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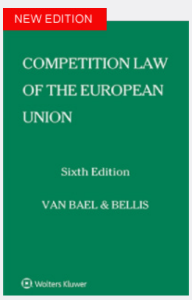

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vbb@vbb.com
www.vbb.com

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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's simplified merger notification procedure package enters into effect

On 20 April 2023, the European Commission ("Commission") adopted a package of new merger control review rules and procedures. These include (i) a new Implementing Regulation, (ii) a new Notice on Simplified Procedure and (iii) a Communication on the transmission of documents (for additional information, please see VBB on Competition, Volume 2023, No. 5).

As of 1 September 2023, the new Notice on Simplified Procedure enters into effect, as a result of which any concentrations must be notified to the Commission using the new forms (i.e., the new Form CO or new Short Form CO) and the specified electronic means of transmission. The Commission will no longer accept notifications submitted using the old forms.

Commission accepts two merger referrals under new Article 22 policy

Following its success defending its new merger referral policy before the General Court in *Illumina/Grail*, the Commission has accepted a further two referrals under Article 22 of the EU Merger Regulation ("EUMR") where the referring Member States did not have jurisdiction to review the transaction.

On 18 August 2023, the Commission accepted a request to review US semiconductor manufacturer Qualcomm's acquisition of Israeli semiconductor manufacturer Autotalks. Both companies supply 2VX semiconductors to the EEA. The Article 22 request for referral to the Commission was launched by seven Member State competition authorities, and ultimately joined by a further eight authorities.

On 21 August 2023, the Commission accepted another referral request, this time to review EEX's acquisition of Nasdaq Power. EEX is a subsidiary of Deutsche Börse and the leading energy exchange in the EEA. Nasdaq Power is a Swedish and Norwegian subsidiary of Nasdaq, which provides a regulated marketplace offering trading and clearing services for Nordic, German and French futures contracts for electricity and for EU emission allowances. The Article 22 referral request was made by Denmark and Finland, who were later joined by Sweden and Norway.

The Commission's acceptance of these referrals is the result of a controversial shift in its merger control policy. In 2021, the Commission announced that it would begin accepting merger control referrals from Member States under Article 22 EUMR even where the referring Member States do not have jurisdiction to review the merger themselves under national law. Shortly thereafter it put this new policy to the test by accepting the referral of *Illumina/Grail*. On appeal, the General Court upheld the Commission's new approach to Article 22 in July 2022 (see VBB on Competition, Volume 2022, No. 7).

The Commission's acceptance of the first referrals under this new policy since Illumina/Grail signals that it is more emboldened in pursuing this policy and that such referrals are likely to become more routine. As these two referrals indicate, the new policy can capture both foreign-to-foreign transactions whose competitive effects are felt in the EEA as well as deals between European companies whose transactions have a more regional impact. Companies whose transactions fall below both EU and Member State merger control thresholds should therefore be aware that they may still face EU scrutiny if the deal poses competitive concerns or raises complaints at the national level.

European Union level

European Court of Justice restores status quo for standard of proof in EU merger control in "gap cases"

On 13 July 2023, the European Court of Justice ("ECJ") handed down its judgment in Case C-376/20 P *Commission v CK Telecoms UK Investments* regarding the legal standard and burden of proof in so-called "gap cases". These are cases in which a transaction – typically involving smaller players in a concentrated market – does not result in the merged entity holding a dominant position, but where the Commission nevertheless concludes that the transaction would result in a significant impediment to effective competition ("SIEC"). Until the CK Telecoms case, it was unclear what legal test the Commission should apply to assess cases that produced such "unilateral effects" but did not result in dominance. In the CK Telecoms ruling, the ECJ reversed the stricter legal tests articulated by the General Court and laid out a blueprint for the assessment of gap cases going forward.

Background

On 28 May 2020, the General Court annulled the Commission's 11 May 2016 decision prohibiting the acquisition by Hutchinson 3G UK (now CK Telecoms UK Investments Ltd) of Telefónica UK. The proposed deal would have constituted a "4-to-3" merger in the mobile telephony retail market. It would have resulted in the merged entity holding roughly between 30 and 40% of the retail market, allowing it to become the main player on that market, ahead of its two remaining competitors. In blocking the deal, the Commission concluded that, although the deal would neither strengthen nor reinforce a dominant position, it would nevertheless give rise to a SIEC. Specifically, it would produce "non-coordinated effects" (i.e., where the merged entity is able to unilaterally exercise market power) by reducing competitive pressure in an already concentrated market.

On appeal, the General Court annulled the Commission's decision in its entirety. It concluded that the Commission had incorrectly determined the burden of proof that must be met to demonstrate a SIEC and misinterpreted how the SIEC test should be applied to the analysis of non-coordinated effects in an oligopolistic market. It then rejected the Commission's three theories of harm, finding that the Commission had not correctly applied the SIEC test nor met its evidentiary burden in each instance. For further detail on the General Court judgment, including background on the SIEC test, see VBB on Competition Law, Volume 2020, No. 6.

The Commission appealed the judgment to the ECJ, which has now set aside the General Court's ruling. The ECJ concluded that the General Court had erred as a matter of law both in its application of the SIEC test, as well as in its conclusions regarding the requisite burden of proof. Consequently, the case has been remanded to the lower court to reevaluate the Commission's theories of harm in light of the correct legal standard. The takeaways from this reversal, outlined below, have far-reaching implications for the future assessment of concentrations in general.

Court of Justice's Judgment

A SIEC can be established by a balance of probabilities.

The General Court required the Commission to demonstrate a "strong probability" of the existence of a SIEC. This standard of proof was higher than "more likely than not" but less than "beyond a reasonable doubt." The Commission argued this standard was too high, extending well beyond the standard of proof required by previous ECJ case law.

The ECJ considered the provisions of the EUMR applicable to the approval or prohibition of a notified concentration and concluded that: (i) there is nothing to suggest that different standards of proof need to be applied for prohibition as opposed to approval decisions; and

MERGER CONTROL

European Union level

(ii) there is no general presumption as to whether a concentration is compatible with the internal market or not. Consequently, the Commission cannot be held to a higher standard of proof when issuing a prohibition decision than a clearance.

The ECJ likewise found that prior case law did not support the General Court's use of a higher burden of proof. Specifically, it noted that: (i) requirements relating to the quality of the evidence that must be produced in certain types of cases (e.g., the quality of the evidence produced is particularly important for conglomerate-type concentrations) do not affect the standard of proof required; and (ii) while the complexity of a theory of harm must be taken into account in assessing the plausibility of the various consequences a concentration may have, this also does not in itself impact the standard of proof required. Consequently, the standard of proof does not vary depending on the type of concentration being examined or the complexity of the theory of harm posited.

Hence, the ECJ concluded that to either prohibit or clear a transaction: "it is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it" (emphasis added). The General Court was held to have made an error in law by applying a higher standard.

The Commission does not need to meet stricter standards to find non-coordinated effects in gap cases than in concentrations resulting in dominance

The General Court sought to lay out a set of strict standards that the Commission must meet to establish that non-coordinated effects result in a SIEC in gap cases (i.e., absent the creation or reinforcement of a dominant position). The ECJ, however, disagreed with the lower court's interpretation of the legal test and key concepts involved, rejecting the higher standards the General Court sought to impose.

First, the General Court had ruled that, in gap cases, in order for non-coordinated effects of a concentration to give rise to a SIEC under Article 2(3) EUMR, two cumulative conditions must be fulfilled: (i) the elimination of important competitive constraints that the merging parties previously exerted upon each other, and (ii) a reduction of competitive pressure on the remaining competitors. To reach this conclusion, the General Court had read Article 2(3) EUMR in light of Recital 25 EUMR (which observes that a SIEC may arise under these two circumstances in oligopolistic markets).

The ECJ held that the wording of Recital 25 cannot be understood to impose such limits on the determination of a SIEC. The intent of the Recital was to indicate that the finding of a SIEC could extend beyond situations of dominance, not to impose a two-pronged test that must always be met in such situations. The ECJ underscored that the EUMR "seeks to establish effective control of all concentrations which would significantly impede effective competition." Effective control would not be possible if the finding of a SIEC as a result of non-coordinated effects was limited to the satisfaction of both conditions. In any event, the ECJ noted that recitals have no binding legal force and cannot be relied on to derogate from Article 2(3) or interpret it in a manner that is clearly contrary to its wording and objective.

Second, the General Court defined the concept of an "important competitive force" as follows: the undertaking in question must: (i) stand out from its competitors in terms of the impact of its pricing policy on competitive dynamics on the market concerned; and (ii) compete particularly aggressively in terms of price and force the other players on the market to align with its prices. The Commission argued that these requirements were excessive.

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European Union level

The ECJ held that the requirements for classifying an undertaking as an important competitive force cannot be so demanding as to preclude the Commission from finding that concentrations that bring about a SIEC are incompatible with the common market. A number of undertakings in an oligopolistic market can be important competitive forces without being particularly aggressive in terms of price. Indeed, concentrations involving parties which are not particularly aggressive in terms of price can also bring about a SIEC, not least because price is not the only important parameter for assessing competitive dynamics – so too are quality, innovation, etc. Consequently, the ECJ set aside the General Court's definition of an important competitive force, and instead held that the definition in the Commission's Horizontal Merger Guidelines is appropriate: that is, undertakings which "have more of an influence on the competitive process than their market shares or similar measures would suggest."

Finally, in its prohibition decision, the Commission relied – among other things – on the closeness of competition between the parties to the concentration to conclude that the concentration was likely to give rise to non-coordinated anticompetitive effects. The General Court held, however, that in an oligopolistic market where all firms are by definition close competitors to some extent, the Commission is required to show that the undertakings are "particularly close" competitors. Otherwise, the General Court reasoned, any merger in an oligopolistic market would necessarily eliminate a close competitor.

The ECJ disagreed, finding that it is not necessary for the merging parties' products to have the high level of substitutability – corresponding to "particularly close" competition – in a differentiated market, in order to incentivise the merging parties to increase prices. It suffices that there is a higher level of substitutability between the merging parties' products as compared to the level of substitutability between the merging parties' and third parties' products. Consequently, the Commission is only required to demonstrate "close" and not "particularly close" competition as between the parties to the concentration.

The Commission does not need to take "standard efficiencies" into account in its analysis

The General Court required the Commission to take into account "standard" efficiencies in its quantitative analysis – that is, efficiencies which are specific to each concentration, and which are a component of a quantitative model designed to establish whether a concentration is capable of producing restrictive effects.

The ECJ disagreed, holding that neither the EUMR nor the Horizontal Merger Guidelines refer to such a category of standard efficiencies, nor do they establish a presumption that all concentrations give rise to such efficiencies. Were the Commission required to take such efficiencies into account systematically, this would reverse the burden of proof with regard to that category of efficiencies, whereas the burden of raising and demonstrating any efficiencies should rest with the transaction parties.

Observations

The General Court's ruling was especially harsh on the Commission in that it rejected each of the Commission's theories of harm on substantive grounds. It raised the level of scrutiny of Commission prohibition decisions based on non-coordinated effects, thus ignoring that the very purpose of the introduction of the SIEC test was to broaden the scope of EU merger control beyond single-dominance situations.

The ECJ's reversal, though comprehensive, is not particularly revolutionary. Indeed, it extends the previously accepted legal landscape to gap cases, using the well-established balance of probabilities standard of proof, and rejecting the General Court's addition of new requirements to the definition of economic concepts.

European Union level

Whilst the General Court judgment had the potential to render enforcement by the Commission in the absence of single firm dominance significantly more demanding, the ECJ judgment reinstates the Commission's margin for manoeuvre. A distinct chastisement of the General Court appears to permeate the judgment – as the ECJ notes multiple instances in which the lower court distorted or otherwise mischaracterised the Commission's arguments and findings.

Despite disagreeing with the General Court's legal analysis at seemingly every turn, the ECJ does leave the General Court's review powers largely intact. Indeed, the ECJ flatly rejected the Commission's argument that the General Court had erred by departing from the definitions of certain economic concepts outlined in the Horizontal Guidelines when it had neither the jurisdiction nor expertise to do so. The ECJ acknowledged that the Commission enjoys a margin of discretion with regard to economic matters for the purpose of applying the substantive rules of the EUMR (and that in such matters, judicial review is confined to ascertaining that the Commission has accurately stated the facts and committed no manifest errors of assessment).

Nevertheless, the ECJ concluded that this does not preclude EU courts from "reviewing the Commission's interpretation of information of an economic nature" nor from "reviewing the Commission's interpretation of concepts of EU law requiring an economic analysis when they are implemented." The ECJ's broader defence of the judiciary's traditional review powers was a notable standout in a judgment that otherwise read squarely in the Commission's favour.

In sum, the ECJ's ruling proves a return to traditional merger review on all fronts. The Commission now has a clear legal roadmap to assess gap cases that does not raise significant additional evidentiary or legal hurdles from the assessment of traditional dominance-based cases. The General Court's unduly restrictive legal analysis has been dismissed by the ECJ, and it will be interesting to see how it will reassess CK Telecoms' initial appeal in light of the ECJ judgment.

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National level

SLOVAKIA

Slovakia imposes €21 million gun jumping fine

On 20 July 2023, the Slovak Competition Authority announced the imposition of a record €21 million fine on Agrofert for purchasing two Slovak bakeries in 2014 and 2016 without notifying either transaction or waiting for clearance. Agrofert is a Czech company that is active in a variety of industries, including bakeries through its subsidiary Panem. The company is owned by Andrej Babiš, who served as Prime Minister of the Czech Republic from 2017 to 2021. Agrofert has indicated that it intends to appeal the fine.

The identification of these two unreported transactions results from a wider inquiry into the bakery sector, which began with dawn raids by the Slovak Competition Authority in 2017. Panem was a competitor to the two acquired firms, though the Competition Authority has yet to review the transactions and issue a decision concerning their effect on competition in the sector.

This is by far the largest gun jumping fine ever to be imposed by the Slovak Competition Authority. It follows a trend at EU level and in other Member States of competition authorities taking an increasingly firm stand against procedural violations in merger control.

FOREIGN DIRECT INVESTMENT

European Union level

Freedom of establishment trumps national FDI control rules when it comes to intra-EU investment (C-106/22 *Xella Magyarország*)?

On 13 July 2023, the ECJ ruled that a prohibition decision under the national FDI control regime by the Hungarian Ministry of Innovation and Technology of Xella Magyarország Építőanyagipari Kft's ("Xella") acquisition of Janes És Társa ("Janes") constitutes an unjustified restriction of freedom of establishment.

The target company, Janes, controls a mine in Hungary from which it is extracting building raw materials such as sand, gravel, and clay. Because of its activity, Janes is considered a "strategic company" under the Hungarian FDI regime. The acquirer, Xella, is also a Hungarian company, an is directly controlled by a German entity, which is in turn directly controlled by a Luxemburg entity, which is indirectly controlled by an investment company registered in Bermuda. Its ultimate beneficial owner ("UBO") is an Irish national.

The decision to block the proposed acquisition was based on the view that the Bermudan company's ownership of the target could have a negative impact on the long-term security of the supply of raw materials to the construction industry and that the acquisition of a strategic company by a foreign owner would reduce the number of domestically owned companies, harming the national interest in a broad sense.

Xella appealed the prohibition to the regional Court of Budapest, which stayed the proceedings and referred two questions to the ECJ for preliminary ruling, essentially: (i) asking whether the Hungarian foreign investment control regime, as established by the national legislation, is compatible with the EU's FDI Screening Regulation and the EU's internal market guarantees, particularly the freedom of establishment; and (ii) requesting guidance on the justification for such a mechanism under EU law if the first question were answered affirmatively.

After clarifying that the scope of the EU FDI Screening Regulation is limited to the investments made by undertakings organised under the laws of third countries, the ECJ examined the compatibility of the Hungarian FDI control regime with the principle of freedom of establishment. Referring to its settled case law, the ECJ noted that although freedom of establishment cannot be invoked in a situation that is confined in all respects within a single Member State, Xella could still rely on freedom of establishment, since its cross-border ownership structure constituted a relevant foreign element.

The ECJ then concluded that the Hungarian FDI control regime, in so far as it allows the Hungarian authorities to prohibit an EU company from acquiring a shareholding in a "strategic" company established in Hungary on grounds of security and public policy, constitutes a restriction of freedom of establishment, which cannot be justified by the objective of ensuring the security of supply to the construction sector, in particular at the local level. As per settled case law, a restriction on freedom of establishment may be justified only if the national measure at issue addresses an overriding reason relating to the public interest such as public policy, public security, or public health. Purely economic grounds, such as promotion of the national economy, cannot serve as justification. Furthermore, there must be a genuine and sufficiently serious threat to a fundamental interest of society. With regard to security of supply, the Court recognised that this justification may be met in the petroleum, telecommunications and energy sectors, but found that security of supply of basic raw construction materials such as sand, gravel and clay, does not constitute a fundamental interest of society, and that the proposed acquisition did not present a genuine and sufficiently serious threat to the supply of basic raw materials.

ABUSE OF DOMINANT POSITION

National level

ITALY

Italian Supreme Administrative Court restricts the use of the AEC test

On 11 July 2023, the Italian Supreme Administrative Court ("Court") upheld the fine imposed by the Italian Competition Authority ("ICA") on Unilever for entering into unlawful exclusivity agreements with retailers, thus confirming the ICA's highly restrictive view on the relevance and probative value of the as-efficient competitor ("AEC") test where the alleged exclusionary conduct is not based on retroactive rebates.

The Court's categorical rejection of the AEC test is difficult to reconcile with the preliminary ruling the ECJ issued earlier in the same case, which held that an AEC test can, in principle, be relevant in all types of exclusionary conduct cases (Case C-680/20, *Unilever*, see VBB on Competition Law, Volume 2023, No. 1). The Court's approach, however, is consistent with recent efforts to limit the scope and relevance of the AEC test because such a test would make enforcement in Article 102 cases "too difficult".

Background

In 2017, the ICA found that Unilever had implemented an exclusionary strategy through several practices: namely exclusive purchasing agreements requiring most of its retailers to buy only from Unilever and the application of (often retroactive) conditional rebates to prevent retailers from switching to other competitors. During the investigation, Unilever submitted an AEC test to demonstrate that the exclusivity arrangements were not capable of foreclosing equally efficient rivals. The ICA, however, dismissed the evidence as irrelevant to its Article 102 TFEU assessment on the basis that such a test would not be conclusive as it could not capture the effects of all of Unilever's practices.

On appeal, the Court requested a preliminary ruling from the ECJ on the relevance of the AEC test, among other issues. In January 2023, the ECJ affirmed that a competition authority is bound to examine the economic evidence submitted by the defendant. The ECJ held that although there is no general legal obligation to use an AEC test to establish an abuse, a competition authority must not disregard economic evidence using an AEC test submitted by the defendant, even if the allegedly exclusionary conduct is not primarily driven by pricing strategies such as loyalty rebates.

The probative value of the AEC test according to the Court

Adopting a final judgment in light of the ECJ's preliminary ruling, the Court concluded that the ICA had lawfully exercised its discretion when it considered evidence concerning the effects on equally efficient competitors to be irrelevant. The Court reasoned that the AEC test would be useful only if allegedly exclusionary conduct is limited to rebates, but would be inconclusive if – as in the case at hand – alleged exclusion results from a variety of practices and where some of these (e.g., long contract duration or use of trade associations to monitor compliance) are allegedly not "directly quantifiable".

Moreover, the Court considered that the AEC test proposed by Unilever was flawed, as such a test would – allegedly – require the existence of a non-contestable share (i.e., a finding that the dominant firm supplied some "must have" products). According to the Court, there was no non-contestable share, as competing products could replace Unilever's supplies in their entirety. Furthermore, according to the Court, the AEC test had no probatory value in that case since competitors were already present on the market. Accordingly, the Court concluded that the ICA was entitled to disregard the AEC test and upheld the ICA's decision.

The Court's views on the relevance of an AEC test are questionable as a matter of law as well as a matter of economics

It is difficult to see how the Court's views on the (ir) relevance of an AEC test can be reconciled with the principles established by the ECJ. Contrary to the Court's interpretation of the ECJ's preliminary ruling, the ECJ never established that the AEC test can be used *only* when alleged exclusion is driven only by rebates and other pricing strategies. Rather, in *Unilever*, the ECJ held exactly the opposite, namely that an AEC test can *also* be relevant in the case of non-price strategies, especially if their effects can be quantified.

As confirmed by the ECJ, the logic of the AEC test remains relevant beyond retroactive rebate cases. A customer committing to buying exclusively from a dominant firm will almost invariably receive some benefits in return, which could consist of lower prices and/or benefits not directly related to price. In this scenario, the question would be equally relevant whether a hypothetical, equally efficient rival could profitably supply some or all of the customer's demand while compensating the customer for the benefits the customer would lose when it shifts some or all of its demand away from the dominant firm.

The Court's categorical exclusion of the AEC test because the effects of some of Unilever's strategies were not "directly" quantifiable also appears to be inconsistent with the ECJ's ruling. This reasoning would offer competition authorities a convenient shortcut to avoid exploring alternative methodologies to calculate such effects. But using such a shortcut would violate the obligation of competition authorities to carefully and impartially examine all the evidence submitted to them during the investigation, as set out by the ECJ in *Unilever*. This is particularly true if an AEC test submitted by the defendant contained a plausible estimation for factors which cannot be directly quantified. A competition authority may well have solid grounds to conclude that it disagrees with the substance of an AEC test submitted by a defendant, but this would be very different than a categorical refusal to engage with the test.

Nor would an AEC test become irrelevant if there is evidence that a competing supplier could replace the entirety of a customer's demand (i.e., a dominant firm's entire demand is found to be contestable). An AEC test can be used to assess whether an equally efficient competitor could profitably replace the supplier for the entire demand by distributing any lost benefits for which a rival has to compensate a customer over the entire demand (rather than the contestable share of the customer's demand).

Finally, the Court is incorrect when it postulates that an AEC test is not relevant where presence actual competitors are present in the market. The AEC test should help to determine whether the conduct is capable of excluding an equally efficient competitor (i.e., a hypothetical competitor with costs comparable to those of the dominant firm). It is the very purpose of the AEC test to preclude the finding of a competition law infringement if a dominant firm's conduct excludes only rivals that are less efficient (i.e., have higher costs than the dominant firm). As affirmed by the ECJ in *Unilever* (para. 37), a conduct that excludes less efficient rivals is consistent with "competition on the merits".

The Court's judgment highlights the continued difficulty courts and competition authorities face in recognizing the proper role of the AEC test in a manner that is consistent with the principles established in several recent ECJ judgments. An AEC test should not be regarded as the only relevant, conclusive evidence in exclusionary conduct cases, and there can be circumstances where the AEC test would not be relevant (which were not alleged to exist in *Unilever*). But in most cases, the AEC test, and the broader principles it reflects can, and – according to the ECJ's *Unilever* judgment – should be incorporated in the assessment of allegedly exclusionary conduct to distinguish lawful conduct from conduct that infringes Article 102 TFEU.

ABUSE OF DOMINANT POSITION

National level

UNITED KINGDOM

Excessive pricing decision against Advanz Pharma upheld by UK Competition Appeal Tribunal

On 8 August 2023, the UK Competition Appeal Tribunal ("CAT") delivered its judgment upholding the decision by the UK Competition and Markets Authority ("CMA") against pharmaceutical company Advanz Pharma and its former owners Hg and Cinven (jointly, "Advanz") for excessive pricing (see VBB on Competition Law, Volume 2021, No. 12).

Background

On 15 December 2021, the CMA imposed fines of £101 million on Advanz for its pricing of liothyronine tablets, used in the treatment of hypothyroidism, which included a twelve-fold increase in the price over an eight-year period. The CMA concluded that Advanz's prices were excessive and unfair – and thus an abuse of dominance – by applying the two-limb test set out in the *United Brand* case (Case 27/76). Advanz challenged the CMA's decision before the CAT.

First Limb - The assessment of excessiveness (Cost-Plus)

Under the excessive limb test, the CMA carried out a "Cost-Plus" assessment and determined that Advanz's prices were excessive when compared with the cost of production, plus a reasonable rate of return. In the appeal, Advanz alleged that there were errors in the CMA's Cost-Plus assessment.

Advanz argued that the CMA understated the costs of acquiring the necessary rights to produce and sell liothyronine tablets, including necessary manufacturing knowhow and a regulatory marketing authorization. In this case, both the CMA and Advanz appear to have accepted that Advanz's actual costs of acquiring these rights were not relevant, in light of subsequent regulatory changes that made acquisition of a marketing authorization more difficult. However, the parties disagreed on how to best calculate the alternative "replacement costs" for acquiring such rights, based on other available data, including the costs incurred by other companies. For example:

- *Companies Considered & Financing Costs*. Advanz argued that the CMA improperly excluded the costs incurred by companies that attempted, but failed, to obtain a market authorization for liothyronine tablets. Advanz also argued that the CMA improperly excluded the costs of financing from its calculations. The CAT agreed with both of these arguments, but concluded that they did not undermine the CMA's ultimate finding that Advanz's prices were excessive.

- *Risk of Failure*. Advanz argued that the CMA failed to properly take into account the risk of failure, as some potential entrants failed to achieve a marketing authorization. In Advanz's view, the CMA should have treated more firms as having attempted (and failed) to enter, since companies might choose not to enter if the competitive price according to the Cost-Plus only includes a small (insufficient) profit margin. However, the CAT confirmed the CMA's approach in considering the risks of failure of the two entrants, plus analysing the probability of success and costs of six firms that had applied for a MA. In fact, in the CAT's view, if a firm merely expressed an interest in applying, it will not reveal useful information on the likelihood and costs of entry.

The CAT further rejected the following arguments presented by Advanz against the CMA's cost assessment:

- *Allocation of Common Costs*. The CAT upheld the CMA's decision to allocate common costs (i.e., costs that are common with other products) based on volumes and rejected the alternative price/value-based approach due to circularity issues, as a higher proportion of common costs would be allocated to products with higher prices.

ABUSE OF DOMINANT POSITION

National level

- *Cost of Capital*. Advanz criticised the CMA for wrongly establishing a reasonable rate of return. The CAT found that the CMA's use of a single WACC rate was justified and that higher rates would not make a difference.

- *Patient Benefit*. The CAT rejected arguments that the liothyronine tablets at issue provided additional patient benefits, concluding that the price premium was the result of captive sales and not of any alleged superiority.

Second Limb - The assessment of unfairness (comparators)

Under the second limb (unfairness) test, the CMA found that Advanz's prices were also unfair "in themselves" and rejected all comparators brought forward by Advanz. In the appeal, Advanz argued that the CMA should have instead considered the prices charged other "comparator" products for the purposes of determining whether Advanz's prices were unfair. The CAT rejected these potential comparators as follows:

- *Post-Entry Prices*. These prices could not be considered as a valid comparator since prices at the time of entry were exceptionally high and later only gradually declined, showing that it took many years for an equilibrium to be reached. These factors showed that the post-entry period was still contaminated and not sufficiently competitive. Upholding Advanz' argument, the CAT however recognised that equilibrium could not be reached at the level of direct costs as this would unlawfully equate workable competition to perfect competition.

- *Entry-Incentivising Prices*. Such prices were also rejected since the *United Brands* test does not require a benchmark to be set at a level that facilitates entry: the test does not presuppose that benefits are such as to render non-abusive whatever price is needed to incentivise other entrants to compete. This benchmark would imply, in markets with high barriers to entry, allowing dominant companies to charge prices that could be excessive and unfair even though below the incentivising level.

- *Forecast Prices*. This comparator could not be considered as forecast prices were partly based on prices that were already found to be excessive (i.e., Advanz's prices during the infringement period).

- *Price of the Oral Version of the Same Medicine*. This price was also not an adequate benchmark because that product includes a pricing premium generated by its specific demand and the parties failed to carry out a comparative assessment of costs and difficulties in producing the oral version compared to the tablet medicine.

The CAT consequently confirmed the CMA's finding that Advanz's pricing was unfair in itself. In doing so, it also pointed out the absence of any independent or objective justification for the price increases, as well as Advanz's special responsibility in light of the lack of competition and low demand elasticity.

Conclusion

This judgment is significant insofar as it confirms the analysis conducted by the CMA in finding excessive pricing in the pharmaceutical sector and provides detailed analysis and guidance for companies conducting self-assessment of future pricing strategies.

CARTELS AND HORIZONTAL AGREEMENTS

National level

FRANCE

French Supreme Court finds interbank fees do not amount to restriction of competition “by object” or “by effect” in long-running French cheque processing case

On 28 June 2023, the French Supreme Court delivered a judgment that provides a significant practical example of a national court’s application of the principles established by the European Courts to determine when an agreement or concerted practice can be considered to restrict competition by object or by effect for the purposes of Article 101 TFEU. In its judgment, the Supreme Court upheld an earlier ruling of the Paris Court of Appeal according to which an agreement between banks establishing various interbank fees for the processing of cashed cheques (i) did not qualify as a restriction of competition by object where the objective pursued by the agreement was to preserve interbank cash balances, and (ii) did not have the effect of restricting competition between banks where there was no evidence that the fees had any significant influence on average prices.

Background

In 2010, the French Competition Authority (“FCA”) fined eleven banks a total of €384.9 million for concluding an agreement introducing various interbank fees in the framework of establishing a system for dematerialised cheque clearing (the “Agreement”). These fees included, among other things, a fixed fee of 4.3 eurocents per cheque paid by the remitting bank to the drawee bank for each cheque payment (known as the Exchanges Cheque-Image Fee (“ECIF”)), which was intended to compensate the drawee bank for the loss of cash suffered as a result of the reduction in cheque processing time.

In 2017, the Paris Court of Appeal confirmed the FCA’s decision but reduced the fines imposed on certain banks. This judgment was subsequently annulled by the French Supreme Court in 2020 on the grounds that the Court of Appeal had interpreted the concept of restriction by object too broadly. Following this judgment, the Paris Court of Appeal annulled the FCA’s decision on the grounds that the Agreement did not constitute a restriction of competition by object, nor did it have anti-competitive effects (see VBB on Competition Law, Volume 2021, No. 12). The FCA challenged the Court of Appeal’s judgment before Supreme Court, which resulted in its recent ruling.

The Agreement cannot be considered a restriction of competition by object

The first ground on which the Supreme Court had to rule was whether the Agreement could be classified as a restriction by object. The Court began by recalling that, in cases such as *Maxima Latvija* (Case C-345/14) and *Cartes Bancaires* (Case C-67/13P), the Court of Justice of the European Union (“CJEU”) has held that, for an agreement to be considered to have the object of restricting competition, it must in itself be sufficiently harmful to competition that it is not even necessary to investigate its effects. In this context, the harmfulness of an agreement to competition is to be assessed in the light of its provisions, the objectives it is intended to achieve and its economic and legal context. The Court noted in this regard that one of the objectives of the Agreement was to preserve interbank cash balances, i.e., the balance between the two sides of the cheque market (issuing and remitting banks).

The Court agreed with the Court of Appeal that there was insufficient evidence that the Agreement, by establishing a fee like the ECIF, was likely to lead to an increase in the prices paid by customers. The banks were in fact free to decide whether or not to pass on the fee and, if so, at what rate. Furthermore, the Court ruled that, in seeking to establish the existence of a restriction of competition, the

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National level

Court of Appeal was entitled to find that the FCA had not proven that an agreement aimed at temporarily offsetting a cash flow imbalance caused by dematerialisation was sufficiently harmful to competition to be considered a restriction by object.

The Agreement does not have the effect of restricting competition

The Supreme Court then addressed the question of whether the Agreement had actual or potential anti-competitive effects such as to fall within the category of being a restriction by effect. The Supreme Court found that the mere fact that there had been an average price increase did not mean that the ECIF had had an anti-competitive effect. In fact, given the great heterogeneity of price trends between banks and within the same bank, the average increase in direct prices did not reflect a significant influence of the ECIF on the prices of the major remitters. In addition, there was no evidence of any indirect pass-through or of a reduction in rates after the abolition of the ECIF. Consequently, the Supreme Court found that the Court of Appeal had rightly concluded that the ECIF did not have the effect of restricting normal competition between banks.

Conclusion

The case represents a significant illustration of a national court's application in practice of the principles established by the CJEU to determine when an agreement or concerted practice may be considered to restrict competition by object. In this respect, the case displays parallels with *Budapest Bank* (C-228/18), where the Hungarian Supreme Court asked the CJEU for a preliminary ruling on whether an agreement between banks introducing a uniform interchange fee payable to the issuing banks for the use of Visa and MasterCard cards, constituted a restriction by object. The CJEU suggested that this was not the case, taking into account the objective of the agreement which was to ensure a degree of balance in the card payment systems concerned. The French Supreme Court has followed a similar approach by taking into account the overall objectives of the interbank fees (in preserving interbank cash balances) in concluding that they could not be considered a restriction of competition by object.

CARTELS AND HORIZONTAL AGREEMENTS

National level

THE NETHERLANDS

Cigarette manufacturers' challenge to Dutch tobacco cartel fines mirrors Belgian precedent

On 18 July 2023, the Rotterdam District Court dismissed the appeals brought by tobacco manufacturers Philip Morris Investments BV, Philip Morris Benelux BV, British American Tobacco International BV, JT International Company Netherlands BV, and Van Nelle Tabak Nederland BV against fines imposed by the Autoriteit Consument & Markt ("ACM") in 2020. These fines were levied after the ACM found that the companies had been involved in an illicit exchange of information about future cigarette prices over a three-year period. The Rotterdam District Court's ruling follows a judgment by the Belgian Market Court on 15 February 2023, which confirmed the decision of the Belgian Competition Authority ("BCA") to fine British American Tobacco Belgium NV, Établissements L. Lacroix Fils NV, JT International Company Netherlands BV, and Philip Morris Benelux BV for a similar unlawful exchange of price-related information.

The contested decisions

In the contested decisions, both the ACM and the BCA established that manufacturers indirectly exchanged price information through their customers. Claiming that this was necessary in price negotiations with their customers, the manufacturers regularly disclosed information to their customers about their intended consumer retail prices, the quantity of cigarettes in a pack and the dates on which intended price changes were to become effective. Subsequently, customers disclosed this information to other manufacturers. Both competition authorities found that the manufacturers were aware of this exchange of information through their customers and incorporated the information received into their individual pricing approaches. This led to a decrease in uncertainties surrounding each other's pricing practices as well as diminished price-based competition and was found to amount to a concerted practice (see VBB on Competition Law, Volume 2022, No. 7).

The judgments: indirect exchange of price information via customer as concerted practice

In their appeals, the tobacco manufacturers contested the classification of the conduct as a concerted practice. They underlined the absence of direct communication amongst themselves and claimed that they were unaware that their customers shared their individual consumer price lists with other manufacturers.

Both courts reaffirmed that a concerted practice requires coordination among the undertakings involved, subsequent market behaviour and a causal link between the two. As regards the degree of coordination, the courts restated that, in cases where information is exchanged through an intermediary, the recipient undertaking must be aware that the information transmitted either originates from a competitor or has also been disclosed to a competitor, and is willing to accept that risk. The Rotterdam District Court supplemented this by indicating that demonstrating the parties' anti-competitive intent is not a prerequisite in this context. The courts also referred to the judgment in *VM Remonts* (C-542/14), in which the ECJ held that an undertaking can be held liable for the exchange of information via a third-party if the undertaking: (i) was aware of the anti-competitive objectives pursued by its competitors and the third party, (ii) expressly or tacitly consented to third party of exchanging that information, or (iii) could reasonably have foreseen that the third party retained by it would share its information with its competitors. According to both courts, the evidence demonstrated that the manufacturers knew price information was being exchanged between them through their customers. Moreover, the manufacturers had assumed the risk as they did not object to their customers disclosing the price lists.

The Dutch and Belgian courts also found that there was sufficient evidence indicating that the manufacturers used this information to shape their pricing strategy. In establishing causality, both courts leaned on the legal presumption that, unless proven otherwise, if an undertaking engages in the exchange of sensitive information and remains active on the market, it is assumed that the undertaking made use of that information. The Rotterdam District Court underscored that this presumption can also be applied when competitors are not in direct communication. While the Belgian Market Court pointed to the opportunity for manufacturers to challenge this presumption through means beyond publicly distancing themselves from the conduct or reporting it to competition authorities, it found that the manufacturers had failed to provide evidence of any such distancing.

Conclusion

In upholding the ACM and BCA's decisions, the Dutch and Belgian courts' judgments provide an interesting example of the application of the growing EU case-law on "hub-and-spoke" cartels, which has recently been restated in the Commission's new Horizontal Guidelines (see VBB on Competition Law, Volume 2023, No. 6). The Horizontal Guidelines indicate that Article 101 TFEU does not prevent a customer from sharing one supplier's pricing information with another as part of its negotiations with the aim of securing better commercial conditions. At the same time, the Guidelines recognise that, in situations where there is mutual awareness among competitors that the customer is sharing such information with other competitors and the customer itself is aware of the anti-competitive arrangements, this may amount to a concerted practice. On the facts, the Dutch and Belgian courts held that there was sufficient evidence of such awareness and that the indirectly exchanged information had been used to adapt the respective commercial strategies of the manufacturers involved.

VERTICAL AGREEMENTS

European Union level

Cross-border sales restrictions remain continued enforcement priority for the Commission (regardless of IP rights)

Main take-aways

- Pierre Cardin and its licensee Ahlers receive statement of objections;
- Commission recognises its limited ability to tackle unilateral territorial supply constraints;
- Pending investigation of Mondelēz covers both collusive and unilateral (possible) restraints;
- Forthcoming Valve judgment should provide important clarification of the law.

Overview of current landscape

After a lull in enforcement lasting nearly two decades, a prominent feature of the Commission's enforcement practice in the field of vertical restraints in recent years has been its focus on overly broad restrictions on cross-border sales (particularly those that prevent passive sales and unauthorized "parallel" trade), which may protect price differences between Member States and thereby deprive consumers of the full benefits of the single market.

The announcement by the Commission on 31 July 2023 that it has issued a statement of objections to the clothing brand Pierre Cardin and its principal licensee Ahlers confirms that this trend is continuing. The Commission is alleging that Pierre Cardin and Ahlers colluded to ensure Ahlers' absolute territorial protection in the countries covered by its licensing agreements with Pierre Cardin in the EEA. More specifically, they are alleged to have infringed Article 101 TFEU by restricting the ability of other Pierre Cardin licensees and their customers to sell Pierre Cardin-licensed clothing, both offline and online: (a) into Ahlers' EEA licensed territories; and/or (b) to low-price retailers (such as discounters) offering lower prices to consumers in such territories.

This case follows in the wake of three infringement decisions adopted in 2019 and 2020 concerning cross-border and customer restrictions imposed on licensees of various sports, film, and character merchandise products. A striking feature of those decisions was the Commission's finding that contractual export restrictions in licensing agreements may infringe Article 101 regardless of whether the licensed intellectual property rights may have been exhausted in the Member States where the restrictions apply (i.e., regardless of whether sales of the licensed (physical) products in those countries could infringe the licensor's intellectual property rights). This view was similarly taken in the subsequent infringement decision adopted in 2021 against Valve in respect of measures taken to prevent the cross-border sale of (intangible) video games (including the supply by Valve to video game publishers of geo-blocked Steam activation keys), which Valve claims were protected by non-exhausted copyright. This decision is currently under appeal (T-172/21, *Valve v Commission*) and a judgment of the General Court is expected soon which should shed further light on this important issue.

In contrast to contractual restrictions affecting cross-border sales that fall within the scope of Article 101 TFEU, the Commission's ability to tackle *unilateral* practices adopted by manufacturers that may prevent cross-border sales from lower to higher priced markets is much more limited. A Commission Staff Working Document published on 27 July 2023 (Co-creation of a transition pathway for a more resilient, digital and green retail ecosystem) confirms that such "territorial supply constraints" ("TCIs") in respect of consumer products continue to be a widespread problem across the EU, which may protect the higher prices charged in smaller countries. Cited examples of TCIs include refusals to supply products across borders and the use of differentiated packaging in different countries. The Commission recognizes, however, that such uniliteral practices can only (potentially) fall foul of the competition rules when they are used by dominant suppliers which are subject to the constraints on unilateral conduct imposed by Article 102 TFEU.

The current formal investigation into Mondelēz (made public in January 2021 and which the company has estimated could result in a liability of €300 million) concerns both unilateral and contractual practices which possibly restrict cross-border 'parallel' trade in chocolate, biscuits and coffee products in breach of Articles 101 and/or 102 TFEU. One issue that can arise in such cases is how to distinguish between collusive conduct (subject to Article 101 TFEU regardless of the market position of the participating firms) and non-collusive, unilateral conduct (only subject to Article 102 TFEU when engaged in by dominant firms). This is one of the points at issue in the appeal brought by Valve against the Commission's Video Games decision referred to above, on which the forthcoming ruling of the General Court should provide important guidance (Valve is contesting the Commission's finding that it was (or should have been) aware that the geo-blocked Steam activation keys it provided to video game publishers were intended to prevent cross-border sales, thereby triggering a concurrence of wills required for Article 101 TFEU to apply).

PRIVATE ENFORCEMENT

National level

FRANCE

French Supreme Court provides guidance on calculation of follow-on damages

On 7 June 2023, the French Supreme Court issued a judgment providing guidance on the calculation of interests on damages resulting from a cartel, as well as on cartel participants' contribution to compensation for such damages.

On 11 March 2015, the French Competition Authority ("FCA") fined several suppliers of dairy products for having engaged in price-fixing and market-sharing conduct from 2006 to 2012. As customers of these suppliers, retail chains Cora and Match sought damages from some of the suppliers before the Paris Commercial Court. Initially, these actions were dismissed by a judgment of the Paris Commercial Court of 20 February 2020 for failure to establish a causal link between the anti-competitive practices and the alleged damages. However, on 24 November 2021, the Paris Court of Appeal overturned the judgment in first instance and ordered the suppliers to pay Cora and Match €2.37 million in damages. Both the suppliers and the retailers appealed the case before the Supreme Court. The Supreme Court largely upheld the judgment of the Court of Appeal. It confirmed, for instance, that the victim of a cartel is not required to minimise its own damages by passing the overcharge resulting from the cartel on to its own customers. The Court of Appeal could therefore order the suppliers to compensate the retailers for the part of the overcharge that the latter had not passed on to their customers.

However, the Supreme Court disagreed with the Court of Appeal on two important issues.

First, regarding the interest rate applicable to the damages incurred by the retailers (the retailers were seeking to apply an interest rate above the legal interest rate), the Supreme Court disagreed with the methodology followed by the Court of Appeal in several respects:

- The Court of Appeal had held that retailers must be compensated for the unavailability of the sums they had paid in excess as a result of the cartel by applying an interest rate reflecting the cost that each retailer had incurred for obtaining financing. While not objecting to this principle, the Supreme Court held that, in this case, by granting an interest rate higher than the legal rate without establishing the nature of the use made by each claimant of the foregone sums, the Court of Appeal had not provided a proper legal basis for its decision. The Court of Appeal should have verified whether retailers had in fact suffered an actual and concrete increase in their financing needs and therefore in their financial costs.

- While observing that the interest rate had varied over the years, the Court of Appeal had determined an interest rate amounting to the average of the rates applicable during the relevant period. The Supreme Court held that this calculation infringed the principle of full compensation. According to the Court, if applicable, the interest rate to be applied must be the rate borne by the victims for each year the excess sums paid to the cartelists were unavailable, not an average of these rates.

- The Supreme Court also held that the Court of Appeal had been wrong to consider that the interest had started running once the harm had fully materialised (i.e., at the end of the infringement period). Since the damage had materialised progressively over the course of the infringement period, the interest applicable to the compensation should also apply progressively.

PRIVATE ENFORCEMENT

National level

Second, regarding a supplier's contribution to the total compensation for the damages resulting from the cartel, the Supreme Court held that, pursuant to French civil law, the contribution must be proportional to the seriousness of that supplier's fault. While the Court of Appeal had professed to follow this legal principle, it had in fact calculated each cartelist's contribution in light of the fines imposed by the FCA on the suppliers for their respective infringements of competition law. Yet, the level of these fines had not been set exclusively on the basis of the seriousness of the anti-competitive practices for which each of the suppliers was found liable, but also, at the time, on the basis of the damage caused by the infringement to the economy.

This French Supreme Court judgment is interesting in that it confirms that the principle of full compensation requires that compensation awarded to victims correspond as closely as possible to the damage actually incurred, including as regards the passage of time and the calculation of interest. It also provides useful nuances about the way contributions for damages caused must be allocated under French civil law among cartel participants.

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

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www.vbb.com