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VBB on Competition Law

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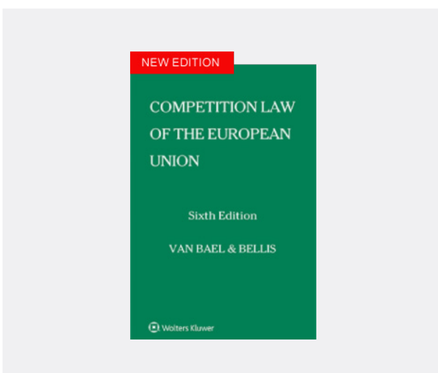

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European Union level

Commission's approval of Korean Air/Asiana deal signals stricter stance on airline merger remedies

On 13 February 2024 the European Commission ("Commission") announced that it had conditionally cleared Korean Air Lines Co. Ltd.'s ("Korean Air") acquisition of Asiana Airlines ("Asiana") following an in-depth investigation. The commitments the Commission accepted in exchange for approving this deal – including providing assets to assist competitors to establish rival routes – extend beyond the slot divestment remedies that have historically been required to clear problematic mergers in the sector.

The Commission opened a Phase 2 investigation on 17 February 2023 (almost exactly a year before it finally approved the transaction), expressing preliminary concerns that the transaction risked substantially harming competition in the EEA. Korean Air and Asiana are the two largest Korean airline companies, each operating out of a hub at Incheon airport in Seoul. Both airlines offer international air passenger and cargo services, including competing head-to-head on routes between Korea and various destinations in the EEA.

Following its Phase 2 investigation, the Commission concluded that by combining, Korean Air and Asiana would remove an important customer alternative. Specifically, the Commission identified concerns relating to the market for air freight services between Korea and the EEA as well as the markets for passenger transport services on four routes between Korea and Barcelona, Paris, Frankfurt and Rome. The Commission determined that it was unlikely that the competitive constraint that the parties had exerted on one another prior to the merger would be replicated by other competitors, as such competitors would face significant regulatory and other barriers to expand services to these routes.

The Commission ultimately cleared the deal subject to commitments aimed at addressing these concerns. The parties have agreed to divest Asiana's entire global cargo freighter business (including aircraft, slots, personnel and other assets). Notably, to address the competitive concerns regarding passenger transport, the parties agreed to divest a package of assets to enable a rival airline, T'Way, to expand operations to cover the four routes at issue. The package includes not only slots, but also traffic rights and access to the required aircraft as well as the commitment not to complete the transaction until T'Way has actually begun operating on the relevant routes.

This is a noteworthy development for merger remedies in the airline industry. The standard remedy in airline mergers has typically involved the simple divestment of take-off and landing slots on overlap routes. It was assumed that if these valuable slots were divested, rival airline companies would move into and replicate competition on routes where merging parties were active. However, the divestment of slots has recently fallen under heavy criticism as being ineffective. In several cases that were cleared subject to slot divestments, the Commission has found that the divested slots remained open for years following the transaction. Sometimes, the third parties that acquired the divested slots used them for routes other than the ones where the merger gave rise to competition concerns. In October 2023, Didier Reynders, in his first interview acting as Competition Commissioner, noted that these slot divestment remedies were not working and that more extensive remedies would need to be considered. In particular, the Commission signaled more might need to be done to sponsor the entry and viability of competitors on divested routes.

The commitments accepted in this transaction appear to be a first step in the Commission's attempt to ensure that remedies in the airline industry stand a better chance of success. In particular, the commitment preventing the parties from closing until T'Way has begun service along these routes is novel and designed to ensure that the divested slots are in fact occupied.

MERGER CONTROL

European Union level

Nevertheless, it remains to be seen whether this divestment will be effective over the longer term. While Korean Air and Asiana are well-known carriers in Europe and globally, T'Way is a much more regional player in East Asia. Despite the divestment of assets and slots, T'Way will need to be able to attract enough customer interest to maintain these routes profitably. While the addition of divestment remedies will raise the bar for airlines seeking merger clearance, if effective these new types of commitments may also help alleviate Commission skepticism when considering whether to conditionally clear future problematic airline mergers.

FOREIGN DIRECT INVESTMENT

European Union level

European Commission proposes reform to the EU's current FDI screening framework

On 24 January 2024, the European Commission published five legislative initiatives, which together form the "European Economic Security Package" ("ESP"). The package includes a legislative proposal that would strengthen and further harmonise the EU's current FDI screening framework.[1] The proposal for a new Regulation on the screening of foreign investments in the EU ("the proposal"), and the ESP as a whole, aims at enhancing and protecting EU economic security and at preserving the EU's competitiveness.

The current FDI Screening Regulation entered into force in October 2020. It created a cooperative framework for the screening of foreign direct investments by the respective authorities of the EU Member States regarding their impact on security and public order. The European Commission found that there is room for improvement to the current system, in the areas of cooperation between screening authorities and identified significant differences between screening mechanisms across the EU, particularly in terms of timing, scope and the notification procedures.

There are four key elements: the proposal (i) makes it mandatory for all EU Member States to have a foreign investment screening regime in place; (ii) extends EU screening to investments by intra-EU investors that are ultimately controlled by individuals or entities from a non-EU country; (iii) defines a minimum sectoral scope of national foreign investment screening; and (iv) enhances cooperation between Member States and the European Commission.

1 Besides this proposal, the ESP includes White Papers on (i) export controls, (ii) outbound investment, (iii) options for enhancing support for research and development involving technologies with dual-use potential, and (iv) a Proposal for a Council Recommendation on enhancing research security.

1. Mandatory FDI screening regime in all Member States

Under the current framework, Member States are free to decide whether to introduce a FDI screening regime. To date, 22 Member States have introduced national FDI screening mechanisms, and the remaining five Member States (Bulgaria, Croatia, Cyprus, Greece, and Ireland) have pending legislation at various stages of advancement, with Ireland's regime due to enter into force by mid-2024. The proposed regulation would oblige these Member States to adopt a FDI screening regime.

2. Extension of the screening regimes to indirect acquisitions of EU businesses by non-EU investors through EU subsidiaries and to greenfield investments

The current FDI Regulation covers EU investments in companies by EU investors directly owned or controlled by non-EU entities. It does not capture investments into the EU made by entities established in the EU which are ultimately controlled by a non-EU investor. The proposal bridges this gap and responds to the European Court of Justice's July 2023 judgment in case C-106/22 Xella which held that indirect investments through EU entities are beyond the scope of the current EU FDI Regulation, unless they amount to "artificial arrangements" which attempt to circumvent the national screening mechanism concerned see, VBB on Competition Law Volume 2023, Nos. 7 & 8.

However, Member States are entitled to adopt national FDI screening mechanisms covering indirect/intra-EU investments, subject to compliance with fundamental freedoms, and many national foreign investment screening regimes within the EU already enable authorities to scrutinise such investments. It therefore is yet to be seen how this extension will change national regulatory practice.

FOREIGN DIRECT INVESTMENT

European Union level

The proposal also encourages Member States to add greenfield investments to the scope of their foreign investment screening regimes if they create a lasting and direct link between a foreign investor and the EU. This would include establishing new facilities or new undertakings in the EU by foreign investors or their EU subsidiaries. Such screening would be relevant for investments in, e.g., the solar, wind, electric vehicle (EV) and semiconductor sectors. However, it remains to be seen what criteria national authorities will apply to determine whether certain greenfield investments qualify for review and require mandatory notification.

3. Revision of the sectoral scope

The proposal aims at bringing the focus on transactions which present the biggest security risks to the EU and its Member States, establishing a list of sectors that must be subject to FDI scrutiny due to their strategic importance. The proposal identifies areas of economic activity where investments would require mandatory ex-ante screening. This concerns investments in EU companies which are active in one of the listed sectors, such as: military and dual-use items, listed critical medicines and biotechnologies, certain parts of the financial system, such as payment systems and crypto asset service providers and critical technologies (such as advanced semiconductors, artificial intelligence and autonomous systems, and advanced materials and manufacturing technologies).

4. Enhanced cooperation and coordinated submission of notifications

The proposal aims at strengthening cooperation between EU Member States. It introduces a cooperation mechanism that will allow Member States to align their deadlines and procedures for multi-jurisdictional transactions. It also requires applicants to submit notifications in multi-jurisdictional transactions in all relevant Member States on the same date and refer to the other requests. Given the strict filing deadlines of some national regimes, the proposal would have a significant impact on transaction planning and timing.

5. Outlook and comment

The proposal must still be reviewed by the European Parliament and the Council of the EU. In light of upcoming elections to the European Parliament in June this year, however, it is likely that the legislative process may be delayed. As the proposal foresees a 15-month transition period after its entry into force, the new provisions are not expected to become fully effective until 2026 or 2027. The European Commission stated that it is unlikely that they can align the timetables for FDI screening reviews with reviews under the EU Merger Regulation and under the EU Foreign Subsidies Regulation, given that they serve different purposes. The proposal constitutes a major revision of the screening framework. However, a number of key terms and concepts in the proposal remain vague, such as how to define “control”, a term which is used in key concepts of the framework, including the definition of “foreign investment” itself. Once adopted, the proposal is likely to trigger a further wave of revisions to national foreign investment screening legislation.

ABUSE OF DOMINANT POSITION

National level

The digital creep - Big Tech antitrust concerns extend to smaller digital players in the EU

As major tech giants dominate headlines with antitrust investigations, fines, and regulatory actions at EU level, smaller tech companies with a more regional or national footprint are also facing increased scrutiny by national authorities. The investigated practices and theories of harm are similar to those found in European Commission ("Commission") cases, such as self-preferencing, exclusivity arrangements, and most-favoured nation clauses ("MFN"). Thus, the concerns raised in cases involving some of the industry giants could be equally relevant for smaller players and should inform their risk assessment and compliance strategies.

Notably, on 14 February 2024, the Dutch Competition Authority opened an investigation concerning Bol.com, an online general merchandise platform active in the Netherlands and Belgium, over concerns of self-preferencing and discrimination in favour of its own products. Indeed, retailers active on the platform had complained of having reduced visibility for their products on the platform, even though their offer was allegedly better in terms of prices and/or quality. In addition, Bol.com allegedly uses the data collected from the retailers active on its platform to strengthen its own dominant position. While the investigation is ongoing, the parallel with EU cases is already remarkable. In fact, the investigated conducts (self-preferencing and use of data to promote the dominant company's own position) take inspiration from the theories of harm developed in *Google Shopping* (see VBB on Competition Law, Volume 2021, No. 11), and further applied to online marketplaces in *Amazon Buy Box*, and *Amazon Marketplace* (closed jointly with *Amazon Buy Box* with commitments at EU level, although Amazon was fined for an equivalent conduct in Italy: see VBB on Competition Law, Volume 2023, No. 2).

Very similar conduct resulted in a fine of 206 million zlotys (around 44 million Euros) imposed by the Polish Competition Authority ("PCA") on the leading Polish e-commerce platform Allegro on 29 December 2022. Similar to the Bol.com investigation, the PCA alleged that Allegro unfairly favoured its Official Allegro Store in terms of visibility of search result to the disadvantage of independent sellers. As in the above cases, Allegro also used data obtained on the platform and unavailable to third parties to adjust its offer and thus get a better positioning of its own offers.

Moreover, on 15 February 2024, the Slovakian Competition Authority ("SCA") accepted commitments proposed by Slevomat, which operates the Zľavomat portal (an online discount platform). The SCA found after a preliminary investigation that Slevomat may have violated EU and national competition laws by demanding exclusivity from its business partners, which were thus prevented from offering their products on competing platforms, or by imposing MFN clauses, thereby limiting the ability of business partners to promote and sell products on competing online platforms at the same or lower prices than on the Zľavomat portal. In response, Slevomat proposed commitments to adjust its business practices, which the SCA deemed effective in addressing competition concerns.

As with the practices in the national cases above, concerns about MFNs and exclusivity arrangements in the digital space are also not new in the European competition landscape. MFN clauses have been targeted in a number of cases, both under Article 101 TFEU (*Apple Ebooks*, closed with commitments, as well as various national investigations against *Booking.com* and other online travel agencies) and Article 102 TFEU (*Amazon Ebooks* case, also closed with commitments, see VBB on Competition Law, Volume 2017, No. 1). Article 5(3) of the Digital Markets Act ("DMA") prohibits gatekeepers from using MFNs, and the Vertical Agreements Block Exemption Regulation as well as the Vertical Guidelines address the use of MFNs (Van Bael & Bellis, Insights & News, 27 June 2022). In addition, authorities and courts have on some occasions dealt with exclusivity clauses (e.g., as regards exclusive purchasing or supplying *Google AdSense* and *Broadcom*).

ABUSE OF DOMINANT POSITION

National level

The role of national competition authorities in monitoring and enforcing competition law in digital markets, alongside with the Commission's efforts, is becoming increasingly relevant as they can focus on conduct of tech companies that are not the largest players and do not qualify as gatekeepers under the DMA, but nevertheless have a more significant market position at national level. This trend underlines that digital markets remain in the focus of European competition law enforcers regardless of the platform size.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Court of Justice dismisses appeal in Trucks cartel case

On 1 February 2024, the Court of Justice of the European Union ("ECJ") delivered a judgment dismissing the appeal brought by Scania AB, Scania CV AB and Scania Deutschland GmbH ("Scania") against an earlier General Court ruling upholding a 2017 decision (the "decision"), in which the Commission imposed a fine of around € 880 million on Scania (Case C-251/2 P, *Scania and Others v Commission*).

In the decision, the Commission found that Scania had participated between January 1997 and January 2011 in a cartel on the market for trucks. According to the Commission, the infringing conduct comprised collusive contacts at three different levels namely: (i) at top manager level, where agreements were concluded on timings for the introduction of emission technologies to comply with EU emission standards (from Euro 3 to Euro 6); (ii) at lower headquarters level, where technical information and gross prices for medium and heavy trucks were discussed; and (iii) German level meetings, where the representatives of German subsidiaries of various companies discussed, *inter alia*, price increases and timings for the introduction of emission technologies.

In 2016, the Commission settled the proceedings against five truck companies and imposed fines totalling € 2.92 billion under its cartel settlement procedure. The Commission continued the investigation against Scania under the standard infringement procedure, which led to the adoption of the 2017 decision. Scania's appeal before the General Court was dismissed in its entirety (see VBB on Competition Law, Volume 2022 No. 2).

On appeal before the ECJ, Scania claimed that the General Court had erred in law by failing to find that the Commission had breached its rights of defence through continuing to use the same case team in its investigation against Scania following the adoption of the settlement decision. According to the ECJ, the Commission is required to respect the fundamental rights of undertakings, including the presumption of innocence and, in the case at hand, noted that the Commission had not offered any guarantees to Scania that excluded legitimate doubts as regards its impartiality. However, the ECJ noted that no evidence of bias had been established by Scania even though, as acknowledged by the General Court, the use of the same case team made it more difficult to ensure that the examination of the case would be made in an impartial manner. The ECJ further noted that the fact that the same case team was used in both the settlement procedure and the standard infringement procedure did not give rise to any difficulty as regards compliance with the "*tabula rasa*" principle (i.e., where liabilities have yet to be determined) since that principle only reflects the finding that the presumption of innocence must be observed in relation to an undertaking which decides not to pursue the settlement procedure with the Commission. Finally, the ECJ took the view that a change in the case team responsible for a file within the Commission would even run counter to the principles of good administration and the handling of the administrative procedure within a reasonable period of time.

Scania also argued that the General Court had erred as regards the geographic scope of the infringement. More specifically, Scania alleged that the exchange of information at the German meetings was wrongly relied on to find the existence of an EEA-wide infringement. The Court of Justice disagreed, stating that the conduct was part of an overall plan which Scania was aware of, or should have been aware of.

In addition, Scania argued that the General Court erred in law in finding that the information exchanges that occurred at different levels, and which were not anticompetitive in themselves, formed part of a single and continuous infringement. The Court of Justice disagreed once again, stating that there was no need for the Commission to establish that each act taken individually constitutes an infringement to then establish that there is a single and continuous infringement, and may instead take into account the various links between the different elements.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Finally, Scania put forward a claim that the contacts at top manager level were not part of the single and continuous infringement, and therefore the imposition of a fine was time-barred, given that the five-year limitation period in Regulation No 1/2003 had expired. The Court of Justice dismissed this argument as unfounded since the conduct was part of the single and continuous infringement.

On the basis of the above, the appeal was therefore dismissed in its entirety.

INTELLECTUAL PROPERTY/LICENSING

European Union level

Court of Justice of European Union delivers judgment on burden of proof for demonstrating exhaustion of trade mark rights

On 18 January 2024, the Court of Justice of the European Union ("ECJ") handed down a judgment in response to a request for a preliminary ruling addressed by the Regional Tribunal of Warsaw (the "Court") regarding the burden of proof for the exhaustion of trade mark rights (case C-367/21, *Hewlett Packard Development Company v. Senetic S.A.)*.

The case involved a dispute between Hewlett Packard Development Company LP ("HP"), a computer hardware manufacturer, and Senetic S.A. ("Senetic"), a company selling computer hardware. HP owns all trade mark rights in its computer hardware products and employs a selective distribution system for their sale. As a result, authorised representatives in the distribution network are permitted to purchase products solely from HP or other authorised representatives. Additionally, each HP product is assigned a unique serial number, enabling HP to ascertain the intended geographical market for its sale. However, this serial number is not accessible to third parties who therefore are unable to verify whether a product was destined for the European Economic Area ("EEA").

Senetic acquired original HP computer hardware from vendors located in the EEA who were not affiliated with HP's selective distribution system and imported them into Poland. These vendors assured Senetic that this would not involve any violation of HP's trade mark rights. Moreover, Senetic sought confirmation from authorised representatives of HP that marketing these products in the EEA would not constitute a trade mark infringement, but the HP representatives refused to give such a confirmation. Subsequently, HP brought a legal action before the Court against Senetic for trade mark infringement. The Court sent a request for a preliminary ruling to the ECJ seeking to learn whether Articles 34, 35, and 36 of the Treaty on the Functioning of the European Union ("TFEU") could prevent HP from enforcing its trade mark rights, as Senetic contended that these had already been exhausted within the meaning of Article 15 of the EU Trade Mark Regulation ("EUTMR"). According to this provision, a trade mark owner cannot prevent the use of its trade mark in relation to goods which have been put on the market in the EEA by the owner or with its consent.

The ECJ observed that (i) EU law does not have specific provisions regarding the burden of proof concerning exhaustion; (ii) national laws imposing the burden of proof regarding exhaustion on the defendant do not contravene EU law as long as the fundamental principle of free movement is not limited; (iii) the burden of proof should therefore be shifted if there is a danger of segmentation of national markets by the trade mark owner that could cause price disparities between Member States to persist; and (iv) the burden of proof for the proposition that the trade mark right is not exhausted should rest with the trade mark owner if the defendant can demonstrate a genuine risk of market segmentation.

In the present case, the ECJ noted that HP operates a selective distribution system and that this system does not allow third parties to ascertain on which market the products are to be sold while HP refused to give that information to third parties. Furthermore, the ECJ found that vendors prefer not to disclose their supply sources to avoid a potential loss of sales. Thus, according to the ECJ, the burden of proof of the exhaustion should fall on the trade mark owner to prevent the loss of legitimate sales. Otherwise, the defendant may face challenges in demonstrating exhaustion.

The ECJ thus concluded that HP must demonstrate that the hardware products were placed on the market outside the EEA. Upon establishing this, Senetic would then have to prove that the goods were imported into the EEA either by, or with the consent of, HP.

STATE AID

European Union level

State aid and arbitration awards - an obvious relation?

On 22 February 2024, the Court of Justice ("ECJ") set aside a General Court's ("GC") judgment whereby the latter annulled two Commission decisions and a letter concerning the State aid assessment of an award rendered by an arbitration tribunal in Greece (Joined Cases C-701/21 P and C-739/21 P). The ECJ ruling provides guidance on when an arbitration award may amount to State aid.

The facts of the dispute

This long-standing dispute concerns the electricity supply tariff that Mytilinaios AE – Omilos Epicheiriseon ("Mytilinaios"), an aluminium producer, must pay to Dimosia Epicheirisi Ilektrismou AE ("DEI"), an electricity supplier controlled by the Greek State. Since 1960, Mytilinaios was granted, by means of an agreement between the two companies, a preferential electricity supply tariff. This preferential tariff expired in 2006, but the two companies were not able to agree on a new tariff level. Following a few years of unfruitful negotiations, Mytilinaios and DEI agreed in 2011 to entrust the resolution of their dispute to a permanent arbitration body of the Greek Energy Regulator ("RAE"). In 2013, this arbitration tribunal issued an award fixing the electricity supply tariff that Mytilinaios must pay to DEI.

Dissatisfied with the result, DEI brought an action for annulment before a Greek court, which was however dismissed. Subsequently, DEI also lodged a complaint with the Commission, arguing that the arbitration award constituted incompatible State aid. Without delving into the details of those proceedings, the Commission dismissed the complaint, by finding, in essence, that the arbitration award did not involve State aid since it did not confer an "advantage" to Mytilinaios. When assessing DEI's decision to settle the dispute by means of an arbitration procedure, the Commission found in fact that DEI acted in accordance with the requirements of the "private investor test" (in other words, a prudent private market operator would have acted in the same way).

The proceedings before the EU courts

Following DEI's actions for annulment of the Commission's dismissal decision under Article 263 TFEU, the GC ruled in DEI's favour in 2021. In particular, the GC found that the arbitration tribunal at issue had to be regarded "*as an ordinary Greek court*" and, therefore, its decisions should be attributed to the Greek State. Consequently, the award had to be understood as a legally binding decision on the fixing of the tariff at issue, which could confer an advantage to Mytilinaios if it did not correspond to normal market conditions. In light of this, the Commission should have assessed whether the award conferred an advantage, by examining the tariff established by the arbitration tribunal in light of the electricity market price. It should thus not have limited its assessment only to DEI's decision to enter the arbitration agreement.

In its judgment at second instance, the ECJ found that this reasoning of the GC was legally wrong. According to the ECJ, the arbitration tribunal at issue could not in fact be considered as an ordinary court. Indeed, none of the criteria upon which the GC based its finding[1] made it possible to distinguish the tribunal at issue from any other arbitration tribunal appointed by contract. Furthermore, importantly, the GC failed to ascertain whether the arbitration tribunal in question had mandatory jurisdiction over the case at hand or it had jurisdiction based on an "*agreement reflecting the freely expressed wishes of the parties*". This aspect seems to have played a major role in the ECJ's reasoning. Indeed, the ECJ concluded that, since the two companies had voluntarily referred the dispute to an arbitration tribunal and given the particularities of the dispute, the Commission was fully entitled to consider that DEI's decision to conclude the arbitration agreement

1 (i) The arbitration tribunal at issue performed a judicial function which is identical to that of the ordinary court; (ii) the arbitrators, selected from a list drawn up by the RAE, had to demonstrate their independence and impartiality; (iii) the proceedings were governed by the Greek Civil Code and the RAE's arbitration rules; (iv) the awards were legally binding, had the force of *res judicata* and were enforceable under the Greek Code of Civil Procedure; (v) the award could be the subject of an appeal brought before an ordinary court.

STATE AID

European Union level

that DEI's decision to conclude the arbitration agreement with Mytilinaios was the only State measure capable of constituting State aid. Therefore, the Commission was right to only assess whether DEI's decision had conferred an advantage, and it was not required, in addition, to analyse the content of the arbitration award.

In conclusion, it follows from the considerations of the ECJ that, apart from cases of circumvention of State aid rules, the award rendered in a voluntary arbitration involving a public entity will not normally be considered State aid, due to the voluntary nature of the tribunal's jurisdiction. Conversely, it seems possible to infer *a contrario* that similar awards rendered in mandatory arbitrations may be classified as State acts, therefore also potentially amounting to State aid. Although the ECJ did not take any conclusion in that regard, this seems to be for instance the case for mandatory arbitration proceedings envisaged by bilateral investment treaties, as is the case in the dispute at issue in the well-known *Micula* case (see, in this regard, VBB on Competition Law, Volume 2022, No. 2).

General Court annuls Commission decision approving aid to KLM, as it recently did vis-à-vis Air France

In order to provide liquidity to deal with the adverse effects of the Covid-19 pandemic, in 2020, the Netherlands granted aid in favour of KLM, in the form of a State guarantee for a loan provided by a consortium of banks and a State loan (collectively, "the measure"), for a total budget of € 3.4 billion. The measure was duly notified to the Commission, which found on 13 July 2020 that it constituted State aid compatible with the internal market.

Following Ryanair's action under Article 263 TFEU, on 19 May 2021, the GC annulled the Commission decision at issue, due to the failure to state reasons on the determination of the beneficiaries of the measure. As a matter of fact, KLM is part of a group (i.e., Air France-KLM). Thus, by not explaining why the measure granted to KLM would not benefit the other companies of the group, the Commission failed to provide – according to the GC – an adequate statement of reasons.

Despite the annulment of the Commission decision, the GC suspended the effects of its judgment pending the adoption of a new decision. The Commission did so on 16 July 2021, finding again that the measure at issue constituted compatible State aid. The new Commission decision was however challenged once more by Ryanair and, for the second time in a row, it faced a negative outcome by the GC on 7 February 2024.

In general, the GC judgment is largely similar to the judgment that the GC delivered in the parallel Air France case on 20 December 2023 (see VBB on Competition Law, Volume 2023 No. 12) and it is based on the same reasons of law. As in the Air France judgment, the GC analysed the capital, organic, functional, and economic links between the companies in the Air France-KLM group, the agreements on the basis of which the measure was granted, as well as the type of aid and the context in which it was granted. Against this background, the GC found that the Commission was wrong to consider that the measure would only entail "'mere secondary economic effects" vis-à-vis the other companies of the group, and that it could not benefit those companies – at least indirectly. For this reason, like the Air France decisions, the Commission decision at issue had to be annulled.

Although the Covid-19 pandemic may represent a peculiar phase for State aid, the judgments in the Air France and KLM cases may lead in the future to a more stringent assessment by the Commission of potential beneficiaries of the aid provided to members of group of companies, and thus to a broader view of the concept of "indirect advantage".

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

European Union level

European Commission adopts revised Market Definition Notice

On 8 February 2024, the European Commission ('Commission') published its long-awaited revised Market Definition Notice ('Revised Notice'), updating its guidance for the first time since 1997. The Revised Notice codifies the Commission's evolving approach to market definition, especially in light of major developments since the 1997 Notice such as digitalisation, sustainability, innovation, and increased globalisation, bearing in mind relevant Commission enforcement practice and EU case law.

The Revised Notice has received much attention because of its approach to currently "hot" topics such as the geographic dimension of markets in an era of globalisation, the delimitation of digital markets and the role of R&D efforts and pipeline products in shaping the scope of relevant markets. Importantly, however, especially for industries that are not at the epicenter of the digital space and are not largely innovation driven, the Revised Notice represents a gradual update and not a revolutionary change – the definition of the relevant market will still be based largely on the same considerations found in past Commission cases.

Background

Market definition facilitates the identification of the boundaries of competition between companies and the appraisal of their market power. It is an essential tool in merger control and abuse of dominance cases, as well as in effects-based Article 101 TFEU analysis.

The Revised Notice retains the role of market definition as a key step in the Commission's merger review and antitrust analysis. The Revised Notice is still structured around the core concept of defining both product and geographic markets, with a focus on demand-side (and less commonly, supply-side) substitutability. It expands on these basic principles, bringing the Commission's guidance closer to new market realities that affect critical aspects of competition in Europe. An overview of these updates is set out below.

Key new features of the Revised Notice

The product dimension of relevant markets – SSNIP test and emphasis on forward-looking assessments

The Revised Notice confirms the Commission's focus on demand-side substitution for product market definition purposes, albeit with some key qualifications highlighting the Commission's increased discretion when defining relevant markets. For example, the Commission declares that it has no obligation to apply a SSNIP (small but significant non-transitory increase in price) test, and would in most cases consider the SSNIP test only as a conceptual framework for the interpretation of available evidence.

The Revised Notice also recognises the limits of the SSNIP test in certain cases, for example, in zero-price markets and highly innovative industries where price is not the key parameter of competition. The Revised Notice also explains that in the case of zero-price products, the Commission may consider using the so-called SSNDQ "test", which purports to modify the SSNIP test by focusing on a small but significant non-transitory decrease of quality instead of an increase in price. Although the SSNDQ "test" has some serious methodological shortcomings, its application would be in line with the Commission's past enforcement practice (see, e.g., AT. 40099 - *Google Android*).

Furthermore, the Revised Notice emphasises the importance of the forward-looking application of market definition, especially in the case of expected short-term or medium-term structural transitions in the market (e.g., on account of technological or regulatory changes). The Commission may consider such structural transitions where they would lead to effective changes in the general dynamics of supply and demand. Nevertheless, the Revised Notice places a high evidentiary threshold requiring reliable evidence (e.g., internal documents or independent industry reports) that the projected structural changes are sufficiently likely to materialise.

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The geographic dimension of relevant markets – global markets and the role of import-based constraints

The Revised Notice's approach to market definition became an important consideration, reportedly delaying the Notice's adoption in light of perceived tensions between competition law analysis and EU industrial policy goals in an era of globalisation. The Revised Notice clarifies that the determination of whether a market is global in scope depends on whether customers around the world have access to the same suppliers on similar terms regardless of the customers' location. Other criteria, including prices, market shares, customer preferences, purchasing behaviour, transport costs, etc. may also affect the Commission's assessment.

The Revised Notice explains that a "sufficiently homogeneous competitive conditions" test will be used to determine the geographic dimension of a relevant market. Unfortunately, the Revised Notice fails to explain why demand-side substitution (including, where possible, empirical tests of substitution patterns) should be less relevant here than when determining the product dimension of a relevant market. Consistent with this approach, the Revised Notice explains that the effect of the competitive pressure exerted by imports (in principle a key factor in determining the boundaries of competition and the assessment of market power) will be relevant for market definition purposes only as part of the "sufficiently homogeneous competitive conditions" analysis.

The impact of non-price parameters and behavioural economics on market definition

The Revised Notice underlines the importance of non-price elements when defining relevant markets in certain industries. Competitive parameters such as innovation, quality, sustainable character, durability, the possibility to integrate the product with other products, and the reliability of supply may inform the Commission's analysis of the degree of substitutability between products. This is in line with the Commission's stated intention to perform an all-encompassing assessment of the underlying reasons forming customer choice, thereby expanding its 'toolkit' beyond price-based considerations and products' intended use. For example, the Commission acknowledges behavioural bias in customer choice, such as the tendency to choose the default option provided, as a potential factor in market definition. This revised assessment attempting to capture how choices are made in the real world will be particularly relevant to consumer-facing markets that likely behave according to a wider set of parameters than those captured by traditional economic models.

Innovation driven markets

Where companies compete on innovation, the Revised Notice places a focus on how to classify pipeline products when defining the relevant market. It identifies the pipeline products' intended use and projected substitutability as key factors in defining relevant markets, provided that there is sufficient visibility on the relevant R&D process.

The Commission may consider that pipeline products form part of an existing product market (i.e., grouped together with already marketed products), or of a new market consisting of the pipeline product and its substitutes. Furthermore, the Commission may expand the geographic scope of a market involving pipeline products to reflect the underlying R&D efforts.

Regarding early-stage R&D, the Revised Notice indicates that it might be relevant to identify the boundaries within which undertakings compete in such early innovation efforts when assessing innovation competition (see, e.g., the concept of innovation spaces used by the Commission in case M. 7932 – *Dow/DuPont*).

Multi-sided platforms

As pertains to multi-sided platforms (e.g., online marketplaces like Amazon or eBay), the Commission may define a relevant product market for the products offered by a platform as a whole, which encompasses all (or

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multiple) user groups (e.g., both buyers and sellers or both job seekers and recruiters active on the same platform), or it may define separate markets for the products offered on each side of the platform (e.g., distinct issuing and acquiring markets in payment card systems).

In this respect, defining separate markets may be more appropriate if there are significant differences in the substitution possibilities on the different sides of the platform. Relevant factors include which undertakings offer substitutable products to different user groups, the level of product differentiation on each side of the platform, the nature of the platform and the (single- or multi-) homing decisions of each user group (i.e., whether users would decide to use one platform for a given product or to use multiple platforms in parallel for the same product).

Moreover, the Revised Notice underscores the importance of non-price parameters in the Commission's substitution analysis where multi-sided platforms offer products at zero monetary prices with the aim to monetise their products on the other sides of the platform. Such parameters include product functionalities, intended use, evidence of past or hypothetical substitution, interoperability with other products, data portability and licensing features.

After-markets, bundles and (digital) ecosystems

In analysing (digital) ecosystems, the Commission may draw inspiration from the market definition approach taken in so-called "after-markets", where the consumption of a primary product (e.g., a watch) leads to the consumption of another secondary product (e.g., spare parts for the watch). The Revised Notice states that ecosystems may present similar characteristics, to the extent that they consist of a core product and several secondary products which are connected to the core product (e.g., through technological links or interoperability).

The Revised Notice presents three possible methods of defining markets for primary and secondary products: (i) a system market comprising both the primary and the secondary product; (ii) multiple markets including a market for the primary product and separate markets for secondary products based on each brand of the primary product; and (iii) dual markets including a market for the primary product and a market for the secondary product.

The selection of the appropriate method depends on several factors, such as substitutability between primary products or between secondary products, customer behaviour in relation to whole-life costs, competition dynamics in the supply of secondary products, and the level of consumer spend on the secondary product compared to that on the primary product.

Where the secondary products within the ecosystem are offered as a bundle, that bundle may be considered as a relevant market on its own. Regardless of whether the ecosystem fits the after-market or the bundle approach, the Commission will consider factors such as network effects, switching costs and (single- or multi-) homing decisions when delineating the relevant market.

Conclusion

The Revised Notice provides additional details on several factors affecting market definition analysis, including statements on key topics such as the geographic dimension of markets in an era of globalisation, the delimitation of digital markets and the role of R&D efforts and pipeline products in shaping the scope of product market definitions. This updated framework may also prove useful to national competition authorities in EU Member States when defining relevant markets.

However, despite some of the new approaches codified therein, the Revised Notice should be seen as an evolution of the Commission's approach to market definition, rather than a significant overhaul or departure from previous practice. Indeed, for most industries that are not at the forefront of the digital space or primarily innovation driven, the definition of the relevant market will still be

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based largely on the same considerations found in past Commission cases. The Commission will still define product and geographic markets based on demand- and supply-side substitutability, and pricing will remain the most relevant factor in most cases. Even in emerging technology, digital and other innovative markets, the Revised Notice does not mark a sea change in market definition, but rather summarises the positions the Commission has taken in previous cases.

Most importantly, the Commission will continue to have considerable flexibility when it comes to defining relevant markets. In fact, the Revised Notice emphasises the considerable discretion that the Commission can exercise when defining relevant markets, and the flexibility to choose parameters that support desired outcomes. Thus, while the Revised Notice provides examples of how the Commission might approach market definition in certain cases, companies still face significant uncertainty, not least given that the Commission is not bound by how it has defined markets in previous cases.

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