July 2022

EU Competition Law Newsletter

Highlights

— *Illumina/Grail:* the General Court Upholds the Commission's Powers to Review Non-Reportable Transactions

Illumina/Grail: the General Court Upholds the Commission's Powers to Review Non-Reportable Transactions

On July 13, 2022, the General Court confirmed the Commission's capacity, pursuant to a referral request from national competition authorities ("NCAs") under Article 22 of the EU Merger Regulation ("EUMR"),[1] to review mergers that do not meet national or EU merger control thresholds.[2] The General Court's judgment in *Illumina/Grail* validated the Commission's policy decision to encourage and accept Article 22 referrals from Member States so that competitively significant but low-value transactions do not escape scrutiny in the EU. The judgment also addressed certain procedural aspects of the Article 22 referral process, including when the 15-working-day deadline for referral requests is triggered and the ability to appeal a referral decision prior to conclusion of the merger control investigation.

This ruling paves the way for the Commission to actively seek Article 22 referrals, after having announced this new policy in September 2020[3] and issued a guidance paper in March 2021 on its policy for assessing if a "below-threshold" concentration merits review.[4] The Commission has not sought to call in other transactions pending the *Illumina/Grail* challenge, although it has continued to accept "traditional" Article 22 referrals for transactions that meet national thresholds but the relevant Member State(s) consider are more appropriately reviewed at EU level, as in *Facebook/Kustomer*[5] and, more recently, *Inmarsat/Viasat*, a transaction involving two satellite communications businesses.[6]

[1] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 024.

[2] *Illumina/Grail* (Case T-227/21) EU:T:2022:447.

[3] Commissioner Vestager, "The future of EU Merger Control," International Bar Association 24th Annual Competition Conference, September 11, 2020. *See* also our Alert Memo, "European Commission Announces New Policy to Accept Member State Referrals for Merger Review Even if EC and National Thresholds Are Not Met," October 12, 2020.

[4] Communication from the Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, 2021/C 113/01, March 3, 2021, C/2021/1959 OJ C 113. *See* also our Alert Memo, "European Commission Implements New Policy To Investigate Transactions That Would Otherwise Escape Merger Review," April 23, 2021.

[5] *Facebook/Kustomer* (Case COMP/M.10262), Commission decision of January 27, 2022.

[6] Commission Press Release MEX/22/4743, "Mergers: Commission to assess proposed acquisition of Inmarsat by Viasat," July 27, 2022.

Article 22 EUMR: an evolving regulatory purpose

Article 22 EUMR enables NCAs to request the Commission to review transactions that do not have an EU dimension but that "affect trade between Member States" and "threaten to significantly affect competition within the territory of the Member State(s) making the request." This provision was originally designed to address the absence of merger control rules in certain Member States at the time the EUMR was adopted in 1989 (such as the Netherlands, which led the provision to become known as the "Dutch clause"). As virtually all Member States have adopted merger control laws, Article 22 has become obsolete for this purpose. It then became used to allow two or more Member States to refer transactions that were notifiable in their jurisdictions, but which the Commission was better placed to assess (*e.g.*, because the relevant markets were wider than national).

More recently, there has been growing concern over transactions involving companies that could play a significant competitive role despite generating little turnover and, in particular, "killer acquisitions," where such companies are acquired by strong incumbents to eliminate a potential competitor. While various Member States, such as Germany and Austria, have introduced a transaction value-based threshold to capture such concentrations, the Commission has responded to this "enforcement gap" by updating its policy on Article 22 referrals, capitalizing on the flexible and broad scope of the provision.

The first test case: the *Illumina/Grail* transaction

In September 2020, Illumina, a supplier of next generation genetic sequencing systems, announced its $7.1 billion acquisition of Grail, a customer that used such systems to develop cancer detection tests. The transaction was not notifiable in the EU or any Member State, as Grail had no revenues. In December 2020, the Commission received a complaint about the transaction, and in February 2021, invited NCAs to make a referral request so it could review the transaction under Article 22. In March 2021, the French Competition Authority submitted a request, which was subsequently supported by a number of other NCAs. In April 2021, the Commission issued a decision accepting the referral request, which was promptly challenged by Illumina before the General Court. In the interim, the parties proceeded to complete the transaction in August 2021, which led the Commission to open an investigation for gun-jumping and impose interim measures against the parties. These decisions are also being contested before the General Court.[7]

The General Court's judgment

The General Court rejected Illumina's action for annulment in full. The judgment is notable on three points: (i) confirmation that Article 22 applies to "below-threshold" transactions; (ii) confirmation that parties may challenge an Article 22 decision; and (iii) clarification on when the 15-working-day deadline for a referral request starts running.

First, on the scope of transactions covered by Article 22, the General Court confirmed—following a literal, historical, contextual, and teleological analysis—that NCAs could request the referral of transactions that were not reportable under their national merger control regimes. The General Court noted that the wording of Article 22 did not explicitly require a transaction to fall within the scope of national merger control rules. To the contrary, its reference to "any concentration" suggested that a Member State would be entitled to refer to the Commission any concentration that satisfies the cumulative conditions set out in Article 22.[8] The General Court observed that this interpretation was consistent with Article 22's purpose as a "corrective mechanism" that is "intended to remedy control deficiencies inherent in a system based principally on turnover thresholds which, because of its rigid, is not capable of

[7] *Illumina v. Commission* (Case T-755/21) and *Grail v. Commission* (Case T-23/22).

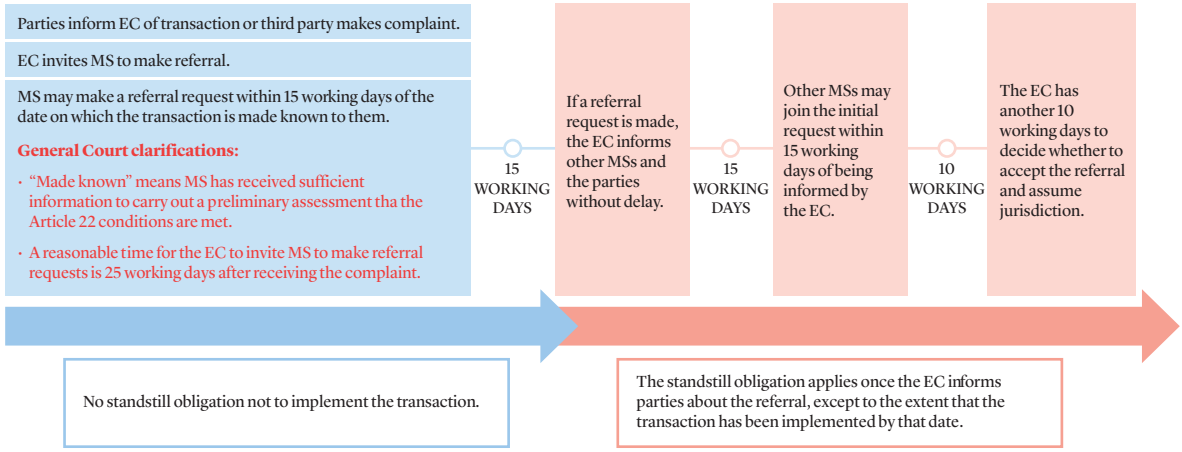
[8] *Illumina/Grail* (Case T-227/21) EU:T:2022:447, paras. 89–95.

covering all concentrations which merit examination at European level."[9]

Second, the General Court confirmed that Illumina could challenge the Commission's decision to accept jurisdiction following an Article 22 referral. Article 22 referral decisions produce binding legal effects leading to a distinct change in the merging parties' legal position, since they bring a transaction within the scope of EU merger control procedures.[10] This was in contrast to Commission decisions to initiate Phase II investigations, which are preparatory steps for a final decision on the compatibility of a transaction. In the alternative, a party was entitled to appeal intermediate measures where a successful challenge of the final decision would not nullify the consequences of the delay. The Court ruled that this was the case here given the parties' need to comply with the standstill obligation.[11]

Finally, in response to Illumina's claim that the referral request was out of time, the General Court explained that the 15-working-day deadline for Member States to make a referral request starts from the date on which a transaction is "made known" to a Member State. It clarified that "made known" should be interpreted to mean "the active transmission [...] to the Member State concerned" of "sufficient information to enable that Member State to carry out a preliminary assessment of the conditions laid down in [...] Article 22."[12] Accordingly, press releases, media reports or "mere knowledge of the existence" of a transaction were insufficient to trigger the referral deadline.[13] The General Court also opined that a reasonable time for the Commission to invite Member States to make a referral request under Article 22(5) after receiving a complaint is 25 working days, taking into account the statutory review period for Phase I investigations.[14] The same time limit should apply where parties proactively consult the Commission to assess the likelihood of a referral.

Post *Illumina/Grail*: Article 22 process and referral deadlines



[9] *Ibid.*, para. 142.

[10] *Ibid.*, paras. 60–82.

[11] *Ibid.*, para. 75.

[12] *Ibid.*, para. 204.; Guidance Paper, para.28.; Commission Notice on Case Referral in respect of concentrations, March 5, 2005, OJ C 56, footnote 43.

[13] *Ibid.*, para. 210.

[14] *Ibid.*, para. 233–234. The Court therefore concluded that the 47 days it took the Commission to inform NCAs of the transaction and invite them to submit a referral request was "unreasonable" although the parties failed to show that the delay prejudiced their rights of defense so as to justify an annulment of the Commission's decision.

Implications

This ruling gives the Commission the green light to use Article 22 EUMR to examine transactions that would otherwise fall through the nets of the EUMR or national merger control regimes. The Commission will wield this tool to scrutinize acquisitions involving innovative targets, particularly in the digital and pharmaceutical sectors.[15] The Article 22 referral mechanism complements the notification obligation for "gatekeepers" under Article 14 of the Digital Markets Act ("DMA"), which ensures the Commission is informed of their digital acquisitions so it can decide whether to invite Article 22 referral requests.[16]

Illumina plans to appeal the judgment. In the meantime, this ruling contributes to the tightening regulatory environment for mergers and acquisitions in the EU, alongside the Digital Markets Act,[17] the expansion of FDI review, and the new EU Foreign Subsidies Regulation.[18] The Commission's ability to review non-reportable transactions creates uncertainty for merging parties, who remain exposed to the risks of a merger investigation even after their transaction has closed. This risk is exacerbated by the General Court's finding that the 15-day deadline for a referral is not easily triggered, and will need to be taken into account when planning transaction timelines and closing conditions. To obtain greater certainty over the prospects of a referral, merging parties can choose to consult with the Commission or to brief the various NCAs about their transaction. However, the practical or strategic disadvantages of pursuing these options mean that parties will, in most cases, rely on the Commission's policy not to accept referrals more than six months after the deal's completion.[19]

News

Commission Updates

Amazon Commitments: Commission Invites Third Parties to "Leave a Review"

On July 14, 2022, the Commission invited comments on Amazon's proposed commitments, offered under Article 9 of Regulation 1/2003, in two investigations concerning practices that allegedly advantaged its own services on its online marketplace, contrary to Article 102 TFEU. The invitation for comments is open until September 9, 2022.

According to the Commission, the investigations concern Amazon's multiple roles on its marketplace: as the platform provider, as a retailer competing with independent sellers, and as a provider of ancillary fulfilment services for sellers on its platform.[20] In the first case, opened in July 2019, the Commission alleged that Amazon's access to third-party seller data allowed it to alter its own retail offers to the detriment of other marketplace sellers. In the second, opened in November 2020, the Commission was investigating whether Amazon's criteria for selecting the sellers featured in the "Buy Box" or who could serve Amazon Prime users unduly favored Amazon's retail or logistics services.

[15] Last month, the Commission and other enforcement authorities launched a multi-stakeholder working group to investigate the effects of mergers in the pharmaceutical sector. *See* Commission Press Release IP/21/1203, "Competition: The European Commission forms a Multilateral Working Group with leading competition authorities to exchange best practices on pharmaceutical mergers," March 16, 2021.

[16] Under Article 14 of the Digital Markets Act, "gatekeepers" will have to inform the Commission of all intended mergers involving "another provider of core platform services or of any other services provided in the digital sector". In light of the *Illumina/Grail* ruling, this provision may actually provide "gatekeepers" with greater certainty over whether their transaction is likely to be called in, since Article 14 requires the Commission to inform Member States of the notified transactions, which would trigger the 15-working-day deadline for referral requests.

[17] Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM/2020/842 final.

[18] Proposal for a regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM/2021/223 final.

[19] *See* Guidance Paper on Article 22 EUMR, para. 21.

[20] *See* Commission Press Release IP/20/2077, "Commission sends Statement of Objections to Amazon for the use of non-public independent seller data and opens second investigation into its e-commerce business practices," November 10, 2020.

The Commission said that Amazon has offered the following commitments for a five-year period:

— **Marketplace data.** Not to use third-party seller data for its competing retail operations.

— **Buy Box.** To treat all sellers equally when selecting featured offers for the Buy Box, and to display a second offer within the display.

— **Prime.** To apply non-discriminatory conditions to determine when sellers are eligible for Prime and get the Prime label, to allow Prime sellers choice over their logistics providers and to negotiate with said providers, and not to use information obtained through Prime about third-party carriers for its own logistics services.

According to the Commission, most of the commitments offered by Amazon mirror the obligations it would be subject to as a "gatekeeper" under the DMA.[21] As a gatekeeper, Amazon would be prohibited from using data generated or provided by third-party sellers and carriers for its own competing products and services.[22] Amazon would also be prevented from ranking its products more favorably than similar third-party products. It would also have to apply transparent, fair, and nondiscriminatory conditions to such ranking.[23] On the other hand, Amazon's commitment to refrain from requiring Prime sellers to use Amazon's own logistics services may not have been required under the DMA.[24]

The Commission proceedings are similar to investigations undertaken by various EU Member States[25] and non-EU countries.[26] If accepted, the EU commitments could open a path for consistent settlements in these cases.

The Commission Fines Crown and Silgan €31.5 Million for Metal Cans Cartel

On July 12, 2022, the Commission fined metal packaging producers Crown and Silgan €31.5m for breaching Article 101 TFEU by exchanging sensitive information and coordinating their commercial strategies for the sale of metal cans and closures in Germany over a three-year period.[27] The products concerned were metal lids for glass jars, coated with lacquers containing bisphenol A ("BPA") or BPA-free lacquers and metal cans coated with BPA-free lacquers. These products were predominantly used to package foods, such as vegetables, fruit, meat, and fish.

In March 2015, the German Federal Cartel Office ("FCO") opened an investigation into Crown, Silgan and other metal packaging manufacturers following an anonymous tip. The FCO referred the proceedings to the Commission after finding the conduct could extend to markets outside Germany and that German law applicable at the time could allow the investigated companies to escape liability.[28] The Commission initiated proceedings in April 2019 and conducted dawn raids in several Member States.

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[21] The Regulation on contestable and fair markets in the digital sector, also known as the Digital Markets Act ("DMA") was adopted by the European Council on July 18, 2022, and is expected to come into force in October 2022. *See also* Cleary Antitrust Watch, "Digital Markets Act Final Text Approved in European Parliament and European Council," July 18, 2022.

[22] Article 6(2) DMA.

[23] Article 6(5) DMA.

[24] While Article 5(8) of the DMA prohibits gatekeepers from conditioning the use of a core platform service on users using another of its core platform services, Amazon's fulfillment services would not appear to constitute a "core platform services" within the meaning of the Act.

[25] The German Federal Cartel Office is investigating Amazon under its rules for large digital companies, in addition to investigations on Amazon's price control mechanisms and brand product rules. The Italian Competition Authority also investigated Amazon's Buy Box and Prime program practices, leading to a €1.1 billion fine in December 2021 and similar commitments being undertaken by Amazon. Amazon previously settled other investigations in Germany and Austria concerning its business terms for sellers on its marketplace.

[26] For example, the UK's CMA opened an investigation into Amazon "looking into similar concerns" on July 6, 2022 (*See* CMA Press Release, "CMA investigates Amazon over suspected anti-competitive practices," July 6, 2022).

[27] *Metal Packaging* (Case AT.40522), Commission Decision of July 12, 2022, not yet published.

[28] Crown and Silgan had dissolved or reorganized their relevant subsidiaries before the FCO concluded its investigation. At the time, and prior to the entry into force on June 9, 2017 of § 81a of the 9th Amendment to the German Act against Restraints of Competition, there was no general legal basis under German competition law to hold a parent company liable for infringements of competition law committed by its subsidiaries. The FCO could fine a parent company only if it had failed to prevent the subsidiary's infringement and thereby violated its own supervisory duty. The 9th Amendment closed this gap by aligning German competition law with the EU law concept of a single economic undertaking, thereby introducing group-wide joint and several liability for fines. For more detail on this change in German competition law, *see* Dr. Romina Polley, "Cartel Enforcement and Regulation in Germany," Presentation at Competition Law Germany, Düsseldorf, September 26, 2017, pp. 31–37, available here.

The Commission found that Crown and Silgan had engaged in a single and continuous infringement consisting of two parts:

— **First:** Regular exchanges of detailed data on their most recent past annual sales volumes of metal lids to individual customers, lasting from March 11, 2011 until March 21, 2014.

— **Second:** Coordination to impose a surcharge and apply shorter minimum durability recommendations for metal cans and lids coated with BPA-free lacquers, lasting from April 18, 2013 until September 18, 2014.

Crown and Silgan chose to settle the investigation after a two-year investigation that earned them a 10% reduction in the fine. Demonstrating the benefits of cooperation, Crown also received a 50% leniency reduction and was fined only €7.7 million compared to €23.9 million for Silgan.

Crown and Silgan's coordination took place at a time when the packaging industry was transitioning away from BPA and "towards less harmful metal cans and closures."[29] BPA was historically used in the lining of metal cans and other food packaging, but by 2011, there were growing efforts to phase out its use due to public health concerns. These have since culminated in EU regulations that severely restrict the use of BPA varnishes and coatings in food packaging.[30]

Against this backdrop, the Commission may have considered information on customer orders for BPA-containing vs BPA-free products to be especially sensitive because they allowed Crown and Silgan to monitor, exploit, and potentially affect the pace of this transition. In particular, the Commission found that these exchanges led to Crown and Silgan coordinating on surcharges and minimum durability recommendations for the new products.[31]

The case shows that companies must be particularly cautious during periods of transition to ensure that their response to regulatory changes or market developments do not give rise to improper coordination. This case is unlikely to be the last word on BPArelated antitrust infringements, as the French Competition Authority is currently investigating over 100 companies and 14 trade associations for potentially concealing BPA in food packaging, in potentially one of the largest cartel probes ever.[32]

Commission Proposes to Extend Rules for Motors Sector Vertical Agreements

On July 6, 2022, the European Commission launched a public consultation on its proposal to extend the Motor Vehicle Block Exemption Regulation ("MVBER"), which has been in force since 2010 and is set to expire in May 2023.[33] This regulation facilitates competition law compliance for businesses by exempting certain vertical agreements for the sale of spare parts and the provision of repair and maintenance services from the scope of the Article 101(1) TFEU prohibition on anti-competitive agreements. The MVBER is accompanied by Supplementary Guidelines that offer further guidance on its interpretation and application.[34]

During its evaluation of the MVBER, the Commission concluded the regime continued to be relevant for stakeholders in providing legal certainty while safeguarding competition between motor vehicle manufacturers ("inter-brand competition") as well as dealers and repairers

[29] *See* Commission Press Release IP/22/4483, "Antitrust: Commission fines the metal packaging producers Crown and Silgan €31.5 million in cartel settlement," July 12, 2022.

[30] *See* Commission Regulation (EU) 2018/213 of 12 February 2018 on the use of bisphenol A in varnishes and coatings intended to come into contact with food and amending Regulation (EU) No 10/2011 as regards the use of that substance in plastic food contact materials ("Regulation 2018/213"), OJ L41/6, recital 29.

[31] *See* Commission Press Release MEMO/10/201, "Antitrust: Commission adopts first cartel settlement decision – questions & answers," May 19, 2010.

[32] *See* Autorité de la Concurrence Press Release "Bisphenol A in food containers: the general rapporteur indicates having stated objections to 101 companies and 14 professional organisations," October 12, 2021. *See also* our October 2021 French Competition Law Newsletter for a discussion of the procedural novelty of the FCA making this allegation public.

[33] Commission Regulation (EU) No 461/2010 of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ 2010 L 129/52.

[34] Commission notice Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, OJ 2010 C 138/16.

for the same brand ("intra-brand competition"). The Commission expects market conditions to evolve rapidly to adapt to vehicle digitalization, environmental strategies and changes in mobility patterns. However, it has chosen to defer substantial changes to the new expiry date in May 2028, when the new market reality has emerged.

In the meantime, the Commission is proposing targeted updates to the Supplementary Guidelines to ensure independent operators have access to vehicle-generated data (such as data generated by a car's sensors) that are essential for repair and maintenance, to ensure they are able to compete with authorized repairers.[35] Such "essential data" would normally include data that is made available to members of the authorized repair network. These amendments are open for consultation until September 30, 2022, and the new MVBER is expected to enter into force in June 2023.

Court Updates

Lithuanian Railways: Advocate General Rantos Rejects the Essential Facilities Doctrine

On July 7, 2022, Advocate General Rantos delivered his Opinion in *Lietuvos geležinkeliai v Commission*, Lithuanian Railways' appeal against a General Court judgment partially upholding a decision by the Commission finding that it had infringed Article 102 TFEU by removing 19 km of train tracks.[36] The Commission concluded that this conduct prevented a major customer from switching to Latvian Railways' rival transportation services.

Lithuanian Railways argued that the General Court should have characterized its conduct as a refusal of access to essential infrastructure, in which case the conduct would not infringe Article 102 TFEU, as it did not meet all three conditions set out by the Court of Justice's case law:[37] (i) access to the facility must be indispensable; (ii) access must be denied without objective justification; and (iii) the refusal to allow access is likely to exclude all competition on the secondary market. The General Court had agreed with the Commission that Lithuanian Railways' removal of the railway tracks was a distinct form of abuse, and that it was sufficient to show that it was capable of restricting competition and was not objectively justified.[38]

In Advocate General Rantos' view, the essential facilities doctrine does not necessarily apply to every denial of access. It did not apply in *Slovak Telekom*,[39] where the conduct involved the tying of unrelated services or products to access to the infrastructure, so the "indispensability" of the infrastructure was not determinative of the conduct's exclusionary nature. The conduct in this case was also different in nature to that at issue in past essential facilities cases: it involved the loss and not the preservation of infrastructure, and followed the logic of "predation" where the dominant firm sacrifices a valuable asset. Advocate General Rantos observed that the essential facilities doctrine should only apply where the dominant undertaking owned and invested in the infrastructure, which was not the case here. This is because the doctrine's narrow scope reflects the need to safeguard a dominant firm's incentives to invest in essential facilities.

The Court of Justice will now rule on Lithuanian Railways' appeal. Its judgment is anticipated to clarify when the essential facilities doctrine applies, and it remains to be seen whether it will adopt the restrictive view adopted by the General Court and build on the specific principles defined by the Advocate General.

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[35] Communication for the Commission on the Amendments to the Commission Notice – Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, available here.

[36] *Lietuvos geležinkeliai v. Commission* (Case C-42/21 P), Opinion of Advocate General Rantos, EU:C:2022:537 ("AG Rantos Opinion"). The General Court decision in the case was discussed in our November 2020 EU Competition Law Newsletter.

[37] *Oscar Bronner Gmbh & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* (Case C-7/97) EU:C:1998:569 and *IMS Health* (Case C-418/01) EU:C2004:257.

[38] The Commission observed that Lithuanian Railways was aware of the customer's plans to switch to its rival; that it had removed the track in a hurry without taking the usual preparatory steps; that this removal was contrary to standard practice in the sector; that it was aware of losing all the customer's business if the track was rebuilt and that it had tried to convince the government not to rebuild the track. *See Baltic rail* (Case COMP/AT.39812), Commission decision of October 2, 2017.

[39] *Slovak Telekom v. Commission* (Case C165/19 P) EU:C:2021:239.

Advocate General Rantos (Case C-680/20 Unilever): "Intel" Principle Applies to All Article 102 Abuses

On July 14, 2022, Advocate General Rantos delivered his opinion in *Unilever* on two important questions referred to the Court of Justice:[40] (i) whether companies linked by contractual ties could constitute a "single economic unit"; and (ii) whether the Court of Justice's ruling in *Intel*, that antitrust agencies must examine evidence put forward by the defendant that conduct is not capable of foreclosing equally efficient competitors, applies to practices beyond the exclusivity rebates considered in *Intel*.[41]

In October 2017, the Italian Competition Authority ("AGCM") fined Unilever Italia Mkt. Operations Srl ("Unilever IT") €60.7 million for an abuse of dominance in the wholesale supply of impulse ice cream in Italy. The strategy involved exclusivity obligations requiring retailers to source all their ice cream requirements from Unilever, as well as a wide range of loyalty rebates, in the form of discounts and sales bonuses for retailers to incentivize exclusivity. The AGCM concluded that the exclusivity obligation and loyalty rebates, which were largely implemented by Unilever IT's network of 150 independent distributors, could be imputed to Unilever IT as a single economic unit with its distributors. Unilever IT appealed this decision to the *Consiglio di Stato*, which sought a preliminary ruling on this issue as well as Unilever IT's complaint that the AGCM had refused to analyze economic studies it had submitted during the investigation.

On the first question, Advocate General Rantos confirmed that companies without capital links could be viewed as a single economic unit for the purpose of attributing liability under Article 102 TFEU. Having found that the concept of "economic unit" has a consistent meaning across competition law, and drawing on past Article 101 TFEU cases, he opined that it is crucial to determine, having regard to the economic, organizational and legal links between the dominant firm and its distributors, whether the former exercised decisive influence over the latter such that the distributors were implementing conduct conceived by the dominant firm and were not acting independently on the market. This may be the case where the distributors did not bear any financial risks in selling the product or had exclusive contracts with the dominant supplier.[42] It is also relevant to consider whether the distributors behaved in accordance with specific instructions given by the dominant firm and whether the dominant firm could reasonably have foreseen these acts and was prepared to accept the risks.[43]

On the second question, Advocate General Rantos clarified that the *Intel* judgment established that conduct only qualifies as an abuse of dominance if it is capable of excluding competitors that are as efficient as the dominant undertaking in light of all the relevant circumstances.[44] Further, where the dominant firm produces supporting evidence during the investigation that this is not the case, the authority must examine this evidence and provide reasons to explain its assessment of the evidence. These principles apply to all forms of allegedly abusive conduct and are not limited to exclusivity rebates (the conduct considered in *Intel*) or exclusivity obligations (the conduct at issue in this case).[45] These conclusions were based on a literal interpretation of the *Intel* judgment and a teleological interpretation of Article 102 TFEU, which distinguishes between competition on the merits and abusive practices based on the anticompetitive effects of the relevant conduct rather than its form.

[40] *Unilever Italia Mkt. Operations Srl* (Case C-680/20), opinion of Advocate General Athanasios Rantos, EU:C:2022:586 ("Advocate General Rantos' Opinion").

[41] *Intel Corporation Inc v. European Commission* (Case C-413/14 P) EU:C:2017:632.

[42] *Ibid.*, para. 55.

[43] *Ibid.*, para. 48.

[44] *Ibid.*, para. 79.

[45] *Ibid.*, para. 86. For a detailed analysis of the *Intel* judgment, please *see* our Alert Memo "Modernising Abuse of Dominance – the CJEU's *Intel* Judgment," October 16, 2017.

Conclusion

Advocate General Rantos' Opinion that the same general principles should apply to distinguish unlawful conduct under Article 102 TFEU is consistent with the guidance he provided in *Servizio Elettrico Nazionale* to establish a more systematic treatment of non-pricing abuses.[46] If endorsed by the Court of Justice, these conclusions would cement the principle, heralded by *Intel*, that there are no "*per se*" abuses under Article 102 TFEU, only presumptively unlawful practices, and it will be open to dominant firms to demonstrate that their conduct is not capable of excluding equally-efficient rivals.

[46] *Servizio Elettrico Nazionale and Others v. Autorità Garante della Concorrenza e del Mercato* (Case 37720), Opinion of Advocate General Rantos, EU:C:2021:998 (as reporter in our December-January 2022 EU Competition Law Newsletter). This opinion was endorsed by the Court of Justice in its judgment *Servizio Elettrico Nazionale and Others v. Autorità Garante della Concorrenza e del Mercato* (Case 377-20), EU:C:2022:379.

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