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VBB on Competition Law

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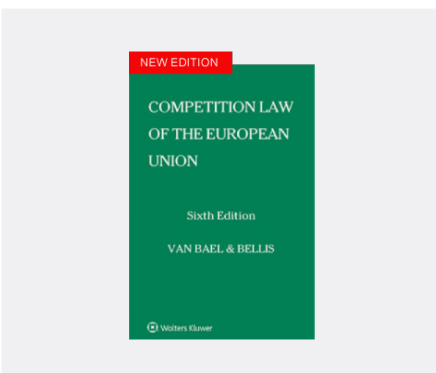

Jurisdictions covered in this issue

EUROPEAN UNION 3, 6, 9
NORWAY 8

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ABUSE OF DOMINANT POSITION

European Union level

European Commission publishes draft Guidelines on Exclusionary Abuses: lowering the bar for intervention

On 1 August 2024, the European Commission ("Commission") launched a public consultation on its draft Guidelines on exclusionary abuses of dominance ("Draft Guidelines"). The Draft Guidelines summarise the Commission's interpretation of the law governing the application of Article 102 TFEU to exclusionary abuses of dominance.

As could be expected from the Commission's 2023 revision of its Article 102 Guidance Paper and the accompanying Policy Brief previewing the key elements of future Article 102 guidelines, the Draft Guidelines are rich in sometimes highly selective quotes from Article 102 judgments of the European Courts, but offer very little in terms of general principles that could be derived from those judgments to govern the assessment of conduct under Article 102. They therefore represent more an enforcement manual for competition authorities rather than significant guidance assisting potentially dominant firms to assess ex ante potential strategies that can reduce competition law risks.

A few key takeaways are noted below.

<u>Analytical framework</u>

Under the Draft Guidelines the Commission can find an exclusionary abuse if conduct by a dominant firm:

1. departs from competition on the merits;

2. is capable of having exclusionary effects; and

3. is not demonstrated to be objectively justified.

Departure from competition on the merits

The Commission bears the burden of demonstrating the lack of competition on the merits. For certain types of conduct, such as exclusive dealing, tying and bundling, refusal to supply, predatory pricing and margin squeeze, the Draft Guidelines provide specific tests to detect a lack of competition on the merits as well as the likelihood of exclusionary effects. In other cases, the Commission will take account of a non-exhaustive list of factors used to assess competition on the merits in the European Courts' case law, including abnormal/unreasonable changes in the dominant firm's behavior, discriminatory self-preferencing behavior, and violations of other areas of law.

Notably, the Draft Guidelines downplay the relevance of the "as efficient competitor" ("AEC") test in determining whether competition is on the merits or capable of producing exclusionary effects. The AEC test is only discussed in detail in the context of the assessment of margin squeezes, where this has been explicitly required by case law.

Otherwise, consistent with its approach in the 2023 revision of its Guidance Paper, the Commission characterises the AEC test as one of a number of possible metrics it might use to show lack of competition on the merits or exclusionary effects. In fact, in the case of conditional rebates, the Commission considers that the conduct's capability to have exclusionary effects should be assessed in relation to existing actual or potential competitors, rather than in relation to hypothetical as efficient competitors.

The effects of the Commission's approach are clear – dominant firms would not be able to rely on the AEC test as a defense or use the AEC test to develop an Article 102-compliant rebate strategy (as the Commission could always switch to other factors in order to determine that a pricing strategy departs from "competition on the merits"). The Commission would however have the discretion to resort to use of the AEC test, whenever convenient, to show that the defendant's pricing strategy was not consistent with the competition on the merits principle.

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ABUSE OF DOMINANT POSITION

European Union level

Capability of having exclusionary effects

The Draft Guidelines indicate that an effects-based assessment is an essential aspect of finding an exclusionary abuse and lay out a complex framework governing how this assessment should operate in practice. The Draft Guidelines identify three categories of conduct for which the related burden of proof is allocated differently:

- *Conduct that the Commission must demonstrate is capable of producing exclusionary effects* – the Commission bears the burden of demonstrating that the conduct is at least capable of producing exclusionary effects (a standard above hypothetical possibility but below showing that it is intended to, actually does or will in the future produce such effects) with reference to specific tangible analysis and evidence. That the conduct enhances the likelihood of such effects arising on the market is deemed sufficient to meet this standard.

  Notably, while the Commission indicates that examining the counterfactual may be helpful in some cases, it does appear to downplay the importance of always doing so, noting that it may be unnecessary or impractical. With this approach, the Commission also signals that it is not committed to seriously engaging in an examination of causality between allegedly harmful conduct and effects on the market.

- *Conduct that is presumed capable of producing exclusionary effects* – this category of conduct (including exclusive supply or purchasing, rebates conditioned on exclusivity, predatory pricing, margin squeeze in the presence of negative spreads and certain types of tying) is seen as highly likely to produce exclusionary effects. As such exclusionary effects are presumed, the Commission is not required to extend its effects analysis beyond the consideration of any evidence introduced by the dominant firm to rebut the presumption. It remains to be seen whether the European Courts (whose case law to date has not explicitly recognised such presumptions) will agree with this shift of evidentiary burden in future appeals.

  Unfortunately, the Commission does not provide meaningful guidance on what rebuttal evidence might be deemed sufficient. For instance, the Draft Guidelines indicate that the firm can submit evidence showing that the circumstances of the case are substantially different from the "background assumptions" upon which the presumption is based, without explaining what these assumptions are.

- *Conduct that constitutes a "naked restriction"* – this conduct has no other economic object but to restrict competition, and a dominant firm can only exceptionally prove that it is not capable of having anticompetitive effects. The Draft Guidelines indicate that this category would include the dominant firm making payments to customers to postpone the launch of new products based on competitors' products, agreeing with distributors to swap a competing product for its own under threat of withdrawing discounts, or actively dismantling infrastructure used by a competitor.

Possible justifications

Finally, the dominant firm bears the burden of demonstrating that conduct that departs from competition on the merits and is capable of producing exclusionary effects is nonetheless objectively justified. To succeed, the firm must demonstrate that the conduct is either necessary to achieve a certain legitimate aim (objective necessity defense) or that it creates efficiencies that counterbalance or outweigh the harmful effects on competition (efficiency defense). In both cases, the exclusionary effects must be proportionate to the legitimate aim/efficiencies generated. Conduct that falls into the categories of presumptively producing exclusionary effects or of naked restrictions will consequently be much harder to justify. As the language

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European Union level

surrounding justifications is somewhat broad and vague, it is not clear whether this will provide a meaningful opportunity to excuse conduct that would otherwise violate Article 102. Experience suggests that it will continue to be very difficult, if not impossible, to defend conduct as objectively justified.

A significant opportunity to comment

The aim of the Draft Guidelines is to provide market actors with greater legal certainty as to how the Commission will assess potential violations. While the Draft Guidelines do not wholly address outstanding legal questions regarding exclusionary abuses, they lay out the Commission's proposed interpretive roadmap on these issues. The direction of the roadmap is clear – lower the burden on the Commission (reflecting the narrative among enforcers that European Court cases have made Article 102 enforcement "too difficult") and maximise opportunities to find an Article 102 infringement.

With this approach, the Draft Guidelines signal a departure from the 2008 Guidance Paper, where the Commission demonstrated a greater commitment to using economic principles and related evidentiary requirements to distinguish conduct that would likely infringe Article 102 from competitive conduct that would generally be considered competition law compliant. In recent years, the European Courts have been receptive to the principles laid out in the 2008 Guidance Paper and it remains to be seen whether they will be prepared to adopt the approach set out in the Draft Guidelines.

Comments on the Draft Guidelines can be submitted until 31 October 2024, and the Commission aims to publish the final version of the Article 102 Guidelines in 2025. In light of the low evidentiary burden and seemingly wide discretion the Draft Guidelines give the Commission, it is in the interest of market actors to review the Draft Guidelines closely and make their views known during the consultation process.

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CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Court of Justice clarifies when stand-alone exchange of information between competitors may constitute restriction of competition by object

On 29 July 2024, the European Court of Justice of the EU ("ECJ") issued a preliminary ruling in a case referred to by the Portuguese Competition, Regulation and Supervision Court (the "referring court") on whether a stand-alone exchange of commercial information between competing banks could constitute a restriction of competition by object infringing Article 101 of the Treaty on the Functioning of the European Union ("TFEU") (Case C-298/22 (*Banco BPN v BIC Português and Others*).

Background

On 9 September 2019, the Portuguese Competition Authority (Autoridade da Concorrência, "AdC") imposed a fine of € 225 million on fourteen credit institutions (including the six largest in Portugal) for having participated in a stand-alone monthly exchange of commercially sensitive information between May 2002 to March 2013, in breach of Article 101 TFEU and the equivalent provisions of national law.

The information exchanged concerned the home loans market, the consumer credit market and the corporate lending market. The information related to certain current and future commercial conditions, e.g., credit spreads, risk variables and disaggregated individual production figures of the participants in the exchange. The exchanges concerned information that was not public or was difficult to access or systematise. According to the AdC, the exchange of information was "stand alone" since it was not linked to a concerted practice restrictive of competition, such as a market-sharing agreement. Furthermore, the AdC considered that the information exchange constituted a restriction of competition by object, which relieved the authority of the obligation to investigate its possible effects on the market.

Most of the participating banks appealed the decision of the AdC before the referring court on the grounds that the exchange of information was not sufficiently harmful to competition for it to be classified as a restriction by object. In their view, an examination of its effects was required and, in any event, the AdC should have taken into account the economic, legal and regulatory context of the exchange.

The referring court stayed proceedings and asked the ECJ whether the exchange could be classified as a restriction by object under Article 101 TFEU.

Ruling of the ECJ

In its judgment, the ECJ held that a stand-alone exchange of information between competitors may constitute a restriction of competition by object. According to the ECJ, it is sufficient that the exchange constitutes a form of coordination which, by its very nature, is necessarily harmful to the proper functioning of normal competition. For a market to function under normal conditions, the operators on that market must determine independently the policy which they intend to adopt and remain uncertain as to the future conduct of other participants on that market.

Accordingly, an exchange of information may be classified as a restriction by object where that exchange makes it possible to remove such uncertainty. That is the case where the information exchanged is confidential and strategic in the sense that it may reveal the future conduct of a competitor on the market concerned. "Confidential information" is defined as information not already known to any economic operator active on the market in question. "Strategic information" is information that may reveal

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the strategy which some of those participants intend to implement with regard to what constitutes one or more parameters in the light of which competition on the market concerned is established.

The ECJ came to the conclusion that the information exchange in this particular case may constitute a restriction of competition by object since it appeared from the referring court's description of the facts that the information exchanged related to the intentions of the participating banks to alter credit spreads in the future. Given that credit spreads constitute one of the parameters on the basis of which competition is established on a market, such an exchange could only have had the objective of distorting competition on that market.

Observations

The ECJ's ruling is consistent with its well-established case law on exchange of information, as well as with the strict standards on information exchange set out in the Commission's 2023 Horizontal Guidelines (see VBB on Competition Law, Volume 2023, No. 6). Applying this past case law, the judgment provides a useful practical illustration of the conditions under which an exchange of information between competitors may itself be considered a restriction of competition by object.

CARTELS AND HORIZONTAL AGREEMENTS

National level

NORWAY

Norwegian Competition Authority imposes fines totalling € 420 million on three grocery chains for illegal exchange of information

On 21 August 2024, the Norwegian Competition Authority (NCA) issued a press release announcing that it had imposed fines totalling NOK 4.9 billion (€ 420 million) on three grocery chains, namely Coop, Norgesgruppen and Rema, for illegal exchange of information between January 2011 and April 2018.

The NCA noted that, in 2010, the grocery chains had entered into the "*Industry Standard for Comparative Advertising*", which provided guidelines for the chains' use of advertising based on price comparisons. The standard contained a provision stipulating that the chains could visit each other's stores to collect prices in order to document claims made in price comparisons. In 2011, the chains agreed that the standard's provision concerning access to each other's stores should be implemented in such a way that the parties could collect large quantities of price information with the use of hand scanners. In 2012, the chains agreed on a further expansion of the access to the parties' grocery stores.

In 2016, the NCA initiated a preliminary project to investigate this conduct and, in April 2018, conducted unannounced inspections at the premises of the three grocery chains

According to the NCA, the grocery chains, which represented 95% of the Norwegian groceries market in terms of turnover, exchanged large volumes of price information and were able to carry out extensive price surveillance in each other's stores. The NCA found that this conduct infringed Section 10 of the Norwegian Competition Act, and the corresponding provision in Article 53 of the EEA Agreement (equivalent to Article 101 TFEU).

The grocery chains can appeal the decision to the Competition Appeals Tribunal within six months.

PRIVATE ENFORCEMENT

European Union level

Court of Justice hands down two judgments clarifying the limits of the application of the "economic unit" concept in the context of antitrust damages

In July 2024, the European Court of Justice ("ECJ") issued two judgments relating to the role of subsidiaries and their parent companies for the purpose of (i) service of judicial documents and (ii) the determination of jurisdiction on the basis of the place where the alleged harmful event occurred.

The Volvo case

On 11 July 2024, the ECJ handed down its judgement in Case C-632/22 (*Volvo v Transsaqui*) concerning the question of whether, having regard to the right to an effective remedy under Article 47 of the Charter of Fundamental Rights of the European Union ("Charter"), a parent company based in a Member State and facing an action for competition law damages is validly served with a summons to appear in court where the document initiating proceedings was served at the address of its subsidiary, which is domiciled in another Member State in which the action was brought and with which it forms an economic unit.

The ECJ's answer was in the negative. In particular, the ECJ first considered that just because a subsidiary forms a single economic unit with its parent company, it does not imply that the former is expressly authorised or designated by the parent company to receive judicial documents on its behalf. Presuming such authority, the ECJ observed, would adversely affect the parent company's rights of defense.

Furthermore, according to the ECJ, the right to a fair trial under Article 47 of the Charter requires that judicial documents intended for a person are actually and effectively delivered to that person. This means that a party bringing an action against a parent company involved in a competition law infringement which is established in another Member State may not rely on the concept of "economic unit" to summon or to serve judicial documents intended for the parent company at the address of its subsidiary established in the Member State in which the party bringing the action resides. This conclusion is not affected, the ECJ added, by the fact that the obligation to effect service of judicial documents in another Member State might give rise to additional constraints on the party bringing the action. Instead, as the ECJ's case-law permits, the party bringing the action may file a claim for damages against the subsidiary in the Member State where that subsidiary is located, thus avoiding translation and service costs in another Member State where the parent company is located.

The MOL case

In an earlier judgement of 4 July 2024 in case C-425/22 (*MOL*), the ECJ set further boundaries on the application of the concept of "economic unit". The case raised the question of whether Article 7(2) of Regulation (EU) No 1215/2012 on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation (recast)) should be interpreted as meaning that, for the purpose of determining jurisdiction, the concept of the "place where the harmful event occurred" covers the registered office of a parent company located in a Member State and bringing a competition law damages action for harm caused solely to that parent company's subsidiaries, established in other Member States, if the parent company and those subsidiaries form part of the same economic unit. The ECJ's answer was again in the negative. In this respect, the ECJ examined the issue through the lens of the objectives of proximity and predictability of the rules governing jurisdiction as well as that of consistency between the forum and the applicable law. It also considered that the jurisdictional rules did not actually hinder potential victims of anticompetitive behaviour from claiming their right to compensation.

PRIVATE ENFORCEMENT

European Union level

In conclusion, the clarifications provided by the ECJ on these jurisdictional and procedural issues highlight the limits of the concept of "economic unit" when applied in private enforcement cases. The practical impact of these judgements could be a limitation on the ability of victims of anticompetitive behavior to engage in forum shopping and claims consolidation.

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