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# VBB on Competition Law

## Issue Highlights





### Jurisdictions covered in this issue





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# MERGER CONTROL

## European Union level

### Court of Justice Rejects Commission's Exercise of Jurisdiction in *Illumina/Grail*

On 3 September 2024, the Grand Chamber of the European Court of Justice of the European Union ("CJEU") issued a judgment setting aside the General Court's ("GC") ruling in the *Illumina/Grail* case and annulling the European Commission's ("Commission") decision exercising jurisdiction over the attempted transaction at the heart of the appeal (Case C-611/22 P, *Illumina v Commission*).

In so doing, the CJEU rejected the Commission's highly controversial interpretation of Article 22 of the European Merger Regulation ("EUMR"). The Commission had claimed that the EUMR empowered it to accept jurisdiction to review a concentration on referral even if the transaction did not meet EU notification thresholds and fell below the national thresholds of the referring Member State(s). The CJEU's judgment voiding the Commission's jurisdiction over the Illumina/Grail merger also annuls the Commission's subsequent decisions prohibiting the transaction and imposing hefty gun jumping penalties on the parties. By restoring the traditional reading of Article 22 EUMR, the CJEU's judgment puts to an end a jurisdictional debate that has generated considerable uncertainty in the EU merger control landscape since 2021. Nevertheless, it can be expected that the Commission will continue its quest to gain greater review powers over below-threshold mergers by other means.

*Background*

The Commission threw European transactional practice into turmoil in March 2021, when it announced that it would change its approach toward accepting referrals under Article 22 EUMR. This Article allows the Commission to accept jurisdiction to review a merger that is referred to it by one or more Member States, under certain conditions. The Commission's longstanding policy had been to accept such referrals only from Member States that either had jurisdiction to review the transaction themselves, or that lacked a merger regime entirely. However, the Commission announced that it would now also welcome referrals even where the referring Member State had a merger regime but lacked jurisdiction to review the transaction. This new policy, the Commission reasoned, would help ensure that transactions that endangered competition but did not generate sufficient turnover to meet any national review thresholds would not escape scrutiny (see VBB on Competition Law, Volume 2021, No. 4).

In a first test of this new policy, the Commission accepted a referral request under Article 22 brought by France, and joined by several other Member States, to review Illumina's proposed acquisition of Grail. As the transaction did not meet the merger control thresholds in any of the referring States, the transaction parties contested the Commission's exercise of jurisdiction. While they initially complied with the Commission's request to notify the transaction at EU level, they ultimately closed the deal while the Commission's in-depth investigation was still underway. This ultimately prompted the Commission to impose a groundbreaking € 432 million gun jumping fine on Illumina (see VBB on Competition Law, Volume 2023, No. 6). The Commission prohibited the deal in September 2022, marking the first prohibition of a merger based solely on vertical foreclosure concerns (see VBB on Competition Law, Volume 2023, No. 8-9), and ordered Illumina to divest Grail (see VBB on Competition Law, Volume 2023, No. 11).

The Commission's prohibition, order to divest the target, and its astronomical gun jumping fine all ultimately rested on the validity of its decision to accept the Article 22 referral despite the lack of jurisdiction of the referring Member States. Illumina challenged that exercise of jurisdiction on appeal. It was dealt a major setback in 2022, when the GC found in favour of the Commission's reading of Article 22.

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The GC looked at the text, history and context of the disputed article. It concluded that the plain text of Article 22 does not expressly limit the referral process to Member States with national jurisdiction to review a transaction. Rather, the EUMR allows Member States to refer "any concentration" that does not meet the EU thresholds but threatens to significantly affect trade within the territory of the Member State making the request. Although the broad language of Article 22 had originally been drafted to accommodate Member States – particularly the Netherlands – that did not have merger control at the time, the GC concluded that its continued inclusion in later versions of the legislation served an additional purpose. Specifically, Article 22 permitted referral of all concentrations that could affect competition in the internal market but that did not meet EU or national thresholds as a "corrective mechanism" to ensure effective merger control (see VBB on Competition Law, Volume 2022, No. 7).

*The CJEU Judgment*

The CJEU reversed the GC's judgment, echoing closely the Opinion of Advocate General ("AG") Nicolas Emiliou, who sided with Illumina in March 2024 (see VBB on Competition Law, Volume 2024, No. 3). Like the AG, the CJEU considered the literal, historical, teleological and contextual framework of Article 22 within the EUMR. While a literal reading of the article in isolation might support the GC's conclusions (though not dispositively), the CJEU concluded that the full assessment of these other factors did not.

When reassessing the historical context of the provision, the CJEU noted that the legislative working documents evince a general understanding that it was inevitable that some transactions would escape *ex-ante* notification at EU level despite affecting the internal market. There was no indication that Article 22 was intended as a "corrective mechanism" for this concern or as a remedy for deficiencies arising from the rigidity of the EU notification thresholds. In other words, the historical record does not support a legislative intent to use Article 22 as a broad catch-all for below-threshold acquisitions.

The CJEU likewise rejected the GC's assertion that a contextual interpretation supported the Commission's position. Rather, the CJEU concluded that the structure of Article 22 is based on the premise that it may be appropriate for the Commission to replace a national competition authority's assessment under certain conditions – even if the transaction does not have an EU dimension. This presupposes that the competence of the national authority to examine the transaction is not precluded in the first place (e.g., because the transaction falls below national thresholds). The CJEU further observed that the EUMR already provides for a legislative mechanism adjust EU notification thresholds if they no longer capture a sufficient number of transactions with harmful effects.

Finally, the CJEU's teleological analysis further supported a finding in favor of Illumina. The CJEU found that the GC erred in considering that Article 22's function was as a "corrective mechanism" to help ensure that the Commission could examine problematic transactions that might otherwise escape review. Rather, the purpose of Article 22 is corrective only insofar as it ensures a proper allocation of the competencies between national and EU merger control authorities, in accordance with the one-stop-shop principal and the need for legal certainty. The EU merger control system is based on establishing a predictable review system with clear notification thresholds and standstill obligations. The Commission's reading of Article 22 would undermine those objectives, by making it exceedingly difficult for merging parties to determine when and if they may be required to notify a transaction. Such an interpretation, which would extend the Commission's review powers beyond the intent of the legislator, would be at odds with the principle of institutional balance.

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In sum, the CJEU's judgment appears guided by an appreciation of the practical aims that the EU merger control regime was designed to serve and by a healthy regard for institutional limits.

*Going Forward*

The CJEU's judgment is of course welcome news for Illumina, as it will now avoid a heavy gun jumping fine and be able to offload its sizeable legal fees on the Commission. However, the ending is bittersweet for the parties, as Illumina ultimately still needed to divest Grail due to opposition by US regulators. This outcome may indicate that the deal was indeed best placed to be evaluated in the US, where both parties are headquartered, rather than in Europe where it met no turnover thresholds whatsoever. The decision also comes too late for the *Qualcomm/Autotalks* and *EEX/Nasdaq Power* transactions, which were referred under the new Article 22 policy and abandoned after facing opposition from the Commission.

In the wake of the CJEU judgment, the Commission does not seem inclined to reflect on whether it might have simply reached the appropriate limits of its existing review powers. Undaunted, the Commission issued a statement indicating that it would evaluate the judgment and consider alternative means to capture and review below-threshold transactions that threaten competition in Europe. In particular, the Commission noted that several Member States have recently enacted legislation giving their competition authorities the power to proactively call-in below threshold mergers. This would, it is presumed, establish sufficient national jurisdiction to allow for a "traditional" referral under Article 22 that is in line – at least in law if not in spirit – with the CJEU's judgment. Of course, such an approach would undermine the aim of the EUMR to establish a predictable EU merger control regime, but it might well survive an appeal and will probably be attempted in the near future.

Other possible approaches to combat the threat of these below threshold transactions would be to use the provisions of Article 102 TFEU against abuses of dominance as an ex-post corrective measure. The CJEU recently upheld the possibility of applying this article to merger control in the *Towercast* decision (see VBB on Competition Law, Volume 2023, No. 3). However, reviewing a merger only after the fact is not generally practical, and the application of Article 102 TFEU requires the acquirer to hold a position of dominance before the acquisition, which might also limit the potential use of this tool. Of course, the most straightforward approach to extending the Commission's reach would be to amend the EUMR to include a notification threshold based on transaction value. It may be that the Commission is considering this option.

In short, despite the welcome result in Illumina/Grail, this remains a very uncertain time for merger control in Europe. Although the CJEU noted that the EUMR was not drafted with the expectation of capturing every transaction that might affect the internal market, we will likely see more cases probing the limit of the Commission's jurisdiction.

# FOREIGN SUBSIDIES REGULATION

## European Union level

### Commission issues first clearance decision following in-depth FSR review

On 24 September 2024, the Commission issued its first clearance decision under the M&A tool of the new Foreign Subsidies Regulation ("FSR"). Following an in-depth investigation, the Commission conditionally cleared Emirates Telecommunications Group Company PJSC's ("e&") acquisition of sole control of PPF Telecom Group B.V. ("PPF"). The acquirer, e&, is controlled by a UAE sovereign wealth fund, the Emirates Investment Authority ("EIA"). This case provides a first glimpse into the Commission's enigmatic FSR review process and shows the authority's willingness to aggressively control the conditions under which State owned enterprises ("SOEs") acquire European companies.

The FSR, which entered into effect in July 2023, is an instrument empowering the Commission to examine the distortive effects of foreign subsidies on competition within the EU. It consists of several tools, including an *ex-ante* requirement to notify concentrations meeting certain thresholds. Although over 100 concentrations have been notified under this M&A tool, the Commission does not publish the identities of notifying parties nor the results of preliminary investigations. There is a very limited public record of how the Commission is approaching the analysis of FSR notifications.

In this case, the Commission expressed concerns that e&'s acquisition could lead subsidies received from the UAE to have a distortive effect on competition in Europe on the markets in which the combined entity would be active. In particular, the Commission noted that e& benefitted from an unlimited guarantee in the form of bankruptcy protection under UAE laws, which would extend to PPF post-transaction. In addition, e& received other subsidies from the UAE in the form of grants, loans and other debt instruments. In the Commission's view, these subsidies could distort competition in the EU by putting the combined entity in a commercially more advantageous financial position (e.g., by enabling it to engage in more aggressive or risk-insulated activities) as compared to its rivals.

To eliminate the distortive effects of these subsidies, e& offered a package of commitments that effectively ring-fenced PPF from any influx of financial contributions from the UAE. Specifically, e& agreed to amend its articles of association to eliminate the unlimited guarantee, committed not to provide financing to e& or PPF activities inside the EU, and consented to inform the Commission of any future acquisitions that are not notifiable under the FSR. The commitments run for 10 years (subject to extension) and will be overseen by an independent monitor.

This extensive package of commitments is significant as it may indicate that the Commission will require SOEs that receive foreign support to take similarly aggressive steps to ring-fence EU operations. It is also noteworthy that the commitments package is entirely focused on ensuring fair competition on the product markets on which the parties are active. The FSR takes clear aim at addressing the effect of foreign subsidies on the market for transactions (i.e., subsidies that give one company an unfair advantage at the moment of acquiring the target assets). It was unclear to what extent the Commission would be willing to extend its review of the distortive impact of foreign subsidies from this backwards-looking review of the acquisition process to also cover a prospective analysis of their effects on the downstream product markets post-transaction. This conditional clearance – which is entirely focused on the product markets – indicates that the Commission considers these effects to be as important to its analysis. However, this also begs the question of how the Commission will weigh the likelihood of such forward-looking effects materializing. It seems likely that the Commission would adopt a similar approach and standard of proof (i.e., balance of probabilities) as it has adopted in the merger control context. However, with only one published case, we are a long way from being able to discern a pattern in the Commission's FSR review process yet.

# ABUSE OF DOMINANT POSITION

## European Union level

### Court of Justice upholds € 2.42 billion fine against Google for discriminating against competing comparison shopping service providers

*Background*

In June 2017, the Commission fined Google € 2.42 billion for abusing its dominant position in national search markets. The Commission found that Google had (i) given an unlawful advantage to its own comparison-shopping service ("CSS") by prominently displaying the Google CSS in search results, while (ii) demoting competing CSSs. The Commission considered this practice to be at least capable of having the effect of restricting competition (AT.39740 *Google Shopping*). In November 2021, the General Court endorsed the Commission decision and maintained the fine, largely dismissing Google and Alphabet's appeal (see VBB on Competition law, Volume 2021, No. 11). The General Court judgment was appealed to the Court of Justice of the European Union ("CJEU").

*Court of Justice judgment*

The CJEU handed down its judgment on 10 September 2024 dismissing Google and Alphabet's appeal and upholding the judgment of the General Court.

The CJEU held that it is not the case that, as a general rule, a dominant firm which treats its own products/ services more favourably than it treats those of its competitors is engaging in conduct which departs from competition on the merits. However, it agreed with the General Court that, in light of the characteristics of the market and the specific circumstances of the present case, Google's conduct was discriminatory and did not amount to competition on the merits.

The relevant market characteristics and special circumstances considered were the following: (i) traffic generated by Google's general search engine is important for CSSs (i.e., the more a CSS is visited by internet users, the greater its relevance and usefulness, and the more merchants are inclined to use them), (ii) users when searching online have a tendency to assume that the most visible results are the most relevant and (iii) Google's general results pages accounted for a large proportion of traffic to competing CSSs and could not be effectively replaced by other sources.

The CJEU also held that Google's conduct – while related to the issue of access – did not constitute a refusal to supply, but discrimination by Google as between Google's own CSS and competing CSSs on Google's general search pages. Hence the conditions for finding a refusal to supply under the *Bronner* case law (Case C-7/97) (including the requirement that Google's search results pages would be indispensable for competing CSSs) did not need to be satisfied for a finding of infringement.

*Observations*

*Google Shopping* is certain to further embolden the Commission in its efforts to "reign in" big tech companies using the EU competition law regime. Margrethe Vestager, the EU's outgoing competition chief described the judgment as a "*landmark in the history of regulatory actions*", and a case that inspired regulators across the globe to adopt a "*more vigilant and proactive approach to regulating big tech*".

Seemingly in line with the Commission's recently published draft Guidelines on exclusionary abuses of dominance ("Draft Guidelines"), the CJEU held that the Commission is not necessarily required to apply the as-efficient-competitor test when finding an abuse of dominant position: "*conduct may be categorised as 'abuse of a dominant position' not only where it has the actual or potential effect of restricting competition on the merits by excluding equally efficient competing undertakings from the market or markets concerned, but also where*

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*it has been proven to have the actual or potential effect – or even the object – of impeding potentially competing undertakings at an earlier stage*". Indeed, a finding of infringement does not require "*proof that the conduct concerned is capable of excluding an as-efficient competitor*". This means that going forward dominant firms will not be able to comfortably rely on the AEC test to develop an Article 102-compliant business strategy.

That said, while the Commission introduced in its Draft Guidelines a presumption that certain conduct by dominant firms is capable of producing exclusionary effects, the CJEU judgment appears to effectively reject that proposal requiring that the Commission demonstrate "*on the basis of specific, tangible points of analysis and evidence, that* [...] *conduct, at the very least, is capable of producing exclusionary effects*". It appears that the CJEU does not agree with the Commission's attempt, with the introduction of the abovementioned presumption, to shift the evidentiary burden to the defendant firm in Article 102 cases, which has also hitherto not been explicitly recognised by court case law.

Google had also argued that the General Court "*reversed the burden of proof*" by upholding the Commission's decision, despite it not containing a counterfactual analysis to determine a causal link between the conduct at issue and its effects. The CJEU held that the Commission is entitled to "*rely on a range of evidence, without being required systematically to use any single tool* [(e.g., the counterfactual analysis)] *to prove the existence of such a causal link*" and that the General Court had not reversed the burden of proof. Consequently, the Commission is not required to engage in a counterfactual analysis in every Article 102 case. It is noteworthy, however, that the CJEU confirmed the requirement to prove the causal link though (while the Commission's Draft Guidelines arguably signalled a departure from this approach): the "*causal link is one of the essential constituent elements of an infringement of competition law which it is for the Commission to prove*".

Lastly, it is noteworthy that the CJEU held that self-preferencing by dominant firms cannot as a general rule be considered to depart from competition on the merits and that the characteristics of the market and the specific circumstances of the case need to be taken into account for this assessment (though the factors taken into account in *Google Shopping* are very case-specific and the judgment does not offer much guidance on what general factors dominant firms can expect to be taken into account in this assessment). This finding appears to contrast with the general self-preferencing ban in the Digital Markets Act (DMA), which applies to certain "gatekeeper" big tech firms, including Google. It is not clear then, in the case of firms like Google, whether the purview of the competition framework is essentially subsumed by the DMA (non-compliance with which can also result in fines of up to 10% of the firm's total worldwide annual turnover, and up to 20% in the event of recidivism), and if so, what the role of Article 102 of the competition regime will be going forward when regulating "gatekeeper" big tech companies.

**Qualcomm – General Court upholds Commission's predatory pricing decision but reduces fine**

On 18 September 2024, the General Court delivered a judgement in Case-671/19 *Qualcomm v Commission*, upholding the Commission's decision to impose a fine on Qualcomm for abuse of a dominant position in the UMTS-compliant baseband chipset market in violation of Article 102 TFEU. The Court did, however, recalculate the fine amount, on account of the Commission having departed, without justification, from its fining guidelines.

*Background*

In June 2009, Icera, a competitor, lodged a complaint against Qualcomm (a revised version of which was lodged in April 2010), alleging abuse of a dominant position. The Commission initiated an investigation which culminated in a decision 10 years later, on 18 July 2019, imposing a € 242

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million fine on Qualcomm for abuse of a dominant position (predatory pricing) on the UMTS-compliant baseband chipset market between 1 January 2009 to 31 December 2011. Qualcomm challenged this decision before the General Court which has now rejected all claims but one, regarding the calculation of the fine.

In its decision, the Commission concluded that the relevant product market was UMTS-compliant baseband chipsets, with a worldwide geographic market. The Commission found that Qualcomm had abused its dominant position on this market by selling certain quantities of chipsets to two key customers at below cost prices, with the intention of eliminating Icera (Qualcomm's main competitor at the time) from the market.

*General Court Judgement – Key takeaways*

The General Court held that, when examining the relevant market for the application of Article 102 TFEU, while the Small but Significant Non-transitory Increase in Price ("SSNIP") test is a recognised method for defining the relevant market, the Commission may utilise other available tools, such as market studies, assessments of consumers' and other competitors' points of view without a rigid hierarchy among these criteria.

The General Court further held that, in the context of an investigation into potential predatory pricing, assessing a dominant undertaking's prices to determine if they are below the average total cost but above the average variable cost involves implicitly applying the "as-efficient" competitor test. This is because a competitor with equal efficiency but less financial resources than the dominant firm is unlikely to be able to compete at those prices without incurring losses that are unsustainable in the long term.

The General Court also confirmed that the Commission is not obliged, when assessing whether a dominant undertaking engaged in predatory pricing, to evaluate whether the market covered by the contested practice is of sufficient magnitude for the conduct to produce anti-competitive effects. If this analysis were mandatory, any selective predatory practice where the undertaking targets specific customers with low prices, rather than applying these prices to all customers, could potentially evade the prohibition established by Article 102 TFEU.

Lastly, the General Court ruled that the Commission had departed, without justification, from the methodology set out in its 2006 Fining Guidelines and accordingly reset the fine to just under € 239 million.

**Google AdSense – General Court annuls Commission decision and quashes € 1.49 billion fine**

On 18 September 2024, the General Court delivered a judgement for Case T-334/19 *Google and Alphabet v Commission* (*Google AdSense for Search*), which concerned allegedly abusive contractual clauses in Google AdSense service agreements. The General Court held that the Commission had committed errors and failed to establish to the required legal standard that the clauses constituted an abuse of Google's dominant position. Accordingly, the General Court annulled the Commission decision in its entirety and quashed the € 1.49 billion fine.

*Background*

The case arose following complaints by Ciao GmbH and several other companies concerning allegedly abusive contractual clauses contained in the Google Services Agreement ("GSA") for Google's AdSense for Search ("AFS") services. Google's AFS is an online search advertising intermediation service, which enables publishers of third-party websites with integrated search engines to display ads linked to online queries that users submit on these third-party websites (with AFS and the publishers sharing the resulting advertising revenues). AFS thus allows publishers of websites independent of Google, with integrated search engines, to display ads

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from Google linked to user queries, with Google acting like an advertising broker between advertisers and publishers.

The contractual clauses at issue included (i) an exclusivity clause prohibiting publishers from also including competing search advertising on the relevant websites, (ii) a placement clause, which reserved the most prominent part of the website for Google ads, and (iii) a prior authorisation clause, which required contracting publishers to obtain Google's approval before changing the displays of all online search ads, including competing ads. The template GSA contained the exclusivity clause until March 2009 and the second two types of clauses thereafter.

In 2019, the Commission issued a decision which concluded that these three contractual clauses constituted three separate infringements of Article 102 TFEU which together amounted to a single and continuous infringement, and imposed a fine of over € 1.49 billion on Google (and Alphabet). Google contested the decision and raised five pleas in law, contesting the market definition, whether each of the three separate clauses constituted an abuse, and the decision to impose a fine.

*Judgement of the General Court*

The General Court upheld the market definition analysis put forward by the Commission and rejected Google's arguments for broader markets due to substitutability between online search and non-search ads, and between the direct sale of online ads and sales concluded via intermediaries.

The General Court concluded, however, that the Commission had failed to prove to the required legal standard that each of the contested clauses in Google's GSA constituted an abuse of Google's dominant position in violation of Article 102 TFEU. While the General Court did not accept all of Google's arguments, it agreed that the Commission had committed errors of assessment which fundamentally undermined the Commission's case, in that the foreclosure effect (i.e., the capability of preventing Google's competing intermediaries from accessing a significant part of the market for online search intermediation in the EEA and/or the capability of preventing publishers from sourcing from Google's competitors) of the clauses was not proven to the requisite legal standard. In particular, the errors included:

- a lack of evidence regarding market coverage (e.g., regarding percentage of overall market revenue, etc. covered by GSAs) for certain periods in 2016; and

- a lack of analysis of relevant factors such as the initial duration of the GSAs, the terms for extension of the GSAs, the existence of a unilateral termination right in favour of publishers, and the ability of publishers to source ads from competitors at the end of the term (including during negotiations of renewals/extensions of the GSAs).

The General Court held that the Commission had failed to prove its allegations that the terms of Google's GSA: (i) prevented competing intermediaries from accessing a significant part of the market; (ii) deterred publishers from sourcing ads from competing intermediaries; (iii) possibly deterred innovation; (iv) helped Google to maintain and strengthen its dominant position; and (v) possibly harmed consumers.

*Observations*

The *Google AdSense* judgement emphasises that the Commission must perform a careful and thorough analysis of exclusivity and similar contractual restrictions, particularly where the defendant produces evidence that such provisions are not capable of producing anticompetitive exclusionary effects. While it remains to be seen whether the Commission will appeal the judgment, the broader implications of this judgement will be limited as the clauses at issue were removed by Google back in 2016 and a number of the complaints have been withdrawn.

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**Advocate General proposes relaxing the criteria under which a dominant company can be forced to grant and facilitate access to a digital platform**

On 5 September 2024, Advocate General Medina (the "AG") delivered his opinion in a case addressing whether Google is required to provide Enel X, an electric car charging app developer, with access to Google's Android Auto operating system, which enables users to access certain apps on their smartphone through a car's integrated display.

The case originated from Enel X's request to make its newly launched app (already available on Google Play Store) compatible with Android Auto. Google refused that request citing safety reasons and because it did not have a specific template available to allow such interoperability. In 2021, the Italian Competition Authority ("ICA") decided that Google's refusal constituted an abuse of Google's dominant position (see VBB on Competition Law, Volume 2021, No. 5). On appeal, the Italian Highest Administrative Court has issued a preliminary ruling request to the Court of Justice of the European Union ("CJEU"), leading to the present opinion by the AG.

The AG first analysed which legal criteria should apply in scenarios where a dominant company refuses access to its own infrastructure. In the landmark *Bronner* case, the CJEU set out relatively stringent criteria, thus limiting the instances where dominant companies would be forced to grant access to other companies (including potential competitors downstream). For example, the Court required evidence that the infrastructure was indispensable for the requesting entity to operate in the downstream market. However, based on the more recent *Slovak Telekom* and *Baltic Rail* judgments, the AG argues that the stringent *Bronner* criteria should only apply where the infrastructure to which access is sought was developed for the needs of the dominant undertaking's own business and where it is dedicated for its own use, to the exclusion of other competitors. The AG further excluded the relevance of the *Microsoft* case where the dominant company refused to grant interoperability (requested in view of improving the technology, rather than providing access to the downstream market), since that case concerned IP rights that, by definition and similarly to normal property rights, entail exclusive use by their owner.

In the present case, the AG noted that Android Auto was deliberately developed to be used by third-party operators. In this context, the AG argued that Google's refusal to provide access could be found to be abusive if the refusal was capable of producing anti-competitive effects and lacked an objective justification.

Concerning the first issue, Google argued that the refusal was not capable of producing anti-competitive effects because Enel X continued to operate and even grow despite Google's refusal to provide access to Android Auto. The AG rejected this claim, arguing instead that the lack of actual exclusionary effects is not sufficient to exclude an abuse of dominant position, and Google must produce additional evidence demonstrating that the absence of such effects was indeed the consequence of the fact that the refusal was not capable of producing anti-competitive effects.

The AG then examined the objective justifications raised by Google (i.e., difficulties in terms of security; time and resource constraints limiting the development of the necessary template). In particular, the AG argued that, in the context of a refusal to provide access to Google's platform, only circumstances that compromise the functioning and purpose of the infrastructure may be accepted. This implies that, if the development of the template by the dominant undertaking concerned is technically impossible, the absence of such a template could become an objective justification. That would also be the case if granting access through that template could affect, from a technical perspective, the performance of the platform. According to the AG, another instance would be where access could run counter to the company's economic model or objectives, although the AG does not develop further to what extent the interoperability would need to negatively affect the interests of the dominant undertaking.

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By contrast, the AG argued that the mere difficulty of developing the template does not justify a plain refusal to grant access, as a necessity and proportionality assessment is required. The AG further argued that any factors relied upon by the dominant undertaking as justification must be the ones that the firm took into account at the time of the conduct. Thus, the examination of the concrete terms of the refusal is an important element in determining whether the justification claimed by the firm did, in fact, form the basis for its conduct. Therefore, when relying on time constraints as a justification, the undertaking must prove that it informed the requesting entity of the time necessary to develop the template, as the development does not necessarily need to be immediate. Similarly, as regards the argument on the availability of limited resources, the fact that a dominant undertaking may be subject to the obligation to grant access does not mean that it must necessarily assume the costs of the development as – in the AG's view – this may cause a disincentive for the developer of the infrastructure: to be able to rely on claims concerning resources constraints, the dominant undertaking must ensure that the requesting entity is offered the possibility to pay an appropriate remuneration.

Finally, the AG explored whether an investigating authority is required to define the relevant downstream market. In this regard, he held that there is no such obligation, especially if the market is still under development and its scope is not fully defined. According to the AG, it would be sufficient to demonstrate that the refusal is capable of producing anti-competitive effects with regard to products or services which are in competition with each other, even if it is only potential competition. Of course, this implies that a degree of substitutability assessment is still necessary, although the precise limits are left open.

*Key takeaways*

Although it remains to be confirmed whether the Grand Chamber of the CJEU will fully endorse the AG's views, the Opinion continues the growing trend to limit the relevance of the *Bronner* conditions and to find that other forms of conduct potentially assimilated to refusals to grant access to infrastructure may be found to be abusive under less demanding standards (see for instance *Slovak Telekom* for constructive refusals, *Baltic Rail* for the destruction of the infrastructure itself and more recently *Google Shopping* for self-preferencing). In effect, this trend has decreased the scope for dominant companies to refuse access or interoperability to their infrastructure or platform without infringing Article 102 TFEU.

A particularly remarkable aspect of the Opinion is the AG's approach to causation. In an effects-based analysis, the burden of demonstrating a causal connection between the dominant firm's conduct and the alleged harmful effects would be plainly on the competition authority or plaintiff. A dominant firm can be liable only for harmful effects its conduct has caused, a core principle recently confirmed in the General Court's *Bulgargaz* judgment (see VBB on Competition Law, Volume 2023, No. 10). The AG deviates from this principle by reversing the burden of proof and requiring the dominant firm to prove the absence of causation. The legal basis for this approach and its potential scope of application remain unclear, and it remains to be seen whether the CJEU will follow the AG in this respect.

The Opinion is also noteworthy as it assumes an obligation of the dominant firm to take pro-active steps to ensure interoperability for third parties, even though it also clarifies that access does not have to be immediate and that the costs of creating more favourable access conditions does not necessarily have to be borne by the dominant firm. The AG advances some potential grounds that could objectively justify the refusal. However, as pointed out in the Opinion, these justifications are limited to those factors relating to the operability of the platform itself and the business model of the firm and cannot amount to mere difficulties.

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National level

ITALY

**Italian Highest Administrative Court annuls interim measures decision requiring Meta to resume negotiations with collective rights management entity**

On 2 July 2024, the Italian Highest Administrative Court ("Court") delivered a judgment upholding Meta's appeal against the decision by the Italian Competition Authority ("ICA") to impose interim measures requiring Meta to resume negotiations with SIAE, the Italian Society of Authors and Publishers (the formerly monopolistic collective management entity, "CMO"). The ICA decision alleged that Meta had abused its relative market power in relation to the CMO (which resulted in the CMO's economic dependence on contracting with Meta) when it terminated negotiations for a license for the use of the CMO's music repertoire on Meta's social platforms (see VBB on Competition Law, Volume 2023, No. 4). In the decision, the ICA relied for the first time on the recently changed legislation establishing a legal presumption of economic dependence in circumstances where a company uses intermediation services provided by a digital platform which has a decisive role in reaching the final users. The Court, however, held that the ICA's decision incorrectly applied the new legal presumption.

*The Court's Judgment*

The Court found that the ICA failed to establish that Meta's relevant activities constituted an intermediary function required for authors to reach final users. Meta's refusal solely concerned a licence to allow users to access an audio library with which they could create their own videos or reels. Meta's refusal did not, however, prevent authors or users from uploading music content (or content already imbedding music) onto Meta's platforms. Second, the Court noted that Meta's refusal to negotiate with the CMO at issue did not prevent authors working with other CMOs to access final users.

The Court further rejected the ICA's preliminary finding that Meta's conduct was abusive, noting that Meta undertook negotiations for a long period and that the parties' respective proposals were very different (Meta proposed an increase in the royalties by 40% while SIAE requested an increase by 310%). According to the Court, this discrepancy should have led the ICA to investigate whether the CMO's requested increase was reasonable. The Court further rejected the ICA's claim that Meta refused to disclose necessary information to the CMO to allow it to negotiate on fair and equal terms with Meta, noting that (i) Meta disclosed a large volume of information to the CMO and (ii) the ICA did not specify which omitted information should have been provided.

*Key Takeaways*

The Court's judgment signals that the ICA must prove that the criteria for the new legal presumption of economic dependence in the digital sphere are met, and thus the ICA cannot simply assume that large companies such as Meta will automatically be subject to the heightened legal standards that apply in scenarios of economic dependence.

SPAIN

**Spanish Competition Authority fines collective management organisation over complex exploitative and exclusionary strategy to discourage effective-use royalty rates**

On 19 June 2024, the Spanish Competition Authority ("SCA") imposed fines of € 6.4 million on Sociedad General de Autores y Editores ("SGAE"), the leading Spanish collective management organisation ("CMO"), for abusing its dominant position by implementing exploitative and exclusionary royalty rates for musical and audiovisual works used by radio and television operators.

# ABUSE OF DOMINANT POSITION

National level

Relying on applicable EU case law, including *SABAM* (Case C-372/19) and Kanal 5 (Case C 52/07), the SCA challenged the royalty rates charged by SGAE, which consisted of "flat-rate" royalties applicable irrespective of use, and alternative "effective-use" royalties tailored to the users' specific requirements. The SCA decided that such royalties constituted an exploitative abuse because (i) the price of the effective-use royalties was much higher than the flat-rate royalties, such that they did not represent a real alternative for users, and (ii) the flat-rate royalties did not appropriately reflect a licensee's effective use of SGAE's repertoire.

The SCA also found that SGAE's royalties had exclusionary effects as the flat-rate royalties disincentivised users from opting for alternative repertoires by competing rights management organisations. The users were forced to continue paying the flat rates to access the SGAE's leading repertoire even if other repertoires (with limited content compared to SGAE's) were available at lower rates. According to the SCA, the availability of appropriate effective-use rates to access SGAE's repertoire would have enabled users to benefit from more (price) competition between alternative providers. The SCA determined that SGAE enhanced such exclusionary effects by including statements or provisions in downstream contracts disincentivising users from negotiating with other rights management organisations, such as misleadingly describing its repertoire as 'universal', and including indemnity clauses against claims for the use of third-party rights.

As the SCA determined that the violation was 'serious', the SCA imposed fines and also prohibited SGAE from entering into contracts with public administration entities under relevant Spanish applicable laws.

*Key Takeaways*

The SCA's decision against SGAE is noteworthy as the authority does not claim that the royalties charged by SGAE were excessive (e.g. relative to the royalties charged in other countries), but nevertheless decided that the rates were abusive because they effectively disincentivized users from licensing repertoire at lower tariffs that were better tailored to their effective use of musical and audiovisual works. This approach by the SCA will likely face scrutiny on appeal in the present case. This issue has also arisen in a similar case arising from a similar ongoing case in the Czech Republic concerning the application of flat-rate royalties, where the CJEU has been asked to clarify the applicable legal standard (Case C-161/24).

**Spanish Competition Authority fines Booking.com for abusing its dominant position through unfair trading conditions**

On 29 July 2024, the Spanish Competition Authority ("SCA") imposed its largest ever fine (€ 413 million) on Booking.com, the leading online travel agent, for abusing its dominant position in the market for intermediary online travel agent services for hotels.

In its decision, the SCA found that Booking.com committed an exploitative abuse by imposing unfair trading conditions on hotels. According to the applicable case-law (see *BRT v SABAM*, C-127/73), unfair trading conditions imposed by a dominant company are abusive if they have unfavorable effects on trading partners or third parties and are not necessary to achieve a legitimate objective and/or are disproportionate. The SCA identified the following unfair trading conditions implemented by Booking.com:

- (Narrow) price parity clauses preventing hotels from offering lower prices on their websites than the prices available on Booking.com, while reserving the right for Booking.com to unilaterally lower the price offers for the hotels on its own website. The SCA considered that these clauses were capable of restricting competition (especially considering that the MFN clauses were complemented by Booking.com's right to decrease the prices in case of the hotels' non-compliance, thereby increasing the

# ABUSE OF DOMINANT POSITION



dissuasive effect of such clauses and weakening the position of hotels *vis-à-vis* Booking.com). In this regard, although not expressly mentioned, the SCA may have been influenced by the recent designation of Booking.com as a gatekeeper under the Digital Markets Act ("DMA"), under which gatekeepers are prohibited from adopting narrow MFN clauses.

- Provisions in the General Delivery Terms ("GDTs") rendering only the English version of the GDTs as legally binding and granting exclusive jurisdiction to Amsterdam courts under Dutch law in the event of a dispute.

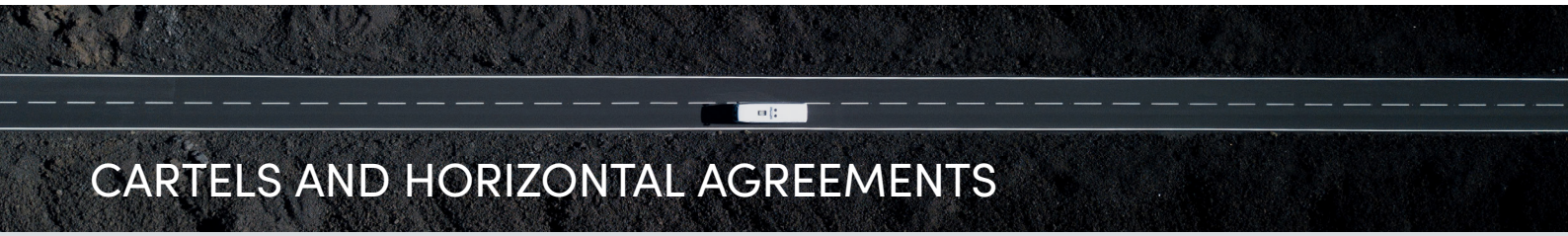
- Non-transparent loyalty and self-preferencing programmes, under which hotels do not receive sufficient information on the actual impact of the programmes on the hotels' visibility.

The SCA also found that Booking.com committed an exclusionary abuse, harming the ability of other online travel agents to compete by (i) setting its default ranking results for hotels based on the total number of reservations done through Booking.com; and (ii) relying on the hotels' performance in Booking.com as an eligibility criterion to join or remain in its fidelity programmes. The SCA decided that such conduct did not constitute competition on the merits as it exclusively reflected performance conditions on Booking.com to the detriment of other online travel agents. The SCA further decided that the conduct was capable of having anticompetitive effects and lacked an objective justification.

Finally, the SCA stated that it is not obliged to apply the as-efficient-competitor (AEC) test to assess the exclusionary effects in the case, citing the *Intel* (C-413/14) and *Unilever* (C-680/20) judgments of the CJEU. This mirrors the Commission's approach in its recent draft Guidelines on exclusionary abuses.

*Key Takeaways*

The SCA's finding that narrow MFNs may have exclusionary effects and violate EU competition law is consistent with the recent Advocate General Opinion in a German Booking.com case referred to the CJEU (Case C-264/23). The SCA's second ground for finding an Article 102 TFEU violation is more remarkable – prohibiting Booking.com from using a hotel's performance on its own platform to determine rankings and access to fidelity programs reflects a very aggressive interpretation of Article 102 TFEU that would severely restrict Booking.com's ability to curate hotel offerings on its own platform, to the detriment of customers. Booking.com must use some criteria to rank hotels in search results. If it cannot use historic performance (which would, at least to some extent, reflect consumer preferences) in ranking decisions, rankings would have to be based on metrics that might be much less relevant, and therefore be of lesser quality, from a consumer perspective.



# CARTELS AND HORIZONTAL AGREEMENTS

## European Union level

### General Court applies EU rules on antitrust fines and associations to agricultural cooperative

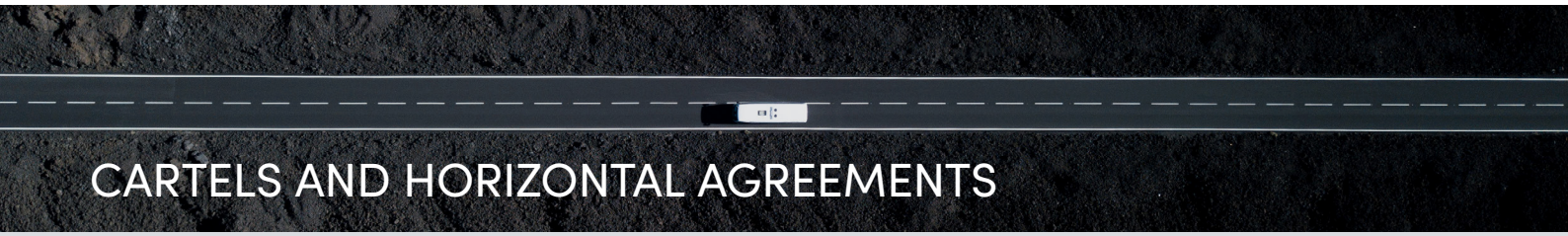
On 4 September 2024, the General Court ("GC") dismissed the action lodged by agricultural cooperative Conserve Italia Soc. coop. Agricola and its subsidiary Conserves France (together, "Conserve Italia") against a decision in which the Commission had imposed on them a fine totalling € 20 million for their involvement in a 13-year price-fixing and customer-allocation cartel relating to the supply of certain types of canned vegetables to retailers and food service companies (the "Decision"). The other participants in the cartel (Bonduelle, Coroos and Groupe CECAB) had previously settled with the Commission under the settlement procedure (Case T-59/22, *Conserve Italia and Conserves France v Commission*).

In its appeal, Conserve Italia challenged the methodology used by the Commission to calculate the fine. More specifically, Conserve Italia claimed, *inter alia*, that the Commission had been wrong to consider it as an undertaking, rather than as an association of undertakings, in the Decision. This miscategorisation had led to errors in the calculation of the maximum amount of the fine that could be imposed on it under Regulation 1/2003. According to Article 23(2), third indent, of Regulation 1/2003, where an infringement by an *association of undertakings* relates to the activities of its members, the fine shall not exceed 10 % of the sum of the total turnover of each member active on the market affected by that infringement. In contrast, according to Article 23(2), second indent, of Regulation 1/2003, in the case of an *undertaking*, the final amount of the fine cannot exceed 10 % of the total turnover of that undertaking. The judgment does not explain why the categorisation makes a difference and what the impact on Conserve Italia would be. We assume, however, that since Conserve Italia made that argument, the fine would have been lower under Article 23(2), third indent, of Regulation 1/2003.

The GC dismissed this claim. The Court found that, since Conserve Italia carries out an economic activity distinct from that of its members, the Commission was correct in finding that Conserve Italia was an undertaking. The Court also found that an economic entity which is organised a cooperative may still be categorised as an undertaking and is subject to competition law. In any event, the Court noted that an entity can be classified as both an undertaking and an association of undertakings at the same time. The Court further dismissed the claim that Conserve Italia had not benefited from the breach of Article 101 TFEU due to its status as a cooperative, whereby it is bound to pass any benefit to its members. The Court reasoned that, despite its cooperative status, Conserve Italia clearly exercised an economic activity in the relevant market and that it had committed the infringement.

The GC concluded that, because Conserve Italia exercised its own economic activity, distinct from that of its members, and because its own turnover adequately reflected its economic strength, that it was not appropriate to refer to the turnover of the members involved in the infringement for the purpose of calculating the fine. As a consequence, the Commission had been correct to calculate the fine based on the total turnover of Conserve Italia, rather than on the turnover of the members involved in the infringement.

Conserve Italia's also claimed that the Commission had committed an error of law by using the wrong value of sales for the purpose of calculating the basic amount of the fine. According to Conserve Italia, in calculating the fine, the Commission should only have considered the value of sales in the Member States in which the anticompetitive agreements had been implemented. The

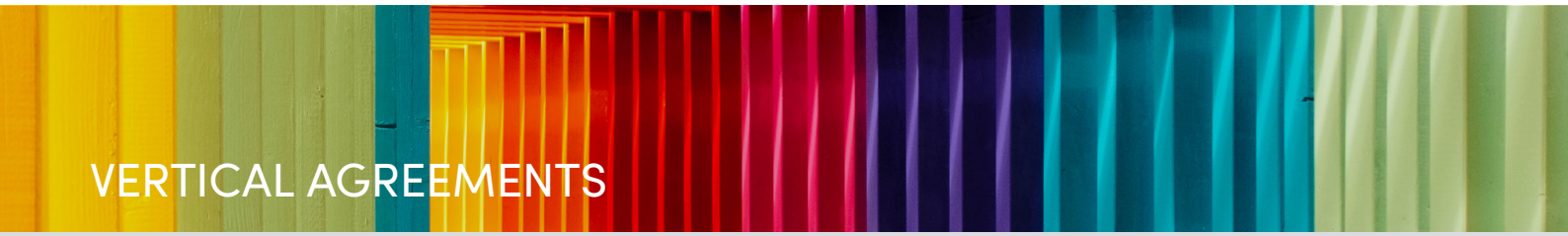


# CARTELS AND HORIZONTAL AGREEMENTS

## European Union level

GC disagreed: the Commission had found the impacted geographical area to be the whole of the EEA, as there was a general understanding between the participants to the cartel that they would not compete with each other in the countries not covered by the anticompetitive agreements. The Commission had therefore been correct to take into account Conserve Italia's EEA-wide sales in setting the basic amount of the fine.

The Court rejected all of Conserve Italia's claims, and dismissed the application as a whole.



# VERTICAL AGREEMENTS

## European Union level

### Court of Justice finds that price parity clauses used by Booking.com are not ancillary restraints

On 19 September 2024, the Court of Justice of the European Union ("CJEU") handed down its judgment in *Booking.com and Booking.com (Deutschland)*, a preliminary reference ruling concerning (i) whether so-called wide and narrow price parity clauses ("PPCs") constitute ancillary restraints and therefore escape the prohibition under Article 101(1) TFEU and (ii) how the relevant product market should be defined for the purposes of the application of the 2010 Vertical Block Exemption Regulation ("VBER") in relation to the activities of an online travel agent ("OTA") which intermediates between hotels and end customers (Case C-264/23, *Booking.com and Booking.com (Deutschland)*).

*Facts*

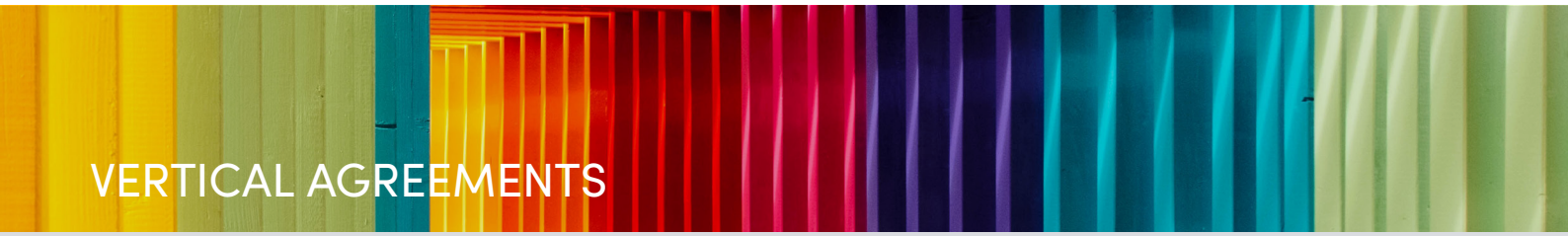
The present case is the most recent iteration in a long saga concerning the PPCs contained in the contracts concluded between OTAs like Booking.com ("Booking") and hotels. Traditionally, it was common for OTAs to include "wide" PPCs in their contracts with hotels, preventing partner hotels from offering rooms at a lower price through their own direct sale channels (i.e., own hotel websites) or through other sales channels, including competing OTAs. In 2013, the German Federal Cartel Office ("FCO") adopted a decision finding that the wide PPCs used by HRS, an OTA, infringed Article 101 TFEU (and the German law equivalent). In July 2015, Booking terminated its wide PPCs and replaced them with "narrow" PPCs, which prevented partner hotels from offering rooms at lower prices through direct sales channels, without restricting the hotels' right to offer lower prices through different channels (such as competing OTAs). However, in December 2015, the FCO adopted a decision finding that Booking's narrow PPCs were also contrary to Article 101 TFEU. In 2021, the German Federal Court of Justice ultimately upheld the FCO's decision against Booking (see VBB on Competition Law, Volume 2021, No. 5).

In 2020, a large group of hotels in Germany lodged a follow-on action for damages against Booking before a German court. In parallel, Booking commenced proceedings before the Amsterdam District Court seeking a declaration that its narrow PPCs did not infringe Article 101 TFEU, arguing that such clauses constitute ancillary restrictions falling outside of Article 101 TFEU and, in the alternative, that they are exempted under the VBER. In this context, the Amsterdam District Court referred two questions to the CJEU.

*First question: ancillary restraints*

The first question concerned whether wide and narrow PPCs fall outside Article 101 TFEU on the ground that they are ancillary to the agreements between Booking and partner hotels. In response, the CJEU reiterated the established legal test for classifying a restriction as ancillary. It must first be considered whether the implementation of the main operation, which has neutral or positive effects on competition (i.e., in this case the provision of online booking services), would be impossible (rather than more difficult or less profitable) without the restriction (i.e., the PPCs). Second, it must be assessed whether the restriction is proportionate to the objectives underlying the main operation, meaning whether there are realistic alternatives which are less restrictive of competition than the restriction at issue.

The CJEU provided detailed indications to the referring court regarding the application of the ancillary restraints doctrine to Booking's PPCs. Regarding wide PPCs, the CJEU held that such restrictions do not appear to be objectively necessary, taking the view that there is no intrinsic link between the continued existence of Booking's main activity and the imposition of wide PPCs which clearly produce appreciable anti-competitive effects.



# VERTICAL AGREEMENTS

## European Union level

Regarding narrow PPCs, while recognising that such clauses are less restrictive of competition and are intended to address the risk of free-riding by partner hotels, the CJEU found that such clauses cannot be regarded as objectively necessary to ensure the economic viability of the hotel reservation platform. The CJEU observed that any negative consequence for the profitability of Booking's service caused by the absence of narrow PPCs does not mean that the clauses must be regarded as being objectively necessary, as these consequences would rather result from the choice of business model chosen by Booking. Furthermore, although examination of objective necessity is a relatively abstract exercise, the CJEU noted that it was possible to take into account counterfactual evidence showing that Booking's activity was not in fact compromised in those Member States which had previously prohibited wide and narrow PPCs.

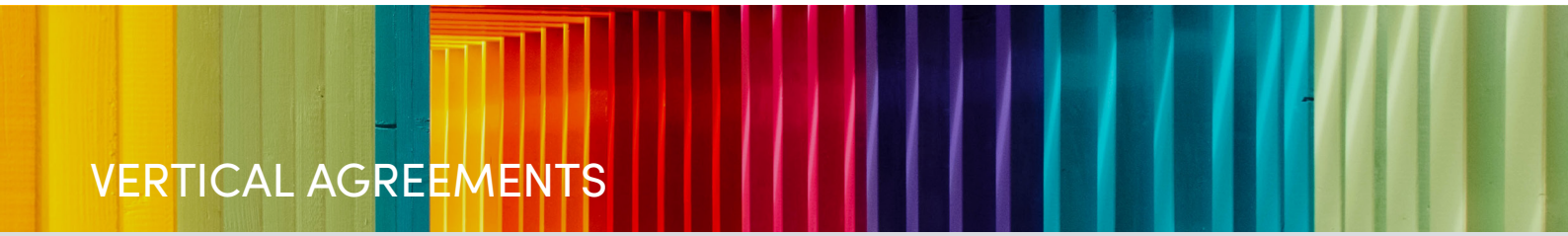
The CJEU stressed that any balancing of the pro- and anti-competitive effects of the PPCs would need to be carried out in an assessment of the applicability of the Article 101(3) TFEU exception and not in determining whether the practice fell outside the scope of Article 101(1) TFEU altogether by qualifying as an ancillary restraint. In this context, the Court noted the distinction between the assessment of objective necessity under the ancillary restraints doctrine and the assessment of indispensability under Article 101(3) TFEU. Even if it were to be found that PPCs were necessary to combat free-riding, thereby guaranteeing efficiency gains, this would not be sufficient to render PPCs objectively necessary for the purpose of Article 101(1) TFEU, but would instead be relevant in determining the possible application of Article 101(3) TFEU. However, as the CJEU had not been asked to consider the application of Article 101(3) TFEU, it did not provide specific guidance on whether the PPCs could be considered to meet the requirements of this exception to the application of the Article 101(1) TFEU prohibition.

*Second question: market definition*

From a market definition perspective, the essential question was whether Booking operates on a narrow market for the provision of online intermediation services to hotels, or on a wider market for the intermediation of hotel accommodation to all user groups, including both hotels and end customers. Under the former definition (which was used by the FCO in Germany), only Booking and other hotel OTAs would be present on the market, whereas the latter broader product market would also include services provided by each hotel's direct sales channels, offline travel agencies, or even other online services such as those provided by metasearch engines.

The CJEU cited the Commission's 2024 Market Definition Notice with approval, observing that in the presence of multi-sided platforms, it is possible to define a relevant product market for the products offered by a platform as a whole, in a way that encompasses all (or multiple) user groups or, alternatively, separate (although interrelated) product markets for products offered on each side of the platform. The CJEU held that the referring court must verify whether there is actual substitutability between online intermediation services and other sales channels, irrespective of the fact that other channels do not offer the same functionalities as hotel OTAs.

Interestingly, the CJEU suggested that the referring court should consider the findings made by the FCO (and confirmed by the German courts) regarding the relevant product market as a particularly relevant contextual factor in making its own market definition analysis (though there was no obligation on the Dutch court to consider those prior German findings as at least prima facie evidence as this requirement only applies in respect of findings of an infringement made in another Member State). This was so considering, in particular, that the FCO's findings related to the same geographic market as was at issue in the Dutch litigation. Nevertheless, the referring court would have to determine whether the FCO's product market definition was vitiated by any errors.



# VERTICAL AGREEMENTS

## European Union level

*Comment*

The case is notable because it provided the CJEU with the first opportunity to examine wide and narrow PPCs in the context of online intermediation services, albeit in relation to the limited issue of whether such clauses constitute ancillary restraints. On this point, the Court gave an unreservedly negative view by applying a strict economic viability test, but the question whether the protection from free riding could justify at least a narrow PPC under Article 101(3) did not need to be addressed. From Booking's perspective, the relevance of these issues ought to remain confined to follow-on damages in respect of its past practices, as the company announced that it would abandon any PPCs in light of its designation as a gatekeeper under the EU Digital Markets Act ("DMA") given that Article 5(3) DMA expressly prohibits gatekeepers from employing PPCs.

# STATE AID

## European Union level

### The *Apple* judgment: a rare but significant win for the Commission in the area of tax rulings

On 10 September 2024, the Grand Chamber of the Court of Justice of the European Union ("CJEU") delivered its judgment in the State aid *Apple* case (C-465/20 P, Commission v Ireland and Others). Unlike other recent judgments in similar tax cases, the CJEU sided with the Commission in finding that the tax arrangements agreed between Ireland and Apple amounted to incompatible State aid in the amount of approximately € 13 billion (Case C-465/20 P, *Commission v Ireland and Others*).

*Background of the dispute*

The dispute concerned in essence the fiscal treatment in Ireland of Apple Operations Europe Ltd ("AOE") and Apple Sales International Ltd ("ASI"), i.e., two subsidiaries of Apple Inc.

AOE and ASI were both incorporated in Ireland but were not considered tax residents in that country, thanks to a specific exception provided for by the Irish Tax Consolidation Act of 1997. Each company operated through a single branch in Ireland. Their head offices, which lacked any physical presence or employees, did not have any taxable presence in Ireland, the US or anywhere else. As a result, AOE and ASI were not taxed in Ireland on their worldwide profits, but just for profits of their Irish branches.

Since AOS and ASI operated certain complex intra-group transactions and, thus, their Irish profits were not immediately identifiable, the Apple group proposed to the Irish competent administration a tax arrangement to establish the method for allocating AOE and ASI's profits to their Irish branches, in order to determine their corporation tax liability in Ireland. The Irish tax authority fully endorsed the tax arrangements proposed by Apple.

Notwithstanding the above, in 2013, the Commission requested information to Ireland with regard to the tax rulings that had been granted to entities of the Apple Group, including ASI and AOE. Following an in-depth investigation, the Commission found that the tax rulings concerning AOE and ASI constituted State aid incompatible with the internal market and ordered recovery. The Commission noted that the contested tax rulings resulted in *selective advantage* since they enabled AOE and ASI's branches to lower their tax liability. An advantage was found because the agreed taxable profit of the two branches did not reliably determine prices on the market at arm's length, as they excluded profits generated by the exploitation of the Apple group's IP (which were instead allocated to AOE and ASI's head offices). Selectivity was found because the arrangement derogated from the ordinary rules of taxation of corporate profit in Ireland since it was not available to non-integrated companies.

*Judicial proceedings before the EU courts*

The Commission decision was challenged before the General Court ("GC") by Ireland and Apple. In 2020, the GC annulled the contested decision by finding that its reasoning was based on various erroneous assessments concerning, among others, the normal taxation under the Irish tax law. The GC found that the Commission had not succeeded in showing that there was a selective advantage granted by the tax rulings at issue (see VBB on Competition Law, Volume 2020, No. 7).

On appeal, the CJEU quashed the GC's judgment and dismissed at the same time the actions brought by Apple and Ireland

Contrary to the *Fiat Chrysler*, *Amazon* and *Engie* cases (see VBB on Competition Law, Volume 2022, No. 11 and Volume 2023, No. 12), the CJEU reached opposite conclusion about the use of technical OECD guidelines to assess whether the tax treatments at issue complied with the arm's length principle (and, thus, if they constituted a derogation from the reference framework). While in *Fiat Chrysler*, *Amazon* and *Engie*, the CJEU considered

STATE AID

European Union level

that the Commission used its own definition of the arm's length principle for the purposes of applying Article 107(1) TFEU and it applied parameters and rules external to the national tax system at issue (i.e., the OECD Guidelines) by essentially ignoring the definition used in Luxembourg law, it did not do so in the *Apple* judgment. On the contrary, the CJEU found that the Commission was not wrong to use the OECD guidelines. In fact, even if these guidelines were not explicitly adopted by Ireland, the CJEU observed that the national legislation "*corresponded in essence to the functional and factual analysis*" suggested by the OECD approach. Thus, the Commission was right in relying on them as a guidance to ensure that the profit allocation and transfer pricing methods produced outcomes in line with market conditions. Although the facts in *Apple* and the other cases appear to be slightly different, this matter – which is of key importance to identify whether a tax ruling is selective – does not seem to be completely clarified and may, thus, lead to further litigation in the future.

Further, it is important to note that the *Apple* judgment consists in one of the very few judicial wins that the Commission obtained in the area of tax rulings. The judgment represents a significant blow for Apple considering the total amount that will have to be recovered from the company (to the benefit of Ireland) – i.e., around € 13 billion.

# LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

## European Union level

### The Draghi Report and the Mission Letter to EVP-designate Ribera: A New Era for EU Competition Policy?

On 9 September 2024, Mario Draghi, former President of the European Central Bank and former Prime Minister of Italy, published the long-awaited Report on the Future of European Competitiveness ("Report") setting out comprehensive recommendations to enhance Europe's competitiveness and capacity for growth. Thereafter, less than two weeks later, European Commission ("Commission") President Ursula von der Leyen announced the nomination of Teresa Ribera Rodríguez, the current Spanish Minister for Ecological Transition and Demographic Challenge, to the role of Executive Vice-President ("EVP") for Clean, Just and Competitive Transition. The Mission Letter to EVP-designate Ribera ("Mission Letter") sets out the main goals of the next mandate with a focus on energy transition and the modernization of EU competition policy.

*A New Approach to Competition Policy*

The Report calls for a new EU industrial strategy that aligns with competition and trade policies and focuses on three key areas for action critical to Europe's growth: (i) closing the innovation gap; (ii) creating a joint plan for decarbonisation and competitiveness to lower energy prices and capture the industrial opportunities of decarbonisation; and (iii) developing genuine EU "foreign economic policy" to increase security and reduce dependencies.

Drawing on the Report, the Mission Letter considers decarbonization to be a key policy priority and calls for a decrease in energy prices and the management of energy poverty across Europe. In this respect, the Mission Letter stresses the importance of adopting a new approach to competition policy which will allow the transition to a more circular and low-carbon economy as well as the scaling up of companies in global markets.

The Report and the Mission Letter provide a framework for the revamp of EU competition policy in a number of key areas to encourage innovation, growth and investment and to achieve the wider objectives on competitiveness and sustainability, social fairness and security.

*Key Recommendations for the Modernization of Competition Policy*

1. **Innovation and Future Competition**. The Report supports a more forward-looking approach in DG COMP Decisions encompassing non-price parameters such as quality and innovation. It also recommends an update to the Commission's merger guidelines to place a heightened emphasis on innovation and future competition. This emphasis is also reflected in the Mission Letter which tasks EVP-designate Ribera with the review of the Horizontal Merger Control Guidelines on the basis of considerations such as innovation, resilience, security and efficiency, and to address risks of killer acquisitions from foreign companies.

   Furthermore, the Report's recommendation envisages an "innovation defence" which would enable merging parties to prove that their proposed merger increases their ability and incentive to innovate. The Report sets out a requirement that merging parties commit to a level of investment to prevent the misuse of this defence. Such investment would require ex-post monitoring.

2. **"New Competition Tool".** The Report recommends the introduction of a "New Competition Tool" ("NCT"), a market investigation instrument which would enable DG COMP to address structural competition problems. The use of the NCT is envisaged in the

# LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

## European Union level

following areas: (i) markets affected by tacit collusion; (ii) markets where the need for consumer protection is more likely; (iii) markets with weak economic resilience; and (iv) past enforcement actions where the information/data received by the authority indicate that the commitments or remedies adopted are not delivering competition.

3. **Strengthened and Efficient Enforcement of the DMA, the FSR and the Competition Rules**. There is impetus to create a more streamlined and predictable decision-making process for competition rules. In this respect, EVP-designate Ribera is entrusted to speed up competition enforcement, with particular attention being given to anticompetitive practices affecting the competitiveness and sustainability of the food and farming sector. Equally, the effective and vigorous enforcement of the Digital Markets Act (DMA) and the Foreign Subsidies Regulation (FSR) is a key point of action in the Report and the Mission Letter.

4. **State Aid as a Tool for Enhancing Industrial Policies - Expansion of IPCEIs**. The Report stresses the impact of increased State aid, provided in response to the COVID-19 pandemic and the energy crisis, on the fragmentation of the common market and distortions of competition. It advises a return to the normal enforcement of State aid controls and coordinated aid at EU level to increase productivity and growth in strategic areas. This involves a compatibility assessment which closely examines the coherence of the State aid with any EU-wide industrial policy and an allowance of greater levels of State aid, where it improves EU coordination. The Report also recommends that State aid decisions take greater account of the possible impacts on innovation and resiliency.

   One of the most significant recommendations, in terms of State aid, is the expansion of Important Projects of Common European Interest ("IPCEIs"), which support breakthrough innovation and are, therefore, an important element for boosting the EU's competitiveness. The proposed reform of IPCEIs includes the broadening of the category of innovations financed to include all forms of innovation that open the possibility of the EU jumping the technological frontier in strategic areas where the RDI (research, development and innovation) framework is not adequate. The Report also recommends speeding up the administrative procedures for the approval of IPCEIs support.

   Equally, the Mission Letter advocates for the development of a new State aid framework with a particular focus on renewable energy, industrial decarbonization and clean tech, and the further simplification of State aid. Importantly, the Mission Letter tasks EVP-designate Ribera with assessing the Report's recommendation pertaining to the expansion of IPCEIs for innovation in strategic sectors. The Mission Letter also envisages a simpler and faster State aid review of IPCEIs.

5. **A New Security and Resilience Assessment**. The Report recommends the introduction of a security and resiliency assessment which would inform DG COMP's enforcement of competition policy. The Report recommends that the performance of this assessment be entrusted to an external body outside DG COMP and is limited to specific sectors such as security, defence, energy and space.

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