October 2024

VBB on Competition Law

Issue Highlights

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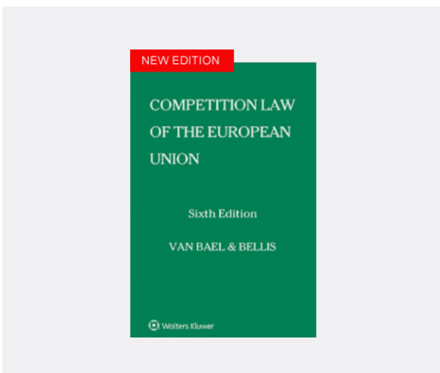

Jurisdictions covered in this issue

EUROPEAN UNION........ 3, 5, 7, 8, 10, 11
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MERGER CONTROL

European Union level

Court of Justice upholds Commission prohibition of joint venture between Thyssenkrupp and Tata

On 4 October 2022, the European Court of Justice ("ECJ") dismissed in full a challenge to the General Court's ("GC") ruling upholding the European Commission's ("Commission") 2019 decision to prohibit a joint venture between ThyssenKrupp and Tata Steel ("the JV"). In so doing, the ECJ confirmed the standard of proof required in so-called "gap" cases, in which a transaction is considered likely to harm competition even though it does not create or strengthen a dominant position.

The Commission had prohibited the proposed JV in 2019 due to concerns that it would give rise to a significant impediment to effective competition (a "SIEC") by reducing the number of steel suppliers available to customers and leading to higher prices for certain types of steel. In particular, the Commission concluded that the JV would have given rise to non-coordinated horizontal effects (i.e. allowed the JV to behave independently from market pressure to an appreciable extent) due to the elimination of an important competitive constraint in the markets for automotive hot dip galvanized steel and metallic coated and laminated steel products for packaging (See VBB on Competition, Volume 2019, No. 6).

ThyssenKrupp appealed the prohibition to the GC on several grounds, including that that the Commission had failed to adequately define the relevant markets, had improperly assessed the existence of a SIEC and had committed various procedural errors (See VBB on Competition, Volume 2022, No. 7). The appeal followed the pattern of the successful 2020 appeal of the Commission's prohibition of CK Hutchison's proposed acquisition of O2 UK ("*CK Telecoms*"). This was also a "gap" case, in which the GC concluded that the Commission had failed to meet its burden of proof (See VBB on Competition, Volume 2020, No. 6). In particular, in *CK Telecoms*, the GC had required a SIEC to be shown by a "strong probability". It had also established a high evidentiary bar for a market player to be considered an "important competitive force," namely that the party must stand out from its competitors and compete particularly aggressively on price. Notably, though, the GC did not appear to apply this standard in *ThyssenKrupp*. Without explicitly overturning its reasoning in *CK Telecoms*, the GC significantly tempered its approach and found that the Commission's burden had indeed been met.

The apparent inconsistencies with the GC's approach in *CK Telecoms* formed a key element of ThyssenKrupp's appeal to the ECJ, as it was not clear what standard the GC was applying in the assessment of whether a SIEC arose in gap cases. Unfortunately for ThyssenKrupp, in the interim, the ECJ overturned the GC's *CK Telecoms* judgment on appeal. The ECJ found that in gap cases – just as in cases where a transaction creates or reinforces a dominant position – the standard of proof the Commission must meet to show a SIEC is simply "more likely than not". Likewise, the ECJ rejected the high requirements that the GC had placed on the Commission to show that one of the parties was an "important competitive force". The ECJ noted that an important competitive force could be shown by demonstrating merely that a competitor had a greater impact on competition than its market shares or similar measures would suggest (See VBB on Competition, Volume 2023, Nos. 7 & 8). In sum, through the *CK Telecoms* ruling, the ECJ extended the traditional burden of proof applicable in dominance cases to "gap" cases.

In the *ThyssenKrupp* appeal, the ECJ reaffirmed the position it had taken on these issues in *CK Telecoms*. In addition, the ECJ confirmed the GC's conclusion that the Commission could leave its conclusions on the existence of dominance open and validly find in parallel that the transaction would give rise to a SEIC by creating and reinforcing a dominant position and by giving rise to non-coordinated horizontal effects. The GC and ECJ concluded that such concepts are not mutually exclusive (rather the clearest example of non-coordinated effects arises where a dominant position is created or strengthened).

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European Union level

In short, looking from *CK Telecoms* to the present *ThyssenKrupp* judgment, the ECJ has now articulated a clear standard for the assessment of a SIEC in "gap" cases going forward and has resolved the tension between the two cases that had arisen at the GC level.

FOREIGN DIRECT INVESTMENT

European Union level

European Commission Publishes Fourth Annual Report on Foreign Direct Investment Screening

On 17 October 2024, the European Commission (the "Commission") published its fourth Annual Report (the "Report") on the screening of foreign direct investments ("FDI") in the European Union (the "EU"). The Report addresses FDI trends in the EU, as well as legislative developments and FDI screening activities in the Member States. In addition, the Report offers data on the functioning of the EU cooperation mechanism on FDI screening, introduced by the FDI Screening Regulation (the "Regulation"), and a discussion of the proposed revision of the Regulation (See, VBB on Competition law, Volume 2024, No. 2).

Nearly All Member States Now Screen FDI

The Report mentions that, on 31 March 2024, 24 Member States had an FDI screening mechanism and that eight of those Member States had adopted their mechanism only after the beginning of 2023 (namely, Belgium, Bulgaria, Estonia, Ireland, Luxembourg, Romania, Slovakia and Sweden). The three remaining Member States (namely, Croatia, Cyprus and Greece) had a consultative or legislative process expected to result in the adoption of a new mechanism.

Smooth Process for Most, but More Notifications and Imposed Measures

The Report indicates that, in 2023, Member States handled 1,808 FDI notifications and *ex officio* investigations, as opposed to just 1,444 in 2022. Of that group, 56% were subject to formal screening. This forms a slight increase compared to 2022, when 55% of the cases were formally screened.

In addition, the Report indicates that the vast majority of notified FDI was cleared without imposed measures. However, the Report reflects a slight decrease of FDI cleared without measures in 2023 (85%) compared to 2022 (86%). In addition, the Report notes a slight increase of approved FDI subject to measures in 2023 (10%) compared to 2022 (9%). As was the case in previous years, only approximately 1% of transactions were blocked and 4% of notifications withdrawn.

Furthermore, the Report indicates that the Commission's recourse to a detailed assessment of potentially harmful FDI remains limited to exceptional cases. Specifically, of the 488 cases shared within the EU cooperation mechanism in 2023, 92% were closed within 15 days, while just 8% prompted additional information requests and only 2% resulted in an opinion being issued by the Commission. This represents a slight decrease of FDI being looked at in more detail compared to 2022, when 87% out of 421 notifications shared within the EU cooperation mechanism were closed by the Commission within 15 days. Notwithstanding the increased scrutiny of FDI over the past years, the Report's message is that the EU continues to be an open global investment environment.

Screened Investments

Of the 488 cases shared within the EU cooperation mechanism in 2023, most FDI reviews were in manufacturing (23%), ICT (21%), wholesale and retail (14%), financial activities (11%), professional services (e.g. law, accounting, consultancy, and engineering) (11%), and energy (6%). This is very similar to the figures of 2022, when most FDI reviews were also in manufacturing, ICT, and wholesale and retail.

FDI reviews in manufacturing (including aerospace, defence and semiconductors) and ICT accounted for most in-depth assessments by the Commission (39% and 24% respectively, which is similar to last year's figures of 59% and 23% respectively). Notably, FDI in wholesale and retail, professional services and financial activities was looked at in more detail, accounting for 10%, 10% and 8% respectively of the Commission's in-depth assessments.

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The Report also indicates that of the 488 cases shared within the EU cooperation mechanism in 2023, FDI files mostly originated from the United States (33%), the UK (12%), the United Arab Emirates (7%, as opposed to 3% in 2022), China (including Hong Kong, at 6%), Canada (5%) and Japan (4%). The remaining 33% of FDI files originated from other countries, while this was 44% in 2022, indicating a higher concentration of FDI originating from the top-six countries of origin.

Outlook

FDI screening rules will soon be reviewed and adapted. In January 2024, the Commission presented a proposal for the revision of the Regulation (See VBB on Competition law, Volume 2024, No. 2). The proposed changes reflect new geopolitical and security challenges and address gaps and shortcomings identified during the application of the Regulation. The proposal, which is currently under review by the European Parliament and the Council of the EU, will make it mandatory for all Member States to have national FDI screening mechanisms in place. Additionally, the proposal seeks to introduce a minimum level of harmonisation of national screening laws across the EU by (i) identifying a minimum sectoral scope that all Member States are required to screen; and (ii) harmonising multi-jurisdictional FDI notifications through procedural improvements and increased accountability between the Member States.

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ABUSE OF DOMINANT POSITION

European Union level

Court of Justice upholds annulment of Commission *Intel* Decision on loyalty rebates

On 24 October 2024, the Court of Justice ("ECJ") delivered a judgment (the "Judgment") upholding the 2022 General Court *Intel* judgment which had annulled the 2009 Commission Decision imposing a € 1.06 billion fine on Intel for allegedly committing a single and continuous infringement of Article 102 TFEU. The contested Commission Decision had found that Intel had implemented a strategy aimed at foreclosing competitors from the x86 CPU market (the "Decision") from October 2002 to December 2007 consisting of (i) loyalty rebates and payments granted to four OEMs and one retailer conditional on exclusivity and (ii) naked restrictions in the form of arrangements with three OEMs to delay or postpone the launch of products containing chips produced by a competitor or to set the conditions under which such products are distributed. In 2014, the General Court dismissed Intel's challenge of the Decision but, on appeal, in 2017 the ECJ set aside that judgment and referred the case to the General Court for reconsideration.

In January 2022, the General Court partially annulled the Decision on the ground that the Commission had not proven to the requisite legal standard that the loyalty rebates concerned were capable of having anticompetitive effects (see VBB on Competition Law, Volume 2022, No. 1). The General Court identified a number of errors in the as-efficient competitor ("AEC") test conducted by the Commission and found that the Decision had not sufficiently addressed the duration and the coverage of the loyalty rebates at issue, and thus annulled the five findings of abuse for such rebates. The General Court, however, upheld the findings of abuse for the three naked restrictions set out in the Decision. The Commission, supported by Germany, filed an appeal against the General Court Judgment before the ECJ which entirely dismissed the Commission's action.

The ECJ confirmed that, as held in para. 138 of its 2017 Judgment (See VBB on Competition Law, Volume 2017, No. 9), if in the course of the administrative procedure, a dominant undertaking argues and provides supporting evidence that the loyalty rebates at issue are not capable of producing alleged foreclosure effects, the Commission is required to examine and rebut that evidence. The Judgment also confirmed para. 139 of the 2017 Judgment which lists the factors that the Commission must assess, namely the extent of the concerned dominant position, the share of the market coverage of the rebate scheme, the conditions and arrangements of the rebates concerned, their amount and duration and the existence of a strategy to exclude competitors as efficient as the undertaking in question from the market. The Judgment is noteworthy as it clarifies that these criteria must be all assessed in full and the Commission cannot cherry-pick only some of them or provide only partial evidence (for instance, by analysing the effects only for a portion of the alleged duration).

Moreover, the ECJ stated in para. 181 of its Judgment that, as a general rule, the capability of loyalty rebates to foreclose an as efficient competitor from the market must be examined on the basis of the AEC test. The Judgment equally clarified that normal competition is synonymous with competition on the merits, noting that the AEC test is one method to determine whether the conduct falls under normal competition.

Additionally, the ECJ also clarified that the AEC test is independent of actual competitors' ability to stay on the market. An AEC test may reach a positive result even where an as efficient competitor has not left the market and, conversely, a negative AEC result may occur even though as efficient competitors left the market.

Finally, the ECJ rejected the Commission's arguments that the General Court had committed errors in law by not taking into account factors other than those relied upon by the General Court to annul the relevant findings in the Decision. More specifically, the Commission had argued that the General Court had failed to examine

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"other factors" consisting of the amount of the rebates, the reinforcing factors for the foreclosure effects and the strategic nature of the OEMs benefiting from these rebates. The Commission had also claimed that, notwithstanding the General Court's findings as regards the market share and the duration of the rebates, the period and the timing during which the rebates were implemented could justify the foreclosure effects produced by the rebates. In rejecting these arguments, the ECJ made the explicit point that the General Court, when reviewing a decision under Article 263 TFEU, cannot save that decision from illegality by picking within that decision elements which, according to the Commission, might validate the infringement finding. The ECJ stressed that the General Court cannot rewrite the Commission decision by modifying the infringement that was found in the contested decision or the statement of reasons on which it is based.

Main takeaways

The ECJ has endorsed the effects-based approach and confirmed that, as a general rule, the capability of loyalty rebates to foreclose an as efficient competitor from the market must be examined on the basis of the AEC test. This conclusion appears to call into question the position taken by the Commission in the Draft Guidelines on exclusionary abuses (See VBB on Competition Law, Volume 2024, No. 7 & 8) in which it appears to suggest that it can be inferred from the case law that loyalty rebates are subject to a presumption of illegality under Article 102 TFEU.

Commission fines Teva for misuse of divisional patents and denigration campaign

On 31 October 2024, the Commission imposed a € 462.6 million fine on Teva for having allegedly implemented strategies aimed at hindering competition for its multiple sclerosis medicine Copaxone, including a divisional patent strategy and a disparagement campaign impacting competition in seven Member States: Belgium, Czech Republic, Germany, Italy, the Netherlands, Poland and Spain. Teva has announced its intention to appeal the decision to the EU Courts.

Misuse of the Patent System ("Divisional Game")

Teva held multiple patents relevant for the protection of its product Copaxone, including a basic patent covering its active ingredient (glatiramer acetate), two secondary patents focused on the manufacturing process and the dosing regimen and numerous "divisionals" of these secondary patents.

In 2015, when Teva's basic patent was about to expire, Teva started to enforce its divisional patents. In response, Teva's competitors took action to invalidate such patents and clear their way to the market. Such efforts by competitors were ultimately successful but it took approximately nine years for all of Teva's relevant patents to be annulled. This lengthy period allegedly arose because Teva filed applications for its divisional patents in a "staggered way". Further, when one of Teva's divisional patents seemed likely to be revoked, Teva would strategically withdraw the patent in order to avoid that other related patents would be also revoked. Due to such actions, Teva's competitors were forced to repeatedly start new lengthy legal challenges of each of the relevant patents. The Commission decided that such actions constituted an abuse of Teva's dominant position as they created artificial barriers to entry of competing products and had the objective of delaying competition and artificially extending Teva's patent protection for Copaxone.

Disparagement Campaign

According to the Commission, Teva also implemented a systematic disparagement campaign against a competitor of Copaxone, including spreading misleading information about its safety, efficacy and therapeutic equivalence.

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This campaign was targeted at key stakeholders, including doctors and pricing and reimbursement authorities, and allegedly had the objective of delaying the market entry or uptake of the rival product.

Initial Takeaways

This case represents the first-ever Commission decision establishing that such a divisional patenting strategy or disparagement campaign constitutes an abuse of a dominant market position. Currently, only the Commission's press releases and statements are publicly available. Pharmaceutical companies and their advisors will therefore eagerly await the publication of the non-confidential version of the Commission's decision, as well as the future judgments of the EU Courts, for further details concerning the specific circumstances when intellectual property or promotional strategies may violate the competition laws.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

General Court dismisses actions for annulment in Metal Packaging cartel case

On 2 October 2024, the General Court dismissed the actions for annulment brought by Crown Holdings ("Crown") and Silgan Holdings ("Silgan") (the "Applicants") against a settlement decision adopted by the European Commission ("Commission"), which found that they had illegally exchanged sensitive business information and coordinated commercial strategies in relation to metal cans and closures in Germany (Cases T-587/22, *Crown Holdings* and T-589/22, *Silgan Holdings*). The General Court also dismissed the Commission's counterclaim for a re-evaluation of the amount of the fine.

In 2015, the German Federal Cartel Office ("FCO") opened an investigation into an alleged illegal exchange of commercially sensitive information in the metal can packaging market. In 2018, the Commission took over the investigation at the FCO's request after the FCO had found that the conduct extended to a number of Member States. The re-allocation was subject to consultation between the concerned authorities under the procedure set out by the Commission Notice on cooperation within the Network of Competition Authorities ("Notice on Cooperation"). In 2022, at the conclusion of settlement discussions with the Applicants, the Commission adopted a decision in which it imposed fines of € 23.85 million on Silgan and € 7.67 million on Crown for infringing Article 101 TFEU. Both parties benefited from a 10% reduction in the fine under the Settlement Notice and Crown received a further 50% reduction under the Leniency Notice. The Applicants subsequently appealed to the General Court against the Commission decision.

The Applicants challenged the amount of the fine based on procedural irregularities, including that the Commission lacked competence to conduct the proceedings and to adopt the settlement decision, that the Commission had committed an error of law by accepting the re-allocation of the case from the FCO and that the Applicants' rights of defence had been breached. In the course of the proceedings, the Commission brought forward a counterclaim asking the General Court to re-evaluate the amount of the fine imposed arguing that the action created additional administrative burden.

In its judgment, the General Court dismissed the argument that the Commission had breached the principle of the protection of legitimate expectations in accepting the re-allocation of the case from the FCO outside the relevant period set out in the Notice on Cooperation. The Court observed that the Notice states that the period of re-allocation between the Commission and the national competition authority should take place within a period of two months, not that it *must* take place within that time period. Thus, the Court found that the Notice on Cooperation did not provide precise, unconditional and consistent assurances creating legitimate expectations regarding the period for re-allocation.

The General Court also found that the re-allocation of the case from the FCO to the Commission, which had taken ten months, did not breach the principle of good administration in light of the amount of the fines and the complexity of the case. The General Court also dismissed the argument that the Commission had breached the principle of subsidiarity by accepting the FCO's request to re-allocate the case. According to the General Court, the principle of subsidiarity does not call into question the power of the Commission to rule on competition law issues under the TFEU.

The Commission counterclaimed that the additional burden caused by the Applicants' annulment actions, brought after a settlement had been reached, made it necessary to increase the amount of the fine. The General Court disagreed. While the General Court noted that the objective of the settlement procedure was to enable the Commission to handle cartel cases more quickly and efficiently, it noted that the Commission had not established the existence of an additional administrative burden caused by the annulment actions. According to

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the General Court, by settling with the Commission, the Applicants had acknowledged their liability, the main facts and the legal qualification of the infringement, which had led to a number of efficiencies. Thus, the counterclaim was dismissed.

The judgment is significant in that it confirms that, where the relevant conduct covers more than one Member State, the Commission and national competition authorities have significant discretion to re-allocate cases involving suspected infringements of Article 101 or 102 TFEU.

Additionally, the General Court rejected the claim that, in the specific circumstances of the case, companies could lose the benefit of the 10% fine reduction under the Settlement Notice if they decide to appeal Commission's settlement decisions before EU Courts. While the Commission considered that such an appeal undermines the purpose of the cartel settlement procedure, it is, according to the General Court, only if the appeal causes the Commission an additional administrative burden that the settling companies may risk losing the benefit of the fine reduction under the settlement procedure.

General Court upholds € 12 million fine against Pharol for concluding non-compete agreement with Telefónica

On 2 October 2024, the General Court dismissed an appeal against a Commission decision re-imposing fines on telecommunication companies Pharol (formerly Portugal Telecom) and Telefónica for concluding a non-compete agreement. The General Court found that (i) the Commission's re-interpretation of the non-compete agreement did not require a new Statement of Objections, and (ii) the Commission was correct to apply the criteria of "insurmountable barriers to entry" when assessing the existence of potential competition for calculating the fines (Case T-182/22, *Pharol v Commission*).

In 2013, the Commission imposed fines of € 12.3 million and € 66.9 million on Portugal Telecom and Telefónica, respectively, for concluding a 15-month agreement not to compete in each other's home markets, namely Portugal and Spain. On appeal, the General Court found that the Commission had committed errors in the calculation of the fine and should have examined the parties' argument whether to exclude sales in markets where they were not potential competitors (See VBB on Competition Law, Volume 2016, No. 7). In 2022, the Commission readopted the decision with recalculated fines, whereby it excluded from the value of sales the markets in which there were "insurmountable barriers to entry", i.e., where potential competition was not possible.

On appeal against the re-adopted decision, the applicant argued that the Commission had breached essential procedural requirements under Article 27(1) of Regulation No 1/2003 by interpretating the non-compete clause at issue differently in the 2013 decision compared to the 2022 decision. In the 2013 decision, the Commission had found that the clause prevented "market entry" whereas, in the 2022 decision, the Commission found that the clause prevented "preparatory steps for market entry". According to the applicant, the Commission should have issued a new Statement of Objections to reflect this change in definition. The General Court disagreed and ruled that the re-interpretation of the non-compete clause neither introduced a new complaint nor altered the findings of the original Statement of Objections. In particular, the General Court interpreted the latter as implicitly covering preparatory steps, since (i) the short duration of the agreement would preclude actual market entry, thereby necessarily covering preparatory steps, and (ii) the English wording "each party shall refrain from engaging or investing [...] in any project" supported this interpretation.

The General Court also dismissed Pharol's argument that the Commission should have assessed whether "real and concrete possibilities" existed for the parties to enter the market, rather than solely examining "insurmountable barriers to entry" when evaluating potential competition to calculate the fines. The General Court reasoned that, since the Commission is not obligated to assess real and

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

concrete market entry possibilities when determining potential competition for establishing a by object restriction infringement of Article 101 TFEU in case of market-sharing agreements, it cannot be expected to do so for fine calculations.

On that basis, the General Court dismissed the actions in their entirety and upheld the fines imposed.

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CARTELS AND HORIZONTAL AGREEMENTS

National level

SPAIN

Spanish Competition Authority imposes fine on Court Attorneys Association for recommending prices

On 4 October 2024, the Spanish Competition Authority ("SCA") adopted a decision imposing a € 2.43 million fine on the General Council of Court Attorneys ("CGPE") for two unlawful practices which were found to infringe Article 101 TFEU and its national equivalent.

The CGPE is a public association that represents all Spanish court attorneys at national level. It operates an online auction platform, which regional councils use in extra-judicial auctions (Spanish law provides for extra-judicial auction of assets and rights, which may arise from judicial or administrative proceedings or private requests and differs from judicial auction by not requiring formalities such as publication in the Official State Gazette). In its decision, the SCA took issue with the recommendation made by the CGPE for minimum and maximum fees that could be charged by the regional councils when they use the platform for extrajudicial auctions. These fees had to be paid by the successful bidder of the auction and, unless otherwise agreed, were set at a maximum of 4-5% of the award price for real estate property and between 5% and 15% of the award price for movable property.

When assessing the case, the SCA explicitly referred to the Commission's decision in the 2005 *Belgian Architects* case which had found that Article 101 TFEU also applies to non-binding decisions adopted by business associations, including price recommendations, since the mere recommendation of prices constitutes an expression of the association's intention to coordinate the behaviour of its members in the relevant market. On that basis, the SCA concluded that Article 101 TFEU (and its national equivalent) can prohibit price recommendations as they can distort competition in the relevant market. In this regard, it is sufficient to establish that a decision setting a price range has the object of restricting competition, without the need to observe its effects, to declare it unlawful.

This case highlights that decisions adopted by associations, including in the legal sector, remain a regular target by national enforcers. Such infringements may arise from price recommendations (as in this case, through minimum and maximum prices), the standardisation of the methodology used to calculate fees (e.g., *Lietuvos notarų rūmai and Others*, Case C 128/21) or through the collection and monitoring of its members' economic data (e.g., as in the 2019 Italian case against the Milan notaries association).

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