the 3 preceding calendar years; (ii) slight modifications to the "grace period" that applies if the parties' market shares increase above the threshold for exemption (the combined share threshold of 25% for competing undertakings remains unchanged); (iii) slight modifications to the criteria concerning when jointly setting prices or sales targets for the resulting products or technologies will (and will not) constitute a hardcore restriction; and (iv) clarification of the situations in which the Commission or national competition authorities may withdraw the benefit of the R&D BER in individual cases, including in cases where an R&D agreement would substantially restrict innovation competition.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

The R&D BER provides for a transitional period of two years (until 30 June 2025) to allow R&D agreements already in force that meet the conditions for exemption under the "old" R&D BER (Regulation No 1217/2010) to be brought in line with the revised conditions of the new BER.

Production Agreements ("Specialisation Agreements")

The new Specialisation BER and corresponding revised chapter of the HGL ("specialisation guidance") concern agreements on joint production and on (unilateral and reciprocal) specialisation in production (collectively defined as "specialisation agreements").

Most notably, the scope of the new Specialisation BER has been expanded, in that the definition of "unilateral specialisation agreements" (i.e., agreements whereby one party agrees to fully or partly cease production and to purchase the products from the other) is extended to cover also agreements between more than two parties. This resulted from the Commission's recognition that effective specialisation in production may require the cooperation of more than two parties, in particular for SMEs. Further, the revised specialisation guidance now expressly applies to all types of horizontal subcontracting agreements. This includes agreements that aim to expand production but do not qualify as specialisation agreements within the meaning of the Specialisation BER, because the contractor does not at the same time cease or limit its own production volumes.

Other changes and clarifications brought about by the new rules include the following: (i) the Specialisation BER introduces an additional market share threshold for specialisation agreements that concern intermediary products (i.e. inputs used captively by at least one party to produce downstream products), whereby the BER will apply only if the combined market share of the parties does not exceed 20% on each of the relevant market(s) for both the intermediary products and the downstream products; (ii) if the parties' market shares in the preceding calendar year are not representative of their market position, market shares must now be calculated as an average of the shares for the 3 preceding calendar years; (iii) slight modifications to the "grace period" that applies if the parties' market shares increase above the threshold for exemption; and (iv) references to the Commission and national competition authorities' power to withdraw the benefit of the BER in individual cases.

Like the R&D BER, the new Specialisation BER provides for a transitional period of two years (until 30 June 2025) to allow specialisation agreements already in force that meet the conditions for exemption under the "old" Specialisation BER to conform with the new BER.

Information Exchange

In the new chapter of the HGL on information exchange ("information exchange guidance"), the Commission has substantially expanded its guidance beyond that provided in the former HGL, in particular to reflect the most recent case law of the European Courts. The revised chapter includes additional guidance on: (i) what constitutes "commercially sensitive information"; (ii) the types of information exchange that may constitute restrictions of competition "by object"; (iii) potential pro-competitive effects of data-sharing arrangements such as data pools; (iv) various concepts relevant for the assessment of the information exchange, such as "genuinely public information", the age and aggregation of information, unilateral disclosure and indirect exchanges (including hub-and-spoke type arrangements and third party facilitators); (v) anti-competitive signalling via public announcements; and (vi) practical measures that companies can take to avoid infringements, such as limiting the scope of the exchange, using clean teams or independent trustees and public distancing.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

In sum, while providing useful indications, the new information exchange guidance leaves substantial uncertainty as to when an exchange of current or recent information risks being considered a "by object" restriction by the Commission. At the same time, it contains valuable guidance on measures that can be used to mitigate compliance risk, including the use of "clean team" arrangements in the context of M&A transactions and horizontal cooperation agreements. In relation to signalling, the information exchange guidance sets out a consumer benefit focused test for the public announcement of future price or other future strategic information. This test may present challenges to companies in informing their shareholders of their plans, such as in earning calls and other investor communications. On "hub-and-spoke" infringements, the information exchange guidance provides welcome clarity, in particular in relation to situations in which a customer shares one supplier's pricing information with another as part of its commercial negotiations (which should not normally raise concerns).

The Use of Pricing Algorithms

For the first time, the information exchange guidance also provides guidance on competition law risks related to the use of pricing algorithms. This is an area of great importance from a competition law compliance perspective, considering the increased use of pricing algorithms in many sectors of the economy and the considerable, continuing uncertainty about the potential reach of competition law when companies use algorithmic pricing tools.

The information exchange guidance essentially distinguishes three scenarios: (i) "collusion by code," whereby companies agree on the use of a pricing algorithm as part of a cartel agreement, which will be considered a restriction by object; (ii) the use of a third party pricing tool that aggregates commercially sensitive information from various competitors, which may be considered hub-and-spoke-type horizontal collusion and a restriction by object; and (iii) a company's independent use of its own pricing algorithm that uses publicly available data for its price setting decisions, which would in principle be lawful.

Despite the HGL's first (and welcome) attempt to develop guidance on pricing algorithms, there is still considerable uncertainty about their application in practice. This lack of clarity relates, in particular, to a company's potential liability when using third party pricing tools, as well as to the risks associated with the independent use of a proprietary algorithmic pricing tool, which could be trained (or learn) to engage in potentially anti-competitive conduct. The guiding principles set out in the information exchange guidance are therefore at best a first step, but not the last word on the competition law risks related to algorithmic pricing tools, and this area will require continuing attention from a compliance perspective.

Sustainability Agreements

The Commission has included a new HGL chapter on sustainability agreements. This is the first time guidance is provided on the assessment of competition law risks when competitors engage in collaborative efforts that pursue sustainability objectives. "Climate change" agreements are the most prominent, and most debated, example of sustainability agreements, but the HGL also apply to agreements pursuing a broad range of other sustainability objectives, ranging from fair labour conditions and inclusive industrialisation to the development of resilient infrastructure.

The HGL first provide guidance on what kinds of collaborative agreements are unlikely to raise competition law risks. This includes, for example, agreements that aim to achieve compliance with international treaty obligations (such as treaties on child labour or the use of certain pollutants). Similarly, the HGL specify the conditions under which sustainability standardisation agreements can benefit from a "soft safe harbour" under Art. 101.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

In addition, the HGL clarify that agreements pursuing sustainability objectives may also benefit from the rules applicable to other types of horizontal agreements. For example, sustainability-related R&D agreements may benefit from the R&D BER or be considered competition law compliant in light of the accompanying R&D guidance. This portion of the HGL's sustainability chapter may well be of greatest practical relevance, as there may be many situations in which bilateral or multilateral sustainability initiatives can be structured so as to minimize competition law concerns, as long as the parties follow their standard competitor collaboration compliance policies.

For agreements that likely would be considered to restrict competition, and therefore fall under Art. 101(1) TFEU, the HGL explain how, and to what extent, efficiency gains (including "individual use" benefits, "individual non-use" benefits and certain collective benefits) can be taken into account when assessing whether an agreement fulfils the conditions of Art. 101(3). This is the most debated portion of the HGL's sustainability chapter, as critics have argued that the Commission should have been willing to recognize more broadly collective benefits (such as reduction of global emissions) as a relevant efficiency gain. While the UK CMA's draft guidelines, for instance, signal a greater openness to include collective benefits in competition law assessment, it remains to be seen whether these differences will result in materially different case outcomes in practice.

Significantly, at the outset and before developing guidance on the assessment under Art. 101, the HGL's sustainability chapter highlights that parties may request informal guidance from the Commission on compliance with the EU competition rules. While this option has yet to generate much interest among market participants, it can be expected parties will see engagement with the Commission as the best option to plan and implement certain collaborative sustainability projects while minimizing enforcement risks.

Agreements between a Joint Venture and its Parents

The extent to which the prohibition of Art. 101 TFEU applies to agreements between a joint venture ("JV") and its parent companies has been in debate for many years. This important topic is now briefly addressed in the Introduction of the new HGL, by way of a statement on the Commission's general enforcement intentions and thus without providing full legal certainty (arguably because the Commission is not yet certain that the issue has been definitively resolved by the relevant case law of the EU Courts which – although apparently articulating clear principles of general application – has concerned issues related specifically to fines for infringements committed by JVs in their dealings with third parties rather than agreements concluded between parents and their JVs).

The Commission states that it will, in general, not scrutinise under Art. 101 TFEU arrangements between controlling parents and their JV which concern conduct in the markets (products and geographies) where the JV is active. Importantly, this statement only applies to the extent that the parents exercise decisive influence ("control") over their JV. It provides some welcome comfort in the - not infrequent - scenario where the JV operates partly or fully in the same markets as its controlling parents and should, for example, mean that JVs can freely share information about their competitive activities with their parents without, at least in most cases, a significant risk of enforcement at least on the part of the Commission.

However, the HGL warn that the Commission will apply Art. 101 TFEU to the following categories of agreements: (a) agreements between parent companies to create a JV; (b) agreements between parent companies to modify the scope of their JV; (c) agreements between parent companies and their JV concerning markets in which the JV is not active; and (d) agreements between parent companies not involving their JV, even if the agreement concerns markets in which the JV is active.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

In particular the category under point (d) above points to the significant scope for Commission scrutiny of any horizontal relationship between the JV partners: it is clear that the parent companies have to conduct themselves as independent competitors and are fully subject to Art. 101 TFEU where they continue to be active (i) outside of their JV in markets in which the JV is active or (ii) in other markets.

Purchasing Agreements

The new HGL include a revised chapter on joint purchasing agreements ("joint purchasing guidance"), which has been expanded to reflect recent case practice and provides useful guidance as to when joint purchasing activities may infringe Art. 101 TFEU. An infringement remains most likely to be found where the cooperation amounts to a buyer cartel or where it is likely to lead to a collusive outcome on the downstream selling market(s).

The modifications and clarifications provided in the new joint purchasing guidance include the following: (i) clarification that the guidance covers not only actual joint purchasing but also the joint negotiation of purchasing terms, which seems to increase the focus on retail alliances that only negotiate the terms on behalf of their members; (ii) guidance on the distinction between buyer cartels (which are considered "by object" restrictions, irrespective of market shares) and joint purchasing agreements (which are generally assessed as "by effect" restrictions), as well as on the factors that make the existence of a buyer cartel less likely; (iii) additional guidance on the circumstances in which joint purchasing may harm upstream suppliers (though the primary focus remains on the risk of collusion among the purchasers as sellers on the downstream selling market); (iv) discussion of possible harm to upstream suppliers due to the restrictive effects of practices such as negotiating threats and temporary suspensions of purchase orders; and (v) additional considerations relevant to determine whether the benefits of joint purchasing can be expected to be passed on to consumers under Art. 101(3) TFEU.

Overall, the Commission continues to treat transparent joint purchasing arrangements rather favourably, provided that the participating parties do not have significant combined market power.

Commercialisation Agreements

The HGL include a revised chapter on commercialisation agreements (i.e., cooperation between competitors concerning the promotion, distribution or selling of their substitute products). The main modifications provided in the revised chapter include the following: (i) additional considerations relevant for the assessment under Art. 101(1) TFEU of commercialisation agreements leading to output limitations, which – like price fixing and market partitioning – are likely to constitute "by object" restrictions of competition; (ii) additional considerations for the assessment under Art. 101(1) TFEU of the potentially restrictive effects of commercialisation agreements, which are linked to the parties' degree of market power on the relevant market for the products subject to the agreement as well as on related markets ("spillover markets"), including their ability to raise prices or reduce output, product quality, product variety or innovation; and (iii) a new section specifically on bidding consortia (i.e. where parties submit a joint bid in a private or public procurement competition), and in particular on the assessment of consortia agreements between undertakings that would otherwise be capable of making independent bids.

Agreements on Standardisation and Standard Terms

The new HGL now contain two separate chapters on standardisation agreements ("standardisation guidance") and agreements on standard terms, which were previously grouped together in the same chapter. Only minimal changes have been made to the guidance relating to agreements on the use of standard contract terms, mainly for the purpose of clarification.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Standardisation agreements have as their primary objective the definition of technical or quality requirements with which current or future products, production processes, services or methods may comply. Whilst most of the amendments to the previous standardisation guidance are also minor, there are some important additions and clarifications, including: (i) additional guidance on the possible methodologies to determine FRAND terms for licensing of IPRs included in a standard; and (ii) guidance on the requirement for participants to disclose IPRs that could potentially be essential for a standard.

As regards the latter point, the guidance now states that, to ensure that industries make an informed choice of the technology to be included in a standard and to achieve effective access to the standard, participants in the development of a standard should be required to make specific disclosures of any IPRs that may be essential for the implementation of the standard. So-called blanket disclosure (where the participant simply declares that it is likely to have IPR claims over a particular technology) should be permitted only where such specific information is not yet publicly available. Participants should be encouraged to update their disclosures at the time of adoption of the standard. Furthermore, the guidance also clarifies that the ex-ante disclosure by participating IPR holders of a maximum cumulated royalty rate is not anti-competitive.

VERTICAL AGREEMENTS

European Union level

Court of Justice issues rare judgment on the legal test to establish resale price maintenance: neither the finding of an object restriction nor acquiescence by resellers can be assumed without a contextual assessment

On 29 June 2023, the ECJ handed down a preliminary ruling on various questions referred to it by a Portuguese court in the context of an appeal against an infringement decision of the Portuguese Competition Authority finding that a beverage supplier had engaged in resale price maintenance (Case C-211/22, *Super Bock*).

According to the ECJ's ruling, the supplier (Super Bock) regularly communicated minimum resale prices to its distributors. The distributors generally complied with these prices. Super Bock put in place a monitoring mechanism, and distributors found to be non-compliant could be subject to retaliatory measures, such as the removal of trade discounts or the refusal to replenish stocks.

The questions put to the ECJ concerned the application of Art. 101(1) TFEU to the setting of minimum resale prices. More specifically, the questions focused on the conditions under which this practice amounts to: (i) a restriction of competition "by object"; (ii) an agreement (as opposed to a unilateral practice outside the scope of Art. 101); and (iii) an agreement that affects trade between Member States (in circumstances where the practice affects less than the entirety of a single Member State).

Summary of the ECJ's Ruling

As discussed in greater detail below, the ECJ's ruling clarifies that minimum prices cannot be assumed to be a restriction "by object" without a full contextual assessment. Although such an assessment may increase the evidentiary burden on authorities to some extent, it is far from clear that this will lead to a softening of approach towards the practice which, for many years, has been one of the main enforcement priorities of competition authorities across the EU (see VBB on Competition Law, Volume 2023, No. 5). Leaving aside that such conduct – even if not a "by object" restriction –could be found to have the *effect* of restricting competition, the Vertical Guidelines already allow for the possibility that such conduct may (in limited circumstances) comply with Art. 101, (albeit in the context of a full assessment under Art. 101(3) rather than under Art. 101(1)). However, this existing possibility does not appear to have slowed down the pace of enforcement or have made subsequent appeals more likely to succeed.

The ruling also confirms that an agreement cannot be assumed to have been reached even if a supplier monitors compliance with minimum prices that it has communicated and issues threats of retaliation. Instead, in the absence of a prior agreement with the distributor(s) authorising the practice, there must be evidence that the conduct was successful in order to establish the acquiescence required to trigger the application of Art. 101.

It may also be noteworthy that the ruling does not repeat the Court's potentially far-reaching observation in *Visma* (in 2021) that a restriction of intra-brand competition resulting from vertical restraints is, in principle, problematic only if inter-brand competition on the market in question is reduced. This may suggest that this earlier observation was (only) intended to apply to practices that do not qualify as "by object" restrictions.

Restriction by object

In apparent contrast to the previous leading precedent dating from the 1980s (e.g., Binon v AMP), the ECJ has now held that an agreement fixing minimum resale prices does not inevitably amount to a restriction of competition "by object" (despite such agreements now being hardcore restrictions under the Vertical Agreements Block Exemption). The ECJ ruled that such an agreement can only be characterised as a "by object" restriction –

VERTICAL AGREEMENTS

European Union level

a concept it noted should be interpreted strictly – if all the requirements of the now well-developed case law are met. Even in the case of vertical price fixing, the agreement must be assessed in its specific context to determine whether – by its very nature – it presents a sufficient degree of harm to competition to merit this characterisation (without, however, needing to assess whether it has appreciable restrictive effects). This assessment should take into account, among other things, the agreement's objectives and both the legal and economic context (including the nature of the products and market structure) of which it forms part. Consistent with earlier case law, the possible pro-competitive effects of an agreement – normally relevant to the assessment under Art. 101(3) rather than Art. 101 (1) – are an important element of its economic context and therefore must be taken into account before concluding there is a "by object" restriction. In sum, where such effects are "*demonstrated, relevant, intrinsic to the agreement and sufficiently significant*," they are capable of raising a reasonable doubt as to whether the agreement sufficiently harms competition such as to prevent the agreement from being considered a "by object" restriction.

Overall, the Court limits itself to setting out a somewhat abstract and complex legal test for the Portuguese court to apply and gives no indication as to whether the conduct in question in the case at hand could escape qualification as a "by object" restriction. Even if – hypothetically – it could, the national court would still need to consider whether the conduct would appreciably restrict competition "by effect", on which the ECJ did not need to provide specific guidance, and, if so, whether it could still benefit from the Art. 101(3) exception.

Proof of agreement

On the notion of agreement, the ECJ observes that calls by a supplier to its distributors to respect minimum prices, even when backed up by monitoring and penalties for non-compliance, amount to unilateral acts on the part of the supplier and do not, in themselves, give rise to an agreement within the meaning of Art. 101(1). The essential question in all cases, vertical or otherwise, remains whether a concurrence of wills exists between the parties to the alleged agreement. In the context of demands by a supplier to its distributors, the concurrence of wills exists if the terms of the relevant distribution agreement contain an express invitation to comply with minimum resale prices or at least authorise the supplier to impose those prices. Absent a contractual basis for making binding demands (which may often be lacking in practice), the fact that the distributors in fact comply with the minimum prices (or request them and, whilst complaining, do not depart from them) may be sufficient to amount to acquiescence on the part of the distributors. Such acquiescence would give rise to an agreement within the meaning of Art. 101(1). This approach is in line with the General Court's ruling in Volkswagen (upheld in C-74/04 P), which – in effect – annulled a Commission infringement decision for failing to prove dealers' acquiescence with the minimum prices communicated to them by Volkswagen (in circumstances where the General Court found the distribution agreement not to have authorised binding pricing demands).

Effect on trade between Member States

Finally, the ECJ held that an agreement would likely affect trade between Member States even if it affected almost the entirety of only a single Member State (as was apparently the case in relation to the practices at issue).

VERTICAL AGREEMENTS

National level

UNITED KINGDOM

New UK rules on motor vehicle distribution and aftermarket activities remain largely anchored on EU approach

New rules in relation to motor vehicle distribution and aftermarket activities now apply in the UK with the entry into force on 1 June 2023 of the Motor Vehicle Agreements Block Exemption Order ("MVBEO") and the publication on 5 June 2023 of the CMA Guidance on Motor Vehicle Agreements. The MVBEO applies for 6 years. The EU rules on motor vehicle distribution - the EU Motor Vehicle Block Exemption Regulation ("MVBER") and Supplementary Guidelines – were recently extended for a period of 5 years with very few changes (VBB on Competition Law, Volume 2023, No. 4). Overall, the UK rules remain very similar to the EU rules, though on some points the UK guidance is more extensive.

Block exemption regime

The distribution of motor vehicles in the UK remains exclusively subject to the generally applicable Vertical Agreements Block Exemption Order (VABEO). The MVBEO imposes the following additional requirements with respect to motor vehicle aftermarket agreements relating to repairer activities and parts distribution:

1. Agreements related to the sale of aftermarket goods (i.e., spare parts, additional related software/information, and certain fluids) are subject to the same three additional hardcore restrictions as apply under the MVBER. These capture certain restrictions on the supply of spare parts by component suppliers (to aftermarket customers in general) and by authorised resellers (to independent repairers).

2. Restrictions in aftermarket agreements on access by independent operators to information, tools or training used by the supplier or provided to its authorized network for carrying out repair and maintenance services are excluded from the benefit of the block exemption (in contrast, such restrictions *do* benefit from the exemption under the MVBER.

Repair and maintenance inputs

The significance of the UK-specific exclusion from the benefit of the block exemption of (in effect discriminatory) restrictions on access to repair and maintenance inputs (including vehicle generated data) is limited as, among other reasons, it only applies to restrictions on access included in aftermarket agreements (i.e., most obviously those concluded by vehicle producers or their importers with their authorized networks) and does not apply to a unilateral refusal by a vehicle producer or importer (who in practice would be the most likely supplier of the information) to provide such access to independent operators. However, where the block exemption does not apply to aftermarket agreements because the 30% market share threshold is exceeded, which the CMA assumes will mostly be the case owing to its narrow approach to market definition in aftermarkets, it seems likely (although the CMA Guidance is not fully clear) that the competition law risk of failing to provide appropriate access in the UK will be similarly high to that in the EU (leaving aside the major risk under type approval legislation).

Parts wholesalers

Interestingly, the CMA Guidance suggests that restrictions on sales of spare parts by an authorized network to independent parts wholesalers (and not just directly to independent repairers) will be a(n indirect) hardcore restriction (on sales to repairers). The EU Supplementary Guidelines do not address this point, which suggests that – in the UK – parts agreements would not be selective distribution agreements (as sales to any "unauthorised" reseller would have to be allowed to avoid the hardcore restriction).

VERTICAL AGREEMENTS

National level

Parts non-competes

The CMA's Guidance also warns against imposing restrictions on the use by the authorized network of matching quality parts, although they are not hardcore restrictions and are exempted unless the 30% market share threshold is exceeded. In contrast, the Guidance seems to assume that restrictions on the use of OES parts by the authorized network would be a(n indirect) hardcore restriction (which is unclear under the EU guidance).

As a result of the strong degree of continuity between the new and pre-existing rules in both the EU and the UK, existing agreements originally based on the EU rules are unlikely to require (significant) revisions in either the EU or the EU. One strategic question for suppliers remains whether they should (continue to) permit sales by UK and EU distributors into each other's territories or whether restrictions may be justifiable in the post-Brexit era.

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
Holborn Gate
330 High Holborn
London
WC1V 7QH
United Kingdom

T +44 (0)20 7406 1471

VAN BAEL & BELLIS

www.vbb.com