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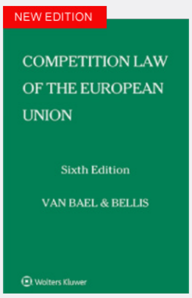
VBB on Competition Law

Issue Highlights



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MERGER CONTROL

European Union level

Commission adopts new, simplified merger notification procedure package

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. The aim of these measures is to reduce the burden on parties notifying uncomplicated transactions that require only a cursory review, to broaden the categories of transactions that are eligible for this simplified review process, and to officialise the electronic submission of merger notifications that had become accepted practice since the start of the Covid-19 epidemic in 2020. These new rules will become applicable for transactions notified as of 1 September 2023.

The revised Implementing Regulation introduces new notification forms, with the most significant changes appearing in the simplified "Short Form CO". While the Short Form CO used to look like a pared-down version of the standard notification form, the new version consists largely of tables and checklists that need to be completed and will require far less narrative explanation to be provided.

The new Notice on Simplified procedure has also expanded the situations in which transactions giving rise only to vertical relationships may be notified using the Short Form CO. Under the existing rules, a transaction would require a full form notification if one or more parties hold a combined market share of 30% or more on a market that is upstream or downstream from any market on which another party is active. Under the revised rules the Short Form CO may be still used in such situations provided that the parties' market shares are:

1. lower than 30% on the upstream market, and parties to the concentration active in the downstream market hold a purchasing share of less than 30% of upstream inputs; and
2. lower than 50% on both the upstream and downstream markets, the market concentration index (HHI delta) is below 150 on both markets, and the smaller party in terms of market share is the same in the upstream and downstream markets.

Notably, this is the first time that the Commission has introduced a purchasing share criterion into the assessment of which notification format should be used.

The new Notice has also given the Commission case teams some additional leeway to allow the Short Form CO to be used in certain cases in which the parties' market shares are slightly above the specified horizontal or vertical thresholds and provides more specific guidance on the situations in which the Commission may waive the requirement to complete certain sections of the standard notification form.

While the roll-out of this new package is certainly a welcome development, the EU merger notification process remains one of the most burdensome and front-loaded procedures globally, with little meaningful procedural oversight (e.g., surrounding the Commission's ability to collect and review internal documents). The added legal uncertainty introduced through the Commission's new Article 22 referral policy and the EU's burdensome new FSR notification requirements further complicate the landscape. Significant further reforms are needed to create an EU regulatory regime that takes a pragmatic and proportionate approach toward mergers.

ABUSE OF DOMINANT POSITION

National level

ITALY

Italian Competition Authority imposes interim measures on Meta and orders Meta to negotiate a license agreement in good faith, applying for the first time the recently introduced presumption of economic dependence in the digital sector

On 20 April 2023, the Italian Competition Authority ("ICA") imposed interim measures on Meta and ordered Meta to negotiate in good faith with the Italian Society of Authors and Publishers ("SIAE"), alleging that SIAE was economically dependent on Meta and that Meta, by terminating negotiations for a license to SIAE's repertoire of music used on Meta's social platforms, had abused its market power vis-à-vis SIAE. In imposing the interim measures, the ICA relied for the first time on a new provision introduced in Italy in August 2022 (VBB on Competition Law, Volume 2022, No. 8/9) which establishes a presumption of economic dependence of an undertaking using intermediation services that are provided by a digital platform with a decisive role for reaching the final users. Interestingly, this provision was applied to the benefit of a collective management organization ("CMO"), i.e. a kind of undertaking that is usually considered to be dominant in competition law decisions. This is even more significant in the present case since the largest CMO in Italy, a former monopolist, is concerned.

This decision is another illustration of the willingness of competition authorities in the EU to rely on the increasingly wide toolbox at their disposal and to actively intervene in the digital sector to resolve real or perceived problems. At the same time, it raises important questions regarding the ICA's substantive evaluation of Meta's market position and conduct, and the inherent risks of an increased use of interim measures.

The presumption of economic dependence

The ICA considered that the conditions for the application of the presumption of economic dependence of SIAE on Meta were met. Referring to German and UK competition law decisions, the ICA noted that Meta is usually considered dominant or, at the very least, as holding a preeminent position. Meta's platforms are indeed among the most important social media platforms (also in Italy), with a high number of active users.

The ICA also emphasized the great disparity in market power between Meta and SIAE in the negotiation of a license agreement, referring, inter alia, to the EU Copyright Directive to conclude that artists (and, by extension, SIAE) are the weaker party in such negotiations. It also found that concluding licence agreements with social media platforms, in particular in view of the increasing online use of musical works, was essential for SIAE, and that Meta was imposing the same license terms on the CMOs, with limited (if any) possibility to negotiate amendments. Interestingly, the ICA did not consider it relevant that SIAE achieved only limited income from an existing license agreement with Meta, alleging that these low license fees were simply an indication of the difficulties for SIAE to negotiate at arm's length with digital platforms.

The ICA also alleged that a presence on social media platforms is fundamental for right holders and that SIAE and the right holders it represents did not have a realistic possibility to reach users of social media platforms without concluding a licence agreement with Meta.

ABUSE OF DOMINANT POSITION

National level

The alleged abuse and interim measures

In its decision, the ICA found that Meta *prima facie* abused SIAE's economic dependence. According to the ICA, the relevant conduct consisted of (i) the arbitrary interruption of the license negotiations and the removal of SIAE-managed content from Meta's platforms and (ii) the refusal – in the context of information asymmetry – to provide data necessary for SIAE to evaluate the congruity and appropriateness of Meta's offer and, thus, to conduct negotiations in a transparent and fair way.

According to the ICA, the measures imposed were also "relevant for the protection of competition" (a statutory requirement for the ICA's intervention) because Meta's conduct risked damaging competition on the copyright markets by (i) impeding SIAE's competitiveness, (ii) preventing the authors represented by SIAE from reaching a growing number of social media users and, thus, from obtaining remuneration for their work, and, consequently, (iii) restricting consumer choice (i.e. consumer access to SIAE-managed content).

In light of the urgency to intervene, the ICA ordered Meta to (i) immediately resume the negotiations and conduct them in good faith and fairness; (ii) provide all necessary information to SIAE to enable it to continue the negotiations; and (iii) subject to SIAE's authorization, restore the availability of SIAE-managed content on Meta's platforms.

VERTICAL AGREEMENTS

European level

Commission extends the validity of the 2010 Motor Vehicle Block Exemption Regulation and adopts amendments to the Supplementary Guidelines; the UK's new regime is also nearing completion

On 17 April 2022, the European Commission ("Commission") adopted a Regulation extending the validity of the 2010 Motor Vehicle Block Exemption Regulation (Regulation (EU) No 461/2010) ("MVBER") until 31 May 2028. The Commission also adopted only modest amendments to the 2010 Supplementary Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles ("the Supplementary Guidelines"). As a result, the adoption of these rules in themselves is unlikely to require material changes to existing distribution arrangements in this sector.

The amendments to the Supplementary Guidelines as adopted are predominantly in line with the draft version published by the Commission on 6 July 2022 (see VBB on Competition Law, Volume 2022, No. 8-9). In addition to the earlier draft, the final amendments clarify two aspects regarding access by independent operators to essential inputs (including vehicle-generated data) for repair and maintenance of motor vehicles. To recap the existing rule, the grant of access is not required as a condition of application of the MVBER, but a failure to grant appropriate access may cause authorised repairer agreements – which the Commission assumes often may not benefit from the MVBER owing to the high market shares enjoyed by authorised networks – to infringe Article 101 TFEU even where qualitative selective distribution is applied. As a result, it may often be prudent in practice for suppliers to grant access in the circumstances foreseen by the Supplementary Guidelines.

The final amendments clarify that withholding access to such essential inputs may in principle be justifiable under Article 101 on security grounds, but that this justification will only apply on the condition that no less restrictive measures would suffice. This clarification is understandable considering that vehicle-generated data – the sharing of which can reasonably give rise to cyber-security concerns – is now specified as one of the types of inputs that could be considered essential. The final amendments also address the question of whether a refusal to grant an independent operator access to an essential input can infringe the competition rules even when the input is withheld from members of the supplier's authorized repair network. The Supplementary Guidelines already provide that, in order for authorized repairer agreements to comply with Article 101 TFEU, access to an essential input should be granted to independent operators where access to that input is provided to the supplier's authorized repairer network (thereby imposing a requirement of non-discrimination). The final amendments clarify that withholding access where access is not granted to the authorized network may, if the supplier is dominant, constitute an infringement of Article 102 TFEU (only) if the conditions set out in the essential facilities case law are met. This makes such non-discriminatory refusals subject to a higher legal bar.

Broader access to in-vehicle data could be mandated in due course by specific EU legislation, although no proposal has yet been made.

In parallel to these developments at EU level, a new legal regime is close to finalisation in the United Kingdom. On 18 April 2023, the UK's Competition and Markets Authority (CMA) put out to consultation its draft Guidance on Motor Vehicle Agreements. The contents of the draft Guidance closely follow the Commission's amended Supplementary Guidelines. On 2 May, the final Motor Vehicles Agreements Block Exemption Order was laid before Parliament and is slated to come into effect on 1 June. This largely follows the EU MVBER, but makes non-discriminatory access to repair and maintenance inputs a condition of application of the block exemption. We will report in more detail once both texts are final.

INTELLECTUAL PROPERTY/LICENSING

European Union level

Commission calls for evidence for an evaluation of the Technology Transfer Block Exemption Regulation

On 17 April 2023, the European Commission launched a public consultation on the implementation of the Technology Transfer Block Exemption Regulation ("TTBER") and related guidelines. The current TTBER exempts from the scope of Article 101 TFEU specific agreements by which one party authorises another to use industrial property rights (such as patents, design rights, software copyrights and know-how) for the production of goods and services.

The purpose of the consultation is to gather evidence on the TTBER so that the Commission can assess whether that Regulation should be allowed to expire on 26 April 2026, have its duration prolonged or have it revised in order to take account of market developments that occurred since its adoption in 2014.

More information on the consultation can be found here. The deadline to submit comments is 24 July 2023.

Commission adopts draft Regulation on standard-essential patents

On 27 April 2023, the European Commission released its long-awaited draft Regulation on a new framework for standard-essential patents ("SEPs"). The draft Regulation aims at improving the efficiency and predictability in the SEP licensing market, particularly for small and medium-sized enterprises ("SMEs"), by increasing transparency and promoting the use of alternative dispute resolution mechanisms. The Commission believes that the draft Regulation will reduce administrative and transactional costs and incentivise participation by European firms in the development process of standardised technologies, particularly in the Internet of Things ("IoT") industries.

The draft Regulation will create a competence centre within the European Union Intellectual Property Office ("EUIPO") entrusted with several complex tasks related to SEPs, the most crucial of which are to (i) perform essentiality assessments of samples of SEP holders' portfolios; (ii) aid the determination of *ex-ante* aggregate royalties; and (iii) issue non-binding resolutions in disputes on fair, reasonable and non-discriminatory ("FRAND") terms if parties fail to agree bilaterally.

Scope

The draft Regulation will apply to all patents that are essential to a standard published by a standard development organisation ("SDO") to which holders of SEPs in force in a Member State have made a commitment to license their SEPs on FRAND terms and conditions. Notable examples of SEPs include those that are essential to comply with cellular standards such as 4G and 5G adopted by the European Telecommunications Standards Institute ("ETSI"). The Commission will be empowered to exempt specific standards and cases from the scope of the draft Regulation if the underlying licensing markets are considered to be working well. Furthermore, the draft Regulation will apply to standards adopted after its entry into force, but not to SEPs that are subject to royalty-free intellectual property of the SDO.

SEP register and database

The draft Regulation includes provisions detailing the process of notifying standards as well as information concerning the registration and database of SEPs. Both are envisaged to contain varying degrees of organisational, patent-related, and commercial information. Patent pools require the publication of information concerning ownership structure and shareholders, the process for evaluating SEPs, cross-references to the standard, standard license agreements and discounts and lists of licensors and licensees.

INTELLECTUAL PROPERTY/LICENSING

European Union level

Collective ex-ante determination of aggregate royalties

The Commission also sets out a process for SEP holders to jointly notify an aggregate royalty to the competence centre after the publication of a standard. An aggregate royalty is the maximum royalty due for all patents essential to a standard. If the SEP holders cannot agree amongst themselves, the competence centre would either facilitate an agreement between the parties or issue non-binding expert opinions on the aggregate royalty.

Registration and essentiality checks

In order to enforce its patents, receive royalties and claim compensation on the basis of an SEP in relation to the implementation of a standard, the SEP holder must register its SEP with a database maintained by the competence centre within defined time limits.

Each year, the competence centre will randomly select a sample of registered SEPs from different families for every non-micro and small enterprise and subject it to essentiality checks, i.e., evaluations of whether the patents are truly essential to the standard. Both SEP holders and implementers may designate annually up to 100 registered SEPs from different patent families to be included in the selection. The competence centre will publish the non-binding results of the essentiality checks in the register and in the database. The competence centre's conclusions cannot be appealed, although it will be possible to request a peer evaluation of the initial assessment (that is, a re-examination of the preliminary results of essentiality checks by evaluators other than those who carried out the original essentiality check). The results of the essentiality checks may be used for the purpose of demonstrating essentiality of the relevant SEPs in negotiations, in patent pools and in court.

Semi-mandatory alternative dispute resolution

The draft Regulation envisages a "*FRAND determination*" mechanism that will take place before an SEP holder may initiate an infringement claim or an implementer could request a determination or assessment of FRAND terms and conditions concerning an SEP in court. Each party may choose whether it wishes to engage in the procedure and respect its outcome. In the event the counterparty elects not to participate in the determination or comply with the outcome, the requesting party may either choose to terminate the proceedings (and immediately start court proceedings) or continue the FRAND determination. Under such circumstances, the requesting party will not be exposed to litigation during the time of the FRAND determination. Similarly, a party may choose to terminate the process if the other party initiated parallel proceedings in a third country.

The competence centre is to conclude the proceedings within at most nine months and deliver a report including a confidential assessment of the FRAND determination and a confidential summary of the main issues of disagreement, as well as a non-confidential methodology and the assessment of the determination of FRAND terms and conditions by the conciliator. Although the competence centre's conclusions are non-binding and cannot be appealed, they may be given evidentiary and precedence status in Member State courts and in the Unitary Patent Court ("UPC") which will become operational this summer.

Initial takeaways

If adopted in its current version, the draft Regulation will fundamentally change the SEP licensing market – but it is not yet clear to what extent. Much will be contingent on how EUIPO, until now competent to oversee trademarks, designs and copyrights but not patents, will assess the essentially of SEPs and conclude complex FRAND determinations within a timeframe of only nine months. EUIPO will thus have to complete in a short period of time what, historically, parties and courts took years to accomplish in judicial proceedings.

INTELLECTUAL PROPERTY/LICENSING

European Union level

It is interesting to note that, by calling for aggregate royalty determinations, the draft Regulation implicitly seems to endorse the "*top-down approach*" (whereby the FRAND-rate determination starts from extrapolating the aggregate royalty rate of all SEPs from a particular standard and then identifies a SEP holder's portion of this aggregate rate). This approach has been used in UK courts as a means of verifying the results of the "comparable licences approach" (whereby licensing agreements signed with similarly situated parties provide for the most reliable evidence on the market price of a given SEP) (see VBB on Competition Law, Volume 2023, No. 3). This determination process would start shortly after the publication of a standard and essentially give rise to *ex-ante* assessments. Assessing the value of a standard, and by extension what aggregate royalty it commands, only months after its release, before it becomes well-established and widely adopted, will be a challenging task and necessarily based on uncertain assumptions about future developments of the product in which the SEPs will be incorporated. Furthermore, the question arises whether the collective cartel-like determination of an aggregate royalty is compatible with competition law.

The draft Regulation has become the subject of hot debate even before it was published and has drawn criticism from both SEP holders and implementers and both within and outside the EU (the US federal government was a notable critic of the proposed rules). The draft Regulation now moves to the European Parliament and the Council of Ministers in the next stages of the legislative process.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

Court of Justice rules that a Commission decision slicing a Member State out of the scope of an antitrust investigation did not infringe Amazon's right to be protected against parallel proceedings

On 20 April 2023, the European Court of Justice ("ECJ") handed down a judgment which confirmed that the European Commission ("Commission") can carve out the market of a Member State from the scope of an investigation and allow the Member State authority to investigate the same conduct for its own territory, without violating the protection against parallel antitrust proceedings (Case C-815/21 P, *Amazon.com and Others v Commission*).

In 2020, the Commission opened an investigation into a possible abuse of dominance by Amazon through its rules and criteria for selecting the single seller whose offer would be prominently displayed in the Buy Box (Case AT.40703, *Amazon – Buy Box*). The investigation covered the whole European Economic Area except for Italy, where the national competition authority ("NCA") had opened proceedings in respect of nearly identical practices of Amazon in 2019. The Italian NCA subsequently imposed a €1.1 billion fine on Amazon (see VBB on Competition Law, Volume 2021, No. 12) and the Commission made the commitments offered by Amazon to resolve its alleged abuses of dominance legally binding (see VBB on Competition Law, Volume 2023, No. 2).

In 2021, Amazon sought the partial annulment of the Commission's decision to open proceedings, insofar as it excluded Italy from the scope of the investigation. Its argumentation hinged mainly on Article 11(6) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty ("Enforcement Regulation"), which relieves the NCAs of EU Member States from their competence to apply Articles 101 and 102 TFEU when the Commission initiates proceedings towards the adoption of a decision. However, by order of 14 October 2021, the General Court dismissed Amazon's action on the ground that the Commission's decision merely constituted a procedural step which did not affect Amazon's legal position (Case T-19/21, *Amazon.com and Others v Commission*).

On further appeal, the ECJ confirmed the General Court's finding that Article 11(6) of the Enforcement Regulation did not imply any right for an undertaking under investigation to have its case dealt with in its entirety by the Commission. Hence, the Commission was entitled to slice Italy out of its investigation and had no obligation to deprive the Italian NCA of its competence to apply Article 102 TFEU. Moreover, the ECJ explained that the protection conferred by Article 11(6) of the Enforcement Regulation only applies where the Commission and one or more NCA(s) investigate the same allegedly anti-competitive practices occurring on the same product and geographical markets during the same period. Because the Commission had excluded the Italian market from the scope of its investigation, there were no parallel proceedings to protect Amazon from.

Observations

While legally sound, this judgment leads to unfortunate policy outcomes. A carveout may – exceptionally – make sense where the market of a given Member State presents specific characteristics that the relevant NCA is best placed to address. However, where no such national or regional specificities exist (such as in the *Amazon* cases), a single, EEA-wide investigation and the adoption of a single, EEA-wide remedy are by far preferable, as two parallel investigations into the same conduct risk resulting in conflicting outcomes. And if that risk can be avoided and the outcomes are largely aligned, running two investigations in parallel is in the end a waste of resources.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

Amazon – Buy Box is only one of the several recent cases that have turned the spotlight on issues raised by parallel antitrust proceedings within the EU. It is reminiscent of the parallel investigations launched by the Commission and the Dutch competition authority in relation to Apple allegedly obliging app developers to use Apple's own payment technology for in-app purchases and restricting their ability to inform consumers of alternative payment services. The investigations focused on different market segments – the Commission's investigation on music streaming app providers, and the Dutch investigation on dating app providers. However, the practices at hand are so substantially similar that a single, consistent outcome would have been desirable.

In the context of the 2022 public consultation on the application of the Enforcement Regulation, a majority of respondents emphasised that the existing system of parallel enforcement has triggered both substantive discrepancies (e.g., in the treatment of narrow parity clauses in the EU) and *ne bis in idem* issues. One can hope, therefore, that the Commission will seize the opportunity to address these issues head-on in the revamped Enforcement Regulation.

PRIVATE ENFORCEMENT

European Union level

Court of Justice rules that, even in the absence of applicable EU rules, a competition law infringement found in a final national competition authority decision is deemed established in the context of a private action

On 20 April 2023, the Court of Justice of the European Union ("ECJ") handed down a preliminary ruling concerning the effect of national competition authorities' ("NCAs") final infringement decisions on follow-on actions for damages and for declarations of nullity, where the actions in question fall outside the temporal scope of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("Damages Directive") (Case C-25/21, *Repsol Comercial de Productos Petrolíferos*).

In 2001 and 2009, the Spanish NCA found that certain refining companies, including Repsol, had engaged in resale price maintenance in the context of their contractual relationship with certain petrol stations. Those decisions became final in 2010 and 2015 respectively. The owners of the petrol stations ("claimants") subsequently brought actions against Repsol before the Madrid Commercial Court seeking a declaration of nullity of the contracts concluded with Repsol pursuant to Article 101(2) TFEU and damages for the harm allegedly caused by those contracts. It is in this context that the Madrid Commercial Court referred two questions to the ECJ.

First, the Madrid Commercial Court asked whether, Article 101 TFEU, read in combination with Article 2 of Regulation 1/2003 – which places the burden of proof on the party alleging an infringement of competition law – must be interpreted as meaning that, in the context of a private action, a competition law infringement found in a final NCA decision must be deemed established until the contrary is proven, where the temporal and territorial scope of the alleged infringement and those of the infringement found in that decision coincide. Second, the Madrid Commercial Court asked whether agreements concerned by an action for a declaration of nullity under Article 101(2) TFEU are automatically void in their entirety where the applicant succeeds in establishing the existence of an infringement of Article 101(1) TFEU.

The ECJ first examined whether Article 9 of the Damages Directive – which provides that a competition law infringement found in a final NCA decision is deemed to be irrefutably established for the purpose of an action for damages brought before their national courts under Articles 101 or 102 TFEU or under national competition law – was applicable in the case at hand. Having concluded that it was not, an answer had to be found in national legislation.

In this respect, the ECJ recalled that Articles 101(1) and 102 TFEU produce direct legal effects in EU Member States and thus create rights for individuals which national courts must protect. Importantly, it ruled that the same is true of Article 101(2) TFEU: accordingly, any individual may rely on the invalidity of an agreement or decision infringing Article 101(1) TFEU. In particular, the ECJ observed that the enforcement of Articles 101(1) and 101(2) TFEU would be rendered excessively difficult if a final NCA decision were to be afforded no effect in private actions before national courts. The ECJ thus held that a final NCA decision must be regarded by the courts of the same Member State as establishing the existence of the infringement until proof of the contrary, provided that the nature of the alleged infringement, and its material, personal, temporal and territorial scope coincide with those of the infringement found by the NCA decision. Furthermore, the ECJ observed, even if the infringement alleged in the civil action coincides only partially with that established through the NCA decision, the findings in such a decision are not necessarily irrelevant but are indicative of the existence of the infringement.

PRIVATE ENFORCEMENT

European Union level

Finally, in the absence of applicable EU rules governing the matter (as was the case here), the ECJ ruled that it is for the legal system of each Member State to lay down detailed rules governing the exercise of the right to seek a declaration of nullity of agreements or decisions and of the right to compensation for the harm resulting from an infringement of Article 101(1) TFEU, including the binding effect of final NCA decisions in the context of these actions.

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