

February 2025

VBB on Competition Law

Issue Highlights

MERGER CONTROL

Austrian Supreme Court imposes a € 70 million gun jumping fine

[Page 3](#)

ABUSE OF DOMINANT POSITION

Android Auto – Article 102 requires access to open digital platforms irrespective of indispensability

[Page 4](#)

CARTELS AND HORIZONTAL AGREEMENTS

Portuguese Competition Authority closes hybrid settlement case by fining a technology consulting firm for engaging in non-poach agreements

[Page 7](#)

INTELLECTUAL PROPERTY/ LICENSING

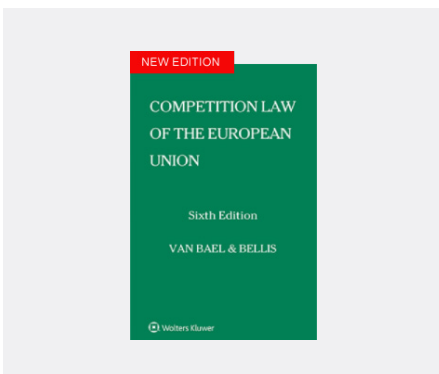
Commission withdraws Proposal for a Regulation on Standard Essential Patents

[Page 9](#)

PRIVATE ENFORCEMENT

Court of Justice rules that Heineken and its subsidiary Athenian Brewery can be sued in the Netherlands for damages resulting from abuse of dominance by the subsidiary in Greece

[Page 12](#)



Jurisdictions covered in this issue

EUROPEAN UNION.....	4, 9, 10, 11, 12
AUSTRIA	3
THE NETHERLANDS	6
PORTUGAL	7
SPAIN	7

Table of contents

MERGER CONTROL	3	LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS	11
National level	3	European Union level	11
Austrian Supreme Court imposes a € 70 million gun jumping fine.....	3	Commission publishes study on EU antitrust remedies	11
ABUSE OF DOMINANT POSITION	4	PRIVATE ENFORCEMENT	12
European Union level	4	European Union level	12
<i>Android Auto</i> – Article 102 requires access to open digital platforms irrespective of indispensability.....	4	Court of Justice rules that Heineken and its subsidiary Athenian Brewery can be sued in the Netherlands for damages resulting from abuse of dominance by the subsidiary in Greece	12
National level	6	ECJ considers whether national legislation limiting access to group actions for collection in the field of competition law damages is contrary to EU law	12
Rotterdam District Court upholds Dutch Competition Authority fine on Leadiant for excessive pricing.....	6		
CARTELS AND HORIZONTAL AGREEMENTS	7		
National level	7		
Portuguese Competition Authority closes hybrid settlement case by fining a technology consulting firm for engaging in non-poach agreements.....	7		
Spanish National High Court extends leniency exemption for involvement in bid rigging cartel to criminal proceedings	7		
INTELLECTUAL PROPERTY/LICENSES	9		
European Union level	9		
Commission withdraws Proposal for a Regulation on Standard Essential Patents.....	9		
Technology Transfer Agreements – Launch of “Call for Evidence”	10		



The firm’s reputation in Brussels and throughout Europe is unmatched. Van Bael & Bellis is always my first call in the EU.

Feedback - Legal 500 (2020)

Van Bael & Bellis on Competition Law should not be construed as legal advice on any specific facts or circumstances. The content is intended for general informational purposes only. Readers should consult attorneys at the firm concerning any specific legal questions or the relevance of the subjects discussed herein to particular factual circumstances.



MERGER CONTROL

National level

AUSTRIA

Austrian Supreme Court imposes a € 70 million gun jumping fine

On 28 January 2025, the Austrian Supreme Court imposed a € 70 million fine on Rewe, a large German/Austrian grocery chain. Rewe had closed a small, local transaction that was deemed notifiable under Austrian merger control law without obtaining prior clearance by the Austrian competition authority.

The Supreme Court reversed the decision of the Court of First Instance, which had imposed a gun jumping fine of only € 1.5 million. The lower court had considered Rewe's failure to notify a minor infraction on the grounds that the transaction concerned only the leasing of a single grocery store, there had been some uncertainty about whether the transaction fell under Austrian merger control law, and the transaction, once notified, was cleared unconditionally. The Supreme Court, however, considered these factors irrelevant in the fine assessment. It pointed out, instead, that Rewe had annual revenues of approximately € 92 billion and had been fined in a previous gun jumping case in Austria.

How the Supreme Court in the end arrived at a € 70 million fine remains unclear. The Supreme Court provides a laundry list of factors that should inform the fine assessment (including economic power, degree of negligence, and effects in a very limited geographic area), but fails to explain how it applied these factors in the case before it. In the end, fines imposed by the European Commission and certain Member State competition authorities in similar cases may have been the principal factor leading the Supreme Court to a € 70 million figure, as the Supreme Court concludes the judgment with a reference to the need to align Austrian fine levels with those commonly imposed in the EU and certain Member States. This indicates that EU Member States that previously may have been considered low risk/low fines jurisdictions are becoming increasingly comfortable raising fines to (much higher) levels prevailing elsewhere in the EU in order to defend the integrity of their merger control regimes.

The judgment is a useful reminder of the substantial risks related to the failure to obtain clearance for notifiable transactions, and the need for careful filing analysis during deal planning. These risks and planning requirements have increased in the EU, as they apply not only with respect to merger control regimes, but also with respect to Member State FDI laws and the EU's Foreign Subsidy Regulation.

ABUSE OF DOMINANT POSITION

European Union level

Android Auto – Article 102 requires access to open digital platforms irrespective of indispensability

On 25 February 2025, the Court of Justice of the European Union (“ECJ”) handed down its judgment in *Alphabet Inc. and Others v Autorità Garante della Concorrenza e del Mercato* (C-233/23), holding that the refusal by Google, a dominant undertaking, to allow the interoperability of Enel X Italia’s JuicePass app with its Android Auto platform, could infringe Article 102 TFEU. The ECJ held that since the Android Auto platform was not developed solely for the needs of the dominant undertaking but for use by third-parties, Google’s refusal could be abusive even if access to the platform was not considered indispensable for the third party’s ability to reach consumers and compete.

Background

The case originated from Enel X Italia’s request to make its newly launched JuicePass app – which enables drivers to find and reserve charging stations for their electric vehicles (among other features) and was already available on Google Play Store – interoperable with Android Auto – a platform that allows drivers to access certain smartphone apps directly on a vehicle’s infotainment screen.

Google refused Enel X Italia’s interoperability request. It cited safety reasons and explained that it did not have a specific template available for the relevant category of apps to allow such interoperability. In 2021, the Italian Competition Authority decided that Google’s refusal constituted an abuse of Google’s dominant position (See [VBB on Competition Law, Volume 2021, No. 5](#)) and imposed a fine of over € 102 million on Google. On appeal, the Italian Council of State issued a preliminary ruling request to the ECJ, leading to the present judgment.

ECJ Judgment

The ECJ departed from the question formulated by the Council of State which sought guidance on the interpretation of the indispensability requirement

developed in the landmark *Bronner* case (C-7/97). Instead, the ECJ found that that the indispensability requirement does not apply when an undertaking in a dominant position has developed a digital platform not only for its own business needs but with a view to enabling third-party undertakings to use it. In other words, a dominant firm’s refusal to ensure that its open platform is interoperable with an – actually or potentially competing – third-party app can constitute an abuse if platform access would make the app more attractive to consumers. It is not necessary to show that platform access is indispensable for the commercial operation of the third-party app.

In such a case, the assessment instead hinges on whether the refusal “*has the actual or potential effect of excluding, obstructing or delaying the development on the market of a product or service which is at least potentially in competition with a product or service supplied or capable of being supplied by the undertaking in a dominant position and constitutes conduct which restricts competition on the merits, and is thereby capable of causing harm to consumers.*”

Evidence showing that the third-party app and its competitors continued to be active/grow on the relevant market without the interoperability was not considered determinative. The ECJ confirmed that a finding that conduct was capable of having harmful effects was sufficient to establish an Article 102 infringement, and that there was no need to show actual exclusionary effect. Nevertheless, the ECJ conceded that evidence of continued and increased market presence of apps without platform access could be considered evidence to show that the refusal of access was not capable of having the alleged exclusionary effect.

The ECJ held that the refusal could be justified by the fact that there is no template for the relevant category of third-party apps at the time of the access/interoperability request. However, this justification would be available

ABUSE OF DOMINANT POSITION

European Union level

only if granting interoperability would compromise the security or the integrity of the platform, or where it would be impossible for other technical reasons to ensure that interoperability. Outside these narrow circumstances, Article 102 obliges the dominant undertaking to develop such a template, within a period which is reasonable and necessary for that purpose, and in return for appropriate financial consideration (taking into account the needs of the third-party which requested that development, the actual cost of the development, and the right of the dominant undertaking to derive an appropriate benefit from it).

Key takeaways

The *Bronner* indispensability requirement to prove that an access refusal is abusive set a high bar in favour of infrastructure developers. The logic behind such a high bar is sound: to ensure that it is not too easy to force access to infrastructure, which may chill incentives to build the relevant infrastructure in the first place. This logic should in principle apply to all access scenarios because a dominant firm could always completely refuse access to its assets and should not be subject to lower liability standards if it decides to grant access on its own conditions.

However, building on the *Google Shopping* judgment (C-48/22 P), Android Auto eliminates the *Bronner* indispensability requirement and its underlying logic by confirming that indispensability does not apply where a platform has been built for third-party use. This apparently applies even if the platform to which access is sought itself cannot be considered dominant (as was the case with Android Auto). This outcome may result in the undesirable consequence of undertakings preferring to develop more closed infrastructure and blocking third-party access from the outset of such development.

Further, interpreting Article 102 TFEU as a tool to override the freedom to contract and the right to property in order to force a dominant undertaking to deal with a third-

party, and invest in its platform solely for the benefit of a third party, is already a tall order. To do so even in circumstances where the third-party does not require access to the infrastructure to be able to continue to operate on the market (and has in fact managed to grow) is a step too far. Indeed, this is yet another step in a general trend towards relaxing the established legal test to prove that a successful digital platform's refusal of access infringes Article 102 TFEU. This trend not only impinges on dominant undertakings' freedom to choose who they contract with and increasingly treats the most successful, open digital platforms like public utilities, but it also renders Article 102 compliance all the more challenging and fraught with legal uncertainty, especially for dominant undertakings that have developed an open digital infrastructure.

ABUSE OF DOMINANT POSITION

National level

THE NETHERLANDS

Rotterdam District Court upholds Dutch Competition Authority fine on Leadiant for excessive pricing

On 13 February 2025, the Rotterdam District Court largely confirmed the decision of the Dutch Competition Authority (“ACM”) to impose a fine on Leadiant for abusing its dominant position by having charged excessive prices for chenodeoxycholic acid (“CDCA”) between 2017 and 2019. Due to the lengthy duration of the proceedings, it reduced the fine by a token amount of € 15,000 to arrive at a fine of just over € 17 million.

Background

In July 2021, the ACM fined Leadiant just over € 19.5 million for excessive pricing of CDCA, which is a medicine used for the treatment of a rare metabolic disorder. The ACM ruled that a price of nearly € 14,000 during the relevant period was excessive, given that CDCA was sold for € 46 in 2008. Following an internal appeal, the ACM reduced the fine by € 2.5 million, as it found that Leadiant did not hold a dominant position for a four-month period during which it was initially held liable (as there was an alternative drug available on the market during that period).

District Court Judgment

Leadiant appealed the ACM decision before the District Court, which found that the ACM correctly applied the two-pronged *United Brands* (C-27/76) test for assessing excessive prices charged by dominant firms (which requires the pricing to be “excessive” and “unfair”).

First, the ACM established that Leadiant’s price was excessive based on an elaborate price-cost test. According to the District Court, in applying this test, the ACM stayed within the limits of its discretionary powers in making the requisite economic analysis of the relevant costs and had carefully calculated the acceptable profitability of the medicine.

Second, the ACM had also reached the conclusion that Leadiant’s price was unfair. The District Court maintained that the ACM had carefully assessed the genuine but modest merits of the new registration of the medicine and its supposedly innovative character. It added that the active substance of Leadiant’s medicine had been in use for decades and that Leadiant’s efforts had been minimal and largely of an administrative nature.

The District Court observed that Leadiant’s conduct amounted to a textbook model of abuse of dominant position. According to the District Court, Leadiant’s conduct was even more disturbing because the firm had taken advantage of a group of vulnerable patients who were dependent on the medication.

Key Takeaways

This judgment reaffirms the continued relevance of the *United Brands* test, established by the Court of Justice in 1978, in cases concerning excessive pricing. Moreover, given the broad phrasing of the two-pronged test (i.e., assessing whether prices are “excessive” and “unfair”), the judgment underscores that competition authorities possess considerable discretion in evaluating these criteria. However, it also reinforces established case law, highlighting that competition authorities rarely intervene in pharmaceutical pricing, except in very exceptional cases.

CARTELS AND HORIZONTAL AGREEMENTS

National level

PORTUGAL

Portuguese Competition Authority closes hybrid settlement case by fining a technology consulting firm for engaging in non-poach agreements

On 18 February 2025, the Portuguese Competition Authority (“PCA”) imposed a fine of approximately € 3 million Euro on a multinational firm operating in the technology consulting sector for engaging in non-poaching practices with its competitors in violation of Article 101(1)(c) TFEU and the corresponding national provision.

The investigation began in March 2022 after the PCA uncovered evidence suggesting that several companies had entered into no-poaching agreements that lasted for at least seven years. Through these no-poaching agreements, the companies involved committed not to recruit or make unsolicited offers to each other’s employees, effectively restricting competition in the labour market by allocating the workforce and limiting the mobility of affected professionals.

During the investigation, three other multinational technology consulting firms decided to settle and received a total fine of approximately € 4 million. The company that chose not to settle received an individual fine of approximately € 3 million.

With this decision, the PCA confirms its leading role in Europe in pursuing anti-competitive arrangements concerning the labour market. In fact, alongside other authorities - such as the Belgian Competition Authority, which sanctioned a non-poaching arrangement between private security firms (case already reported in [Van Bael & Bellis Competition News and Insights, 04 July 2024](#)), the Polish Competition Authority, which sanctioned a non-poaching agreement between basketball teams and the Hungarian Competition Authority, which sanctioned a similar agreement between HR consulting agencies - the PCA previously investigated non-poaching agreements in

other sectors (e.g., in the football business). In addition, in September 2021, the PCA published an Issues Paper on Labor Market Agreements and Competition Policy as well as its Best Practices in Preventing Anti-competitive Agreements in Labour Markets.

Consistent with the PCA’s 2025 Competition Policy Priorities, this decision reaffirms the PCA’s commitment to tackling horizontal agreements by resorting to ex officio investigations.

SPAIN

Spanish National High Court extends leniency exemption for involvement in bid rigging cartel to criminal proceedings

On 5 February 2025, the Spanish National High Court sentenced nine company executives to imprisonment after finding that six companies (which were held jointly and severally civilly liable with them) engaged in a price-fixing and bid-rigging cartel in relation to public contracts for firefighting air navigation services.

Criminal sanctions

This judgment marks the first time in Spain that prison sentences are imposed on executives for involvement in a cartel. Unlike usual cartel cases which are assessed under competition law and investigated by the Spanish Competition Authority (“SCA”), this case was examined pursuant to Article 262 of the Spanish Criminal Code, under which price-fixing in public tenders is a criminal offence. Prison sentences ranging from six months to over two years were imposed.

CARTELS AND HORIZONTAL AGREEMENTS

National level

Additionally, in line with recent cartel decisions issued by the SCA, the National High Court also imposed a nine-month ban on access to public procurement for several of the companies involved.

Application of the leniency exemption

The judgment marks the first time for the National High Court to apply the leniency exemption (introduced to national law through the transposition of the ECN+ Directive) to a criminal offence committed by a party who had reported the cartel to the Public Prosecutor's Office. This leniency exemption (also known as the "exculpatory excuse") grants immunity to parties reporting cartels to and collaborating with the competition authority handling the case. The National High Court also confirmed that defendants may apply for leniency in relation to criminal sanctions directly to the Public Prosecutor's Office.

Key takeaways

Although still subject to appeal to the Supreme Court, the National High Court's judgment represents a landmark decision in Spain since, based on a theological interpretation of the ECN+ Directive, it broadens the scope of the leniency exemption to criminal proceedings.

INTELLECTUAL PROPERTY/LICENSING

European Union level

Commission withdraws Proposal for a Regulation on Standard Essential Patents

On 11 February 2025, the Commission withdrew its Proposal for a Regulation on Standard Essential Patents (“SEP”) of 27 April 2023. The Proposal contained a mandatory reconciliation procedure to determine royalty rates that are based on fair, reasonable and non-discriminatory terms (“FRAND”) led by a third-party conciliator before allowing the parties to go to court. It aimed to promote transparency by establishing an obligatory register for SEPs and the European Intellectual Property Office (“EUIPO”) as a competence centre that would administer, e.g., the SEP register, essentiality checks, FRAND determination and collect information about the expected maximum aggregate royalties notified by SEP holder or implementers.

The proposed SEP Regulation proved controversial. It was strongly criticized by SEP holders like [Nokia](#) or [Ericsson](#), predominately because of the limited enforceability of SEPs, the cost of its (administrative) registration requirements and the limited expertise of the EUIPO on patent matters. But many implementers as well as industry players active on both sides of the SEP “wars” welcomed the direction of the Proposal, including the increased transparency and reduction of information asymmetry. Particularly, the automotive sector often faces challenges with SEP licensing in the value chain (See [VBB on Competition Law, Volume 2021, No. 6](#)) and the threat of injunctions against vehicle manufactures using components which are subject to SEP licensing. In fact, the European Automobile Manufacturers Association had welcomed the Commission’s proposed SEP Regulation as improving transparency and establishing mechanisms that facilitates more balanced licensing negotiations.

The proposed SEP Regulation had also been supported by a majority of the European Parliament about a year ago and was currently under discussion in the Council. In the [Commission work programme 2025](#), the Commission states as a reason for withdrawal that there is “no foreseeable agreement”. Given the scarce insights

provided, it can only be assumed that the Commission’s decision was connected to the [Draghi report](#) and the Commission’s declared aim to “[unleash innovation](#)”.

The withdrawal, which for many came as a surprise, has received mixed, although predictable, reactions. Nokia, one of the major critics, expressed its relief against the “flawed” proposal which would have negatively impacted the European leadership in 5G and 6G telecommunications standards. In contrast, the [Fair Standards Alliance](#), representing small and medium businesses, as well as some of Europe’s most innovative large businesses urged the Commission to reconsider its withdrawal. It considered the move to send a “*terrible signal to innovators and businesses who rely on a predictable and fair SEP licensing system*”. It would disregard “*years of pleas for legal and business certainty, for consistent and transparent regime across Europe for large and small businesses seeking to digitise their products and services*”. Reportedly, 62 stakeholders, including companies like Amazon, Cisco, Deutsche Telekom, Microsoft and carmakers, including Volkswagen, Mercedes Benz and Toyota, have signed a letter to the Commission asking it to “*reconsider its intention*” to withdraw the proposed SEP Regulation.

The withdrawal specifies that “*the Commission will assess whether another proposal should be tabled or another type of approach should be chosen.*” Therefore, future legislative steps shaping SEP licensing negotiations are currently highly uncertain. This gives even more weight to recent and future case-law developments, such as the recent two FRAND judgments of the Unified Patent Court (See [VBB on Competition Law, Volume 2025, No. 1](#)) and the judgment before the Higher Regional Court Munich *VoiceAge v HMD* which is expected to be delivered on 20 March 2025. The Proposed SEP Regulation’s more transparent system might also have reduced claims about anticompetitive practices especially by SEP holders. Its withdrawal likely means that antitrust claims, especially alleged violations of the *Huawei/ZTE* negotiating

INTELLECTUAL PROPERTY/LICENSING

European Union level

framework, will remain prominent features in UPC proceedings. This may well require the Commission to more actively engage and take a clearer position on how Article 102 TFEU can be used to prevent anticompetitive practices in the SEP space.

Technology Transfer Agreements – Launch of “Call for Evidence”

On 31 January 2025, the European Commission launched a Call for Evidence (“CfE”) concerning the revision of the Technology Transfer Block Exemption Regulation (“TTBER”) and the Technology Transfer Guidelines (“TTG”) exempting economically beneficial technology transfer agreements from Article 101(1) TFEU (See [VBB on Competition Law, Volume 2024, No. 11](#)). The existing TTBER will expire on 30 April 2026.

The CfE forms part of an elaborate public consultation process which ultimately will give rise to a new set of competition law rules governing technology licences. According to the European Commission, several issues are not adequately addressed in the TTBER and TTG, although they have become considerably important in recent years. The CfE most prominently asks questions about:

- *Inclusion of data licensing agreements*, which are currently not covered by either the TTBER or the TTG, even if data is increasingly important in the digital economy;
- *Revision of the market share threshold for technology markets*, due to the uncertainty by the lack of information on substitutability, market shares and the application of (competing) technologies, which is further exacerbated in dynamic technology markets;
- *Updating technology pools*, regarding the essentiality of technology, FRAND licensing, the exchange of sensitive information, licensing on a non-exclusive basis and the danger of double payment of royalties for the same technology (“double-dipping”);

- *Further exclusion of licensing negotiation groups*, which enable technology implementers to jointly negotiate with technology right holders;
- *Consideration of exclusive grant-backs*, obliging the licensee to exclusively grant the licensor rights in any improvements or new applications of the licensed technology;
- *Revision of settlement agreements*, to understand if the TTG are in line with the case law of the Court of Justice of the EU towards pay-for-delay restrictions, offering payments for the later market entry of generic or biosimilar medicines, and cross-licensing clauses.

Stakeholders may submit their views until 25 April 2025 ([Call for Evidence](#), [Questionnaire](#)). A draft of the revised TTBER and TTG is aimed to be published for public consultation in the summer of 2025.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

Commission publishes study on EU antitrust remedies

On 20 February 2025, the European Commission published the results of a study evaluating the implementation and effectiveness of EU antitrust remedies imposed in over 100 non-cartel antitrust decisions adopted by the Commission between January 2003 and December 2022. The study is part of the broader ongoing evaluation of Regulation 1/2003. These antitrust remedies evaluated include cease-and-desist orders and other remedies imposed in Article 7 prohibition decisions, as well as final commitments proposed by the undertakings subject to investigation in Article 9 commitment decisions.

Twelve cases were evaluated in greater detail to assess whether the chosen remedies, both behavioral and structural, were successful in meeting the Commission's objectives within the individual case. In these cases, the study found that a majority of the remedies were fully implemented, but less than half were fully effective in reaching the intended outcome. In particular, purely behavioral remedies were less likely to be both fully implemented and effective compared to mixed or purely structural remedies.

The study includes recommendations for the Commission's consideration in its evaluation of Regulation 1/2003, the most significant of which include:

- increased use of interim measures in cases of urgency
- increased use of structural remedies in appropriate cases
- increased use of remedies that seek to remove the detrimental effects on the market caused by the anticompetitive conduct
- inclusion of reporting obligations
- default appointment of trustees (absent compelling reasons) in remedy decisions

- requiring companies subject to infringement decisions to bear the costs of monitoring trustees

The results of the study and its recommendations are not binding on the Commission, but are likely to influence the Commission's revisions to the updated version of Regulation 1/2003. An online expert workshop hosted by the Commission will take place on 27 March 2025 to discuss the key findings of the study and what they could lead to.



PRIVATE ENFORCEMENT

European Union level

Court of Justice rules that Heineken and its subsidiary Athenian Brewery can be sued in the Netherlands for damages resulting from abuse of dominance by the subsidiary in Greece

On 13 February 2025, the European Court of Justice (“ECJ”) issued a preliminary ruling in Case C-393/23 (*Athenian Brewery and Heineken*) referred to it by the Supreme Court of the Netherlands (“the referring court”) on whether Heineken and its Greek subsidiary, Athenian Brewery (“AB”), can be held jointly and severally liable for damages resulting from the abuse of dominance by AB in the Greek beer market and on the jurisdiction of the Dutch courts to hear claims against both Heineken and AB under Regulation (EU) No. 1215/2012 (“Recast Brussels Regulation”). This follows the 2014 Hellenic Competition Commission decision fining AB € 31.5 million (See [VBB on Competition Law, Volume 2015, No. 12](#)).

In 2017, Macedonian Thrace Brewery, a company active in the Greek beer market, filed a € 100 million damages action against Heineken and AB before the Amsterdam District Court, which ruled that it lacked jurisdiction in respect of AB on the basis of Article 8(1) Recast Brussels Regulation. This provision allows a defendant domiciled in a Member State to be sued where a co-defendant is domiciled, provided the claims are closely connected, to prevent the risk of irreconcilable judgments. The Amsterdam Court of Appeal overturned the District Court’s ruling, leading to a further appeal before the referring court.

The referring court then sought guidance from the ECJ on this jurisdictional issue, and specifically asked whether the presumption that a parent company exercises decisive influence on the economic activity of the subsidiary where it directly or indirectly holds (almost) all of the capital of that subsidiary (“the presumption of control”) can be relied on to substantiate the “close connection” referred to in Article 8(1). If so, the referring court further inquired whether, in case the parent company denies having exercised decisive influence over the subsidiary, jurisdiction may still be assumed as long as the existence of decisive influence cannot be excluded *a priori*.

The ECJ first held that the 2014 infringement decision’s omission to establish Heineken’s liability does not preclude it from being sued, as it forms an economic unit with its subsidiary and the two entities are therefore jointly and severally liable for any potential damages. This means that the presumption of control may form the basis for the assumption of jurisdiction by the Dutch courts under Article 8(1).

Next, the ECJ clarified that in the stage of determining international jurisdiction, the national court does not examine the claim’s admissibility or substance, but only identifies the connecting factors with the state whose courts are claimed to have jurisdiction under Article 8(1). According to the ECJ, in order to ascertain whether there is connection, the national court may limit itself to verifying that a decisive influence by the parent company over its subsidiary cannot be excluded *a priori*. This will be the case where the claimant relies on the presumption of control. However, the ECJ also stated that defendants must be allowed to present firm evidence showing either that the parent company does not directly or indirectly hold all or nearly all of the subsidiary’s capital or that the presumption of control should be otherwise rebutted.

ECJ considers whether national legislation limiting access to group actions for collection in the field of competition law damages is contrary to EU law

On 28 January 2025, the European Court of Justice (“ECJ”) issued its judgment in Case C-253/23 (*ASG 2*) concerning the compatibility of national legislation restricting the fiduciary assignment of damage claims for harm suffered from a cartel with EU law, and in particular with the principle of effectiveness and the right to effective judicial protection.



PRIVATE ENFORCEMENT

European Union level

Background

German law establishes the mechanism of the “group action for collection” whereby claimants assign their claims to a licensed provider of legal services authorizing it to bring a collective action in its own name and at its own expense, but on behalf of the assignors, in return for fees in the event of success.

In 2009, the German Federal Competition Office adopted a commitment decision with respect to a suspected cartel involving the Land of North Rhine-Westphalia (“Land”) and other owners of woodland in the roundwood industry. A group of 32 sawmills sought compensation for the harm they claim to have suffered from the purchase of roundwood at inflated prices as a result the cartel and assigned to ASG 2, a provider of legal services within the meaning of German law, their legal claims to pursue consolidated compensation for that harm.

The Land challenged the validity of the assignment of the sawmills’ rights to compensation to ASG 2. More specifically, the Land submitted that ASG 2 does not have the legal standing to bring proceedings because the applicable German legislation does not allow it to bring collective action in case of a competition law infringement. According to the referring court, the issue has not been touched upon by the German Federal Court of Justice while certain lower courts have not accepted the practice of bringing group actions for collection for harm caused by a cartel, especially in stand-alone actions where there is no definitive finding of an infringement by a competition authority. The referring court also noted that German law does not provide for an equivalent alternative mechanism to a group action for collection that could ensure the effective implementation of the right to compensation arising from a cartel in the case of low-value damages owed to a wide number of parties who are unlikely to exercise their right to compensation individually.

In this context, the referring court asked the ECJ whether EU law precludes an interpretation of the German legislation that would limit the assignment by individuals harmed by a cartel of their rights to compensation to a provider of legal services.

ECJ Judgment

The ECJ noted that the establishment of a group damages action mechanism and the conditions governing the validity of the relevant claim assignment fall within the procedural autonomy of the Member States as they relate to the exercise of the right to compensation for harm caused by a competition law violation. In this respect, the ECJ reminded that the relevant national rules should conform to the principles of effectiveness and equivalence (set out in the *Courage* case law) as well as to the right to effective judicial protection (set out in Article 47 of the Charter of Fundamental Rights of the European Union).

Focusing on the principle of effectiveness, the ECJ ruled that if the referring court were to conclude that there is no alternative collective mechanism available under German law to ensure the effective implementation of the right to compensation, and the conditions for individual action make the exercise of the right to compensation impossible or excessively difficult, then an interpretation of national law that precludes a group action for collection should be considered contrary to EU law.

The ECJ observed that the complexity and high procedural costs associated with bringing actions for damages are not sufficient themselves to assess whether the exercise of the right to compensation in an individual action complies with the principle of effectiveness and, by extension, whether an individual is being deprived of his/her right to judicial protection. The referring court should examine all of the legal and factual elements of the individual case and identify specific elements of the national law that make the bringing of individuals actions practically impossible or excessively difficult.



PRIVATE ENFORCEMENT

European Union level

The ECJ added that, even if the group action for collection mechanism was the only effective procedural means for the sawmills to assert their right to compensation, national rules pertaining to the quality of the collection services, the proportionate nature of the remuneration of the providers of such services, and the prevention of conflicts of interest and of abusive procedural conduct could still place a limit to the collection process.

Conclusion

Even though the scope of this judgement is limited to stand-alone actions, it highlights the emphasis placed by the ECJ on the principle of effectiveness to further shape the private enforcement framework. In the area of collective actions, EU law intervenes only where individual actions render the exercise of the right to compensation practically impossible or excessively difficult. This assessment is left to the national courts. Moreover, the application of the principle of effectiveness does not go as far as to require the Member States to ensure the availability of collective claims.

Brussels

Glaverbel Building
Chaussée de La Hulpe 166
Terhulpesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50

Fax: +32 (0)2 640 64 99

Geneva

26, Bd des Philosophes
CH-1205 Geneva
Switzerland

Phone: +41 (0)22 320 90 20

Fax: +41 (0)22 320 94 20

London

Holborn Gate
330 High Holborn
London
WC1V 7QH
United Kingdom

T +44 (0)20 7406 1471

VAN BAEL & BELLIS

www.vbb.com

