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VBB on Competition Law

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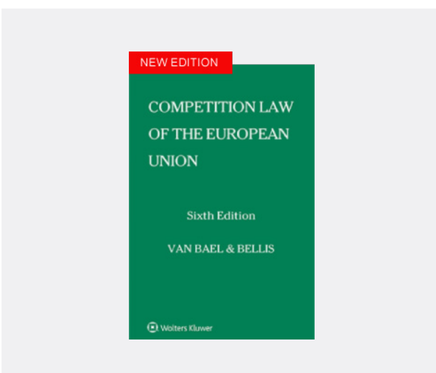

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National level

UNITED KINGDOM

CMA's unconventional *Vodafone/Three* decision could herald a new UK approach to behavioural remedies

On 5 December 2024, the UK's Competition and Markets Authority ("CMA") announced that it had conditionally cleared the proposed merger between Vodafone and Three – two of the four largest UK mobile network operators ("MNOs") – following an in-depth, Phase 2 review. Rather unusually, the remedies that the CMA ultimately accepted featured a number of behavioural elements – including a novel investment commitment – that the CMA has historically treated with considerable skepticism. This could potentially signal a shift in the CMA's approach to both (i) resolving concerns in 4-to-3 mergers involving MNOs; and (ii) behavioural remedies more generally.

The Vodafone/Three decision

In essence, the transaction – structured as a joint venture between Vodafone and CK Hutchison, combining their respective UK telecoms businesses – will result in the number of UK MNOs reducing from four to three. (Various mobile virtual network operators ("MVNOs"), which set their own prices but rely on wholesale access to the MNOs' networks to operate, will remain active in the market.)

Following its Phase 2 investigation, the CMA provisionally concluded that the transaction would give rise to a substantial lessening of competition ("SLC") in relation to the UK supply of (i) retail mobile telecommunications services to end customers; and (ii) wholesale mobile telecommunications services.

To address the CMA's concerns in these areas, the merging parties proposed – and the CMA ultimately approved – a package of legally binding undertakings featuring the following key elements:

1. Execution of the merging parties' joint network plan, which sets out the network upgrade, integration and improvements Vodafone and Three will make to their combined network across the UK over the next eight years (in this context, the CMA's Phase 2 Inquiry Group concluded that "*by significantly improving the quality of the combined network, the full implementation of this plan would boost competition between the mobile network operators in the long term, benefiting millions of people who rely on mobile services*");

2. Capping selected mobile tariffs and data plans for three years, and thus protecting large numbers of the merging parties' customers from short-term price rises in the early years of the network plan; and

3. Offering pre-set prices and contractual terms for wholesale services – again for three years – to ensure that MVNOs can obtain competitive terms and conditions as the network plan is rolled out.

Notably, these remedies will be overseen by both Ofcom (the body responsible for regulating, amongst other things, the UK telecommunications sector) and the CMA – with the merged entity also required to publish an annual report setting out its progress on the implementation of the network plan.

A new approach to addressing concerns in (European) 4-to-3 MNO mergers?

In terms of how to address concerns arising from European 4-to-3 MNO mergers, the outcome of this case is interesting.

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In particular, recent European Commission ("Commission") precedent suggests that where the Commission has concerns about a 4-to-3 MNO merger, it will likely require structural remedies as opposed to mere behavioural access remedies for MVNOs, i.e., by mandating a divestment of the necessary spectrum, sites, co-location, and network sharing/roaming agreements required to create a new (fourth) MNO. This approach was most recently reflected in the Commission's conditional clearance decision in *MásMóvil/Orange* (2024).

Until recently, there did not seem to be any indication that the CMA was taking a materially different approach to the Commission in relation to the remedies needed to address 4-to-3 MNO mergers. Indeed, the CMA's approach in *Vodafone/Three* differs notably from that taken in relation to CK Hutchison's proposed acquisition of Telefonica Europe plc (O2 UK), which was prohibited by the Commission in 2016. In that earlier case, the CMA wrote to the Commission, expressing its "*serious concerns*" about the transaction and stating that it considered that the only appropriate remedy was the divestment of essentially all of one of the merging parties' networks – and also noted that the behavioural remedies offered by the merging parties fell "*well short of what would be required*" and were "*materially deficient*", since they would not "*lead to the creation of a fourth Mobile Network Operator … capable of competing effectively and in the long term*".

Although the CMA identified almost exactly the same theories of harm in relation to Vodafone/Three, and notwithstanding that a new (fourth) MNO will not be created as a result of the proposed remedies, the merging parties were nevertheless ultimately able to persuade the CMA that this package of primarily behavioural remedies (which are markedly different to what the CMA would have considered acceptable in *Three/O2*, and indeed from those accepted in previous similar cases before the Commission) will address its concerns.

Thus, the *Vodafone/Three* decision could suggest that the CMA is potentially now more open to (at least considering) behavioural remedies in order to resolve 4-to-3 MNO mergers. That said, in light of recent highly critical and skeptical comments made by senior Commission officials about the remedies accepted by the CMA in *Vodafone/Three*, it seems unlikely that the Commission will be minded to follow the CMA's lead in this regard anytime soon.

A one-off, or the first signs of a new CMA approach to behavioural remedies?

It is also possible that the outcome of this case – when considered alongside other recent developments – could be an early sign of an evolution in the CMA's thinking on behavioural remedies more generally.

Indeed, this is the first time that the CMA has accepted behavioural remedies in Phase 2 since March 2020. While the CMA has historically been perceived as skeptical of behavioural remedies, at the very least the *Vodafone/Three* decision shows that the CMA is not always opposed to such remedies (even where they are complex and/or novel).

Relatedly, in a speech late last year, CMA Chief Executive Sarah Cardell announced that the CMA will launch a review of its approach to merger remedies in 2025. This arises partly in response to the new Labour government's drive to emphasise the UK's pro-growth, business-friendly environment (including from a regulatory perspective). One of the (many) issues that the CMA intends to explore in this regard is "*when behavioural remedies may be appropriate (including any distinction for regulated sectors)*".

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MERGER CONTROL

National level

Nevertheless, whether these developments could be part of a broader trend towards a potential evolution in the CMA's approach/attitude regarding behavioural remedies remains to be seen. At a conference in Brussels late last year (following the abovementioned speech from Cardell) – the CMA's chief economic adviser (Mike Walker) made certain comments that seemed to be trying to downplay the significance of *Vodafone/Three* in the context of the CMA's overall policy towards behavioural remedies. For instance, when discussing the potential impact of *Vodafone/Three*, Walker stated, "*But is there some idea that the CMA is now suddenly going to be going out there and looking to find remedies and clear them on efficiency defences that they previously wouldn't have cleared them on? I don't think that's right*".

Notwithstanding these comments, it seems clear from the recently-announced CMA review that the CMA intends to take a fresh look at its policy on behavioural remedies and that the *Vodafone/Three* decision appears to demonstrate an increased willingness to be more flexible in this regard going forwards. Nevertheless, at present, the bar to convince the CMA to accept behavioural remedies remains high (especially in Phase 1, and also outside the context of regulated sectors – where, unlike in *Vodafone/Three*, the CMA would presumably be solely responsible for overseeing any such behavioural remedies).

Changes to CMA merger review thresholds

On 1 January 2025, the long-awaited UK Digital Markets, Competition and Consumers (DMCC) Act formally entered into force. The DMCC Act significantly reforms the CMA's wider competition (and consumer) law toolkit and provides it with substantial new digital markets regulation powers – similar to the Digital Markets Act in the EU.

Although the UK merger control regime will remain voluntary and non-suspensory, the DMCC Act introduces to UK merger control certain new/updated thresholds and procedures aimed at expanding the CMA's ability to review transactions. Importantly, the new/updated thresholds apply to transactions that had not closed – or for which the CMA had not opened an investigation – by 31 December 2024. The key changes can be summarised as follows:

A new – additional – acquirer-focused jurisdictional threshold

The DMCC Act expands the jurisdiction of the CMA by introducing a new, alternative threshold for merger review – in addition to the pre-existing turnover test (as updated per the second point below) and share of supply test (which will be retained in its current form). This new threshold will give the CMA the ability to review transactions where:

1. One party has an existing UK share of supply of at least 33% and UK turnover exceeding £350 million; and

2. Another party has sufficient "UK nexus" (meaning that it is registered in the UK, at least part of its activities are carried on in the UK, or it supplies goods or services in the UK).

This threshold is aimed primarily at capturing certain vertical and conglomerate mergers – as, unlike the pre-existing share of supply threshold, it does not require any share increment resulting from the transaction.

An increase to the turnover threshold

The DMCC Act also raises the threshold of the CMA's turnover-based jurisdiction test – to account for inflation since the last time the threshold was revised – from £70 million to £100 million. Transactions will thus be caught by this threshold if the target had revenues in the UK in the most recent complete financial year exceeding £100 million.

MERGER CONTROL

National level

A new safe harbour for smaller transactions

Transactions will be exempt from a CMA merger review where each party's UK turnover is less than £10 million – an amendment intended to reduce the regulatory burden on smaller businesses.

Procedural changes

The DMCC Act also introduces a number of changes to the CMA's merger control-related procedures aimed at adding flexibility to the process, including (i) allowing a fast-track Phase 2 reference on request from the merging parties at any stage (i.e., without having to concede an SLC); and (ii) extending the Phase 2 timetable by mutual consent of the CMA and the merging parties.

FOREIGN DIRECT INVESTMENT

European Union level

EU inches closer to outbound investment screening: European Commission issues recommendation on reviewing outbound investments

On 15 January 2025, the European Commission issued a recommendation on reviewing certain outbound investments (the "Recommendation"). In the Recommendation, the European Commission invites EU Member States to review outbound investments from the EU towards third countries in specific critical technology areas.

The Recommendation follows the European Commission's White Paper on Outbound Investments of 24 January 2024 in which it outlined a step-by-step approach in order to mitigate any identified risks connected to outbound investments. This step-plan involved (i) first a public consultation stage (launched in January 2024 and closed in April 2024), (ii) a monitoring stage and (iii) finally a risk assessment stage where the European Commission and the EU Member States would draw their conclusions regarding the risks linked to outbound investments. The results of this final stage would subsequently be set out in a further Communication and potential proposals to mitigate any identified risks. The Recommendation is part of the second stage of this step-plan.

The Recommendation calls on EU Member States to review outbound investments into semiconductor technologies, artificial intelligence and quantum technologies, covering new transactions over the next fifteen months, as well as past transactions going back as far as 1 January 2021, or ever earlier in cases of particular concern. The targeted transactions include acquisitions, mergers, greenfield investments, asset deals, joint ventures and venture capital investments, but exclude non-controlling financial investments. The purpose of the review is to collect certain information on those outbound investments and assess any risks connected thereto.

The EU Member States should provide an update of their progress to the European Commission by 15 July 2025 and a comprehensive report by 30 June 2026. Based on the information collected through these reports, the EU Member States and European Commission will discuss the outcome of this exercise to achieve a shared understanding of risks connected to outbound investments and formulate potential proposals to mitigate any identified risks.

The Recommendation further follows the entry into force on 2 January 2025 of the U.S. outbound investment regime. Interestingly, the U.S. outbound investment regime targets an almost identical set of technologies. Unlike the U.S. regime, the Recommendation targets outbound investments to third countries under a so-called country-neutral approach, without targeting any one destination in particular. However, the Recommendation does suggest that EU Member States prioritise their review based on the risk profiles of individual countries.

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ABUSE OF DOMINANT POSITION

European Union level

European Commission fines Meta € 797.72 million for unlawful tying and imposing unfair trading conditions

On 14 November 2024, the European Commission ("Commission") adopted a decision imposing a € 797.72 million fine on Meta, based on the finding that Meta had infringed Article 102 TFEU by tying Meta's Facebook Marketplace ("Marketplace") to Facebook and by imposing unfair trading conditions on Marketplace competitors advertising on Meta's social media platforms (Case AT.40684 – *Facebook Marketplace*).

The Commission determined that Meta's Facebook held a dominant position in the at least EEA-wide market for personal social networks, and that Marketplace was dominant in the national markets for online display advertising on social media. It found that Meta had engaged in unlawful tying conduct by giving all Facebook users automatic access to Marketplace regardless of their preferences or choice. As a result, competitors of Marketplace faced a distribution disadvantage in comparison to Marketplace, leading to their foreclosure. The Commission also found that Meta had imposed unfair trading conditions on competitors of Marketplace that advertise on Meta's social media platforms – such as Facebook and Instagram – allowing Meta to use ads-related data generated by other advertisers for the benefit of Marketplace. To justify the nearly € 800 million fine, the Commission took into account the duration and gravity of the infringement, as well as the turnover of Marketplace, but also considered, for deterrence purposes, Meta's total turnover.

Meta has indicated that it will appeal the Commission's decision. Although details of the appeal are not yet known, it can be expected that Meta will argue, *inter alia*, that the Commission has failed to provide evidence of competitive harm to consumers or competitors, and point out that platforms like eBay, Leboncoin, Marktplaats, Subito, Blocket and Finn.no. are formidable competitors and market leaders in many EU Member States, and new entrants such as Vinted have emerged in the past years and have continued to grow in the EU.

Observations

Unfair trading conditions

The CMA opened a similar investigation to the Commission – in respect of Meta's use of advertising customers' data to the benefit of Marketplace – but was assuaged by Meta's commitment to limit how it uses such data in order to prevent it from getting an unfair advantage. However, it appears the Commission did not consider this type of commitment sufficient to address its "unfair trading conditions" concern. The different outcomes in parallel cases investigating the same conduct highlight, again, the risk for global digital players resulting from inconsistent standards applied by competition regulators around the world.

Although the full text of the Commission decision is yet to be published, the theory of harm raised by the Commission appears to align with the objectives of Article 6(2) of the Digital Markets Act (DMA), which in turn reflects the Commission's enforcement practice in Case AT.40462 – *Amazon Marketplace* (*See*, VBB on Competition Law, Volume 2023, No. 2). It remains to be seen whether this alignment between DMA obligations and Article 102 unfairness findings will be limited to large digital players that are subject to the DMA or will have a wider impact in Article 102 cases when smaller, yet dominant, players engage in similar conduct.

The European Courts may also have an opportunity to opine on whether any commitments Meta may have offered during the Commission investigation should have been considered sufficient to effectively address the Commission's "unfairness" concerns. In *Amazon Marketplace*, for example, the Commission found that Amazon's use of non-public business data of third party retailers using Amazon Marketplace to inform its own retail decisions gave Amazon an unfair advantage over competing third parties on downstream markets. The

ABUSE OF DOMINANT POSITION

European Union level

Commission considered Amazon's commitment not to use such data for its own retail business to be sufficient to address the concern, i.e., the Commission accepted a commitment that mirrored Amazon's obligation under Article 6(2) of the DMA.

Tying

The Commission's tying theory of harm, which allegedly lead to competitors of Marketplace facing foreclosure as they experienced a distribution disadvantage, resembles the Commission's tying theory of harm in Case AT.40099 – *Google Android*. In *Google Android*, the Commission had alleged that Google's tying of the pre-installation of Google Search and Google Chrome on the Google Android OS with original equipment manufacturers' ability to license Google Play Store for free, led to competing search engines and browsers facing a distribution disadvantage. The General Court upheld the Commission's finding of infringement. Google has appealed the *Google Android* case to the Court of Justice, and the Court of Justice's judgment may provide further guidance that could impact the outcome in Meta's appeal of the present case.

Google Shopping should also contribute to the framework used to review the Commission's Meta decision on appeal. Although the Court of Justice recently upheld the Commission's decision in *Google Shopping* (Case C 48/22 P; *See*, VBB on Competition Law, Volume 2024, No. 9), the Court required the Commission to demonstrate on the basis of specific, tangible points of analysis and evidence that conduct of dominant firms (which, for example, allegedly creates a distribution advantage) at the very least is capable of producing exclusionary effects. Hence, the Commission cannot – as it suggested in its draft guidelines on exclusionary abuses of dominance – rely on a presumption of exclusionary effects. *Google Shopping* suggests that for the distribution advantage theory of harm to work in the present case, the Commission would have to establish the overwhelming importance of the traffic generated via Facebook for competitors of Marketplace, as well as that the proportion of traffic generated via Facebook cannot be effectively replaced via other social media platforms. This should be relevant even if the alleged distribution advantage is the result of a tying arrangement.

VERTICAL AGREEMENTS

National level

FRANCE

French Competition Authority imposes fines totalling € 611 million on 10 manufacturers and 2 distributors in the household appliances sector for resale price maintenance

On 19 December 2024, the French Competition Authority ("FCA") fined ten manufacturers and two distributors of household appliances a total of € 611 million for engaging in vertical price fixing practices (resale price maintenance, or "RPM") between 2007 and 2014. The manufacturers involved were BSH, Candy Hoover, Eberhardt, Electrolux, Whirlpool, LG, Miele, SEB, Smeg, and Whirlpool, alongside distributors Boulanger and Darty. BSH sought leniency and all companies involved chose to settle the case, except for one supplier (SEB) and one distributor (Boulanger).

The FCA found that the 10 manufacturers imposed resale prices on their distributors by using coded language, such as referring to "generally observed prices" or "stock prices" to instruct the distributors to adjust their prices. The manufacturers also monitored compliance with the imposed resale prices and threatened of retaliatory measures, such as suspending deliveries, in case of deviation from the fixed prices.

Additionally, the FCA found that the two distributors under investigation not only complied with the manufacturer's pricing policies but also actively monitored other distributors, reporting any deviations from the manufacturer's pricing guidelines. Additionally, these distributors also pressured manufacturers and threatened of reprisals to ensure compliance of their competitors with the communicated resale prices. Another tactic involved demanding "margin compensation" from manufacturers if a competing distributor maintained lower prices. The FCA concluded that the conduct of the two distributors helped to set a benchmark for the pricing policies required of other distributors.

The FCA emphasised the gravity of the infringement. It characterised agreements on retail prices as particularly serious and noted that the widespread nature of these practices had an extensive impact. In addition to the high fines imposed, the FCA ordered the companies to publish a summary of the decision in the newspapers *Le Monde* and *Les Échos*.

Comments

This case is at the convergence of horizontal and vertical practices. The initial investigation was split in 2016, and a separate case of horizontal anticompetitive agreements was prosecuted separately and led in 2018 to an infringement decision concerning six companies. Conversely, while this decision includes multiple vertical infringements, they are not connected horizontally. The FCA dismissed a complaint concerning a potential horizontal agreement between manufacturers, which were accused of using a tool made available by their trade association to exchange individualised and recent data on sales volumes by category of small electrical appliance. The FCA found that the information exchanged was not, in this particular case, of a strategic nature, and the exchanges had no effect on the autonomy of the participating companies.

Lastly, this case shows that distributors are not necessarily the victims of resale price maintenance. The FCA found distributors Darty and Boulanger to be active participants in the infringement, which led to the wiping out of a vast number of their online competitors. According to the estimates of one distributor (which were quoted by the FCA), around 95% of distributors with an online presence at the beginning of the infringement have disappeared or been taken over by the traditional distributors.

INTELLECTUAL PROPERTY/LICENSING

European Union level

Unified Patent Court delivers its first two substantive judgments rejecting the implementers' FRAND defence in SEP infringement proceedings

In judgments of 22 November 2024 in *Panasonic v OPPO* and of 18 December 2024 in *Huawei v Netgear*, the Unified Patent Court ("UPC") gave its first two rulings dealing with the substantial aspects of the not fair, reasonable and non-discriminatory ("FRAND") defence mounted by implementers in SEP infringement proceedings.

The UPC's local divisions (based in Mannheim and Munich) had to decide in actions for injunctive relief whether the implementer could argue that the standard essential patent ("SEP") holder had abused its dominant position by requesting licensing terms which were FRAND.

This question is informed by the landmark judgment of the Court of Justice of the European Union ("ECJ") in Huawei v. ZTE ("Huawei judgment") defining the FRAND negotiation framework (*See*, VBB on Competition law, Volume 2015, No. 7), which had subsequently led to different approaches and outcomes, including a SEP holder friendly approach by German courts (*See*, VBB on Competition law, Volume 2021, No. 6 and Volume 2020, No. 7). The latter approach was challenged by the European Commission ("Commission") in the *amicus curiae* brief which it submitted in April 2024 to the Higher Regional Court of Munich in the FRAND dispute *VoiceAge EVS v HMD Global*.

Commission's amicus curiae brief

In its *amicus curiae* brief, the Commission advocated for a strict (and sequential) application of the steps set out in the ECJ's *Huawei* judgment. Moreover, the willingness of the implementer should be assessed based solely on its response and should not involve an overall judgment of its subsequent behaviour. Finally, the Commission argued that a court should not grant injunctive relief without having assessed whether the licence offer of the SEP holder was indeed FRAND (step 3). On this basis, the Commission suggested that the Higher Regional Court of Munich should refer the matter to the ECJ for further clarification.

Position of UPC

The UPC is bound by EU Union law, including the rules governing abuse of dominance, and has the power to refer matters to the ECJ (which it did not consider necessary in the present cases). It rejected a purely economic licence fee determination that does not take account of the behaviour of the negotiation partners as contrary to the ECJ's Huawei judgment. For OPPO's counterclaim for a licence on FRAND terms, the Mannheim division of the UPC assumed its exclusive competence terms based on Art. 32 (1) (a) of the UPC agreement.

On several points, the UPC appears to position itself closer to the existing case-law in Germany than the position taken by the Commission:

Step 1: In relation to the **infringement alert** of the SEP holder, the UPC rejected the formalistic approach of the Commission that required the infringement alert to invoke the patent infringement, reference the patents concerned and also describe the infringement. In line with national case-law in the Netherlands and Germany, the UPC considered a notice with reference to claim charts as sufficient. The UPC specified that the infringement alert for the SEP in question must be sent before initiating court proceedings.

Step 2: The UPC held that the assessment of the **implementer's willingness** to take a FRAND licence should not be limited to the content and circumstances of the declaration itself, as advocated by the Commission, but should also take account of subsequent behaviour. The licensing request marks the starting point of the FRAND negotiations. On the other hand, the UPC also cautioned that the subsequent steps should not be intertwined in the overall analysis in a way that no importance would be given to the FRAND offer of the SEP holder.

INTELLECTUAL PROPERTY/LICENSING

European Union level

The Mannheim division of the UPC considered several procedural steps of OPPO as a breach of good faith. It held that it is contradictory to question the competence of the UPC while bringing a FRAND counterclaim. Furthermore, the auxiliary request, limiting the claim to the UPC to a determination of a FRAND rate only for UPC contracting states, USA and Japan while asking the main part of the licence to be determined by the Beijing Intellectual Property Court, was regarded as needlessly complicating the situation and an indication that the implementer was not pursuing the conclusion of the licence agreement in good faith. In this context reference was made to the fact that there are no treaties in place with China that would determine which court ruling takes precedence and that the risk of diverting FRAND approaches might lead to appeals in various jurisdictions.

Step 3: According to the UPC, the **FRAND offer** of the SEP holder has to explain the licence calculation and the reasons for presenting the offer as FRAND. There is no general rule that would require the SEP holder to disclose names or conditions of third-party licence agreements if the implementer fails to disclose the extent to which it has used the SEP. Similarly, the offer does not have to take the form of a detailed written contract ready for signature. Additionally, there is a range for FRAND rates, which implies that the SEP holder is not obliged to make the cheapest offer of that range. In case several offers were made, the UPC will assess whether the **last offer, pending for acceptance, was FRAND**. This is in line with the case law of the German Federal Court of Justice and the Higher Regional Court of Munich but contrary to the view of the Commission which suggested that the first offer to the SEP holder must already be FRAND. According to the UPC, if several offers were made, e.g., a bilateral licence to the portfolio of the SEP holder and a licence to the portfolio of a patent pool, the FRAND defence cannot succeed if one of these offers was FRAND.

Step 4: In order to allow the SEP holder to assess whether the timely **counteroffer** of the implementer was FRAND, the implementer must provide information about the use of the SEP and sales data, including the sales price of its products.

Step 5: If the FRAND offer is rejected, the implementer must provide an **adequate security**, at least matching the counteroffer. Moreover, the implementer must make a **binding declaration to grant the security in the form of a licence fee payment** should the SEP holder's offer turn out to be FRAND and its injunction based on the patent infringement be successful. Such declaration aims to prevent that after the FRAND assessment by the court, the implementer reconsiders, withdraws its FRAND defence and leaves the SEP holder with the injunctive relief and potentially lower claims for damages (that are limited by the territorial competence of the competent courts). While not contained in the obligations described in the ECJ's Huawei judgment, the UPC (as previously the Higher Regional Court of Munich) observed that such a declaration causes delaying tactics by the implementer to be less attractive and is therefore required for an "adequate" security.

Impact of the UPC's FRAND judgments and outlook

The UPC distanced itself from the more implementer-friendly "step-by-step" approach advocated by the Commission. As was already the case in Germany, the threshold for implementers to successfully mount a FRAND defence is high.

However, other developments may further impact FRAND discussions, including the proposed Regulation on Standard Essential Patents and the Request for Consultation with China which the European Union submitted to the Dispute Settlement Body of the World Trade Organization on 22 January 2025. According to the EU, China infringes the TRIPS Agreement because Chinese courts have the authority under Chinese law to determine, without the consent of both parties, worldwide licensing conditions, including royalty rates, for portfolios of SEPs which include non-Chinese SEPs. A legally effective decision determining such conditions is binding on both parties and enforceable in China. According to the EU's position, this measure curtails the ability of the parties to enforce their rights under the non-Chinese SEPs in the jurisdictions in which the patents were granted

INTELLECTUAL PROPERTY/LICENSING

European Union level

and harms the ability of the courts in these countries to adjudicate actions relating to those patents.

Lastly, the question arises whether the UPC will engage in determining FRAND rates, as UK or Chinese courts do. During a conference, two judges of the Munich division of the UPC who sat in the *Huawei v. Netgear* proceedings expressed the view that Article 32 (1) (a) of the UPC-Agreement gives the UPC the '*exclusive competence in respect of (a) actions for actual or threatened infringements of patents* [...] *and related defences,* ***including counterclaims concerning licences***' and is sufficiently broadly worded to allow the UPC to assess FRAND rates. Procedurally, this would require that the defendant ask in a counterclaim a finding that the SEP holder is obliged to enter into a licence agreement (at a specific rate). The court could then find that such an obligation exists at the requested rate or a higher rate. Even if no such counterclaim was made, FRAND rates could still form part of settlement talks before the UPC but would not show up in the final judgment.

PRIVATE ENFORCEMENT

National level

BELGIUM

Brussels Court of Appeal dismisses action for damages of European Commission against members of elevators and escalators cartel

On 18 November 2024, the Brussels Court of Appeal ("Court of Appeal") rejected the appeal filed by the European Commission ("Commission") against the judgment of the Brussels Commercial Court ("Commercial Court") dismissing the Commission's action for damages against four elevator and escalator suppliers who had participated in a cartel.

The case stems from the 2007 Commission decision fining Kone, Otis, Schindler and ThyssenKrupp € 992 million for engaging in market-sharing, bid-ridding and the exchange of commercially sensitive information in Belgium, Germany, Luxembourg and the Netherlands from 1996 to 2004. In 2008, several EU institutions represented by the Commission sought damages before the Commercial Court, alleging to be a victim of the cartel in Belgium and Luxembourg.

However, the Commission's attempt to recover damages took several twists and turns. In 2011, the Commercial Court declared it lacked jurisdiction to rule over the Luxembourg claim. In 2012, in response to a preliminary reference from the Commercial Court, the European Court of Justice held that the Commission could seek damages as a private entity provided that it would not use for such purpose the confidential information obtained during its own public enforcement efforts.

In 2014, the Commercial Court dismissed the Commission's claim for failure to prove the alleged fault, as well as any concrete damages and loss of opportunity (*See*, VBB on Competition Law, Volume 2014, No. 12). The Commission then appealed this judgment before the Court of Appeal.

The Court of Appeal ruled that the Commission was allowed to seek compensation not only for the duration of the cartel but also for the follow-on period, i.e., for contracts concluded after the termination of the cartel. However, the burden of proof lies with the party seeking compensation, i.e., the Commission, which has to demonstrate that it suffered harm causally related to the fault of the elevator suppliers, in accordance with the Belgian Civil Code.

The Court of Appeal noted that the established fact that the cartel had an impact on the market does not necessarily mean that it had also impacted the specific agreements or projects in relation to which the Commission was claiming damages.

The Commission therefore had to submit concrete supporting evidence of fault, damage and causal link between fault and damage for each of the 20 servicing and maintenance agreements in question.

The Court of Appeal was critical of the economic report submitted by the Commission as it did not prove a concrete link between the general fault (i.e., the cartel) and any specific damage. More specifically, the Court of Appeal noted that the report contradicted the Commission's own claim before the Commercial Court that the prices dropped sharply after the cartel ended. The Court of Appeal also observed that the economic report failed to consider the possible impact on prices of other factors, such as technological evolutions, and questioned the use of the Harmonised Index of Consumer Prices for industrial products and services in a specific sector.

PRIVATE ENFORCEMENT

National level

Observations

The Court of Appeal judgment, which is still subject to a possible appeal to the Supreme Court, makes clear that a claimant has to meet its burden of proof by adducing concrete evidence that it has suffered harm and to that effect cannot simply rely on the finding of infringement of the competition rules established in the Commission's decision. Directive 2014/104 governing actions for damages for infringements of competition law ("Directive") did not apply to this action for damages which had been brought long before the Directive was implemented in Belgian law. Yet, it is not clear whether the Commission would have been helped by the rebuttable presumption provided for by Article 17 (2) of the Directive (which provides that cartel infringements cause harm) or by the requirement imposed on Member States by Article 17 (1) of the Directive that they should not apply a burden or standard of proof that "renders the exercise of the right to damages practically impossible or excessively difficult".

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