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VBB on Competition Law

Issue Highlights

Jurisdictions covered in this issue

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MERGER CONTROL

European Union level

European Union accepts first below-threshold referral since *Illumina/Grail* judgment

On 31 October 2024, the European Commission ("Commission") announced that it had accepted a referral request submitted by Italy to assess NVIDIA's proposed acquisition of Run:ai Labs Ltd. Although the transaction did not satisfy EU or Italian jurisdictional thresholds, the Italian Competition Authority ("AGCM") used its new "call-in" powers to request notification before referring the case to the Commission.

In this way, the Commission and certain Member State competition authorities such as the ACGM have found a significant work-around to the Court of Justice's ("ECJ") recent judgment in *Illumina/Grail*. In that ruling, the ECJ held that Article 22 could not be understood to allow the Commission to accept the referral of a merger from a Member State that lacked original jurisdiction to review the transaction itself under its own merger review laws (see VBB on Competition, Volume 2024, No. 9). This seemingly shut the door on the Commission's ability to review mergers that do not meet national thresholds.

However, several Member States, including Italy, have recently passed national merger review legislation allowing their competition authorities to call in below threshold mergers. As the ECJ's judgment in *Illumina/Grail* seemingly would not preclude the ECJ from taking up a referral once a national authority has assumed jurisdiction over a transaction by exercise of its call in powers, it is likely that this strategy will increasing be used to enable the Commission to review below-threshold mergers. Unfortunately, this works against a core aim of the EU Merger Regulation – as recognized by the ECJ in *Illumina/Grail* – of establishing a merger control regime in the EU that is workable and predictable for business. We can therefore expect ongoing uncertainty as to whether below-threshold transactions may be caught by national and ultimately EU merger control.

General Court rejects challenge to Vodafone/Liberty clearance

On 13 November 2024, the General Court ("GC") dismissed an appeal of the Commission's 2019 clearance of *Vodafone/Liberty Global*. Despite both German cable businesses having activities in the same sector in Germany, the GC upheld the Commission's finding that Vodafone and Liberty Global's businesses were not actual or potential competitors. Moreover, although the appeal argued that the deal would give Vodafone a *de facto* monopoly by merging two dominant regional cable networks, the GC ruled that holding or strengthening a dominant position does not automatically give rise to a significant impediment to effective competition (a "SIEC") or a reason to block the concentration (Case T-58/20, *NetCologne v Commission*; Case T-64/20, *Deutsche Telekom v Commission* and Case T-69/20, *Tele Columbus v Commission*).

Vodafone, a British telecom company, entered into an agreement to purchase the telecommunications activities of Liberty Global in Germany, the Czech Republic, Hungary and Romania. The Commission ultimately cleared the deal conditionally after an in-depth investigation. Several German telecom companies challenged the clearance decision on a variety of grounds, including two noteworthy arguments regarding how the Commission should have assessed the competitive relationship of the parties and the resulting dominance of the merged entity.

Firstly, the appellants argued that the Commission should have found the transaction parties to be actual or potential competitors on the market for the retail supply of signal transmission services to customers living in multi-dwelling units (the "MDU market") and in single dwelling units (the "SDU market") in Germany. The Commission had found them not to be actual competitors as they were each active in their own respective cable footprints, which did not overlap. The appellants argued that, if not direct

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competitors, the parties should at least be considered potential competitors. The Commission investigated whether Vodafone or the target were likely to exert competitive pressure in the other's cable footprint absent the transaction. While market competitors stated that they expected this to occur, the Commission's investigation revealed no plans indicating that expansion into each others' footprints was imminent, was economically desirable or was ultimately likely.

The Commission noted that the parties' mere theoretical ability to expand into other footprints (in other words. that expansion is in principle feasible and viable) was not sufficient to render them potential competitors. The GC upheld this reasoning, noting that where the Commission observes that an undertaking takes no steps to enter a particular market within a short period of time, that the undertaking does not believe it economically rational to enter and that it therefore does not intend to enter in the future, it is reasonable to conclude that the undertaking is not a potential competitor. If, absent the concentration, it was not likely that the parties would expand into the MDU or SDU markets of the other, the Commission could validly conclude that the concentration would not have eliminated any nascent competition between the two.

Secondly, the appellants contended that the creation of Vodaphone's dominant position in the MDU markets was a merger-specific structural change that gave rise to a SIEC. As each party held a dominant position in its respective MDU market, the appellants argued that their combination inevitably conferred a dominant position to Vodafone at the national level, which no single party held prior to the transaction. Because, in the appellants' view, the creation of a dominant position is sufficient to find a SIEC, the Commission erred by first considering whether any merger-specific reduction in competition would occur rather than confining itself to identifying the dominant position that the transaction created. It was not necessary, they argued, for the Commission to find that the transaction eliminated an important competitive constraint on Vodafone. The GC rejected this view, noting that the true test was whether the transaction, even if it might lead to dominance or other anticompetitive effects, significantly impedes effective competition. The Commission was therefore justified in carrying out a prospective analysis of whether competition would actually likely be lessened as a result of the transaction, regardless of the resulting dominance structures.

It will be interesting to watch whether any of this line of reasoning will resurface in the pending appeal of the Commission's prohibition in *Booking.com/eTraveli* (see VBB on Competition, Volume 2023, No. 9). That was the first prohibition based on an "ecosystem" theory of harm – where Booking was dominant in one market and sought to acquire eTraveli, which was active in another, and where the Commission maintained that the merger would strengthen the "network effects" within Booking's ecosystem. Though the theory was plausible, it was not clear that there was much evidence to support the ecosystem effects resulting in a SIEC. The GC may need to elaborate on what level of proof the Commission must show to support the conclusion that an acquirer in a position preexisting of dominance buying a non- or insignificant direct competitor is actually likely lead to a reduction of effective competition post-transaction.

General Court rejects challenge to Vodafone/Telecom Italia remedies

On 13 November 2024, the GC issued a judgment dismissing a challenge to Vodafone's formation of a joint venture with Telecom Italia ("TIM"). The concentration, which would consolidate the passive telecommunications infrastructure (i.e., ground- and roof-based towers) of both parties in Italy, was conditionally cleared by the Commission on 6 March 2020. Iliad and Fastweb, rival telecommunications companies, appealed the clearance decision, arguing that the access commitments that the Commission had accepted were insufficiently precise and that they failed to protect third parties against bias (Case T-692/20, *Iliad Italia v Commission*).

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Specifically, during its Phase I review, the Commission identified that the joint venture could give rise to competitive concerns arising from vertical and horizontal non-coordinated effects concerning the supply of various types of hosting services provided to other market players, including the appellants. To eliminate these concerns, the parties agreed, among other things, to provide competitors with access to free space at 4,000 mobile tower sites, a certain percentage of which had to be located in municipalities with more than 35,000 residents.

Iliad and Fastweb argued that these commitments were not sufficiently precise to dispel the serious doubts the Commission had identified in its investigation as they did not precisely define what degree of free space was needed to classify a site as being available to competitors. The GC found these arguments unpersuasive, observing that the use of general terms is not unusual in access remedies, which are typically highly complex.

The appellants also contended that the terms of the remedy – which do not contain any qualitative criteria with regards to site selection – allow the parties to discriminate against rivals in the selection of sites to which access is granted. The GC also rejected these arguments, noting that the remedy provided for a significant amount of access in proportion to the appellants' stated needs and that the geographic requirement left less scope for the parties to potentially discriminate against competitors in granting access. It was clear that the objective of the commitments was to ensure that the site access provided was useful to competitors. If the partners in fact engaged in any discrimination contrary to this objective in the implementation of the commitments, this would be a matter to be dealt with through the monitoring mechanisms, not by challenging the validity of the underlying commitments themselves.

ABUSE OF DOMINANT POSITION

European Union level

European Commission publishes first decision on disparagement

On 6 November 2024, the European Commission ("Commission") published the non-confidential version of its decision accepting commitments offered by Vifor to resolve allegations of disparagement ("Decision"). According to the Commission's preliminary findings, Vifor held a dominant position in the relevant market for intravenous ("IV") iron treatment, and potentially abused this dominance by implementing a disparagement campaign against a competing IV iron medicine (Monofer) marketed by Pharmacosmos.

Commission's preliminary finding of disparagement

While companies are generally allowed to advertise the qualities of their products, competition law issues may arise if activities go further to disparage a competing product by creating false perceptions about its material characteristics (e.g., safety and efficacy). In the pharmaceutical sector, relevant activities may include both promotional and medical communications, for example, promotional campaigns to healthcare providers ("HCPs"), eDetailers, sponsored studies and external seminars.

In the Decision, the Commission indicates that a company may abuse its dominant position where (i) it disseminates objectively misleading information capable of discrediting a competing product, (ii) the behaviour is capable of harming competition, and (iii) the behaviour cannot be objectively justified.

Objectively Misleading Information Capable of Discrediting a Competing Product. This notion includes information that is inaccurate as well as information that, although technically correct, is presented in a manner that is capable of confusing and manipulating the addressees or likely to mislead those who receive it (e.g. because relevant information is omitted or exaggerated).

In the case at hand, the Commission challenged two lines of promotional messages.

- The first messages allegedly claimed that Monofer was a dextran (or dextran-derived), which is a substance linked to safety issues and is no longer marketed in Europe. According to the Commission, these statements were inaccurate or incomplete because (i) Monofer is neither a dextran nor its derivate, and (ii) the statements contradicted the findings of regulatory authorities, courts, and the company's own internal documents.

- The second line of message allegedly claimed that patients receiving Monofer had an increased risk of hypersensitivity reactions compared to the dominant company's product. The Commission's decision claims that such messages had no basis in the regulatory approvals for the products. Further, the Commission alleges that the dominant company was aware of the deficiencies in its statements and selectively used the available studies while omitting others. The company also relied on ad hoc studies (either sponsored by the company itself or co-authored by its employees) and external seminars.

In the Commission's preliminary view, such messages were misleading and capable of confusing HCPs and discrediting Monofer.

Capability to Produce Exclusionary Effects. The Decision indicates that pharmaceutical markets are particularly vulnerable to disparagement practices. According to the Commission, doctors and other HCPs are generally conservative and are more likely to be affected by misleading statements regarding the safety or efficacy of medicines. In this context, a systematic communication campaign addressed to HCPs is more

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likely to be capable of adversely affecting the uptake of the disparaged medicine, particularly when such a campaign is implemented by a dominant company with a strong reputation and established local market presence and relationships with HCPs.

In the case at hand, the Commission alleges that the dominant company's communications were capable of harming competition because (i) they targeted key drivers of the demand for high-dose IV irons, including doctors and other parties that may influence the administration, dispensing or procurement of medicines, (ii) the addressees of the communications were likely to be affected by the allegedly misleading messages about the safety of the only alternative medicine, (iii) the disparaging company enjoyed a special position in its communications with HCPs due to established relationships and trust and unrivalled direct local presence, and (iv) the messages were disseminated via a centrally organised campaign and via numerous means (including through funded studies).

Lack of Objective Justifications. The Commission also examined whether the conduct could be objectively justified, but considered that the messaging was not seeking to raise awareness of the therapeutic and clinical characteristics of Vifor's own product and also did not seek to pursue a genuine and evidence-based public health objective.

Committments

The Commission preliminarily concluded that the messages could constitute an abuse, but did not impose fines. Instead, the Commission accepted commitments submitted by the dominant company seeking to address the concern, including (i) the launch of a communication campaign to rectify the effects of its potentially misleading prior messages and (ii) a commitment to not engage in external promotional and medical communications for the next 10 years concerning Monofer's safety profile (subject to limited exceptions).

Key takeaways

The Decision is the first time that the Commission has analysed disparagement conduct (previous cases were dealt with by the Court of Justice in preliminary rulings concerning the Italian *Avastin/Lucentis* saga, or by national authorities, notably in France). While a more detailed analysis of disparagement practices can be expected when the non-confidential version of the *Teva* decision is released (see VBB on Competition Law, Volume 2024, No. 10), companies active in the pharmaceutical sector should already be very careful in all promotional and medical communications, especially activities targeting HCPs. Risks will be higher if statements by dominant companies concerning competing products are inaccurate from a factual perspective, unsupported by scientific evidence, drafted in an unbalanced manner, and/or omit relevant information, particularly where the statements contradict the findings of regulatory authorities, concern crucial topics about the medicine (such as safety and efficacy) and are part of a systematic campaign by a player enjoying a strong reputation.

While the Decision concerns pharmaceutical companies, its findings may also potentially be relevant for other sectors. However, it remains to be seen whether competition authorities will launch similar investigations in other markets. In the Decision, the Commission found that the pharmaceutical sector is "particularly vulnerable" to disparagement practices, and will likely prioritize other cases in the pharmaceutical sector due to its importance for the citizens' health and public budgets. For other industries, competition authorities may have less incentive to pursue cases, and instead direct affected parties to other legal protections (e.g. EU legislation on misleading and comparative advertising).

ABUSE OF DOMINANT POSITION

National level

UNITED KINGDOM

UK Competition Appeal Tribunal quashes CMA's excessive pricing decision against Pfizer and Flynn, but still finds abuse

On 20 November 2024, the UK Competition Appeal Tribunal ("CAT") delivered the latest instalment in the *Pfizer/Flynn* saga by annulling the decision re-imposed by the Competition and Markets Authority ("CMA"). The CAT instead conducted its own assessment of the conduct and ultimately imposed a fine similar to that imposed by the CMA.

In 2016 the CMA issued a decision finding that the prices of phenytoin sodium capsules sold by Pfizer and Flynn were excessive. Pfizer manufactured and marketed the said capsules until 2012, when it entered into arrangements with Flynn for their distribution in the UK on an exclusive basis. Flynn de-branded the capsules (thereby escaping price control) and significantly increased their price. The CMA found two separate abuses, one for Pfizer's price to Flynn and another for Flynn's prices to wholesalers and pharmacies.

The CMA's decision was quashed by the CAT and the Court of Appeal in 2018 and 2020, respectively (see VBB on Competition Law, Volume 2020, No. 3), following which the CMA re-adopted the decision in 2022 again finding an abuse of dominance. Following a further appeal, the CAT issued the present judgment, in which it applied the standard framework (first established in the landmark *United Brands* case) to assess whether a price is excessive. First, it must be ascertained whether the price charged is excessive relative to the production costs plus a reasonable rate of profit (excessiveness limb). Second, the authority must establish whether the price is unfair either in itself or compared to relevant benchmarks (unfairness limb).

First limb: Excessiveness test

The CMA employed a "Cost-Plus" test, which compares (a) the parties' cost of producing a unit of product (the "product unit cost") plus a normal profit margin ("reasonable rate of return"), against (b) the price charged (the "product unit price"). In the judgment, the CAT identified multiple "fundamental" errors in the CMA's application of the test to Flynn's pricing, including:

- The CMA failed to include Flynn's costs for acquiring the capsules from Pfizer.
- The CMA assessed Flynn's reasonable rate of return based on its overall business, instead of focusing on the specific product at issue.
- The CMA incorrectly took the view that a price is automatically excessive if it fails the cost-plus test (i.e. if the product unit price is more than the product unit cost plus a reasonable rate of return). The CAT identified scenarios in which a higher price may not be excessive (e.g. in case the company is more efficient than rivals supplying the same product), although ultimately determined that such exceptions do not apply in this case.

In remaking the decision, the CAT carried out its own Cost-Plus test. Although the CAT explicitly acknowledged the fragility of its figures, it recalculated the product unit cost and reasonable rate of return for each company. It found that the prices charged were significantly higher and thus excessive.

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- For Pfizer, the CAT calculated a reasonable rate of return at 15% in light of the fact that the product had been marketed for many years (meaning that profit margin may be expected to decrease, not increase), there was a low risk of product liability litigation, and demand was inelastic. Pfizer's profits significantly exceeded this level.

- For Flynn, the CAT adopted a lenient approach as it took the input purchase price into account and considered that a reasonable rate of return could not exceed 30%. However, even this was exceeded and, consequently, Flynn's price was considered excessive.

Second limb: Unfairness test

The CMA considered that the prices at hand were unfair, including because they were (i) significantly higher than the cost, (ii) higher than prices charged for the same products in other countries, and (iii) the features of the capsules did not provide any legitimate justification.

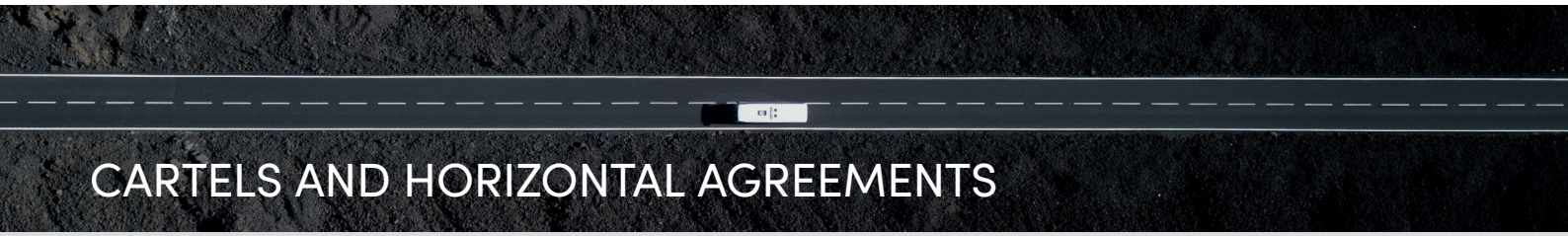
The CAT again criticised the CMA's decision and argued that the assessment should focus on why there is a "producer surplus" (i.e. why is the price charged higher than the company's cost plus a reasonable rate of return). As in the excessiveness test (above), the CAT criticized the CMA for taking the position that any producer surplus charged by a dominant undertaking is essentially automatically unfair in all cases. The CMA should have instead considered the economic value and medical benefits of the capsule products in order to determine whether the producer surplus was justified.

The CAT, therefore, carried out its own unfairness analysis and held that, for Pfizer, a portion of the surplus was legitimate since it was providing distinctive value to customers in the form of a differentiated product. However, according to the CAT, the said distinctive value was limited to the provision of continuity of supply (i.e., the recommendation for patients to retain the same manufacturer), while similar medical benefits could be provided by differently manufactured capsules or tables (which is relevant since there was evidence of switching). For Flynn, the CAT concluded that no producer surplus was justified as Flynn simply distributed the products and did not provide any additional services providing added value.

Both the CMA and the CAT also disregarded pricing in other countries since, as held by the CAT, this would assume that prices should be similar across different highly regulated markets.

Key takeaways

This judgment provides an in-depth assessment of the numerous complicated factors to be considered when applying the *United Brands* test to determine whether a price is excessive. Importantly for pharmaceutical companies, the CAT confirmed that the mere existence of a price increase should not create the assumption of a violation, and also confirmed that it is important to consider the value delivered by medicines to patients and health systems, which may justify a producer surplus.



CARTELS AND HORIZONTAL AGREEMENTS

European Union level

General Court upholds Commission decision in supra-sovereign, sovereign and agency bonds cartel case

On 6 November 2024, the General Court delivered two judgments confirming the fines imposed by the Commission on Crédit agricole and Credit Suisse (now UBS Group AG) for their participation in a cartel in the US dollar-denominated bonds sector. This sector includes supra-sovereign bonds (issued by supra-national institutions), sovereign bonds (issued by central governments under foreign law and/or in foreign currencies) and agency bonds (issued by sub-national public authorities and government-related agencies) ("SSA bonds"). The General Court dismissed the applicants' pleas, rejecting claims of errors in: (1) attributing the infringement to employees based on their passive involvement in chat rooms, (2) classifying the conduct as a 'single and continuous infringement', (3) classifying the conduct as a 'restriction by object', and (4) the calculation of the fines (Case T-386/21, *Crédit agricole and Crédit agricole Corporate and Investment Bank v Commission*; Case T-406/21, *UBS Group and Credit Suisse Securities (Europe) v Commission*)

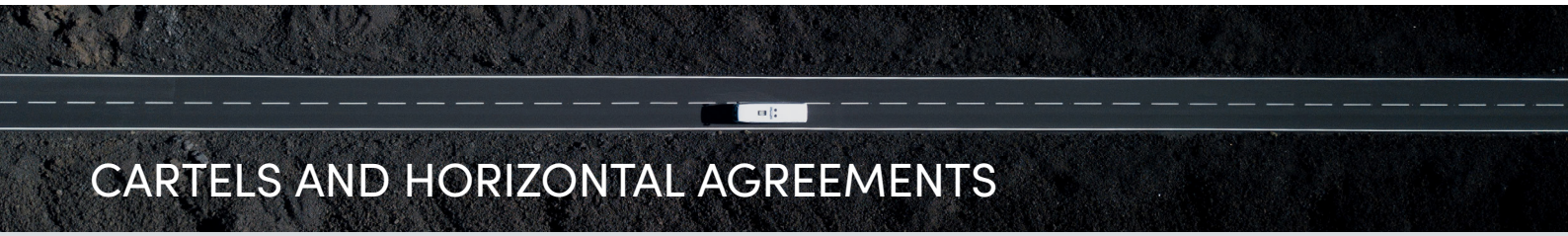
In 2018, the Commission adopted a decision in which it imposed total fines of €28.5 million on Bank of America, Merrill Lynch, Crédit agricole and Credit Suisse for allegedly participating in a cartel in the secondary market for USD-denominated SSA bonds in the EEA. Bonds are initially sold to investors on the primary market through auctions or syndicates, then traded on the secondary market among banks, brokers and investors. The Commission found the existence of a cartel on the secondary market in which a core group of traders from the banks involved maintained regular contact through online chat rooms.

On appeal, the General Court rejected Crédit agricole's claim that the Commission had wrongly assumed the Crédit agricole trader involved was aware of all the chat room exchanges given that the trader had not participated in the specific discussions and his membership in over 100 chat rooms. In doing so, the General Court first recalled the settled case law according to which passive modes of participation in an infringement, without an undertaking's clear opposition or distancing, are indicative of collusion. According to the General Court, there is no reason why this case law should not be applied by analogy to discussions held in online chat rooms to which an undertaking is connected. It is only if an undertaking provides clear evidence proving the trader was unaware of the incriminating messages that opposition or distancing can be found.

However, the General Court annulled the Commission decision insofar it found 10 January 2013 as the start date of Crédit agricole's involvement in the infringement. In this respect, the General Court ruled that merely logging into the chat room was insufficient to prove that the trader in question had become aware of earlier anti-competitive discussions, especially as no such discussions had occurred in the chat room on that day. Nonetheless, this did not affect the amount of the fine, as the start date of Crédit agricole's participation was set to the following day.

The General Court also rejected the applicants' pleas disputing the existence of a single and continuous infringement. The General Court held that the conduct adopted by the traders of the banks concerned formed part of an overall plan pursuing a single anti-competitive objective even though the discussions between the traders became less frequent after a certain point. Moreover, the General Court found that the significant gaps in their discussions, ranging from 49 to 82 days, did not alter the continuous nature of the infringement, given that the discussions persisted for more than five years.

The applicants further argued that the Commission had wrongly classified the conduct at issue as a 'restriction by object', as they argued that the classification should be based on an individual assessment for each undertaking

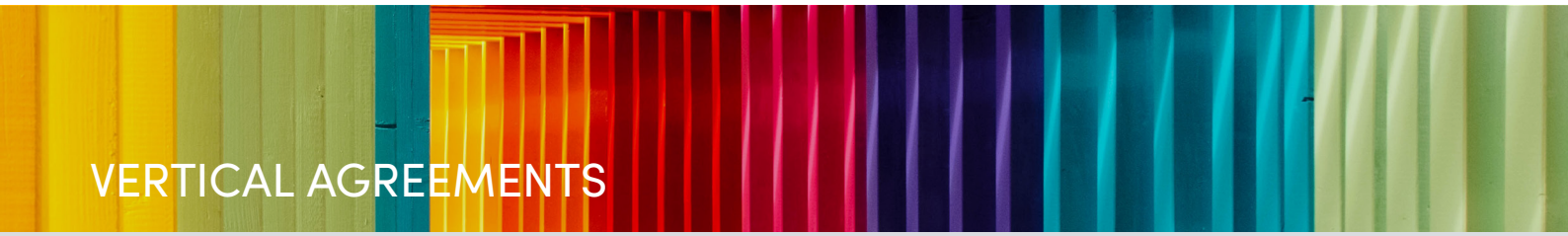


CARTELS AND HORIZONTAL AGREEMENTS

European Union level

taking part in that conduct. The General Court dismissed this claim by asserting that the classification of a restriction by object must be made in light of the objective characteristics of that conduct without regard to the particular situation of each undertaking which participated in it.

Lastly, the General Court endorsed the Commission's methodology to apply, for the fines imposed, a proxy based on the notional amounts of SSA bonds traded during the infringement period, adjusted to account for the spreads between purchase and sale prices. The General Court endorsed the Commission's discretion to depart from its Fining Guidelines, provided the Commission gives reasons for doing so and justifies it to the requisite legal standard.



VERTICAL AGREEMENTS

European Union level

Pierre Cardin and Ahlers: European Commission announces latest decision tackling cross-border sales restrictions

On 28 November 2024, the European Commission announced that it had fined clothing brand Pierre Cardin and its principal licensee Ahlers a total of €5.7 million for restricting cross-border sales of Pierre Cardin-branded clothing in the EEA, as well as sales of such products to specific customers, in breach of Article 101 TFEU.

By way of background, Pierre Cardin licences its trademark to allow third parties, such as Ahlers, to manufacture and distribute branded clothing. In June 2021, the Commission conducted unannounced inspections in the sector and subsequently opened proceedings against Pierre Cardin and Ahlers in January 2022. On 31 July 2023, the Commission sent the parties a statement of objections (see VBB on Competition Law, Volume 2023, Nos 7 & 8).

The Commission has now concluded that, from 2008 to 2021, Pierre Cardin and Ahlers took part in agreements and concerted practices having the objective of ensuring Ahlers' absolute territorial protection in the Member States covered by its licensing agreements with Pierre Cardin against sales by other Pierre Cardin licensees (and their customers) located elsewhere in the EEA. According to the Commission, Pierre Cardin prevented its other licensees from selling Pierre-Cardin branded products: (i) to retailers located outside their licensed territories; and/or (ii) to low-price retailers (such as discounters) that offered the clothing to consumers at lower prices.

Notably, Ahlers, as the licensee, received a higher fine (€3.5 million) than Pierre Cardin (€2.2 million). Furthermore, it is apparent from the Commission press release that the fine imposed on Ahlers would have been even higher but for the Commission granting a reduction based on Ahlers' inability to pay (in view of its filing for insolvency in April 2023).

This case is the latest development in the Commission's now-vigorous enforcement against overly broad restrictions on cross-border sales, which it considers may protect price differences between Member States thereby depriving consumers of the full benefits of the single market. Similar cases in the last five years include *Ancillary Sport Merchandise* (2019), *Character Merchandise* (2019), *Film Merchandise* (2020), *Video Games* (2021) and, most recently, *Mondelez* (2024). The facts of *Pierre Cardin* would appear to be closer to those of the *Merchandise* and *Video Games* cases, insofar as the sanctioned practice seems to have been aimed (at least in part) at preventing trademark licensees from selling branded products outside the territory for which the licence was granted.

Unlike in *Mondelez* and most of the other licensing cases mentioned above, in which the companies under investigation resorted to the cooperation procedure (equivalent to a settlement in cartel cases), the parties in *Pierre Cardin* opted for a contested procedure. It will be interesting to see on what basis the parties defended the licensing practices and, in particular, whether they argued that the sales subject to the contested contractual restrictions would in any event have been violations of their intellectual property rights. This argument has been soundly rejected, regardless of whether or not the rights at issue should be considered to have been exhausted, both by the Commission in its recent trade mark licensing cases as well as, in respect of copyright, by the General Court in its judgment in *Valve v Commission* (T-172/21) (see VBB on Competition Law, Volume 2024, No. 9).

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

Technology Transfer Agreements – New European Commission report and study released on Block Exemption and Guidelines

The European Commission is currently conducting a review of the Technology Transfer Block Exemption Regulation ("TTBER") and accompanying Guidelines ("TTGL"), which provide safe harbours and guidance concerning technology license agreements, patent settlements, technology pools and other topics. The existing TTBER entered into force on 1 May 2014, and will expire on 30 April 2026 along with the TTGL. As part of its review, the Commission has now published a new report and study, which will be used as a basis for drafting updated versions of these instruments.

These instruments are important for companies active in highly innovative sectors such as tech and pharmaceutical sectors. The TTBER provides a safe harbour for technology transfer agreements among parties meeting market share thresholds which do not contain "hardcore" restrictions. The TTBER also contains a short list of excluded restrictions which are not "hardcore" but are nevertheless not covered by the safe harbour. The TTGL creates an additional "soft" safe harbour for technology transfer agreements which fall outside the block exemption when they do not contain hardcore restrictions and when there are at least four other independently controlled substitutable technologies to the licensed technology. The TTGL also sets out guidance for evaluation of agreements that do not qualify for the safe harbours.

On 22 November 2024, the European Commission published a staff working document evaluating these instruments, together with a third-party study and a summary of a stakeholder workshop. These materials indicate that the TTBER and the TTGL have been beneficial in assisting companies to assess whether their technology transfer agreements comply with the competition laws, and exempting agreements which would likely satisfy Article 101(3) TFEU. Nevertheless, the materials also indicate that there may be scope for updates and improvement of the TTBER and TTGL, including:

- *Coverage of data licensing agreements*: Due to the increased importance of data or data rights for innovative sectors, stakeholders have requested that the instruments are extended to also address licensing agreements for data and data rights, which are not addressed in the existing TTBER and TTGL.

- *Application of market share thresholds and 4+ independent competitors test*: Stakeholders identified practical difficulties in applying the tests for the application of the safe harbours, for example due to a lack of information on competing technologies or difficulties to determine exact market shares for new and dynamic technologies.

- *Tightening safe harbour for technology pools*. The materials indicate revisions to the safe harbour may be required in order to exclude certain technology pools that may violate the competition laws.

- *Need for guidance on licencing negotiation groups*. The Commission's study indicates that there is increasing interest in licensing negotiation groups, which negotiate with licensors on behalf of multiple licensees. Similar to joint purchasing arrangements, such licensing negotiation groups may create efficiencies, but might also harm competition, depending on the circumstances.

- *Clarification of guidance on settlement agreements*. The study indicates that updates are required to the TTGL in order to bring them into line with the recent judgments of the EU Court of Justice addressing settlement agreements in the pharmaceutical sector.

The above topics will be areas of focus for the Commission when drafting updated versions of the TTBER and TTGL. Interested parties will have a further opportunity to comment, as the Commission has indicated that a public consultation and "call for evidence" will be announced during December 2024.

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