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Insights

BCLP PARIS – COMPETITION AND DISTRIBUTION NEWSLETTER – DECEMBER 2020

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This Newsletter of the Competition and Distribution team of BCLP's Paris office features some of the key developments of the last quarter. In this newsletter:

1. To enable national authorities to better apprehend killer acquisitions, the European Commission (the **"Commission"**) announces the "return" of Article 22 of the European Merger Regulation;

2. As part of the review of the Vertical Block Exemption Regulation, the Commission publishes its roadmap and reveals the first reform options envisaged at this stage;

3. Finally, the French Government has acknowledged, before the European Court of Human Rights (the **"ECHR"**), *via* a unilateral declaration - which is a rare occurrence - that the FILMM (*Syndicat des fabricants de laines minérales manufacturées*) has not been granted an effective remedy against the decisions of the General Rapporteur of the French Competition Authority refusing to grant or lifting the protection awarded to business secrets. The French Government undertook to compensate the union.

Merger control: From mid-2021, national competition authorities will be able to refer to the European Commission mergers that present a risk to competition, even when these operations are not subject to national control.

This discreet announcement was made by Margrethe Vestager, European Commissioner for Competition, on September 11: the Commission will accept **referrals** by national competition authorities regarding operations that **do not have a European dimension**, even **if the national notification thresholds are not met**. Such referral will be based on Article 22 of Regulation (EC) No. 139/2004 (the "**European Merger Regulation**"), even though, until now, this provision seemed to have been forgotten by the European competition regulator.

Was this evolution to be expected within the context of a broader reflection on merger control, or does it constitute a real revolution? In any case, it is a remarkable change in doctrine. Indeed, until now, the Commission only accepted to examine a merger operation which, without being of European dimension, was likely to significantly affect competition in a State, provided that the

national thresholds triggering a control and therefore the notification of a merger operation were crossed.

However, this approach excluded the possibility for Member States to refer to the Commission operations that did not meet the national controllability thresholds and which often involved highly innovative operators. Therefore, the Commission could not apprehend said "**killer" acquisitions,** with a high transaction value, but "below the thresholds" for a national notification. This type of acquisitions can be found in particular in the digital sector, the pharmaceutical sector or the biotechnologies sector.

The review of **killer acquisitions** is also an issue of concern for many European jurisdictions: Germany and Austria have already modified their merger control criteria and have incorporated into their national legislation an alternative criterion related to the value of the transaction in question.

The European regulator's change of approach that we witness in this context has been expected by the French Competition Authority since 2017. The European Commissioner is particularly targeting these killer acquisitions in her announcement, indicating that "*there are a handful of mergers every year that could seriously affect competition, but that we don't see because the companies' turnover doesn't reach our thresholds*".

Refusing, at this stage, to question the current notification thresholds in order to address the issue, the Commission choses to restore the application of Article 22 of the European Merger Regulation to broaden its control and remedy the problem of killer acquisitions. This change in the Commission's approach will therefore be implemented **without legislative changes to European merger control regime**.

Article 22 of the European Merger Regulation already allows any Member State to request the Commission to examine a concentration of a national dimension "*which affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request*". The **Commission can then accept or reject the referral**. The only limit to the Commission's intervention is of a geographical nature: it may only take the measures that are strictly necessary to restore competition in the territory of the States which requested its intervention.

This article, also referred to as the "Dutch clause", was proposed by the Netherlands when this Member State did not yet have a national merger control mechanism - and therefore wished to be able to ask the Commission to review an operation that did not have a European dimension but could affect the Dutch market.

Since the adoption of this clause, all Member States, with the exception of Luxembourg, have adopted a national merger control system. The Commission therefore considered that a Member State could request a referral under the "Dutch clause" only if it had jurisdiction to examine the

referred transaction under its own national merger law. However, the letter of Article 22 did not provide for such a condition for its application.

While the change in the Commission's doctrine provides a welcome clarification, and while the decision of the European regulator allows, according to Isabelle De Silva, the President of the French Competition Authority, "a *good part of the problem to be dealt with within the framework of the European competition network*", companies will have to remain vigilant as to the consequences of such evolution.

Indeed, it should be remembered that the suspensive effect of merger notifications applies within the framework of a procedure resulting from the application of Article 22. In the event that a referral request is filed by a Member State and accepted by the Commission, the companies involved in the operation will have to suspend the implementation of the operation (provided that it has not already been completed...).

The use of this new mechanism may therefore create legal uncertainty for economic operators, in particular for companies active in the sectors concerned by killer acquisitions, which will undoubtedly have to **informally contact the French Competition Authority beforehand** in order to "assess" its intentions regarding a possible referral request.

The Commission should adopt guidance on the circumstances in which referral requests will be accepted, before the application of Article 22 from mid-2021. This guidance is eagerly awaited.

Distribution: Review of the Vertical Block Exemption Regulation: the Commission publishes its roadmap and reveals the possible first options of reforms envisaged at this stage.

Since 2010, the Commission Regulation n° 330/2010 on the application of Article 101(3) to categories of vertical agreements and concerted practices (the "**Regulation**"), and its Guidelines, aim to provide economic operators party to agreements with companies operating at different levels of the production or distribution chain (vertical agreements) with a certain level of legal certainty by allowing them to assess by themselves the compliance of their agreements with competition law.

The Regulation thus automatically exempts all agreements that do not contain certain restrictions of competition ("black" or "grey" clauses), provided that the supplier and the purchaser hold less than 30% market share.

However, this "reference analysis guide" leaves the way open to certain difficulties of interpretation, and in recent years the doctrine and professionals have been relaying requests for clarification from operators. These clarifications and a review of the applicable rules are all the more necessary since, since 2010, many changes have occurred in a reshaped distribution environment, particularly

through the growth of e-commerce and online platforms, where new competition concerns have appeared.

The competent authorities have therefore questioned the adequacy of existing tools with the reality of the market and current commercial practices. At the end of 2018, the Commission thus launched the process of assessing the functioning of the Regulation, which will expire on 31 May 2022, in order to determine whether it should let the Regulation lapse, prolong its duration or revise it.

In this context, the Commission published on 8 September 2020 a Staff Working Document and on 23 October, its initial impact assessment and roadmap, revealing the first steps envisaged for the modification of the considered legislation. This document is important because it reviews and presents the options considered for the rules that will govern vertical relations between economic operators and in particular all their distribution contracts.

First of all, the Commission indicates that it intends to **clarify and simplify the existing rules**, in particular by including recent case law on restrictions that have become more common in recent years (such as the prohibition to use online platforms or to carry out online advertising – a clear reference to the Commission's "Guess" and the European Court of Justice's "Coty" decisions).

Secondly, the Commission wishes to clarify **possible efficiencies resulting from resale price maintenance**, which are considered to be a hardcore restriction of competition under the current Regulation. To this end, the Commission intends to enter into discussions with companies in order to identify concrete cases in which such efficiencies could be validly asserted. In other words, in some cases, the imposition of a resale price may no longer constitute a hardcore, expressly prohibited restriction.

Finally, the Commission lists a number of amendments to existing rules that are currently under consideration:

- **Online sales bans or restrictions**: The ban on online sales, a form of passive sale, is currently considered as a hardcore restriction of competition. Thus, some indirect restrictive measures, such as dual pricing, which imposes a higher wholesale price for online sales than for sales in physical locations, do not benefit from the exemption. However, some suppliers and distributors consider that the current rules, by excluding the possibility of applying differentiated selling prices according to the costs of each channel, do in fact act as a brake on investment in physical shops. Several options are being considered by the Commission:
  - Not to amend the Regulation;
  - To no longer consider the practice of dual pricing as a hardcore restriction of competition, but to impose safeguards through a framework to be defined in accordance with the case law applicable;

- To no longer consider that the imposition of stricter criteria for online sales than for physical sales would constitute a hardcore restriction of competition, but to impose safeguards through a framework to be defined in accordance with the case law applicable.

- **As regards active sales restrictions** (limiting the territory allocated to a distributor or the clients to whom the distributor may sell the products concerned), many suppliers have expressed their wish to be able to establish "shared exclusivities" between distributors within the same territory and to combine selective and exclusive distribution. Several options are proposed by the Commission:
  - Not to amend the Regulation;
  - Broaden the exceptions to active sales restrictions to give suppliers more flexibility in establishing and setting up their distribution network;
  - Protect selective distribution networks by allowing restrictions on sales outside the territory in which the network is established and to unauthorised resellers located in the territory in which the network is established.

Finally, the Commission considers that it may be necessary to modify the rules applicable to (i) **dual distribution** - a supplier sells directly to consumers in competition with its own distributors - and (ii) **parity clauses**, requiring the supplier to offer its co-contractor conditions at least similar to those offered through any other sales channel or only through its direct sales channels (since, although these clauses benefit from the Exemption Regulation, some anti-competitive effects have been identified by national competition authorities and courts). The regulator is therefore considering the possibility to withdraw, in some cases, the benefit of the exemption concerning these parity clauses and to include them in the list of hardcore restrictions.

The Commission will now review the feedback received on the roadmap, and a public consultation is expected to be launched by the end of the year. The Commission is expected to adopt the final version of the new Regulation in the second quarter of 2022. To be continued...

Fundamental rights: The French government has undertaken, before the ECHR, to compensate the *Syndicat des fabricants de laines minérales manufacturées* (the "FILMM"), acknowledging that the latter has not been granted an effective remedy against the decisions of the General Rapporteur of the French Competition Authority (the “Authority") refusing to grant or lifting business secret protection.

The case goes back a long way: on 8 April 2009, the French Minister of the Economy referred to the Authority facts that could constitute anti-competitive practices in the thin multilayer reflective

insulation sector. On 16 April 2010, company A. also referred the matter to the Authority, and the two referrals had been joined on 21 May 2010.

As part of its investigation, in June 2009 the Authority visited the premises of several companies and organisations, including those of the FILMM, and seized a number of documents, including some relating to ongoing proceedings between the FILMM and the company A, first before the Commercial Court and then before the Versailles Court of Appeal. The FILMM requested the Authority, pursuant to Article L. 463-4 of the French Commercial Code, to award protection of business secrets to some of the documents seized. By decision of 1 September 2010, the Authority's General Rapporteur only partially granted this request. On 27 February 2012 and 20 June 2014, after receiving the observations of the FILMM, the General Rapporteur decided to lift business secret protection with regard to several additional documents.

These partial "*declassification*" decisions were definitive since Article R. 464-29 of the French Commercial Code, in the version in force at the time, provided that decisions taken by the General Rapporteur in the area of business secrets protection could only be appealed with the Authority's decision on the merits (which has not yet been issued to this date).

Company A. was thus able to have access to the documents subject of the decisions to refuse or lift business secret protection, without the FILMM being able to oppose it. Company A. was therefore able to produce these documents during legal proceedings against the FILMM, even though the Prime Minister's decision refusing to repeal or modify Article R. 464-29 of the French Commercial Code was discussed as the same time before the *Conseil d'Etat* (French administrative Supreme Court).

In its decision of 10 October 2014, the *Conseil d'Etat* considered that the contested provisions of the aforementioned Article R. 464-29 were unlawful and ordered the French State to amend its legislation in order to provide for an effective remedy. Following this decision, Decree No. 2015-521 of 11 May 2015 abrogated the provisions in question and the Act of 18 November 2016 transferred to the judicial judge, in particular the First President of the Paris Court of Appeal, the review of appeals against the decisions of the General Rapporteur relating to the protection of business secrets.

The decision of the ECHR of 5 November 2020 definitively concludes the present case. The Court recognized the unilateral declaration of the French government, which unambiguously acknowledged that the FILMM had not benefited from an effective remedy against the decisions to partially lift the latter's business secrets, which was contrary to the requirements of a fair trial arising from Article 6 § 1 of the Convention. The French Government therefore undertook to pay 13,000 euros to the FILMM by way of compensation.

The ECHR stroke out the application submitted by the, despite the opposition of the union, which may nevertheless request that its claim be reinstated, if the French government does not comply

with the measures provided for, or, if the union considers that the damages awarded are not such as to make good all of its prejudice, and sues the French State before the competent national courts.

Finally, although this “chapter” of the case seems to have been definitively settled, the proceedings before the Authority are still ongoing. After a particularly lengthy investigation, a decision should be issued.

RELATED PRACTICE AREAS

- Antitrust

MEET THE TEAM

Julie Catala Marty

Paris

julie.catalamarty@bclplaw.com
+33 (0) 1 44 17 77 95