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EU Competition Law Newsletter

Highlights

— The Saga Continues: Commission Blocks *Illumina/GRAIL* In Landmark Decision

— The General Court Partially Annuls The Commission Decision In *Google Android*

The Saga Continues: Commission Blocks *Illumina/GRAIL* In Landmark Decision

On September 6, 2022, the Commission prohibited the acquisition by Illumina, a U.S.-based company specializing in genomic sequencing, of GRAIL, a U.S.-based start-up developing early cancer detection tests based on genomic sequencing.[1] The decision marks the first Commission review and prohibition of a transaction falling below the EU Merger Regulation ("EUMR") and national notification thresholds.

Background

Illumina is a global genomics company that focuses on next-generation sequencing ("NGS") instruments and consumables. GRAIL is a start-up developing early cancer detection tests based on genomic sequencing and data science tools. The transaction is thus purely vertical in nature, with Illumina operating upstream of GRAIL.

In September 2020, Illumina announced its acquisition of GRAIL for $8 billion. The transaction was not reportable at the EU or Member State level as GRAIL had—and still has—not launched a product on the market and had no sales in the EEA. In March 2021, the French Competition Authority referred the transaction to the Commission for review under Article 22 EUMR.[2] The Commission accepted the referral request in April 2021 and requested that the merging parties notify the transaction to the Commission.

Illumina notified the transaction to the Commission in June 2021 but closed it in August 2021, in violation of the standstill obligation. The Commission prohibited the transaction on September 6, 2022.[3]

[1] *Illumina/GRAIL* (Case COMP/M.10188), Commission decision of September 6, 2022.

[2] National competition authorities in Greece, Belgium, Norway, Iceland and the Netherlands later joined the referral request.

[3] On October 28, 2022, the Commission renewed and adjusted its hold separate and interim measures orders initially imposed on October 29, 2021. We cover these developments in our October 2021 and October 2022 EU Competition Law Newsletters.

The Prohibition Decision

On September 6, 2022, almost two years after its announcement, the Commission prohibited the transaction on input foreclosure grounds. The Commission noted that post-transaction, Illumina would have the ability and incentive to foreclose GRAIL's putative competitors and potential new entrants, thereby putting GRAIL's putative competitors at a disadvantage in the early cancer-detection testing market:

— **The Commission found that Illumina would have the ability to foreclose GRAIL's putative rivals.** The Commission noted that Illumina's NGS systems were critical inputs for the development of new early cancer detection tests. The Commission highlighted that GRAIL's putative competitors require cutting-edge "high-throughput NGS systems with a reliable support network and a solid track record."[4] The Commission considered that Illumina was the only suitable supplier of NGS systems in the short to medium-term, in a market characterized by significant barriers to entry and high switching costs. Accordingly, the Commission was concerned that Illumina could withhold GRAIL's putative rivals' access to its own NGS technology or refuse to assist rivals.

— **The Commission found that Illumina would have the incentive to foreclose GRAIL's putative rivals in a market that has "enormous potential" and which has "ongoing close innovation competition."** The Commission found that Illumina would benefit from foreclosure in a market that was set to be highly lucrative and was expected to reach more than €40 billion per annum by 2035. The Commission's investigation explored the nature of GRAIL's product, Galleri. The Commission deemed that GRAIL enjoyed a first-mover advantage, but nonetheless faced competitive constraints from several players who were developing early cancer detection tests that would directly and closely compete with Galleri in the near future absent the transaction. Basing its assessment on a 12-year timeframe, the Commission concluded that Illumina would have the incentive to foreclose GRAIL's putative rivals "already today despite benefitting from this action only at a later stage."[5]

— **The Commission dismissed Illumina's proposed remedies.** To address the Commission's concerns at the upstream level, Illumina offered to license some of its gene-sequencing technology patents to NGS suppliers and to stop patent lawsuits in the U.S. and in Europe against the Chinese NGS supplier BGI Genomics for three years. The Commission found the commitments insufficient as, among others, putative rivals would require access to other Illumina patents in any event. To address concerns at the downstream level, Illumina committed to supply GRAIL's putative rivals until 2023. But the Commission noted that Illumina's commitments did not remove the risk of Illumina degrading technical support for its NGS systems and that they would be complex to monitor.

Implications

The *Illumina/GRAIL* saga has broken new procedural and substantive legal grounds and promises to continue doing so:

— **From a procedural standpoint**, *Illumina/GRAIL* stands out for its intricacies and retroactive application of the Commission's revised Article 22 EUMR policy. The Commission requested a referral of the transaction in February 2021 and accepted the referral from the French Competition Authority in March 2021, before it introduced changes to the Article 22 EUMR policy in late March 2021. At the time the Commission called in the transaction, its policy was to discourage referrals, as was confirmed by Commissioner Vestager in a speech she gave ten days after the parties announced the transaction.[6]

[4] *See* Commission Press Release IP/22/5364, "Mergers: Commission prohibits acquisition of GRAIL by Illumina," September 6, 2022.

[5] *Illumina/GRAIL* (Case COMP/M.10188), Commission decision of September 6, 2022. The press release is accessible here.

[6] Commissioner Vestager, *The future of EU merger control*, Speech to the International Bar Association 24th Annual Competition Conference, September 11, 2020.

— **From a substantive standpoint**, *Illumina/GRAIL* reshapes the Commission's innovation-based theories of harm. It not only confirms the Commission's increasing scrutiny of vertical mergers, but also marks the first prohibition of a vertical merger on grounds of risks to innovation.

— The decision is also noteworthy for its departure from the Commission's analytical framework in past innovation cases: while precedents focus on the merging parties' incentives to innovate in a horizontal setting,[7] *Illumina/GRAIL* instead focuses on the merging parties' putative rivals' incentive to innovate in a vertical context. The Commission's novel approach creates significant uncertainty on the standards the merging parties would need to meet in vertical mergers involving innovation-intense industries, such as pharmaceuticals and technology.

— **As to remedies**, the Commission's rejection of Illumina's proposed commitments confirms the Commission's skepticism of non-divestiture remedies in vertical cases. The decision suggests that a satisfactory remedy should have maintained competition in the innovation race among third parties in a potential market for the production of early cancer detection blood-based tests. Such a threshold may be unattainable, as one must wonder what remedies, if any, Illumina could have convincingly offered to incentivize third parties in the innovation race.

— **And finally, from a cross-jurisdictional standpoint**, *Illumina/GRAIL* stands out as one of a handful cases of dividing the Atlantic. In a judgment announced only five days before the Commission's prohibition decision, a Chief Administrative Law Judge in the U.S. dismissed the FTC's challenge of the acquisition. The Judge found that Illumina had long been the only viable NGS technology supplier, and, as such, its ability to foreclose GRAIL's putative competitors pre-dated the transaction. However, looking at the same timeframe as the Commission, the Judge deemed that while Illumina might profit from foreclosure in 12 years, this did not indicate that it had a current or near-term incentive to harm GRAIL's putative rivals.[8] The Judge found that the FTC did not present credible evidence that GRAIL's putative rivals would imminently launch their products, and even if they did, there was no assurance that the products would be in direct competition with GRAIL's.[9]

Illumina has already announced that it will appeal the decision to the General Court.[10] In the meantime, the Commission is expected to adopt an Article 8(4) EUMR decision requiring Illumina and GRAIL to unwind the transaction it closed but did not implement, by keeping GRAIL as a distinct entity. The parties will have the possibility to appeal this decision and seek interim relief suspending the divestment of GRAIL until the final determination of these appeals, promising us many more seasons of the *Illumina/GRAIL* saga.

[7] *See e.g., Dow/Dupont* (Case COMP/M. 7932), Commission decision of March 27, 2017; and *BMS/Celgene* (Case COMP/M. 9294), Commission decision of July 29, 2019.

[8] U.S. FTC Administrative Law Judge, *Illumina Inc./GRAIL Inc.* Docket No. 9401, Initial Decision of September 9, 2022.

[9] *Ibid.*

[10] Illumina Press Release, "Illumina Intends to Appeal European Commission's Decision in GRAIL Deal," September 6, 2022, available here.

The General Court Partially Annuls The Commission Decision In *Google Android*

On September 14, 2022, the General Court partially annulled the Commission's 2018 infringement decision which fined Google €4.3 billion for abusing its dominant position by imposing restrictions on Android device manufactures ("OEMs") and mobile network operators ("MNOs").[11] The General Court also found that the Commission's investigation suffered from procedural errors and reduced the fine by €200 million.

Background

Google's business model depends on the distribution of its revenue-generating services on smart phones produced by OEMs. Beyond its revenue-generating services, Google also offers OEMs and MNOs its open-source operating system ("OS"), Android, free of charge. Google's business model therefore significantly differs from that of Apple, a vertically integrated company that generates revenue primarily from the sales of its devices.

On July 18, 2018, following a four year investigation, the Commission fined Google €4.3 million for abusing its alleged dominant position in four interconnected markets: (i) the market for the licensing of smart mobile device OSs, in which Google's Android was found to be dominant; (ii) the market for Android app stores, in which Google's Play store was found to be dominant; (ii) the market for online general search services, in which Google Search was found to be dominant; and (iv) the market for non-OS-specific mobile web browsers, in which Google Chrome was found to be dominant.[12]

The Commission considered that Google's agreements with OEMs and MNOs formed part of an overall strategy to anchor Google's dominant position in the online general search market. In particular, the Commission found that:

— Google unlawfully tied several of its revenue-generating services together in its Mobile Application Distribution Agreements ("MADAs") with Android OEMs. In particular, it tied the Google Search app to Play and Google Chrome to Play and the Google Search app.

— Google anticompetitively prevented Android OEMs that wished to preinstall Google's apps from selling smart phones that did not comply with Android's baseline compatibility standard through its Anti-Fragmentation Agreements ("AFAs"). The Commission considered that absent the AFAs, versions of open-source Android that did not meet Google's compatibility requirements (so-called "forks") could have supported the distribution of rival search engines.

— Google acted anticompetitively through its portfolio-based Revenue Share Agreements ("RSAs") by paying OEMs and MNOs a portion of Google's advertising revenue if the Google Search app was the sole preinstalled search app across an agreed portfolio of Android devices.

In its appeal before the General Court, Google challenged the Commission's market definition and finding of dominance, as well as the abuses listed above and the fines imposed. Google also claimed that the Commission's investigation infringed its procedural rights.

The General Court Judgment Largely Upheld The Commission's Findings…

The General Court largely affirmed the Commission's findings on market definition, dominance, and the abuses related to MADAs and AFAs. In particular:

[11] *Google LLC and Alphabet, Inc. v. European Commission* ("Google Judgment")(Case T-604/18) EU:T:2022:541.

[12] *Google Android* (Case COMP/AT. 40099) Commission decision of July 18, 2018.

- The General Court upheld the Commission's finding that Android and iOS belonged to separate relevant product markets, that iOS at best posed an indirect constraint on Android, and that Google Play was not sufficiently constrained by Apple's App Store.
- The General Court upheld the Commission's finding that MADAs contained unlawful tying arrangements.[13] In doing so, the General Court rejected Google's argument that the preinstallation conditions were necessary for Google to recoup its investments in maintaining the free Android platform.[14]
- The General Court also upheld the Commission's finding that AFAs restricted competition from Android forks, which in turn protected Google's search dominance.[15]

… But Annulled the RSA-Based Infringement…

The Commission had found that Google's payments to OEMs and MNOs as part of the portfolio-based RSAs constituted exclusivity payments that could foreclose as-efficient competitors ("AEC"). The General Court overturned this finding for two main substantive reasons:

- ***First,*** **the Commission failed to consider the full scope of the relevant markets in its assessment of the coverage of the challenged practice.** In particular, the General Court ruled that the Commission's coverage assessment was limited to a too narrow segment of the market and that the Commission failed to show that the coverage of the challenged practice was significant. It was more convinced by the coverage figure that Google offered, of less than 5% of the relevant market.
- ***Second,*** **the Commission erred in its AEC analysis.** Following its recent precedents, the General Court affirmed the importance of the AEC assessment in establishing the ability of a practice to foreclose competitors that are at least as efficient as the dominant undertaking. While the Commission is not under an obligation to conduct an AEC test, in line with its recent *Intel* judgment, the General Court held that, when conducted, the AEC test "must be conducted rigorously." The General Court agreed with Google that the Commission's analysis contained vitiating errors.

… And Ruled That Google's Rights of Defense Were Infringed

The General Court accepted Google's submissions that the Commission had infringed its rights of defense during the administrative procedure by denying an oral hearing regarding essential aspects of the Commission's case on portfolio-based RSAs and the AEC assessment by failing to adopt a supplementary Statement of Objections. In particular, the General Court acknowledged that the Commission's AEC test had "played an important role" in the Commission's assessment, and Google could have developed its defense "more easily orally" had the supplementary Statement of Objections been issued.

While the General Court also noted that the Commission's failure to provide notes of meetings with third parties also infringed Google's rights of defense, it found that the infringement did not have an impact on the Commission's finding of abuse, as Google had not established that the disclosure would enhance its defense.

Implications

The judgment is interesting for two main reasons:

- *First*, the judgment marks the third instance in 2022 where the EU courts have partially annulled a decision on grounds of procedural errors or the Commission's failure to establish competitive effects.[16] The judgment, therefore,

[13] *Google Judgment*, para. 295.

[14] *Ibid.*, paras. 608–609, 619.

[15] *Ibid.*, paras. 866–891.

[16] *See Intel v. Commission* (Case T-286/09 RENV) EU:T:2022:19; and *Qualcomm v. Commission* (Case T-235/18) EU:T:2022:358.

affirms the importance of the Commission's obligation to conduct investigations rigorously and free of procedural defects.

— *Second*, the General Court's assessment suggests that the requirement to establish anticompetitive effects applies in both pricing and non-pricing abuse of dominance cases. On the facts, the General Court was persuaded that the Commission had established actual anticompetitive effects of Google's tying arrangements by reference to evidence of OEM and user behavior regarding Google's actual rivals. In other words, it was sufficient for the General Court that, in practice, OEMs did not preinstall, and users did not download, rival search engines. For the exclusivity abuse, the General Court took a different approach. It demanded evidence of anticompetitive effects on hypothetical as-efficient competitors and concluded that the Commission had failed in this exercise. While the judgment sheds light on what competitive effects are not, it remains to be seen what the relevant threshold for assessing effects should be.

News

Commission Updates

Commission Publishes The Infringement Decision In Video Games For Geo-Blocking

On August 23, 2022, the Commission published its full decision in *Video Games*, fining Valve (the owner of the online PC gaming platform Steam) and five PC video game publishers (Bandai Namco, Capcom, Focus Home, Koch Media, and ZeniMax) a total of €7.8 million for restricting cross-border sales of PC video games.[17] The Commission found that the agreement between Valve and the video game publishers, which prevented gamers from activating certain PC videogames purchased in eight Member States where prices are generally lower than in other Member States (so-called "geo-blocking"), breached Article 101 TFEU.

Background

Steam is an online PC video gaming platform that allows consumers to directly download or stream video games. Gamers can also purchase video games elsewhere than through the Steam platform (*e.g.*, brick-and-mortar stores or third-party website downloads), which they can then play on Steam by using so-called activation keys. Valve supplied such keys to the five video game publishers for use in their video games. At the publishers' request, Valve set up geographic restrictions to prevent consumers located outside the eight designated Central and Eastern European Member States[18] from activating the games purchased in these lower-price markets (in brick-and-mortar or online stores) and playing the games on Steam from another Member State. In return for the geo-blocked activation keys, the game publishers granted Valve a non-exclusive license to distribute their games globally through the Steam platform.

The Decision and Its Implications

The Commission concluded that the restrictions prevented consumers from buying cheaper games from brick-and-mortar stores and third-party websites located in other Member States, thereby denying consumers the benefits of the EU's Digital Single Market, allowing them to shop around for the lowest prices. The decision is consistent with the Commission's hardline stance against cross-border sales restrictions, deeming them 'by object' restrictions.

[17] Commission Cases AT.40413 – Focus Home, AT.40414 – Koch Media, AT.40420 - ZeniMax, AT.40422 – Bandai Namco and AT.40424 – Capcom.
We reported on the Statement Objections and the Commission's initial announcement of fines in our April 2019 and January 2021 EU Competition Law Newsletters respectively.

[18] Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia.

The decision is noteworthy for its treatment of copyright in competition law. It clarifies that, as a matter of principle, "an agreement is not exempted under EU competition law merely because it concerns an IP right."[19] It reiterates the Court of Justice's precedent on the treatment of IP rights in exclusive distribution relationships and holds that the same conclusions apply in non-exclusive distribution and licensing agreements. Accordingly, the decision finds that IP rights cannot be exercised to frustrate the very objective of the Treaty, *i.e.* the creation and protection of the internal market.

The decision is also of procedural interest as it marks the first hybrid-settlement in non-cartel proceedings.[20] Companies subject to vertical investigations face the same strategic questions as those involved in cartel cases, namely: (i) whether to cooperate and settle with the Commission or preserve their rights to appeal; and (ii) if they decide to settle, how swift their cooperation should be. In the present case, the publishers' decision to settle after the Statement of Objections meant that they received relatively low discounts (10–15%) compared to Guess and Pioneer, who received fine reductions of 50% in other investigations for cooperating before the Statement of Objections stage.[21]

The Commission Publishes An External Study On Parity Clauses

On August 26, 2022, the Commission published the results of an external market study on the distribution practices of hotels in the EU, with a particular focus on parity clauses.[22] The study was conducted in 2021, after several years of close scrutiny by national competition authorities,[23] as well as the introduction of national legislation restricting the use of such clauses in several Member States.[24]

Parity clauses are applied by hotel booking platforms, and prevent listed suppliers from offering lower prices or better terms on other platforms. More specifically:

- Wide parity clauses compel hotels to grant an online travel agency ("OTA") the lowest room price and the best room availability compared to all other sales channels.
- Narrow parity clauses allow hotels to offer better prices and availabilities on competing OTA services, but prevent them from offering better conditions through the hotel's own website.

The European Competition Network ("ECN") had previously monitored the bookings sector in 2016.[25] The 2021 study provides an update based on 2017–2021 data and assesses the impact of the Austrian and Belgian prohibitions against parity clauses.

The new study found that, compared to 2016 figures, the prices and availabilities hotels offered: (i) across different OTAs; and (ii) on the hotels' own websites and via OTAs had converged. The study found no significant differences in the sample between Austria and Belgium (which introduced legislation prohibiting parity clauses) and the other Member States that had not introduced such legislation. The results of the study indicate that, even absent contractual obligations, OTAs may incentivize price parity through the use of indirect incentives—such as algorithms that rank hotels less favorably when they offer better prices elsewhere than on the platform.

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[19] Commission Cases AT.40413 – Focus Home, AT.40414 – Koch Media, AT.40420 - ZeniMax, AT.40422 – Bandai Namco and AT.40424 – Capcom, August 24, 2022, paras. 293, 350 et seq.

[20] Valve refused to cooperate with the Commission, leading to a separate infringement decision which Valve has since appealed. *See Valve v. Commission* (Case T-172/21).

[21] Guess (Case COMP/AT.40428) and Pioneer (vertical restraints) (Case COMP/AT.40182).

[22] The full study is available at: https://competition-policy.ec.europa.eu/system/files/2022-09/kd0722783enn_hotel_accomodation_market_study.pdf.

[23] Parity clauses were recently scrutinized, with divergent outcomes, by national authorities in, among others, Germany, as discussed in our July/August 2019 German Competition Law Newsletter, France, as discussed in our December 2019 French Competition Law Newsletter, Italy and Sweden.

[24] At the date of the study, France, Austria, Italy and Belgium have adopted laws prohibiting parity clauses in contracts between accommodation providers and online travel agencies.

[25] The ECN had found that 79% of the hotels did not price differentiate between OTAs, even after large OTAs such a Booking.com or Expedia switched from wide to narrow parity clauses. *See* ECN, *Report On The Monitoring Exercise Carried Out In The Online Hotel Booking Sector By EU Competition Authorities In 2016*.

The Commission Improves The Position Of Certain Collective Agreements By Solo Self-Employed People

On September 29, 2022, the Commission adopted its Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons ("Guidelines").[26] The Guidelines represent a part of a bigger push by the Commission to improve working conditions in platform work in the EU.[27]

Background

Self-employed persons risk infringing Article 101 TFEU if they engage in collective bargaining because they constitute "undertakings" under competition law. While the Court of Justice has held that collective agreements by trade unions negotiating on behalf of self-employed members comparable to workers fall outside the scope of Article 101 TFEU, uncertainty as to the status of self-employed persons remained.

Recent developments, such as an increase in subcontracting and outsourcing, the digitization of the production process and the rise of online platform economies, have increased the need for clarity on the application of Article 101 TFEU to self-employed persons. It is therefore not surprising that that the Guidelines were adopted at the same time as other digital platform instruments such as the Digital Markets Act.[28] .

The Draft Proposal and The Final Guidelines

The Guidelines remain effectively unchanged from the initial draft proposal published by the Commission in December 2021. Most notably:

— **The Guidelines exclude collective agreements by solo self-employed persons who are in a situation comparable to that of workers who fall outside the scope of Article 101 TFEU.** In practice, this applies to three categories of solo self-employed workers: (i) those who provide their services exclusively or predominantly to one counterparty (on average 50% of total work-related income is from a single counterparty); (ii) those who perform the same or similar tasks side-by-side with workers for the same counterparty; and (iii) those who work through digital labor platforms.

— **Even when the solo self-employed persons are not comparable to workers, the Commission undertakes not to intervene against collective agreements where solo self-employed people are in a weak bargaining position and unable to influence their working conditions.** The Guidelines set a presumption of imbalance when either: (i) one or more counterparties represent the whole of a sector or industry; or (ii) a counterparty whose aggregate annual turnover or annual balance sheet total exceeds €2 million or whose staff headcount consists of at least 10 persons, or with several counterparties which jointly exceed one of those thresholds.

Conclusions

Historically, the EU courts have been reluctant to harmonize workers' social policy through competition law.[29] The Guidelines do not change this approach: while they set out the Commission's enforcement priorities, they do not introduce harmonization in the social sector, where competences remain primarily national. While

[26] Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons, OJ 2022 C 374/2. We reported on the draft proposal in our December 2021/January 2022 EU Competition Law Newsletter.

[27] The Commission has also published its Proposal for a directive of the European parliament and of the council on improving working conditions in platform work, 2021/0414, and Communication from the Commission on better working conditions for a stronger social Europe: harnessing the full benefits of digitalisation for the future of work, COM/2021/761.

[28] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, OJ L 265/1.

[29] *See Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96) EU:C:1999:430, para. 59: "However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [101](1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment".

the Guidelines do not target a particular industry sector, its focus on online platform economies transpires from numerous hypothetical examples in the Guidelines relating to online delivery services and ridesharing platforms.

Court Updates

Advocate General Rantos Indicates That Competition Authorities Can Take Into Account Compliance With The GDPR In Their Assessment Of Competition Law Infringements

On September 20, 2022, Advocate General Rantos delivered his opinion on the Higher Regional Court of Düsseldorf (the "Düsseldorf Court")'s request for a preliminary ruling concerning the decision of the Bundeskartellamt (German Federal Cartel Office, "FCO") which had found that Meta Platforms ("Meta", formerly Facebook Inc.) abused its dominant position in relation to the collection, processing, aggregation and use of personal data of its users in 2019.[30] The Advocate General concluded that a competition authority may examine, as an incidental question, the compliance of the practices under investigation with the General Data Protection Regulation ("GDPR") rules, while informing and, where appropriate, consulting the competent supervisory authority on the basis of the GDPR.[31]

Background

On February 6, 2019, the FCO found that Meta had abused its market power on the German market for social networks by making the use of its social network conditional on the collection of user data from multiple sources. The FCO ordered Meta to adapt its terms of services within a year and combine the data it collects from other sources with Facebook user accounts *only* if it obtains "voluntary consent" from users.

Meta appealed the decision to the Düsseldorf Court, which, on March 24, 2021, decided to stay the proceedings and to refer seven questions to the Court of Justice for a preliminary ruling. In terms of the intersection of competition law with GDPR rules, the Düsseldorf Court asked whether a national competition authority could, in parallel to an ongoing investigation from the competent data protection supervisory authority, and when prosecuting infringements of the competition rules: (i) rule primarily on the infringement of GDPR data processing rules and issue an order to end that breach; and (ii) establish, as an incidental question, whether the data processing terms and their implementation comply with the GDPR. The remaining questions sought clarifications on the interpretation of certain GDPR provisions.

Opinion

In his opinion, Advocate General Rantos first explains that, in the course of their investigations, competition authorities can take account of the compatibility of a commercial practice with the GDPR, but only as an incidental question. He explains that non-compliance with GDPR provisions, depending on the legal and economic context in which it takes place, may constitute an important indication of whether that practice amounts to a breach of competition law insofar as it may entail resorting to methods other than those prevailing under merit-based competition. That being said, it is not enough to demonstrate the non-compliance with the GDPR or other legal rules in order for the conduct to amount to an infringement of Article 102 TFEU.

Advocate General Rantos clarifies that such an incidental examination is without prejudice to the application of the GDPR by the competent supervisory authorities, which are the sole competent authorities for the application of that regulation. To that end, he offers some guidelines for the interactions that could arise between the two:

— *First*, to the extent possible, competition authorities must comply with, and not deviate from, any decision adopted by the supervisory authority for the same conduct or similar

[30] Decision of the Bundeskartellamt (6th Decision Division) in Case B6-22/16.

[31] *Meta Platforms and Others* (Case C-252/21), opinion of Advocate General Rantos, ECLI:EU:C:2022:704.

practices. Competition authorities should consult supervisory authorities when doubts arise as to the interpretation they have previously given.

— *Second*, it is the competition authorities' duty to inform and cooperate with the competent supervisory authority where the latter has already begun an investigation regarding the same practices, or has indicated its intention to do so. Advocate General Rantos mentions that competition authorities could even have to await the outcome of the supervisory authority's investigation before starting their own assessment, provided this would not result in an unreasonable investigation period and undermine the rights of defense of the data subjects.

Implications

Advocate General Rantos' non-binding opinion, if followed by the Court of Justice, could further encourage the Commission and national competition authorities to assess compliance with data protection rules in future competition law investigations.

Companies should carefully review their data processing policies from a competition law angle, given the entry into force of the EU Digital Markets Act on November 1, 2022, which sets the bar higher for data usage practices.

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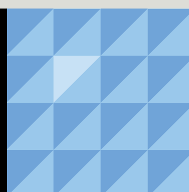

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