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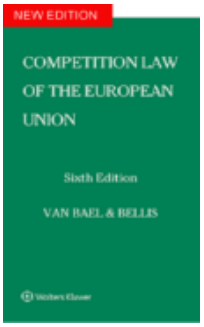
VBB on Competition Law

Highlights



Jurisdictions covered in this issue

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission unveils proposed regulation on foreign subsidies

On 5 May 2021, the Commission adopted a proposal for a Regulation on foreign subsidies distorting the internal market ("Proposed Regulation"), following on from an initial framework laid out in a White Paper in June 2020 (see VBB Client Alert of 1 July 2020). Broadly speaking, through the Proposed Regulation, the Commission aims to "level the playing field" between EU companies and state-sponsored non-EU companies doing business in the EU, including – which is of particular relevance to merger control – in the context of the funding of mergers, acquisitions and certain joint ventures, as well as in relation to the funding of their participation in public procurement processes and, more generally, their other business activities in the EU.

Features of the Proposed Regulation

A number of mechanisms already exist to address state influences in the internal market: EU Member State subsidies granted to companies are subject to close scrutiny under the EU State aid rules; foreign imports of goods (but not services) are subject to WTO subsidy rules and EU trade defence instruments; and the 2020 Foreign Direct Investment ("FDI") Regulation addresses potential threats to EU Member States' security and public order posed by foreign takeovers. However, no framework currently exists under EU law to regulate the ability of foreign states to distort the internal market by subsidizing the activities of (non-EU) companies within the EU. The Commission asserts that such subsidized companies are able to benefit from an unfair advantage when doing business in the EU, including when entering into merger negotiations or bidding for public procurement contracts, giving rise to an enforcement gap between the EU internal State aid rules, which apply only to benefits granted to companies by EU Member States, and the broader multilateral-based trade rules which do not apply to the subsidization by third countries of business activities within the EU (including by way of mergers and acquisitions).

The Proposed Regulation seeks to address this perceived gap by empowering the Commission to investigate financial contributions granted by non-EU governments to companies active in the EU in order to determine whether they distort the internal market and require redress. For this purpose, the Commission will be armed with three new tools:

1. a notification tool to investigate concentrations (i.e., mergers, acquisitions and full-function joint ventures as defined in the Merger Regulation) where:
    - the acquired party, or one of the merging parties, is established in the EU and has turnover in the EU of at least € 500 million (or, in the case of a full-function joint venture, where either the joint venture or one of the parents is established in the EU and has turnover there of at least € 500 million); and
    - the parties have together received an aggregate financial contribution from non-EU governments of at least € 50 million over the past three years;
2. a notification tool to investigate public procurement bids with an estimated value of at least € 250 million and where the bidder has received a financial contribution from non-EU governments over the past three years; and
3. a general market investigation tool allowing the Commission to investigate ex-officio "all other market situations" involving financial contributions by non-EU governments to companies active in the EU (including smaller concentrations or public procurement bids).

The Proposed Regulation also establishes a *de minimis* threshold whereby foreign contributions of under € 5 million within the preceding 3 years are considered unlikely to distort the internal market (which is relevant to the second and third tools described above).

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The Proposed Regulation is neither industry- nor country-specific, covering companies active in the provision of goods as well as services in the EU, allowing the Commission to target subsidized activities, including transactions, of all kinds.

The nature of a "financial contribution" is broadly defined to cover the conferral of a "benefit" on an undertaking engaging in an economic activity in the EU where the benefit is limited to that company or to a group of particular companies (reflecting the principle of "selectivity" applicable under the EU State aid rules). As a result, the concept covers a wide array of benefits a company might receive beyond direct payments, such as tax-advantaged treatment, favourable financing, or preferential loan arrangements.

Under the Proposed Regulation, the Commission will hold exclusive responsibility to enforce these tools – the partial role for Member States discussed in the White Paper has not been incorporated in the proposal. Notably, the two notification-based tools will require notification to the Commission of any concentration or public procurement bid meeting the above-mentioned thresholds and will impose a standstill obligation on such concentrations pending the conclusion of the Commission's review (and, in a similar way, prevent the award of public procurement contracts pending such review). If a company fails to notify such a concentration, the Commission is empowered to impose fines and to assess the transaction as if it had been notified.

The review process itself for notifiable concentrations essentially follows the merger review process laid down in the EU Merger Regulation – providing for the same deadlines for the completion of Phase I and Phase II reviews (including the ability for the Commission to stop the clock if incomplete information is provided). Likewise, the penalties for failing to notify a transaction (10% of turnover) or for providing false or misleading information (1% of turnover) are the same as under the Merger Regulation. The Commission will have the power to conduct inspections at company premises in the EU, and even outside the EU with the consent of the third country and company concerned. If a company fails to cooperate (including by declining to submit to an inspection outside the EU), the Commission is entitled to rule on the concentration on the basis of the facts available.

Under all three mechanisms the Commission will have the power to balance any distortive effect on competition in the internal market resulting from the subsidy against any potential positive effects on "the development of the relevant economic activity" in order to determine whether to impose corrective measures or accept commitments from the parties concerned. The Commission also has the power to prohibit notified transactions entirely.

The right tools for the task?

The Proposed Regulation undoubtedly provides the Commission with a powerful and far-ranging arsenal of tools to address a relatively specific gap in its enforcement. With respect specifically to mergers, the fact that there has been little attention given to whether EU State aid has "unfairly" facilitated concentrations may give ammunition to critics who claim that the new regime is essentially protectionist in nature and discriminates against third countries. It in any event begs the question of whether the tool is appropriately tailored to the task, or whether it risks creating more concerns than it seeks to solve. In particular, a few aspects of the Proposed Regulation raise concern with regard to mergers:

1. *Breadth of the Commission's powers*: Under the Proposed Regulation, the Commission would be empowered to target foreign companies that acquire a controlling stake in an EU company or – more broadly in the case of the Commission's ex-officio tool – engage in an economic activity in the EU, regardless of where these companies are based. This could open mergers involving foreign companies to considerable additional investment scrutiny (adding to the already highly front-loaded and burdensome EU merger notification process, as well as – in some cases – one or more additional FDI processes). Moreover, while the notification thresholds for the first investigative tool increased from those originally proposed in the Commission's White Paper, the third, ex-officio tool essentially functions as a catch-all, allowing the Commission to call in any mergers where the level of foreign contribution granted (for any purpose) over the previous three years is at least € 5 million. In short, the Commission will likely be able to review a potentially very large number of transactions, should it so wish.

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2. *Legal certainty for merging parties*: The Commission's third investigative tool provides the Commission with broad powers to investigate foreign support provided over the past 10 years and, if needed, to impose remedies (including unwinding completed mergers). Combined with the Commission's new approach to allowing Article 22 referrals including on completed transactions that do not meet the EU or Member State merger thresholds (see VBB on Competition Law, Volume 2021, No. 4), merging parties face increased uncertainty as to whether unnotified, completed deals are in fact safe from retroactive scrutiny.

3. *Substantive assessment*: While the Proposed Regulation gives a list of indicators used to determine the distortive effect of a subsidy, it remains to be seen how these would be applied in practice. The Proposed Regulation contains little detail regarding how the Commission will establish causality between indirect support granted potentially years previously and the funding of a specific concentration, or how it will balance the distortive effect of any subsidies against positive effects on the development of the relevant economic activity (particularly where at least part of those positive effects may be felt outside the EU). For example, it is unclear whether these justifications will be assessed using an analogous framework to the Treaty provisions governing State aid or, whether another legal test will apply. Importantly, however, a foreign subsidy directly facilitating a transaction will automatically be considered "most likely" to distort the internal market without the need for a detailed assessment based on indicative factors. Unless the parties can rebut that (apparently) strong presumption, it seems they may find it (very) hard to demonstrate that there are sufficient positive effects to outweigh the distortion, given that the Proposed Regulation deems this "less likely" in such cases (apparently creating a further adverse presumption for the parties).

4. *Remedies*: The Proposed Regulation empowers the Commission to address both actual and potential market distortions. It also enables the Commission to accept commitments proposed by the merging parties (as under the EU Merger Regulation) as well as to impose corrective measures of its own design. The large degree of discretion apparently afforded to the Commission may give it considerable leverage in extracting concessions from merging parties, with few clear checks and balances.

In sum, the Proposed Regulation gives the Commission broad powers to intervene (or not), with little guidance on how it should assess a given transaction and relatively few constraints on what measures it may impose. Some of these concerns may be alleviated as implementing instruments are developed to complement the Proposed Regulation and to provide further detail and guidance. As a practical matter, merging parties which have received no more than very modest levels of foreign government support over the previous three years will be faced with a new set of heavy regulatory hurdles to clear before closing the transaction where the EU turnover test is met, and when even that modest bar is not met, they will face uncertainty as to whether the Commission might choose to intervene at a later stage. When assessing deal feasibility and risk, merging parties with any EU activities are advised to consider carefully any foreign state benefits (broadly defined) that they may have received in the decade preceding the transaction.

Commission imposes fines on Sigma Aldrich for providing misleading information, extending trend in clamping down on procedural infringements

On 3 May 2021, the Commission imposed a € 7.5 million fine on Sigma-Aldrich for providing incorrect and misleading information during the Commission's review of its acquisition by Merck. While this is only the third fine the Commission has imposed on this basis, it extends the Commission's ramp-up in fines for procedural violations in recent years.

The Commission approved Merck's acquisition of Sigma-Aldrich in June 2015, subject to the divestiture of certain of the target's assets. During the course of the divestment process, the Commission became aware of a Sigma-Aldrich innovation project that had not previously been disclosed to the Commission. Notably, although the project was closely linked to, and developed products included in, the divestment business, the merging parties failed to mention it in remedy discussions. The parties also withheld information relating to this project in their responses to requests for information. Moreover, the Commission inferred from internal documents that these omissions were intended to avoid the need to include the project as part of the divestment business.

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The Commission concluded that Sigma-Aldrich's statements to the Commission were incorrect or misleading, constituting three distinct infringements. In particular, the Commission emphasized the importance of providing fulsome and accurate statements regarding R&D projects. Such initiatives are normally not publicly known and therefore the Commission relies heavily on the merging parties for information regarding these activities.

The Commission's previous two fines also concerned concealment of projects or capabilities under development. Most notoriously, in 2014, the Commission fined Facebook € 110 million for supplying incorrect and misleading information during its acquisition of WhatsApp. In its merger notification, Facebook asserted that it would not be able to automatically link Facebook and WhatsApp user accounts. However, the Commission subsequently discovered that Facebook employees at the time were fully aware that the technical possibility of linking these user accounts existed. Similarly, in 2017, the Commission fined GE € 52 million in the context of its acquisition of LM Wind. GE had informed the Commission that it did not have any offshore turbines in development beyond its existing 6 megawatt turbine, while the Commission later learned from a third party that, in fact, GE was developing a higher watt turbine and offering this turbine to customers.

While the fines against Facebook and GE were considerably higher than those imposed on Sigma-Aldrich, the size of the fines are broadly proportionate to each other given the relative size of the companies concerned. The Commission has the ability to fine companies up to 1% of annual turnover for this kind of procedural violation. While the Commission has not sought to reach this maximum level yet, the high amounts of fines imposed so far are clearly intended to serve a deterrent effect.

Merging parties are therefore advised to take extreme care to ensure that they are straightforward and complete when providing information to the Commission – particularly where this information concerns pipeline projects or development plans.

– UK LEVEL –

More than just *Sabre*-rattling: UK's CAT endorses broad CMA discretion in relation to share of supply test, increasing uncertainty for merging parties and advisers

On 21 May 2021, the UK's Competition Appeal Tribunal ("CAT") unanimously dismissed an appeal by aviation technology and software supplier Sabre against the decision of the UK Competition and Markets Authority ("CMA") to block its acquisition of travel industry software innovator Farelogix.

Sabre's challenge related primarily to the CMA's application of the share of supply jurisdictional test – a unique aspect of the UK merger control regime that the CMA has in recent years been willing to deploy with ever-increasing flexibility. If the CAT's judgment is not overturned following a potential appeal, it will afford the CMA very broad discretion in deciding whether to assert jurisdiction over any transaction that it deems sufficiently worthy of consideration (or interesting), even where there is little to no horizontal overlap and/or UK nexus. Accordingly, it will be significantly more difficult to mount an argument as to why the CMA should not investigate a transaction based on primarily jurisdictional, rather than substantive, grounds.

Following an in-depth Phase 2 investigation, the CMA asserted jurisdiction over the *Sabre/Farelogix* deal (on the basis of the share of supply test) and further found that the transaction could be expected to give rise to a substantial lessening of competition in two worldwide markets: (i) the supply of merchandising solutions to airlines; and (ii) the supply of distribution solutions to airlines. Thus, the CMA prohibited the transaction in its entirety in April 2020 (see VBB on Competition Law, Volume 2020, No. 4), and the parties abandoned the deal in May 2020. Farelogix was later acquired by Accelya, a software technology company.

Sabre challenged various aspects of the CMA's jurisdictional findings, including: (i) the relevant description of the services the CMA used to assess the share of supply test; (ii) the application of this test to certain of Farelogix's contractual arrangements; and (iii) whether the merger resulted in an increase ("increment") in Sabre's existing share of supply (with Sabre considering such increment to be hypothetical and, in any event, *de minimis*).

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In a lengthy judgment, the CAT unanimously rejected all of Sabre's grounds of appeal. In particular, the CAT concluded that:

- in applying the share of supply test, the CMA has very broad discretion to define the "relevant description of goods and services" as it sees fit, and such description need not relate to any economic market or industry-recognised standard;

- the purpose of the test is, broadly, to identify transactions that do not satisfy the turnover test but are nevertheless "worthy" of investigation (i.e., those that may raise competition concerns, as well as, some would argue, in practice also those that the CMA considers interesting);

- there is no *de minimis* threshold by which a transaction must increase the share of UK supply (although such increment must still exist, and be quantifiable). Thus, provided one party supplies at least 25% of a product/service in the UK, the test will be met if the other party has any corresponding UK supply (however small). In *Sabre/Farelogix*, this "increment" essentially arose as a result of Farelogix's limited supply of the relevant services to the UK, exclusively through an indirect relationship with a single UK "customer" (British Airways), and then only pursuant to an agreement between Farelogix and its direct US customer (American Airlines). This agreement concerned only interline segments (i.e., flight segments coordinated between the two airlines), such that ultimately the services Farelogix provided to British Airways related to only 62 tickets. The CAT found that Farelogix nevertheless had derived "value" from these services, even though British Airways never paid it any fees;

- the CMA may adopt an iterative approach to defining the relevant service during Phase 2, and need not be restricted by the findings of its preliminary Phase 1 decision (in the present case, the CMA proposed – and then abandoned – at least four different formulations).

The CAT's judgment is the first detailed consideration of a number of aspects of the CMA's recent, liberal approach to the share of supply test (applied also in the recent *Roche/Spark* and *Google/Looker* cases). Whilst the CAT's findings may yet be appealed, below are a few initial reactions and key takeaways for business:

1. The CAT's judgment emphatically confirms the CMA's almost unlimited discretion in deciding whether to assert jurisdiction over transactions that may raise competition issues (or that it considers sufficiently worthy/interesting), even in circumstances where there is: (i) minimal (if any) horizontal overlap; and/or (ii) only a tenuous/tangential UK nexus. The CAT's judgment will likely embolden the CMA to call in transactions concerning innovative/dynamic markets (consistent with the CMA's recent focus).

2. The CAT's judgment also appears to confirm that the CMA can establish jurisdiction even where one party lacks a (direct) UK presence. Therefore, it may now be even more difficult for merging parties based outside the UK to predict whether their (global) transactions are likely to face CMA scrutiny. Indeed, the present case is but one of a number of recent examples where a global transaction with only a very limited UK nexus could not be completed following CMA intervention (see, for example, *Thermo Fisher Scientific /Roper*, VBB on Competition, Volume 2019, No. 6).

3. Such developments appear indicative of a wider global trend towards an expansive approach to jurisdiction by competition regulators. For example, the European Commission has revived the Article 22 EU Merger Regulation referral mechanism to call in transactions that do not meet EU or Member State turnover thresholds (VBB on Competition Law, Volume 2021, No. 4).

4. As a result of these UK and global developments, there is a risk of erosion in the degree of legal certainty companies have in determining whether their transactions are subject to regulatory scrutiny. Such considerations are especially relevant to the UK, given the nature of the ostensibly "voluntary" and "non-suspensory" regime (which, in practice, is increasingly becoming the opposite).

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In light of the CAT's judgment, in any transaction with even a potential UK nexus, merging parties should redouble their efforts to: (i) robustly evaluate, from the outset, the likelihood of CMA intervention (with a focus on substantive rather than jurisdictional considerations); and (ii) consider whether early engagement with the CMA would be beneficial.

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ABUSE OF DOMINANT POSITION

– MEMBER STATE LEVEL –

ITALY

Italian Competition Authority imposes € 102 million fine on Google for refusing to include Enel's JuicePass app in Android Auto

On 27 April 2021, the Italian Competition Authority ("ICA") imposed a fine of over € 102 million on Alphabet Inc., Google LLC and Google Italy S.r.l. (collectively, "Google") after concluding that Google had infringed Article 102 TFEU by refusing to include in Google's own Android Auto app a third party app which enables users to locate car recharging stations, to book and manage a recharging session, and to pay directly through the app. The ICA's decision is another illustration of how competition authorities feel emboldened to pursue vigorous enforcement action against large digital platforms and are willing to push the boundaries of competition law analysis in order to find an infringement and shape a remedy.

Factual background

The case centered around Google's Android Auto app, an app that allows users to view and use certain apps installed on their cell phones on a car's infotainment system. For safety reasons, Google tightly controls which apps from the Google Play Store are made available on Android Auto, and essentially only selected media apps and messaging apps ase available alongside the Google Maps app. Development efforts and extensive testing are required to ensure that an app can be used on a car's infotainment system without distracting the driver. Because of these significant costs, but also because Google does not consider Android Auto a commercial priority and dedicates only limited resources to its development, relatively few apps remain available on Android Auto.

Enel X Italia ("Enel"), which provides services in relation to electric car mobility, had developed an app enabling the user to search for a recharging station for electric cars, to book and manage a recharging session, and to pay directly on the app itself. Enel's app has been available on Google Play Store since 2018 (more recently under the name "JuicePass"), but Google has repeatedly refused Enel's request to include the app in Android Auto. Google reasoned that Enel's app did not comply with Google's publishing policy concerning Android Auto apps, and that it had limited appeal as the uptake of electric cars in Italy was very slow. Google therefore did not consider it justified to spend the resources that would have been required to ensure the safe use of the app and all its functionalities when included in Android Auto. As proposed compromise solutions failed, Enel launched a complaint with the ICA which resulted in the ICA's infringement decision.

The ICA's assessment

The ICA framed the case as a refusal to deal case whereby Google had failed, without objective justification, to develop and offer additional technology solutions that would have been required before Enel's JuicePass app could be published in Android Auto and used on the car's infotainment system.

To confirm Google's dominant position, the ICA relied heavily on the European Commission's ("Commission") Android decision (Case AT.40099, VBB on Competition Law, Volume 2018, No. 7) to find that Google was dominant on the market for the licensing of operating systems for mobile devices (through Android) as well as the market for Android compatible app stores, and that Apple was not present on either market. This shortcut glossed over some important differences between the two cases. In particular, while the Commission had emphasized that Apple's iOS, unlike Android, is not licensable to mobile OEMs, Apple Car Play is licensed to automotive OEMs (which should have been relevant in the ICA's case). The Commission had also sought to downplay the competitive interaction between Android and iOS, whereas the ICA explicitly acknowledged that Android Auto was launched as a "competitive response" to Apple Car Play.

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In what was probably a first for a competition law case in the digital space, the ICA sought to strengthen its dominance finding by labelling Google as a "gatekeeper," arguing that Google could decide which apps would be available on its platforms (including Android Auto) and therefore controlled how app developers could reach final users. The "gatekeeper" concept features prominently in the proposed Digital Markets Act, as well as several recent reports on the digital economy. It remains to be seen, though, whether the use of the gatekeeper concept can meaningfully contribute to the assessment of dominance in a competition case (which is not readily apparent from the facts of the case at issue) as otherwise the use of this label risks amounting to an analytical shortcut applied to hide weaknesses in the substantive assessment.

In the evaluation of Google's conduct, the ICA characterised Google's decision not to include JuicePass in Android Auto in conventional terms – it was a refusal to grant access to an indispensable infrastructure, which, in turn, prevented the emergence of a new product for which there was potential demand and hindered effective competition. But the ICA's findings with respect to the required refusal to deal elements were less conventional. For example, in the ICA's view, it was sufficient to establish the indispensability requirement by pointing out that Enel's app was "conceived" to be used while the user was driving and that inclusion in Android Auto would be necessary for the app's "effective use", i.e., safe use while the user is driving its car.

In finding that competition would be hindered as a result of the refusal by Google to grant access, the ICA noted that Google had been able to expand its own user base during the two years in which Enel's app was excluded from Android Auto, while Enel had been prevented from doing so. The ICA did not accept the argument that the high number of downloads of Enel's app during the relevant period – which exceeded the number of chargeable cars on the Italian market – showed that the app had sufficient direct access to end users, and that its market presence and ability to compete was not threatened by its absence from Android Auto. Instead, it found it more relevant to consider the expected future growth of the electric car market in Italy, which would increase the demand for the functionalities offered by Juice App. In light of network effects and the winner-takes-all nature of the market, the ICA found that the delay in the availability of Enel's app on Android Auto could preclude the latter from reaching a considerable user base.

The ICA also found that Google's conduct created a competitive advantage for Google Maps, Google's own navigation app that was available on Android Auto, even though the two relevant apps – Google Maps and Enel's JuicePass – offer very different functionalities: one is a general navigation app which also includes information about charging stations, while the other provides specialised services related to charging stations. There was also no evidence on file suggesting that Google's position vis-à-vis JuicePass was motivated by the idea of weakening an actual or potential rival or of protecting Google's own (current or future) competitive position. Although the ICA could not identify a market on which the two apps competed, it considered it sufficient to identify more loosely a "competitive space" in which both apps offered similar services. In this space, the ICA saw Google Maps and JuicePass as actual competitors with respect to search services and as potential competitors for related additional services – e.g., booking and payment services for recharging sessions. Such services are currently available only on Enel's app and not on Google Maps, and there was no evidence that Google had any concrete plans to offer these services on Google Maps. Nevertheless, the ICA speculated that Google could eventually do so.

The most remarkable aspect of the decision is the ICA's assessment of possible objective justifications for Google's conduct (which, if accepted, could prevent the finding of an abuse). Google had explained that it considered the additional investment needed to make JuicePass (with all its functionalities) available on Android Auto not justified, pointing to its publishing policy for Android Auto, the need to ensure the safe use of each app, and the low number of users of both Android Auto and Enel's app. Thus, Google may have had legitimate business reasons (that had nothing to do with any intent to exclude a rival) to refuse JuicePass's integration into Android Auto. These reasons, however, did not satisfy the ICA, which appeared to take the position that only technical limitations could constitute a valid justification for the purposes of Article 102 TFEU, while business or financial considerations, at least in the case of a large digital platform, would not be legally relevant. The ICA found that, taking into account Google's size, Google should have changed its business model and been willing to make the necessary investment to give

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third party apps access to Android Auto. The ICA noted that, due to Google's own size, Google would have been able to dedicate the necessary resources to support Enel's desired solution. Finally, the ICA noted that Google could have lawfully requested Enel to cover part of the costs to support Enel's desired solution.

In addition to using an unorthodox approach in calculating the fine (the ICA considered that the Italian turnover submitted by Google was too low and instead used public, aggregated revenue data to arrive at its own estimate), the ICA ordered Google to adopt measures to ensure that JuicePass can be used through Android Auto with all the functionalities requested by Enel. This means that – when Juice App is used through Android Auto – Google will have to ensure the availability of functionalities even though they are not available for any other apps, including Google's own. The ICA considered this type of remedy, which goes far beyond a standard non-discrimination remedy, as necessary to ensure a "dynamic level playing field".

Comment

The *Google/Enel* decision is notable for the ICA's willingness to push the boundaries of established competition law analysis in order to establish the liability of a digital platform. It shows how evidentiary standards, which arguably are already not particularly demanding in "traditional" Article 102 cases, may be further relaxed when the target is a large digital platform.

An illustration of this approach is the ICA's determination that, in order for Enel's JuicePass app to be able to compete, it was indispensable for it to be included in Android Auto with all functionalities determined by Enel. The ICA adopted this view even though downloads of JuicePass on cellphones during the period in which Google engaged in the allegedly unlawful conduct appeared to have given JuicePass a robust presence among users of chargeable cars. Thus, although it may have been commercially attractive for JuicePass to be present on Android Auto, there does not seem to have been strong evidence demonstrating that this presence was indispensable in order to reach customers effectively. The ICA's view that Enel had a right to access Android Auto and have all functionalities available there (rather than being "merely" downloadable onto cellphones) creates a certain tension with the European Court of Justice's case law, which has considered that alternative solutions, even though they might be less advantageous, would be sufficient to refute indispensability.

But the most remarkable aspect of the decision is the ICA's finding that Google acted unlawfully when it declined to change its existing policy related to Android Auto when approached by Enel, and refused to invest in the development of solutions that Enel demanded for JuicePass but that Google had not even developed for its own apps. Thus, in the ICA's view, a refusal to deal may constitute an abuse not only when the conduct amounts to discrimination and a strategy to favour the dominant firm's own operations. In the ICA's view, an abuse can also exist where the dominant firm fails to invest in order to support another market participant's product, even if there was no evidence of an "underinvestment strategy" to keep rivals out of the market . The ICA is very explicit in its conclusion that, as a matter of competition law, Google ought to have invested all necessary resources to implement solutions that would accommodate Enel's demands. This approach is also reflected in the required remedies, as Google is ordered to develop solutions in the future that will allow the inclusion of Enel's JuicePass app in Android Auto with all its functionalities.

If upheld on appeal, the ICA's Google/Enel decision would significantly expand antitrust risks for large digital platforms. In the case of Google, for example, it could mean that any app developer that wishes to integrate its app's functionalities with a Google app may have a valid competition law claim against Google to make such integration possible. This could lead to Google's decisions on resource allocation being questioned – and condemned – in the context of competition law claims. This might please advocates of stricter competition law enforcement against digital platforms, but there remain serious doubts as to whether this is a role that competition law enforcement should play.

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– UK LEVEL –

CAT confirms GSK pay-for-delay infringement decision but reduces fines

On 10 May 2021, the UK's Competition Appeal Tribunal ("CAT") issued its final decision in GSK (*Paroxetine*) – the long-running saga concerning pay-for-delay patent settlement agreements between GSK and several generics. The CAT upheld the Competition and Markets Authority's ("CMA") finding of an infringement of both Articles 101 and 102 TFEU but reduced the level of the fines by 40%.

In its infringement decision of 2016, the CMA found GSK and several generic manufacturers to have infringed EU and UK competition law by concluding a series of agreements settling disputes concerning the validity of GSK's process patent for the manufacture of paroxetine. These settlements provided that GSK would make various transfers of value to the manufacturers of generic medicines in return for the latter's commitment to delay introducing a generic version of paroxetine to the market.

The parties appealed the CMA's decision to the CAT which, in turn, referred several questions to the Court of Justice of the European Union ("ECJ") for a preliminary ruling. The ECJ issued its judgment in January 2020, in which it set out the standard for evaluating the legality of patent settlement agreements under EU competition law. The CAT has now applied the ECJ's guidance to the settlement agreements at issue in the case.

The CAT confirmed that the generic manufacturers were potential competitors of GSK at the time the settlement agreements were concluded, as they had a "*firm intention and an inherent ability to enter the market*" and did not meet barriers to entry that were "*insurmountable*". It also held that the agreements restricted competition by effect and, in principle, by object, given that the generics only agreed to the settlements once the value transfers offered by GSK were sufficiently attractive to induce them to cease their attempts to enter the market independently. The CAT also confirmed that GSK's strategy of concluding settlement agreements in order to deprive potential competitors of their ability to access the market constituted an abuse of its dominant position. Notably, however, the CAT upheld the CMA's definition of the relevant market on a different basis to that contained in the CMA's decision.

Reduction in Fines

The parties argued against the level of the fines on the basis that the agreements were concluded at a time (2001-2002) when it had not been suggested that such patent settlements would infringe competition law. They argued, therefore, that the CMA's findings were "wholly novel" and could not have been foreseen. With regard to the infringement of Article 101, the CAT held that the CMA was entitled to impose fines because the parties "*could not have been unaware that the Agreements had the potential appreciably to restrict competition*". The CAT did, however, accept that the amount of the penalty should be mitigated due to the novelty of the infringement.

However, with respect to GSK's abuse of dominance, the CAT held that no penalty should be imposed. It based this decision on the fact that it had disapproved of the CMA's approach to market definition (on which the CMA had based its finding of dominance); that the ECJ's approach to market definition was not the standard means for defining markets for medicines in 2001-2002; and that the conduct constituting the infringement of Article 102 largely overlapped with the conduct which amounted to the infringement of Article 101.

In reducing the overall level of the fines by 40%, the CAT also took into account the substantial passage of time between the initial infringement and the beginning of the investigation and the practical challenges this would have raised for the parties (e.g., in terms of their ability to gather evidence). Whilst the CAT did not accept that this additional burden amounted to an infringement of the parties' rights of defence, it did consider that it should be reflected in the form of lower penalties.

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CARTELS AND HORIZONTAL AGREEMENTS

– EUROPEAN UNION LEVEL –

European Commission fines investment banks for involvement in bond trading cartels

On 28 April and 20 May 2021, the European Commission adopted two decisions imposing fines on a series of investment banks in relation to two separate cartels relating to the trading of: (i) Supra-sovereign, Sovereign and Agency ("SSA") bonds and (ii) European Government Bonds ("EGB") respectively.

SSA Bonds

In the first decision, adopted on 28 April 2021, the Commission imposed total fines of € 28 million on three investment banks, namely Bank of America Merrill Lynch, Crédit Agricole and Crédit Suisse, for their involvement in a cartel in the EEA secondary trading market for SSA bonds denominated in US Dollars in the period between 2010 and 2015. A fourth participant in the infringement, Deutsche Bank, received immunity from fines under the Leniency Notice.

Bonds are first issued on the "primary market" for sale to investors through auctions or syndicates. Bonds are then traded between banks, brokers and investors on the "secondary market". SSA bonds cover three types of bonds: (i) Supra-sovereign bonds, which are issued by supranational institutions or agencies, such as the European Investment Bank; (ii) Sovereign bonds, which are issued by central governments; and (iii) Agency bonds, which are issued by government-related agencies and public authorities below the level of national government, such as regional development banks.

According to the Commission, traders at the investment banks concerned exchanged commercially sensitive information in chatrooms on Bloomberg terminals, including on their bidding strategy, prices and volumes offered in the run up to the auctions of SSA bonds. The Commission also found that traders agreed to refrain from bidding when the banks risked entering into competition with one another.

Bank of America Merrill Lynch was fined over € 12.6 million, Crédit Suisse over € 11.8 million and Crédit Agricole nearly € 4 million. Deutsche Bank was exempted from fines under the Leniency Notice as it was the first to reveal the existence of the cartel to the Commission.

EGB

In its second decision, adopted on 20 May 2021, the Commission found seven investment banks, Bank of America, Natixis, Nomura, RBS (now NatWest), UBS, UniCredit and WestLB (now Portigon), liable for operating a cartel in the primary and secondary markets for European Government Bonds ("EGB") between 2007 and 2011. Total fines of € 371 million were imposed.

EGB are debt securities issued in Euro by the central governments of the Eurozone Member States to raise funds on international financial markets. These bonds are first issued on the primary market where a limited number of investment banks (referred to as the "primary dealers") can bid for the bonds in auctions. The primary dealers then place and trade the bonds with other investors on the secondary market. These investors include other banks, asset managers, pension funds, hedge funds and major companies.

Similarly to the SSA bond cartel, the Commission found that the traders of the investment banks concerned exchanged commercially sensitive information in chatrooms on Bloomberg terminals, including on their bidding strategy, prices and volumes offered in the run up to the auctions.

Of the seven banks involved, only three of them received fines: Nomura (€ 129 million) UBS (€ 172 million) and Unicredit (€ 69 million). Natwest received full immunity from fines as the leniency applicant under the Leniency Notice.

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The involvement of Bank of America and Natixis in the cartel, which ended in 2008 and 2009 respectively, was time-barred having ended more than five years before the Commission opened its investigation. Therefore, no fines were imposed on these two banks. However, follow-on damage claims remain a possibility since the Commission found the two banks were involved in the infringement. Portigon was not fined because it did not generate any net turnover in the last business year of the cartel.

These two decisions follow a long string of cases in which the Commission targeted the behaviour of investment banks in the wake of the 2008 financial crisis in connection with Yen interest rate derivatives (2013), Euro interest rate derivatives (2013) and Swiss Franc interest rate derivatives (2014).

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VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Review of the motor vehicle distribution rules: first indications of the future regime

On 28 May 2021, the European Commission ("Commission") published its Evaluation Report on the operation of the Motor Vehicle Block Exemption Regulation, Commission Regulation No 461/2010, (available here), and the accompanying Staff Working Document (available here).

The aim of the evaluation was to gather evidence on the functioning of the regime applicable to vertical agreements in the automotive sector, in order to decide whether these rules should lapse, be renewed in their current form or be revised when Commission Regulation No 461/2010 (the "2010 MVBER") expires on 31 May 2023. The evaluation covered the full gamut of rules applicable to vertical agreements in the automotive sector, including both the 2010 MVBER and the Commission's Supplementary Guidelines, as well as the 2010 Vertical Block Exemption Regulation (the "2010 VBER") and the Commission's Guidelines on Vertical Restraints (with the 2010 VBER due to expire one year earlier than the 2010 MVBER on 31 May 2022). The evaluation examined the extent to which the objectives of the MVBER regime have been effectively and efficiently met. Overall, the Commission's findings do not suggest that a major overhaul of the current regime looks likely.

The last reform of the MVBER in 2010 predominantly targeted the primary market for motor vehicles by abolishing sector-specific rules altogether. Today, as a result, distribution agreements for the sale of motor vehicles are subject to the same block exemption regime as all other products (which regime was founded on the 2010 VBER). Nevertheless, the Commission found in 2010 that certain characteristics of the motor vehicle aftermarkets (i.e., the provision of repair services and the supply of spare parts) warranted sector-specific rules (supplementing the generally applicable rules based on the VBER) in order to address what were seen as certain persistent competition issues in those aftermarkets. As a result, the 2010 MVBER provided additional hardcore restrictions that, if included in agreements concerning vehicle spare parts or repair and maintenance services, would prevent the agreements from being block exempted even if they otherwise met the requirements of the 2010 VBER. In addition, Supplementary Guidelines were adopted to address specific particularities of the motor vehicle sector in both the primary and the aftermarkets.

In its current Evaluation Report, the Commission finds overall that the competitive environment in the motor vehicle sector has not significantly changed since the evaluation it carried out prior to the adoption of the 2010 regime, but there is now intense pressure on market players to adapt in light of the ongoing environmental and digital transformation of the sector mandated by strict EU rules. The Commission analyses the competitive landscape in three markets: (i) motor vehicle distribution; (ii) motor vehicle repair and maintenance; and (iii) motor vehicles and the sale of spare parts.

Motor vehicle distribution markets

As regards the motor vehicle distribution markets, the Commission finds that competitive conditions differ to some extent on the basis of vehicle type: inter-brand competition in passenger cars is reportedly vigorous with shifting market shares and stable R&D spending, but inter-brand competition seems weaker in light commercial vehicles, trucks and buses with higher concentration levels. Overall, the Commission considers that the continued application of the general framework on vertical agreements (founded on the VBER) in these markets would be appropriate. For example, it appears to see no need for stricter provisions on dealer non-compete obligations as market access has not proven difficult in recent years.

Motor vehicle repair markets

The Evaluation Report considers that, at least for passenger vehicles, aftermarkets are still likely to be brand-specific as end customers (mainly private individuals and small/medium-sized businesses) do not take sufficient account of aftermarket costs when buying vehicles and,

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in addition, many entities only offer aftermarket products and services. – The Report acknowledges that the same analysis may not necessarily apply in the case of other types of vehicles where professional consumers are more prevalent. Many authorised repairers are said to enjoy considerable local market power in brand-specific repair markets, while intra-brand competition within the authorised networks appointed by vehicle manufacturers is limited by the strict and detailed quality criteria that are used by vehicle manufacturers to determine access to these networks. As a result, the Evaluation Report suggests that block exempting more agreements between authorised repairers and their suppliers by raising the current 30% market share threshold of the MVBER for agreements would not be appropriate.

Independent repairers are considered by the Commission to provide consumers with an important lower-cost alternative channel for the maintenance of their motor vehicles and are, therefore, viewed as a source of vital competitive pressure. The Evaluation Report emphasises that independent repairers can only continue to exert such pressure if they have sufficient access to key inputs such as spare parts, tools, training, technical information and vehicle-generated data. The Commission suggests that the current MVBER regime may require updating to ensure effective access to these inputs taking account of technological progress in these areas – vehicle-generated data is identified as an area where attention may be warranted.

Motor vehicle spare parts

The Evaluation Report highlights the importance of the availability of third-party spare parts (provided by sources other than the motor vehicle suppliers). The Commission therefore considers that the continued special treatment of the motor vehicle spare parts markets remains a requirement of any new regime. The Commission identifies specific rigidities resulting from certain contractual arrangements between 'original equipment suppliers' (which supply parts used in vehicle assembly) and vehicle manufacturers, including IP transfer obligations and tooling arrangements, which may prevent original equipment suppliers from supplying parts to buyers other than the vehicle manufacturer with which they have contracted.

Next steps and predictions

As a next step, the Commission will move to the policy-making stage of the review process. Considering the results of the evaluation, the Commission will decide whether to renew, let lapse or revise the MVBER regime. The distribution of motor vehicles seems very likely to remain subject to the VBER, which itself seems set to be renewed with certain modifications by 31 May 2022, as discussed here. The type of guidance currently included in the Supplemental Guidelines on specific aspects of vehicle distribution may remain (e.g., on parallel trade issues to protect intra-brand competition between dealers), though possibly with less emphasis on the indirect means by which dealer non-competes may give rise to foreclosure concerns (as obstacles to market access have not been identified by the evaluation). Interestingly, there is no suggestion of concerns over the prevalence in this sector of dual distribution (where manufacturers make direct retail sales of vehicles to users as well as selling through an independent dealer network), which has become a highly controversial topic in the review of the 2010 VBER.

It seems likely that the Commission will consider that the particularities of the aftermarket will continue to require stricter rules to protect, in particular, independent repairers and third-party parts suppliers, and that these will be reflected in a sector-specific block exemption regulation which supplements the VBER. It remains to be seen whether, for example, tooling arrangements included in parts supply agreements with vehicle manufacturers will come under increased scrutiny, although this has failed to materialise in the past. Furthermore, the Commission's current approach to authorised repair networks, which assumes that repairer agreements will generally not be block exempted for reasons of market share and that only qualitative systems will meet the requirements of Article 101, looks at this stage unlikely to change. All in all, only modest changes in the current framework look likely, and the Commission's relative disinterest in distribution issues in the sector may well continue for the time being, though any threats to innovation and sustainability goals can be expected to trigger concern. All in all, the market analysis on which the evaluation is based risks rapidly becoming outdated given the potentially huge changes to business models that seem likely in this sector in the coming years

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with the growth of mobility services, autonomous vehicles and electrification – in this sense, the timing of the evaluation is unfortunate but legally unavoidable given the expiry of the existing rules.

– MEMBER STATE LEVEL –

GERMANY

German Federal Court of Justice finds narrow price parity clauses anticompetitive (*Booking.com*)

On 18 May 2021, the German Federal Court of Justice ("FCJ") overturned the ruling of the Higher Regional Court of Düsseldorf concerning the use of (so-called) 'narrow' price parity clauses by Booking.com ("Booking"). These clauses, which were included in contracts concluded between Booking and hotels in Germany, prevented the hotels from listing prices on their own websites that were lower than the prices which they offered on Booking.com, without restricting the hotels' right to offer lower prices on different hotel booking platforms.

In 2015, the Federal Cartel Office ("FCO") had prohibited Booking from using such clauses in contracts with hotel operators in Germany. According to the FCO's reasoning, narrow price parity clauses restrict the hotels' freedom to set prices by disincentivising them from offering prices on other portals which are lower than the prices listed on the hotels' own websites. This is because, even if the narrow parity obligation owed to Booking would not contractually prevent hotels from listing lower prices on other portals, their interest in doing so would be limited by the fact that the parity obligation owed to Booking would prevent them from matching those lower prices on their own websites without also lowering the price offered through Booking. Furthermore, the narrow price parity clauses were found by the FCO to hinder market entry of new hotel booking portals by indirectly limiting their ability to offer lower prices than Booking as a competitive tool to attract customers (see VBB on Competition Law, Volume 2016, No.1).

On appeal, the Higher Regional Court of Düsseldorf had found in 2019 that such clauses restricted competition, but nonetheless qualified as necessary ancillary restraints which did not infringe Article 101(1) TFEU: the protection afforded to Booking from direct undercutting by hotels was considered necessary to ensure a fair and balanced exchange of services between the portal operators and the contracted hotels. The Higher Regional Court of Düsseldorf therefore overturned the FCO's decision (see VBB on Competition Law, Volume 2019, No. 6).

In overturning the judgment of the Higher Regional Court of Düsseldorf, the FCJ has found that Booking's narrow price parity clauses did infringe Article 101 TFEU. The FCJ considered that the clauses precluded hotels from passing-on – in the form of lower prices – the benefit of the cost savings which they made in making direct sales to consumers (by not having to pay the commission due on sales through Booking and other intermediaries). In contrast to the Higher Regional Court of Düsseldorf, the FCJ found that the narrow price parity clauses were not indispensable ancillary restraints because they were not objectively necessary to attain the purpose of these contracts, i.e., the provision of online platform services enabling hotels to offer their rooms. This was demonstrated by the fact that, even after Booking stopped using narrow price parity clauses as a result of the FCO's decision, Booking was able to further strengthen its market position in Germany.

The FCJ stated that any pro-competitive arguments invoked in favour of narrow price parity clauses, such as the prevention of free-riding by hotels on the investments of Booking or increasing transparency for consumers, must be carefully weighed against their anti-competitive effects. However, this could only be done in applying Article 101(3) and not, as the Higher Regional Court of Düsseldorf had done, in deciding whether Article 101(1) was infringed. In conducting this balancing exercise, the FCJ found that the first condition for the application of Article 101(3) TFEU was not met (i.e., that the restriction did not contribute to improving the production or distribution of goods or to promoting technical or economic progress). Although the FCJ recognised that hotel booking platforms provide a convenient, attractive and efficient service both for consumers and for hotels that is not otherwise available, it held that the realisation of these efficiencies does not require the use of narrow price parity clauses. Although the FCJ could not entirely rule out the existence of a free-rider problem, it found no indications that this risk seriously jeopardised the efficiency of the booking platform, while the narrow price parity clauses were found to considerably restrict the independent online marketing of hotels.

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The FCJ also held that Booking's narrow price parity clauses could not be block exempted under Article 2(1) of the Vertical Agreements Block Exemption Regulation ("VBER") because Booking's market share on the relevant market of hotel booking platforms in Germany exceeds the 30% maximum threshold for application of the exemption.

In light of the FCO's ruling, the German approach to price parity clauses in the online booking market is once again more restrictive than the approach of most national competition authorities. EU Member States where narrow – as opposed to wide – price parity clauses have been found to be compatible with Article 101 TFEU include France, Ireland, Italy and Sweden (see VBB on Competition Law, Volume 2015, No. 4; Volume 2015, No. 5 and Volume 2019, No. 5), with some countries choosing to resort instead to specific regulation to prohibit them. More broadly, this recent judgment further illustrates Germany's stricter approach to restrictions in the context of online distribution relative to certain other competition authorities in the EU. It is to be hoped that revised Vertical Guidelines due to be adopted by the European Commission next year will provide meaningful guidance on the criteria that are relevant to assessing in practice the application of Article 101 to parity clauses, although ultimately a ruling by the European Court of Justice may be required to curtail the undesirable risk of divergence.

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STATE AID

– EUROPEAN UNION LEVEL –

General Court delivers two new landmark rulings in the field of State aid and taxation in the *Amazon* and *Engie* cases

On 12 May 2021, the General Court of the European Union ("GC") delivered two important judgments concerning tax rulings granted by Luxembourg to Amazon (Joined cases T-816/17, *Luxembourg v Commission* and T-318/18, *Amazon EU and Amazon.com v Commission*) and Engie (Joined cases T-516/18, *Luxembourg v Commission* and T-525/18, *Engie Global LNG Holding e.a. v Commission*). In both cases, the Commission had found that certain tax rulings granted by Luxembourg in favour of Amazon and Engie qualified as State aid in the sense of Article 107(1) TFEU, and were incompatible with the internal market. In *Amazon* the General Court annulled the contested Commission decision, whereas in *Engie* it rejected the action for annulment as unfounded.

The Commission's crusade against "aggressive fiscal optimization"

The *Amazon* and *Engie* judgments are part of the broader context of the relatively recent wave of State aid decisions adopted by the Commission concerning tax measures. As is well-known, in 2013 DG Competition set up a dedicated Task Force on Tax Planning Practices in response to public allegations of the favourable tax treatment of certain companies granted by various Member States, in particular in the form of tax rulings. The Commission has since opened a dozen State aid investigations in this field, eight of which have been closed with a final decision. The General Court has already delivered a number of landmark rulings, which have given significant guidance on the application of Article 107(1) TFEU to tax rulings (see, e.g., the rulings in *Starbucks*, *Fiat* and *Apple*, as well as now the *Amazon* and *Engie* judgments).

Even though in some cases, such as *Apple* and *Amazon*, the General Court has annulled the contested State aid decisions, in each of them the Court seems to have endorsed the general principle that the Commission is entitled to review tax rulings granted by Member States to establish whether they constitute State aid. So far, arguments that the Commission lacks jurisdiction to open investigations into tax rulings under the State aid rules have been summarily rejected by the General Court. The underlying message of the General Court's rulings seems to be that it warmly welcomes the Commission's crusade against "aggressive fiscal optimization" practices endorsed by certain Member States. It remains to be seen whether, on appeal, the Court of Justice will be of the same view.

Below we briefly describe some of the most interesting aspects of the *Amazon* and *Engie* cases.

1. *Amazon: further guidance on the assessment of transfer pricing arrangements from the perspective of the State aid rules*

The *Amazon* case concerns transfer pricing arrangements within a group of companies – the facts are to a large extent similar to those at stake in previous cases, such as *Starbucks* and *FIAT*. (For our analysis of those judgments, see VBB on Competition Law, Volume 2019, No. 9).

In particular, the background to the *Amazon* case concerns a corporate restructuring carried out by that company between 2003 and 2006. As part of its restructuring, Amazon set up two companies in Luxembourg, namely Amazon Europe Holding Technologies SCS ("LuxSCS") – a Luxembourg limited partnership whose partners were Amazon companies based in the US – and Amazon EU Sàrl ("LuxOpCo") – a wholly-owned subsidiary of LuxSCS. During the relevant period, LuxOpCo constituted the headquarters of the Amazon group in Europe and functioned as the principal operator of Amazon's European online retail and service business. In 2005, LuxSCS concluded certain agreements with its US (Amazon) partners, including licensing agreements related to certain intellectual property rights. In 2006, LuxSCS then sublicensed those intellectual property rights to LuxOpCo, in exchange for the payment of a royalty (the "License Agreement").

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In preparation for that corporate restructuring, in 2003, Amazon requested the Luxembourg tax authorities to confirm the methodology envisaged by Amazon to estimate the arm's length royalty rates that LuxOpCo was to pay to LuxSCS for the use of the IP rights, in accordance with the License Agreement. The rates were calculated on the basis of a transfer pricing report prepared by Amazon's tax advisors. In November 2003, the Luxembourg tax authorities adopted a tax ruling, which approved the proposed transfer pricing analysis and resulting rates. A second ruling was adopted in 2011 to prolong the validity of the earlier ruling. The tax treatment endorsed by the tax ruling(s) was applied from 2006 to 2014.

On 4 October 2017, the Commission adopted a decision finding that Luxembourg had granted undue tax benefits to Amazon of around € 250 million in breach of the State aid rules (the "Amazon Decision"). In essence, the Commission found that – in so far as Luxembourg had endorsed the arm's length nature of the method of calculating the royalty to be paid by LuxOpCo to LuxSCS – the Luxembourg tax rulings, and their annual implementation from 2006 to 2014, constituted "State aid" for the purpose of Article 107(1) TFEU and were incompatible with the internal market. More specifically, the Commission found that an advantage had been granted to LuxOpCo, considering that the royalty paid by LuxOpCo to LuxSCS during the relevant period was too high to be at arm's length, with the result that LuxOpCo's remuneration and its tax base were artificially reduced.

In its judgment of 12 May 2021, the General Court annulled the *Amazon* Decision. For the most part, the judgment of the General Court is highly fact-specific and, from a substantive perspective, is not innovative. There are, however, some interesting points to note.

The first interesting aspect of the ruling concerns the criteria to assess whether a fiscal measure endorsing a certain level of transfer pricing for an intra-group transaction constitutes an "advantage" in the sense of Article 107(1) TFEU. The Court recalled its existing case law concerning the correct assessment of methodological errors made by tax authorities (*Starbucks*) and clarified that "[t]*he existence of State aid cannot be presumed or inferred from a calculation error which has no impact on the result*" (*ibid.*, para. 124). This finding does not seem to be exclusively related to transfer pricing calculations and may in principle also be valid in other cases where the Commission criticizes the methodology endorsed by Member States to calculate the taxable amount of a given transaction.

The second point of interest is that, in its ruling, the General Court specified the conditions under which the Commission was entitled to rely on the OECD Transfer Pricing Guidelines when assessing the tax rulings. The Court first recalled that "*even though the Commission cannot be formally bound by the OECD Guidelines, the fact remains that those guidelines are based on important work carried out by groups of renowned experts, that they reflect the international consensus achieved with regard to transfer pricing and that they thus have a certain practical significance in the interpretation of issues relating to transfer pricing*" (para. 122). However, the problem in the present case was that the Commission applied different versions of the OECD Guidelines on transfer pricing (those of 1995, 2010 and 2017). This raised the question of whether it could (retroactively) apply the 2010 and 2017 versions of the OECD Guidelines for the purpose of assessing whether the tax ruling (adopted in 2003 and renewed in 2011) was compatible with the State aid rules.

In this regard, the Court noted that "*the 1995, 2010 and 2017 versions of the OECD Guidelines differ on several points, and to various extents. Those differences range from mere clarifications which have no impact on the substance of the earlier versions to entirely new elaborations, namely recommendations which were not contained, including implicitly, in the earlier versions*" (*ibid.*, para. 152). Therefore, even though the Commission is, as a general rule, entitled to rely on the OECD Guidelines, in the present case it could only apply the version that the Luxembourg tax authority could consult in 2003, i.e. 1995 version, and, to a limited extent, the 2010 version insofar as this merely provided useful clarifications, without further elaboration, of the 1995 version. The Commission could not, on the other hand, use the 2017 version of the OECD Guidelines in the context of its assessment, because these were adopted after the relevant period and significantly modified the earlier versions of OECD Guidelines. This confirms that even non-binding instruments, such as the OECD Guidelines, are subject to the general principle of *tempus regit actum* – according to which a situation must be appraised in light of the rules applicable at the time of the event.

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The third point to note concerns the choice of the "tested party" in the transfer pricing calculation. As a general rule, the tested party (i.e., the intra-group party which has to be tested as a benchmark) must be the one that has the less complex functions in relation to the intra-group transaction under review. The profit of this tested party has then to be compared to the profit realized by comparable uncontrolled transactions of independent undertakings, in order to establish the arm's length price. In the present case, the primary line of reasoning of the Commission in relation to the existence of a "selective advantage" was based on the choice of LuxOpCo as the tested party. According to the Commission, the functional analysis of LuxOpCo and LuxSCS made by the authors of the 2003 transfer pricing report, and ultimately accepted by the Luxembourg tax administration, was incorrect and could not result in an arm's length outcome. The Commission noted that: "[o]*n the contrary, the Luxembourg tax administration should have concluded that LuxSCS did not perform any 'unique and valuable' functions in relation to the intangible assets for which it merely held the legal title.*" Therefore, according to the Commission, LuxSCS should have been selected as the tested party for the application of the transfer pricing calculation and not LuxOpCo – since it was the less complex entity of the two and thus better suited to serve as tested party.

The General Court, however, found that the Commission wrongly assessed the functions exercised by LuxSCS in the context of the Amazon corporate structure. In short, contrary to what the Commission held, in the Court's view it could not be considered that LuxSCS passively held the intangible assets licensed to LuxOpCo, since it exploited them and assumed all the related risks. In light of this, the Court found that the Commission wrongly considered that the Luxembourg tax authorities had incorrectly chosen LuxOpCo as the tested party in the context of the transfer pricing calculation. In addition, the Court found that the Commission's calculation of the remuneration of LuxSCS was vitiated by numerous errors. Therefore, according to the Court, the Commission's primary findings wrongly established that LuxOpCo's tax burden was artificially reduced. The Court also found that the subsidiary findings of the Commission did not demonstrate that LuxOpCo obtained an advantage.

2. *Engie: the General Court endorses the Commission's economic assessment of fiscal aid measures and opens the way to State aid investigations on "abuse of law"*

The *Engie* case (Joined cases T-516/18 and T-525/18) concerns two tax rulings issued by the Luxembourg authorities in relation to intragroup transactions implemented by Engie. In short, a holding company established by Engie in Luxembourg transferred a set of assets to a subsidiary in Luxembourg to finance the latter's business activities. The payment of the price for those assets by the subsidiary was financed by a 15-year interest-free mandatorily convertible loan (the "ZORA") granted by an intermediary company of the Engie group, which is also resident in Luxembourg. The ZORA did not bear any periodic interest but, at conversion, the subsidiary would transfer to the lender shares representing the nominal value of the ZORA plus a "bonus" (consisting of all profits realised by the subsidiary during the life of the ZORA minus a certain margin) (the "ZORA Accretions"). In turn, the lender would finance the loan by means of a Prepaid Forward Sale Contract (the "Forward Contract") entered into with the holding company (also resident in Luxembourg). Under the Forward Contract, the holding company paid to the intermediary company an amount equal to the nominal value of the ZORA, against the acquisition of the rights to the shares that the subsidiary would issue on the day of conversion of the ZORA.

The tax rulings granted by the Luxembourg authorities confirmed that, in light of the ordinary Luxembourg tax rules, the Engie subsidiary could deduct provisions for the ZORA Accretions to be paid on the date of conversion every year – meaning that it would not be taxed except on the margin agreed with the tax authorities. If and when the holding company then realised the ZORA Accretions, this profit would be tax exempt pursuant to the application of the Luxembourg participation exemption regime, which allows for the non-taxation of holding profits stemming from participation in other companies. The intermediary entity would also not be taxed since the profit realised from the conversion of the ZORA (the ZORA Accretions) would be compensated by a loss of the same amount resulting from the Forward Contract.

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On 20 June 2018, the Commission adopted a decision (the "*Engie Decision*"), which found that the tax rulings granted a "selective advantage" to Engie in the form of a reduction of the taxable base and the corporate income tax liability of the group in Luxembourg. According to the Commission, an economic operator in a factual and legal position similar to the Engie group should have been taxed on the costs related to an instrument such as the ZORA, either at the level of the borrower or at the level of the lender. In short, by allowing for the deduction of the ZORA Accretions by the subsidiary and, at the same time, the non-taxation of the corresponding income at the level of the holding, the contested tax rulings gave rise to a selective advantage in the sense of Article 107(1) TFEU.

On 12 May 2021, the General Court rejected Engie's action for annulment against the contested Commission decision. Contrary to *Amazon* – which, as noted above, is essentially aligned with the earlier case law – *Engie* provides a ground-breaking interpretation of the State aid rules, which will most likely spark considerable debate about the powers of the Commission in the field of fiscal aid measures.

Leaving the technicalities of the case aside, the following steps in the General Court's reasoning is noteworthy.

First, the ruling confirms the increasing extent to which the distinction between the conditions required to prove the existence of an "advantage" and the "selectivity" of that advantage in the sense of Article 107(1) TFEU is being blurred by the case law – at least in the case of fiscal aid measures. In particular, the General Court noted that, even though these are separate and cumulative conditions (para. 239), their examination may in practice overlap in the context of fiscal measures since their assessment requires it to be demonstrated that the measure led to a reduction of the amount of tax which the recipient would have had to pay under the ordinary tax rules (*ibid.*, para. 241). The General Court referred to the judgment of 30 June 2016, *Belgium v Commissio*n (Case C-270/15 P, paragraph 32), in which the Court of Justice had (cryptically) referred to a "third condition", according to which the Commission is required to assess whether the measure at issue confers a "selective advantage" on the recipient. The same approach was followed in the judgment of 15 July 2020 in *Apple* (VBB on Competition Law, Volume 2020, No. 7).

As we already noted in relation to the *Apple* judgment, the conflation of the "advantage" and "selectivity" conditions into one single requirement is making it even more difficult to assess whether a fiscal measure is caught by the State aid prohibition or not. In particular, it is increasingly challenging to understand the interplay between these two conditions and the related standards of proof with which the Commission is required to comply. It is to be hoped that the Court of Justice will soon clarify whether – and to what extent – the distinction between those two conditions still exists when it comes to State aid in the form of fiscal measures.

Second, the General Court rejected a line of argument put forward by Engie and Luxembourg, which was based on Directive 90/435/EEC of 23 July 1990 on the common system of taxation applicable in the case of parent companies and subsidiaries of different Member States (the "Parent-subsidiary Directive").

In short, the applicants argued that the system of reference – i.e., the benchmark – to establish whether the advantage granted to Engie was selective had to include cross-border transactions covered by the Parent-Subsidiary Directive applicable at the time of the tax rulings. At that time, that Directive (now repealed) provided that Member States could choose between two options to ensure tax neutrality of cross-border transactions. The Member State could either: (i) exempt from taxation the income of tax resident holding companies from their participation in subsidiaries which are tax resident in another Member State; or (ii) allow for a deduction of the income originating from those subsidiaries. Neither of these two options was subject to the condition that the income must be taxed at the level of the subsidiary in order for the holding company to benefit from the exemption or the deduction. With that in mind, the applicants argued that the Commission could not find, in the present case, that Luxembourg granted "State aid" to Engie, insofar as it did not require the income of its subsidiary to be taxed for the holding company to benefit from the exemption. In fact, insofar as the Parent-Subsidiary Directive allowed the tax exemption of the holding in a cross-border scenario, the same treatment must have also been allowed in relation to transactions whereby all parties are located in the same Member State (i.e., "purely internal"). Had Luxembourg done what the Commission required, it would have granted a selective advantage only in favour of cross-bor-

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der transactions, in respect of which, as noted above, the prior taxation condition was not applicable in order to benefit from the exemption at the holding company level.

In regard to this argument, the General Court noted that, in the present case, the Parent-Subsidiary Directive is not applicable, since the situation is "purely internal" – i.e., the holding, intermediary and subsidiary companies are all based in Luxembourg. In such circumstances, according to the Court, Luxembourg was not obliged to extend the favourable tax treatment granted by the Parent-Subsidiary Directive to the type of transactions at issue. The Court clarified that EU law requires Member States not to treat cross-border transactions in a less favourable manner than "purely internal" situations. However, it does not, by contrast, require them to avoid any reverse discrimination, meaning that a cross-border transaction can be treated more favourably than a domestic one (para. 281).

As regards the possibility that the advantage granted to cross-border transactions (to which the Parent-Subsidiary Directive would apply) would qualify as "State aid" – in accordance with the *World Duty Free* judgment of 21 December 2016 – the Court noted that Luxembourg would have been required by the Parent-Subsidiary Directive to exempt or allow the deduction of the income of the holding company in case of a cross-border transaction. Therefore, this benefit would result from the application of the Directive itself and could not be attributable to the Member State – and constitute "State aid". While past case law had already recognized this principle in situations where EU law set out a clear, unconditional and precise obligation for the Member State to act in a certain way (see judgment of 5 April 2006, *Deutsche Bahn*, paras 99 to 104), the Court has now extended this principle to situations in which – as in the present case – the relevant EU law provision leaves a significant margin of discretion to Member States. In fact, as noted above, the Parent-Subsidiary Directive leaves Member States free to decide whether to opt for an exemption or a deduction methodology, in order to achieve the intended tax neutrality of cross-border transactions. This is an interesting development, which may in the future grant more leeway to Member States to adopt aid measures on the basis of EU law provisions without being caught by the State aid rules.

A third important aspect of the judgment concerns the interpretation by the General Court of the relevant provisions of Luxembourg tax legislation. As pointed out by the Court, Luxembourg tax law did not expressly require – at the time of the adoption of the tax rulings –income to be taxed at the level of the subsidiary company in order for it to benefit from an exemption at the level of the holding company (e.g., para. 292). However, the Court found that this reading of the national rules would lead to the result that, in a situation such as the one at stake, the income generated by this type of transaction would not be subject to taxation. Hence, the Court considered that those rules must be interpreted in the sense that the exemption could only be granted by the tax administration if and insofar as the relevant income was previously taxed (para. 293). In the Court's view, this concretely means that the relevant income must not have been deducted by the subsidiary (para. 297).

This approach of the General Court, which essentially consists of going beyond the text of the relevant tax rules and looking at the economic reality and effects of the transaction, is also reflected in other passages of the judgment (see, in particular, para. 311). While this effects-based approach is not new in State aid law, it does not seem to have been applied in the past in order to identify the scope of the relevant national rules or the qualification of a transaction under tax legislation. This development may in future lead to an extension of the powers of the Commission in reviewing Member States' tax policies – and in interpreting, on the basis of an economic approach, the relevant national rules.

The last aspect of the *Engie* judgment to note is the reasoning concerning "abuse of law", which – although of secondary importance in the argumentation of the Court in this case – is likely to be of considerable relevance for future cases. In this regard, the GC essentially upheld the Commission's finding that, since the type of transaction carried out by Engie qualified as an "abuse of law" under national law, the relevant provisions of Luxembourg law precluded the tax authorities from issuing the tax rulings. Had those authorities correctly applied the national legislation, they should have refrained from granting those tax rulings. Therefore, as the rulings were issued in derogation of the national rules on "abuse of law", they granted a "selective advantage" to *Engie*.

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General Court delivers three new judgments concerning State aid granted to support airlines in the aftermath of the COVID-19 pandemic

On 19 May 2021, the General Court of the European Union ("GC") delivered three further judgments in cases brought by Ryanair concerning State aid granted to support other airlines in the aftermath of the COVID-19 pandemic. In one of these cases, the GC rejected Ryanair's action for annulment against a Spanish aid scheme (Case T-628/20, *Ryanair v Commission*); in the other two cases, it ruled in favour of Ryanair and annulled the contested Commission decisions relating to aid granted by Portugal and the Netherlands (Cases T-465/20 and T-643/20, *Ryanair v Commission*). These judgments follow the recent rejections by the GC of several other actions for annulment filed by Ryanair against Commission decisions authorizing other COVID-19 related State aid in the airline sector (see VBB on Compe-tition Law, Volume 2021, Nos 2 and 4).

The two judgments in which the General Court ruled in favour of Ryanair are the most interesting of the three, and these are analysed further below.

The first case (T-465/20) concerns aid measures adopted by Portugal in favour of Transportes Aéreos Portugueses SGPS SA ("TAP Holding"). TAP Holding is the sole shareholder of Portuguese Transportes Aéreos Portugueses SA (better known as "TAP Air Portugal"). The shares in TAP Holding were held as to: 50% by a state-owned management company Parpública; 45% by Atlantic Gateway SGPS Lda ("AGW"); and 5% by third parties. In a decision of 10 June 2020, the Commission authorized the State aid granted by Portugal in favour of TAP Holding (the "TAP decision") on the basis of Article 107(3)(c) TFEU and the Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty (the "Restructuring Guidelines").

The second case (T-643/20) concerns State aid granted by the Netherlands in favour of the airline Koninklijke Luchtvaart Maatschappij NV (better known as "KLM"). The aid was authorized by a Commission Decision of 15 July 2020 (the "KLM decision") on the basis of the Temporary Framework for State aid measures to support the economy in the current COVID-19 outbreak (the "Temporary Framework"). As explained in the judgment (para. 3), the aid to KLM followed another aid measure granted by the Netherlands to Air France, which is part of the same corporate group as KLM (Air France and KLM are both subsidiaries of the Air France-KLM holding company).

In its judgments of 19 May 2020, the General Court annulled both the TAP and KLM decisions, finding that the Commission failed to comply with its duty to state reasons under Article 296 TFEU. It should be recalled that this provision, as interpreted by the case law, requires an EU institution adopting a measure to "*disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent court to exercise its power of review*" (Cases T-465/20, para. 36, and T-643/20, para. 38).

In particular, the Court found that the TAP decision did not provide any analysis with regard to the conditions set out in paragraph 22 of the Restructuring Guidelines. This paragraph sets out three cumulative conditions in order for aid granted to a company belonging to a group to be regarded as compatible with the internal market. The Commission must examine, first, whether the beneficiary of the aid belongs to a group and, as the case may be, the composition of that group; second, whether the difficulties faced by the beneficiary are intrinsic and are not the result of an arbitrary allocation of costs within the group; and third whether those difficulties are too serious to be dealt with by that group itself. The Court noted that the TAP decision did not include any findings or analysis in relation to the group of undertakings to which the beneficiary belonged. Moreover, it failed to provide any explanation as to why the second and third conditions laid down by paragraph 22 of the Guidelines would be satisfied.

As regards the KLM decision, the Court found that the Commission had breached its duty to state reasons essentially because it had failed to assess whether the aid previously granted to Air France had an impact on the compatibility with the internal market of the aid adopted in favour of KLM. Since Air France and KLM are part of the same group of undertakings, the Commission should have provided sufficient reasons to demonstrate that the aid previously granted to Air France could not have been used

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by KLM to finance its liquidity needs. In the absence of such a demonstration, the Court found that it could not authorize the State aid to KLM.

For these reasons, the General Court annulled both the TAP and KLM decisions. However, the Court decided, on the basis of Article 264 TFEU, to maintain the effects of those decisions (i.e., to treat them as still applicable) on a temporary basis until the Commission has adopted the measures necessary to replace them in accordance with the requirements stemming from Articles 266 and 296 TFEU.

In particular, the Court ruled that overriding reasons of legal certainty justify the temporary maintenance of the effects of the TAP and KLM decisions "*for a period of no more than two months from the date of delivery of this judgment if the Commission decides to adopt such a new decision under Article 108(3) TFEU, and for a reasonable further period if the Commission decides to initiate the procedure under Article 108(2) TFEU*" (Cases T-465/20, para. 62, and T-643/20, para. 84). In this regard, the Court emphasized, *inter alia*, the negative effects that an (immediate) annulment would have had on the Member States' economies. It also noted that the reason for the annulment of the decisions was the inadequacy of the statement of reasons provided by the Commission – and not flaws in the substantive analysis. As a result, in each of the two cases, the Commission could potentially remedy the defects in the decisions by providing a more detailed analysis of the relevant factors at stake.

The temporary maintenance of the effects of the two decisions is the sting in the tail of these judgments. At least for the time being, in practice Ryanair's victory will not have any positive consequences for the airline, and will not lead to the recovery of the amount of aid granted to its competitors. An order maintaining the effects of an annulled EU law provision is very rare – the Court only applies Article 264 TFEU in exceptional circumstances. The fact that it decided to do so in this case appears to confirm the Court's desire to ensure greater flexibility in the application of the State aid rules in order to enable Member States to tackle the economic consequences of the COVID-19 outbreak.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Review of EU competition rules on horizontal agreements – Commission identifies areas where existing rules may be revised or amended

In the course of the ongoing review of the application of the EU competition rules to horizontal cooperation agreements, the European Commission ("Commission") published on 7 June 2021 an inception impact assessment ("IIA") in relation to potential revisions to the Research and Development Block Exemption Regulation ("R&D BER") and the Specialisation Block Exemption Regulation ("Specialisation BER") (together the "H-BERs") as well as of the guidelines on horizontal cooperation agreements (the "Horizontal Guidelines"). This follows the publication of a Staff Working Document ("SWD") on 6 May 2021, which concluded the evaluation phase of the review, during which the Commission had gathered evidence on the functioning of the current horizontal cooperation rules. In the IIA, the Commission now indicates the areas in which it is considering revising and amending the existing legal framework.

The SWD took stock of evidence collected during the evaluation phase on the experience of stakeholders with the three instruments (described above) governing horizontal cooperation agreements. The SWD also considered feedback on a 2020 call for contributions on competition policy and the Green Deal, to the extent that this was relevant to horizontal cooperation agreements.

Unsurprisingly, the SWD concluded that the three instruments have generally worked well. At the same time, it identified a range of issues that could be addressed in order to reduce compliance costs for businesses, mitigate potential chilling effects of the existing rules on R&D, and encourage socially desirable horizontal cooperation agreements.

The IIA builds on the results of the SWD and identifies, in several areas, concrete policy options for potential revisions and amendments to the current rules. The most significant areas identified by the IIA include:

- **Widening the scope of the R&D BER**: This could, for example, be done by creating a specific category of R&D agreements involving SMEs covered by the exemption, by making it easier for R&D agreements involving academic bodies and research institutions to qualify for exemption, and by relaxing some of the current conditions for exemption (e.g., full access to R&D results and access to pre-existing know-how) which might exclude R&D agreements that do not raise competition law concerns.

- **Widening the scope of the Specialisation BER**: This could be done by including additional types of agreements (e.g., tolling arrangements) within the scope of the Specialisation BER, and by introducing a specific category of specialisation agreements in which SMEs participate.

- **Modernising the Horizontal Guidelines to take account of recent market developments**: The Commission intends to address a range of agreements which are not covered in the current Horizontal Guidelines but have become increasingly commonplace in light of digitalisation and the pursuit of sustainability objectives.

- **Improved guidance on standardization agreements**: In the standards setting context, the revised Horizontal Guidelines may provide greater clarity on what constitute fair, reasonable and non-discriminatory ("FRAND") terms and on SEP licensing and disclosures, an area that continues to be hotly contested and where the Commission has to date not been able to reconcile the diametrically opposed positions of SEP holders and implementers.

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- **Clarifying rules on information exchanges**: In addition to updates in light of recent case law, revised Horizontal Guidelines may address a number of additional areas, including data sharing, data pooling and network sharing agreements. The Commission may also attempt to provide more guidance on certain types of permitted information exchanges, such as information sharing in the context of mergers and acquisitions projects. As part of its recent review of the Vertical Block Exemption Regulation (see VBB on Competition Law, Volume 2021, No. 3), the Commission also indicated that it may consider it appropriate to address information exchanges in dual distribution systems in the Horizontal Guidelines.

A widening of the scope of the H-BERs to include a wider range of agreements that do not raise competition law concerns would be justified from a competition policy perspective and would be welcomed by market participants. But other changes considered by the Commission could result in more restrictive rules. This would be the case, for example, if information exchanges in dual distribution agreements were addressed in the Horizontal Guidelines. This would be an unfortunate development, considering that the relationship between a supplier and its distributors remains vertical, even if the supplier also operates through its own retail outlets.

It will also be very interesting to see how the Commission intends to incorporate sustainability goals in the Horizontal Guidelines. There is – for good reason – very little experience in the consideration of non-competition policy goals in competition law analysis, but the EU Green Deal has led to calls for improved guidance on the assessment of collaboration agreements pursuing sustainability goals. The most difficult – and potentially controversial – aspect that revised Horizontal Guidelines would have to address in this context is how qualitative efficiencies, including out-of-market efficiencies (e.g., reductions of CO2 emissions), can be incorporated in an Article 101(3) analysis. In doing so, the Commission would have to address a number of thorny questions. For example, even if there appears to be a great willingness to consider sustainability goals pursued by horizontal agreements, one might wonder whether such an analysis should be limited to sustainability or more broadly encompass a wide range of other public interest goals, ranging from animal welfare and privacy to EU industrial policy goals. It also would have to be determined whether sustainability (and other policy goals) should be relevant only when considering whether an agreement merits an exemption under Article 101(3): If non-competition concerns matter in competition law analysis, the Commission would have to consider whether agreements that undermine certain non-competition goals (e.g., agreements that have a harmful impact on the environment) would be more likely to be found to "restrict competition" and infringe Article 101(1).

Clearly, because horizontal cooperation agreements can exist in so many shapes and forms – from early R&D to standardisation agreements, information exchanges, joint bidding, joint purchasing, and agreements pursuing sustainability goals – any revisions to the currently applicable rules likely will have a major impact on almost all market participants.

Stakeholders have until 5 July 2021 to comment on the IIA. This will be followed by a public consultation in the summer of 2021. The publication of the draft revised H-BERs and Horizontal Guidelines is expected in early 2022, with new rules being adopted toward the end of 2022.

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