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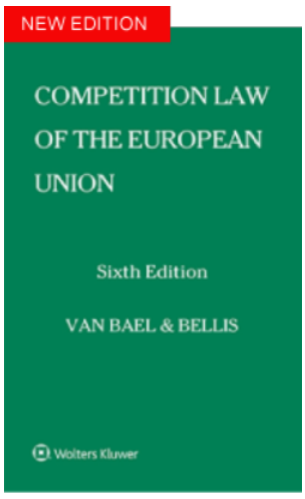
Highlights

MERGER CONTROL
Commission unleashes new approach to Article 22 referrals in *Illumina/Grail*
Page 3

ABUSE OF DOMINANT POSITION
Court of Justice rules that Bronner indispensability requirement does not apply to conduct that falls short of outright refusal to supply
Page 7

Pricing of medicines – what's next following Aspen?
Page 8

STATE AID
General Court rejects Ryanair's actions for annulment against Commission decisions on COVID-19 individual aid in the aviation sector (Cases T-388/20, *Ryanair v Commission*, T-378/20, *Ryanair v Commission*, and T-379/20, *Ryanair v Commission*)
Page 14



Jurisdictions covered in this issue

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Table of contents

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission unleashes new approach to Article 22 referrals in *Illumina/Grail*

On 23 March 2021, the European Commission ("Commission") published Guidance outlining its new approach in accepting and encouraging referrals under Article 22 of the Merger Regulation of deals that fail to meet either the EU or Member State turnover thresholds but that nonetheless affect competition. Shortly thereafter, on 20 April 2021, the Commission accepted its first Article 22 referral under the new policy, asserting jurisdiction to review the *Illumina/Grail* transaction although the deal was not notifiable in the EU – either to the Commission or to any Member State competition authority. This shift in the EU's longstanding policy of discouraging such referrals could signal a new era of expansive Commission powers and of increased uncertainty for merging parties.

The Article 22 referral mechanism

Article. 22 is one of several referral mechanisms in the Merger Regulation, which allows the Commission to take up jurisdiction of a transaction that does not meet the EU's merger notification thresholds. It provides that the Member States may request that the Commission examine any such transaction, provided that it: (i) affects trade between the Member States, and (ii) threatens to significantly affect competition within the territory of the Member State making the request.

Notably, the text of Article 22 indicates that the Commission may take up the referral of "any transaction" meeting these conditions, and does not expressly require that the referring Member State have original jurisdiction under national law to review the merger. This construction was intentional. Colloquially referred to as the "Dutch clause", Article 22 was drafted at a time when a number of Member States (including the Netherlands) did not have their own merger control authorities. The article's liberal approach to jurisdiction was meant to ensure that significant transactions in such Member States could not evade review entirely.

Nevertheless, the Commission had not used – and indeed had a policy of discouraging – Member States with merger control regimes from referring cases over which they did not have original jurisdiction. Once all the Member States, with the exception of Luxembourg, had implemented national merger control procedures, it increasingly appeared that the technical possibility of a Member State referring a case over which it lacked jurisdiction was merely a legal vestige of a past age, which many argued should be corrected in the Merger Regulation.

The EU's 'New Approach'

The Commission, however, saw an opportunity to revive the relevance of this historical legal loophole and expand the reaches of its jurisdiction to cover so-called "killer" acquisitions that did not meet national or EU turnover thresholds. In its new Guidance, the Commission has indicated that it views the Article 22 mechanism as an important tool to control mergers in emerging markets where the parties may develop into key competitive players, but have not yet generated sufficient turnover to trigger any notification requirements. In particular, the Commission has singled out the digital and pharmaceutical sectors as areas in which innovative companies with significant competition potential may be acquired well before they are able to realize any revenues. The Article 22 mechanism, the Commission notes, would ensure that such acquisitions do not escape review if they affect trade between the Member States and could negatively impact competition. The Commission has therefore announced its intention to accept and encourage Article 22 referrals from Member States lacking original jurisdiction under certain circumstances.

Illumina/Grail

After publishing its Guidance, the Commission wasted little time in accepting its first referral under the new policy: the acquisition of the US cancer detection test start-up Grail by the US genomics firm Illumina. The Commission

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asserted jurisdiction seven months after the deal was publicly announced, although the acquisition was not notifiable at EU or Member State level, and Grail has no activities at all in the EU. After reportedly being prompted by the Commission, France referred the merger to the Commission, and Belgium, the Netherlands, Greece, Iceland and Norway joined the request. The Commission agreed to accept jurisdiction, noting that the fact that Illumina was willing to pay over USD 7 billion for a company that had not yet generated turnover indicated that the competitive significance of the deal was not reflected in the target's revenues. The Commission also concluded that the acquisition might allow Illumina to restrict access to or increase prices for the next generation of sequencers or reagents used in cancer testing. After losing court appeals in both France and the Netherlands, Illumina is now required to notify the transaction to the Commission and must delay implementation of its transaction until clearance is granted. Illumina has appealed the Commission's decision to assert jurisdiction under Article 22 before the General Court.

An uncertain future for small mergers

The review of *Illumina/Grail* is the first in what is likely to be an expansive new use of Article 22 to examine previously non-reviewable mergers. Until now, EU and national turnover thresholds provided merging parties with clear obligations and expectations when considering regulatory approval in Europe. The Commission's new Guidance purportedly aims to provide indications of which types of transactions are most suitable for an Article 22 referral, in the interest of providing "transparency, predictability and legal certainty" to merging parties. Unfortunately, the Guidance falls far short of doing so.

First, the Guidance does not appreciably heighten the historically low bar for the Commission to accept an Article 22 referral, despite now accepting cases where the requesting Member State lacks original jurisdiction. Historically, the Commission has accepted nearly all Article 22 referral cases. The first statutory condition that a transaction must affect trade between the Member States is routinely satisfied, as most mergers have some discernible impact on the cross-border trade of goods or services. In order to fulfil the second condition, a Member State authority need only make a *prima facie* demonstration that the transaction could raise competition law concerns. The Guidance does not indicate that these requirements should be judged more stringently in cases where no original jurisdiction exists.

Rather, the Guidance merely stresses that "normally" the new policy will cover transactions where the turnover of one party does not reflect its actual or future competitive potential (e.g., because it is a start up, an important innovator, an actual or potential important competitive force, has access to competitively significant assets, or provides products or services that are key components to downstream industries). As this broad list is purely "illustrative", nothing prevents the Commission from accepting any case that it wants to review, provided the low statutory conditions are met. Moreover, the Commission is currently proposing to require gatekeepers to notify below-threshold mergers through the Digital Market Act, though this notification has no suspensory effect. A broad application of Art. 22 combined with this increased transparency, however, will make it very easy for the Commission to call in, suspend, review, and potentially block such transactions, even if they do not meet any EU or national notification threshold. Second, the Guidance does not meaningfully create legal certainty for parties that have closed a transaction that did not require notification. Article 22 sets a 15 day time limit for a referral, running from the time a transaction is notified or "otherwise made known" to the Member State. If a transaction does not require any national merger notifications, it may be that a Member State only learns of a deal long after it has closed. Although the Guidance notes that the Commission "generally" does not intend to examine cases more than six months after closing, the Guidance firmly asserts that the Commission retains the right to examine (and potentially undo) any deal, no matter how long after closing, based on its assessment of the magnitude of the competition concerns involved or the potential effect on consumers. This leaves merging parties in perpetual uncertainty, unless they proactively inform every Member State of their transaction, even though there is no formal legal requirement to do so.

In short, instead of engaging in the – admittedly more challenging – task of reforming the EU merger rules to address the threat of "killer" acquisitions falling below the EU merger thresholds, the Commission has instead resurrected an outdated and ill-suited provision in the Merger Regulation to do so. Unfortunately, this new policy grants the Commission very extensive, discretionary powers of review without implementing any meaningful safeguards to ensure legal certainty for merging parties.

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– UK LEVEL –

Facebook/Giphy: the CMA's unique approach to analysing tech deals

On 1 April 2021, the UK's Competition and Markets Authority ("CMA") referred Facebook's acquisition of Giphy (which closed in May 2020) for an in-depth review. Giphy is an online provider of animated images and stickers (GIFs), which users can share on all major platforms, such as Facebook, Instagram, Snapchat and Twitter. The CMA referred the deal to Phase II, concluding that post-transaction Giphy would have lower incentives to compete with Facebook in the digital advertising market, and that the merged entity could harm rival social media platforms by worsening the terms on which Giphy provides its (free) GIFs or terminating supply to other digital players. The statutory deadline for the completion of the Phase II review is 15 September 2021.

In reviewing this transaction, the CMA has used several unusual features of the UK merger control process to strike an aggressive posture in the tech sector. This includes establishing jurisdiction on the flexible "share of supply" test, imposing hotly contested hold-separate arrangements though an Initial Enforcement Order ("IEO"), assessing the acquisition against two counterfactual scenarios, relying on evidence from the CMA's 2020 market study on online platforms, and applying a vertical theory of harm in the context of digital markets. Each of these aspects is discussed below.

Jurisdiction

The CMA has relied on the "share of supply" concept particular to the UK merger regime to establish jurisdiction. Share of supply is different from the notion of "market share" used in most other jurisdictions, and need not relate to a recognised economic market. The CMA concluded that the transaction met the share of supply test with regard to both: (i) the supply of GIF searches to the UK market (as the merging parties held a combined share of 50-60% in the supply of monthly GIF searches); and (ii) the supply of searchable libraries of animated stickers, including GIF and non-GIF stickers (as the merging parties had a combined share by sticker library size of 80-90%). The share of supply test has therefore allowed the CMA to use an innovative and flexible approach to establish jurisdiction.

The IEO

Facebook and Giphy closed the transaction in May 2020, without notifying it to the CMA. After calling in the deal for review, the CMA imposed an IEO to ensure that the parties' businesses were managed independently in the interim. Facebook quickly sought a derogation, asking that a large part of its existing business be released from the IEO. The CMA refused on the basis that it had received insufficient information from Facebook to consider allowing the derogation. On appeal, the UK's Competition Appeal Tribunal ("CAT") endorsed the CMA's strict approach to IEOs and called for parties seeking derogations to cooperate more closely with the CMA when providing information. If the CAT's decision is upheld on further appeal to the Court of Appeal, this will signal that parties seeking any broad derogations from IEOs will face a high evidentiary burden and an uphill battle.

The counterfactual and additional evidence

The CMA adopted an unconventional approach to assessing the counterfactual (i.e., the situation that would exist absent the merger), by considering two different scenarios rather than only one. The first counterfactual was the pre-merger situation, wherein Giphy would have continued to operate independently on the market, separate from Facebook and competing with it. The second scenario assumed Giphy's acquisition by another player, potentially another social media platform. The CMA concluded that the deal raised a realistic prospect of substantial lessening of competition as compared to both of these counterfactual scenarios.

Notably, the CMA also based its assessment on evidence from its recent online platforms and digital advertising market study. The CMA considered that relying on the market study was reasonable given the timeliness of the study, the breadth of evidence it considered, and its significant relevance to the CMA's competitive assessment of factors particularly relevant to this transaction (e.g., Facebook's market share and the degree of competition that Facebook and its apps faced).

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Vertical theory of harm

The CMA considered four theories of harm, including: (i) loss of potential competition in display advertising; (ii) vertical effects through the foreclosure of social media platforms; (iii) heightened barriers to entry and expansion due to Facebook's increased data advantage in display advertising; and (iv) loss of potential competition in the supply of searchable GIF libraries.

In particular, with regard to the second theory of harm, the CMA considered that the merged entity could use foreclosure strategies to harm competitors by either causing Giphy to cease supplying GIFs to other platforms (total foreclosure), or worsening the terms on which GIFs are supplied, including requiring platforms to provide more user data in exchange for access to the GIFs (partial foreclosure). The CMA concluded that the merger gave rise to a realistic prospect of a significant lessening of competition due to these vertical effects in social media and display advertising.

The CMA's future approach to digital markets

This transaction is another example of the CMA's increasingly aggressive approach to assessing high-profile deals in the tech industry. Recently, the CMA has adopted an increasingly interventionist approach to mergers and acquisitions in the digital sector, both in terms of referring deals to Phase II and in blocking them at Phase II (see *viagogo/StubHub*, VBB on Competition Law, Volume 2021, No. 2; *FNZ/GBST*, VBB on Competition Law, Volume 2020, No. 11; and *Sabre/Farelogix*, VBB on Competition Law, Volume 2020, No. 4).

The CMA is anticipating a new, enhanced merger review rulebook for this sector to enter into force. These rules are expected to include a mandatory notification requirement preventing the completion of transactions that involve platforms with strategic market status ("SMS") until the CMA has concluded its investigation. Facebook is expected to fall within this definition, meaning that it would likely be required to notify any future acquisitions in the UK.

The CMA has already created a specially dedicated Digital Mergers Unit ("DMU"), which commenced operations on 1 April 2021, and which will enforce this new rulebook. The DMU and the new rules for digital players are intended to address wide-spread concern about historic under-enforcement in this area. Such concerns were raised in the 2019 Furman report on digital competition, which provides examples of past deals that should have been more closely scrutinised, such as *Facebook/Instagram* and *Google/DoubleClick*.

In sum, the CMA's Phase I assessment of *Facebook/Giphy* demonstrates the regulator's increasing activity in the digital sector and its willingness to intervene using a variety of creative enforcement approaches. Dealmakers should carefully consider the allocation of UK merger control risk and the serious complications and delays a CMA investigation might cause in both anticipated and already closed transactions.

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ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

Court of Justice rules that Bronner indispensability requirement does not apply to conduct that falls short of outright refusal to supply

In two judgments delivered on 25 March 2021, the Court of Justice of the European Union (the "ECJ") dismissed the appeals brought by Deutsche Telekom and Slovak Telekom against the judgments of the General Court which had partially annulled the European Commission's decision finding them to have infringed Article 102 TFEU (Case C-165/19 P, *Slovak Telekom v. European Commission*, and Case C-152/19 P, *Deutsche Telekom v. European Commission*).

By way of background, Slovak Telekom held a legal monopoly in the Slovakian telecommunications market prior to 2000. By virtue of Regulation 2887/2000 of 18 December 2000 on unbundled access to the local loop, Slovak Telekom was required to provide unbundled access to its fixed-line telecommunications network ("local loop") in order to allow other operators to compete.

On 15 October 2014, the Commission imposed fines on Slovak Telekom and its parent company, Deutsche Telekom, for abusing its dominant position on the Slovak market for broadband internet services, by refusing to provide alternative operators with fair terms of access to its local loop network, and by engaging in a margin squeeze on alternative operators of broadband services. Deutsche Telekom was fined a further € 31m for recidivism, as it had already been fined for margin squeeze practices in Germany.

By judgments of 13 December 2018, the General Court partially annulled the decision at issue and reduced both fines to account for: (i) the European Commission's failure to establish exclusionary effects of margin squeeze over a limited period (see VBB on Competition Law, Volume 2019, No. 1), and (ii) the high amount of fine imposed on Deutsche Telekom for recidivism.

In its recent judgments, the ECJ found that the General Court did not commit any errors of law, a result that was consistent with the opinion issued by Advocate General Saugmandsgaard Øe (see VBB on Competition Law, Volume 2020, No. 9).

In particular, the ECJ rejected the argument that the unfair contract terms applied by Slovak Telekom amounted to an implicit refusal to grant access to the infrastructure that would have required the Commission – in order to establish that such terms amounted to an abuse – to meet the conditions set down by the ECJ in *Bronner* (Case C-7/97), including the requirement to prove that the dominant firm's infrastructure was indispensable for competitors. The ECJ clarified that this requirement did not apply to the present case because Slovak Telekom did not refuse access to its network – indeed, it was required by EU telecommunications regulations to grant access – but merely made access more difficult through the imposition of certain terms and conditions. According to the Court, making access subject to such terms and conditions is not a refusal that triggers the *Bronner* indispensability requirement.

The Court therefore declined to expand the scope of the strict test set down in *Bronner* to situations where the conduct does not rise to the level of an outright refusal to supply. Somewhat counter-intuitively, the Court's ruling means that it will be easier to challenge conduct that makes access more difficult even in circumstances where a refusal to grant access altogether would not be abusive. In making it harder for dominant firms to engage in strategies that make access more difficult for competitors without denying them access altogether, the ruling would seem to downplay the concern raised in *Bronner* about protecting a dominant firm's freedom of contract and the incentive to innovate and compete that this freedom encourages.

The Court rejected the other arguments raised by the appellants, including the assessment of the margin squeeze and the liability of Deutsche Telekom for the conduct of its subsidiary. On the latter, the Court of Justice ruled that the exercise of decisive influence by a parent

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company over its subsidiary's conduct may be inferred from a body of consistent evidence, including: (i) the presence, in leading positions of the subsidiary, of individuals who occupy managerial posts within the parent company; (ii) the provision of staff to the subsidiary; and (iii) the regular reporting by a subsidiary to its parent company of detailed information relating to its commercial policy.

Pricing of medicines – what's next following Aspen?

In February 2021, the European Commission's ("Commission") long-running excessive pricing case against Aspen was brought to a close, with Aspen accepting a series of forward-looking pricing and supply commitments, but avoiding any fines or requirements to repay all of the higher prices charged (see VBB on Competition Law, Volume 2021, No. 2). This appears to have been a good result for Aspen, particularly in comparison with the € 5.2 million fine received in the 2016 decision from the Italian competition authority. Against this backdrop, it is timely to consider what future developments can be expected in relation to this controversial topic and what steps pharmaceutical companies can take to avoid regulatory scrutiny.

Are there other ongoing investigations?

National competition authorities in Europe (Belgium, Italy, the Netherlands and Spain) have recently focused their attention on the possibility that excessive prices are being charged for orphan medicines. One ongoing case concerns off-patent medicines previously used off-label that were later redeveloped and granted orphan status, leading to higher prices.

Will authorities prosecute the pricing of new innovative medicines?

This is unlikely. Since the failure of the Valium cases in Germany back in the 1970s, competition authorities in Europe have generally avoided prosecuting claims of excessive pricing of new medicines, both to avoid harming the incentives for innovation that drive the development of new medicines, and due to the practical difficulties of determining a "fair" price for innovative medicines. Together with the annulment of the *Pfizer/Flynn* decision in the UK, the new *Aspen* decision makes such prosecution of innovative therapies even less likely, as even in these more straightforward cases involving off-patent medicines (with no risk of harming innovation), the authorities did not establish an infringement.

Nevertheless, it is not possible to rule out prosecution of excessive prices for innovative products. Indeed, the Commission acknowledged this possibility in its submission to the OECD on Excessive Pricing in Pharmaceutical Markets. Factors that heighten the risk include significant price increases, charging different prices for the same therapy by customer type or indication (making the higher price more likely to appear excessive), or aggressive negotiations and threats (e.g., to cease supplies altogether). One helpful point from the Aspen case is that it appears that the Commission has accepted that price differences between countries do not necessarily indicate that prices are excessive.

How should companies manage excessive pricing issues?

Complaints of excessive pricing by consumer associations, politicians and NGOs should not be ignored. BEUC, together with its affiliated national consumer organizations, have successfully initiated or supported many cases against high prices of medicines, including *Aspen*. Pharmaceutical companies should both consider these challenges before they arise and be ready to respond should they do so:

Preparation:

- Set the correct price upfront (any later price increases or removal of discounts will raise higher risks);
- Carefully evaluate any differential pricing plans (by customer, indication, etc.) in the same country; and
- Avoid threats or aggressive negotiations.

Response:

- Be proactive – establish contact and credibility with any authorities considering an investigation; and
- Focus submissions on the value of the medicine to patients and health systems, the benefits of rewarding development and innovation, and the company's commitment to negotiate in good faith to achieve patient access.

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– MEMBER STATE LEVEL –

AUSTRIA

Conclusion of Pharmaceutical Pricing Investigation in Austria

On 2 April 2021, the Austrian competition authority ("ACA") accepted commitments and closed its investigation into a pricing strategy of Merck Sharp & Dohme which was alleged to unlawfully hinder entry by generic competitors (see the press releases in German and in English).

According to the ACA's press release, the investigated pricing strategy concerned the product Temodal (temozolomide – a treatment for brain tumors) and involved special offers to hospitals of below-cost prices or free products, with higher prices charged for supply to community pharmacies. This strategy was alleged to unfairly foreclose the entry of generic competitors by removing any incentive for hospitals to use alternative generic versions for the initial doses received by patients in the hospital setting. Thereafter, patients were rarely switched to an alternative generic version for subsequent doses dispensed at pharmacies.

While this pricing strategy may have benefited hospitals due to the lower prices for the initial doses, the ACA considered that, overall, the health system would be harmed due to the higher prices charged for later doses dispensed at pharmacies, and due to the reduced security of supply arising from the inability of other suppliers to successfully enter the market.

The case arose following a 2016 inspection by the European Commission, after which the ACA commenced its investigation in 2018 and brought the case to the Austrian Cartel Court in 2020, ultimately resulting in a settlement in which Merck Sharp & Dohme committed that:

- future sales of Temodal to hospitals would be at a price above average variable cost; and
- it would implement training and procedures to ensure compliance with competition law.

This case and fact pattern is reminiscent of the 2001 *Napp* case in the UK (which resulted in the finding of an infringement and the imposition of a fine on Napp) and the 2014 *AstraZeneca* case in the Netherlands (in which no infringement was established as the authority could not establish that AstraZeneca held a dominant market position). As this new case in Austria involves a settlement (with no fines and relatively light commitments), it is not certain what the ultimate result would have been had the case proceeded to a judgment by the Austrian Cartel Court.

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VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

German FCO's concerns cause leading household appliances producer to change online rebate conditions further underscoring the FCO's strict enforce-ment policy (Liebherr)

According to a press release of the German Federal Cartel Office ("FCO") dated 12 April 2021, the FCO terminated proceedings against household appliances producer Liebherr after Liebherr agreed to change its sales conditions. The FCO had initiated proceedings in response to complaints about a new rebate scheme introduced by Liebherr early in 2021.

Within its selective distribution system, Liebherr had imposed what the FCO considered to be several considerably stricter requirements for online sales than for offline sales which retailers had to meet to qualify for rebates. Liebherr required distributors selling online to ensure the availability of staff between 9 a.m. and 8 p.m. on Sundays and public holidays, to guarantee the delivery period for products that are not in stock, and to provide certain methods of payment. According to the FCO's preliminary assessment, the scheme weakened intra-brand competition, and may have impacted on online pricing. The FCO found that "*retailers who use both distribution channels and do not meet the strict online requirements risk losing the rebate for brick-and-mortar sales as well. Such clauses can substantially impair the attractiveness of online sales and even cause some retailers to cease their online activities altogether.*"

In response to the FCO's concerns, Liebherr aligned the requirements at issue to those applicable to offline sales and made availability requirements more flexible. At the same time, the FCO dismissed complaints concerning the reduction by Liebherr in the number of authorised retailers admitted to its selective distribution system: the FCO found no evidence that Liebherr's selection of retailers was discriminatory or disproportionate, and it had no objections to Liebherr's new authorization criteria. Liebherr also undertook to inform retailers which it refused to authorise of the reasons for this in writing.

While the adjustments to the rebate conditions led to the termination of proceedings, the FCO announced that it will continue to pay close attention to selective distribution systems for branded products and in particular online sales requirements. As noted in the press release, the assessment of online sales "*restrictions*" is currently a topic of "*intensive discussions at the European level*" in the context of the planned revision of the Vertical Agreements Block Exemption (VBER) and Vertical Guidelines. In this context, the European Commission is considering adopting a more flexible approach and relaxing the current requirement that obligations in relation to online sales should be equivalent to obligations imposed on off-line sales. Given the past divergence of views on the topic of online sales between the FCO and the Commission (in particular on the interpretation of the *Coty* judgment in relation to restrictions of sales over unauthorised online platforms), it would not be surprising if the FCO were somewhat sceptical of this possible change of approach at the European level.

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STATE AID

– EUROPEAN UNION LEVEL –

General Court provides guidance on the standard of judicial review of decisions not to raise objections at the end of a preliminary examination (*Achema and Lifosa*, Case T-300/19, and *Verband Deutscher Alten und Behindertenhilfe and CarePool Hannover*, Case T-69/18)

On 14 April 2021, the General Court delivered two judgments (*Achema and Lifosa*, Case T-300/19, and *Verband Deutscher Alten und Behindertenhilfe and CarePool Hannover*, Case T-69/18, hereinafter "*Achema*" and "*Verband Deutscher Alten*"), which provide further guidance on the standard of judicial review of Commission decisions not to raise objections at the end of the preliminary examination phase (see Article 4(3) of Regulation 2015/1589, OJ L 248, 24.9.2015, pp. 9-29, the "State aid Procedural Regulation").

Before describing some of the relevant takeaways of the judgments from the viewpoint of the State aid rules, it is useful to briefly outline the background of the cases.

Achema (Case T-300/19) concerned aid measures adopted by Lithuania to support producers of electricity from renewable energy sources ("RES" and the "RES aid measures"). In January 2016, Achema and other competitors of the beneficiaries of those measures filed a complaint before the Commission alleging that they constituted unlawful State aid. This complaint was supplemented in 2017. In parallel, in June 2016, the Lithuanian authorities "pre-notified" the RES aid measures to the Commission – even though the measures had already been implemented as of 2011. After several written exchanges, requests for information and meetings between the complainants, the Commission and Lithuania, Lithuania finally filed a formal State aid notification in November 2018. Following that notification, the Commission informed the complainants that it would examine their claims as part of the preliminary examination of the notified aid measure. In January 2019, the Commission adopted Decision C(2018) 9209 final on State aid SA.45765 (2018/NN), which closed the investigation and rejected the complaints.

The background to *Verband Deutscher Alten* were aid measures adopted by the state (Land) of Lower Saxony (Germany) in favour of the so-called "*umbrella welfare service organisations*" established in the territory of that state (the "*Welfare organisations*"). These organisations provide various services, including economic activities such as long-term care, nurseries, support for the elderly and people with disabilities, and for that purpose they receive financial support from the state of Lower Saxony (based on a law adopted in 1956). In June 2015, a trade association representing competitors of the Welfare organisations brought a complaint before the Commission. The complainant argued that the 1956 law was modified in 1997 and 2015, and that those changes resulted in "new aid" in the sense of Article 1(c) of the State aid Procedural Regulation. An additional complaint – based on the same grounds – was filed in 2017. Between 2015 and 2017, several exchanges took place between the Commission and the German authorities. In November 2017, the Commission adopted Decision C(2017) 7686 final on State aid cases SA.42268 and SA.42877, which closed the preliminary examination. The Commission found that, insofar as the financial contribution to the Welfare organisations would constitute State aid, it would be an "existing aid" in the sense of Article 1(b)(i) of the State aid Procedural Regulation. It hence dismissed the complaints.

In both cases, the complainants brought an action for annulment under Article 263(4) TFEU against the Commission rejection decisions. The General Court ruled in favour of Achema and Lifosa, and annulled the contested decision (Case T-300/19), whereas it dismissed the action brought by Verband Deutscher Alten and others as unfounded (Case T-69/18). Below we summarise the most important take-aways concerning the admissibility of actions for annulment (see 1. below) and the assessment of whether the Commission can lawfully terminate a State aid procedure without opening a formal investigation (see 2. below).

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1. *The General Court clarifies that the decision rejecting a complaint against an "aid scheme" is a "regulatory act" which is of "direct concern" to the complainant and "does not entail implementing measures", in the sense of Article 263(4) TFEU*

The first issue addressed by the General Court in both cases concerns the admissibility of the actions for annulment. The Court recalled that, as "interested parties" within the meaning of Article 1(h) of the State aid Procedural Regulation, complainants have standing to challenge the decision rejecting their complaint. In fact, past case law had already clarified that an action for annulment brought by an "interested party" against a decision not to open a formal investigation is admissible to the extent that it relies on violations of procedural rights. This is why the issue of admissibility was straightforward in *Achema*, since the applicants raised a single plea related to the breach of such rights.

The situation was less clear in *Verband Deutscher Alten*, because the applicants did not only rely on violations of their procedural rights, but also raised a plea contesting the substance of the State aid analysis carried out by the Commission (by arguing that the aid measure should be considered a "new aid" and not an "existing aid"). This led the General Court to examine whether the complainant had standing to bring those substantive arguments. In this regard, it recalled that, under Article 263(4) TFEU, the admissibility of an action brought by a natural or legal person against an act which is not addressed to them is granted in two alternative scenarios. Such proceedings may be instituted if (i) the act is of direct and individual concern to those persons, or (ii) the act is a "regulatory act" – i.e., a non-legislative act of general application – which does not entail implementing measures, provided that act is of direct concern to them. In *Verband Deutscher Alten*, the General Court focused on the second of these grounds on which admissibility may be established.

First, it found that the decision rejecting the complaint was a "regulatory act" in the sense of Article 263(4), third paragraph, TFEU. It referred to the *Montessori* case law, according to which a decision prohibiting or authorising a State "aid scheme" – within the meaning of Article 1(d) of the State aid Procedural Regulation – is an "act of general application" (Joined cases C-622/16 P to C-624/16 P, *Scuola Elementare Maria Montessori v. Commission*, para. 31). By analogy, the General Court found that, in the present case, the decision rejecting the complaints concerned an "aid scheme". As the beneficiaries of the aid measure were identified in "a general and abstract manner" by the German provisions, the General Court considered that the contested decision amounted to a non-legislative act of general application that qualified as a "regulatory act" for the purposes of Article 263(4), third limb, TFEU.

Second, the General Court found that the complainants were "directly concerned" by the contested decision. It noted that one of the applicants was an undertaking that provides medical assistance and ambulatory care in the Hannover region (Lower Saxony, Germany). In this context, that applicant competed with the Welfare organisations which benefited from the aid measures granted by the state of Lower Saxony. Therefore, the decision rejecting the complaint against those aid measures was capable of affecting the competitive position of that applicant and, consequently, was of direct concern to it.

Third, the General Court found that the contested decision did not require "implementing measures".

For all of the above reasons, the Court ruled that the complainants had standing to challenge the substantive assessment of the Commission in the contested decision. The findings in relation to the concepts of "regulatory act" and "direct concern" appear to be particularly important, as they seem to relax the conditions for complainants to challenge the State aid analysis carried out by the Commission in support of its rejection decisions. This may result in an increase in the number and scope of actions for annulment brought by complainants in the future.

2. *The "excessive length" of the preliminary examination as an indicator of "serious difficulties" which would require the opening of a formal investigation*

Insofar as the breach of procedural rights is concerned, the applicants in *Achema* and *Verband Deutscher Alten* contested the fact that the decisions taken by the Commission in relation to the aid measures were adopted without initiating the formal investigation procedure. As a result, the complainants were deprived of the procedural rights which would have been granted to them had the Commission opened a formal investigation.

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In this regard, the General Court recalled that the applicants must demonstrate, in the context of such actions, that the information and evidence that was available to the Commission during the preliminary examination raised doubts as to the compatibility of the aid with the internal market. The existence of such doubts must be shown on the basis of a "body of consistent evidence", which must demonstrate that the Commission encountered "serious difficulties" in its preliminary examination. The applicant can rely on evidence concerning, in particular: (i) the circumstances and length of the preliminary examination procedure, and (ii) the content of the contested decision. While most of the General Court's analysis focused on fact-specific issues, it also provided some interesting views on the length of the preliminary examination procedure that could be relevant in future cases.

In fact, both in *Achema* and *Verband Deutscher Alten*, the preliminary examinations lasted significantly longer than the 12 months (non-binding) deadline set out in the Commission's Best Practices on the conduct of State aid control proceedings (OJ C 253, 19.7.2018, pp.14-27). In *Achema*, the overall procedure lasted 36 months, whereas in *Verband Deutscher Alten* it lasted 29 months. However, despite the similar (excessive) length of the procedures, the General Court did not follow the same reasoning, and ultimately reached opposite conclusions, in the two cases.

In *Achema*, the Court first recalled that the State aid Procedural Regulation does not set any deadline for the preliminary examination in cases of "unlawful aid". However, Article 12(1) of that Regulation requires the Commission to examine "*without undue delay any complaint*" (Case T-300/19, paras 57-58). Moreover, as noted above, the Best Practices require the Commission to complete the preliminary examination within 12 months. Even though the Best Practices are not legally binding, "*the Commission cannot depart from [them] under the pain of being found, where appropriate, to be in breach of the general principles of law, such as equal treatment or the protection of legitimate expectations*" (*ibid.*, para. 59, emphasis added). With this in mind, the Court held that the excessive length of the preliminary examination – and of the pre-notification procedure that ran in parallel to it (see *ibid.*, para. 78) – constituted objective evidence of the "serious difficulties" encountered by the Commission (see *ibid.*, para. 86). Taken together with the other circumstances of the case, the excessively long duration indicated the existence of "serious difficulties", which would have justified the opening of a formal investigation (see *ibid.*, para. 113).

In *Verband Deutscher Alten* the General Court arguably adopted a stricter approach in relation to the excessive length of the preliminary examination, and ultimately ruled that the fact that it lasted 29 months did not support the view that there were "serious difficulties" in that phase. First, the General Court noted that the excessive length must be assessed in light of the circumstances of the case, and that the 12-month time-limit in the Best practices is merely indicative (see Case T-69/18, para. 101), meaning that no concrete implications could be drawn from the fact it was not respected. This is the first important difference with *Achema*, where, as noted above, the Court attached specific importance to the (non-binding) deadline established in the Best Practices.

Another difference concerns the fact that during the preliminary examination the Commission asked the complainants to provide additional information. In *Achema*, the Court observed that the fact that the Commission had to request such additional information may indicate "serious difficulties" (Case T-300/19, para. 64). Conversely, in *Verband Deutscher Alten* the Court ruled that the need to request additional information justified the excessive length of the procedure – meaning that it did not support the view that there were "serious difficulties" (Case T-69/18, para. 103).

Overall, the approach followed by the General Court in those two cases does not seem to be aligned. This may be the result of the fact that two different chambers and Reporting judges were responsible for the cases, or may result from the factual specificities of the two cases involved. However, additional guidance from the Court in the future would be welcome in relation to the length of the preliminary examination procedure as an indicator of "serious difficulties" encountered by the Commission. For instance, at this stage, it is not clear whether the breach of the (non-binding) deadline can constitute an indication of "serious difficulties" or not. Depending on how this criterion is interpreted, complainants may be encouraged to bring more actions for annulment against rejection decisions – also in light of the broad interpretation of the standing requirements set out in *Verband Deutscher Alten* (see 1. above).

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General Court rejects Ryanair's actions for annulment against Commission decisions on COVID-19 individual aid in the aviation sector (Cases T-388/20, *Ryanair v Commission*, T-378/20, *Ryanair v Commission*, and T-379/20, *Ryanair v Commission*)

On 14 April 2020, the General Court dismissed the actions for annulment brought by Ryanair against three decisions of the Commission authorising State aid in the airline sector. These judgments were delivered by the same Tenth Chamber (extended composition), which had already dismissed in February two actions for annulment filed by Ryanair against COVID-19 aid measures (Cases T-238/20, *Ryanair v Commission*, and T-259/20, *Ryanair v Commission*, see VBB on Competition Law, Volume 2021, No. 2 – both currently under appeal before the Court of Justice, Cases C-209/21 P and C-210/21 P).

The present cases concern "individual aid" measures – within the meaning of Article 1(e) of Regulation 2015/1589 (OJ L 248, 24.9.2015, pp. 9-29, the "State aid Procedural Regulation") granted by Finland to Finnair, and by Denmark and Sweden to Scandinavian Airlines ("SAS") (Cases T-388/20, T-378/20 and T-379/20).

In particular, the Finnish case (Case T-388/20) concerns a State guarantee in favour of Finnair, which was granted with a view to supporting that airline in obtaining a loan from a pension fund to cover its working capital needs. The guarantee covers 90% of the loan for three years, and would be triggered in the event of Finnair's default. The Commission authorised the aid measure on the basis of Article 107(3)(b) TFEU, which enables Member States to grant "*aid to* […] *remedy a serious disturbance in the*[ir] *economy*" (Decision C(2020) 3387 final on State aid SA.56809 (2020/N)). It found that the potential liquidity shortage addressed by the aid was "realistic", and that the measure was necessary to avoid such a scenario. Given the importance of this airline for the Finnish economy, the Commission considered that the aid would contribute to the objective sought by Article 107(3)(b) TFEU.

The Danish case (Case T-378/20) concerns a State guarantee on a revolving credit facility (up to a certain amount) in favour of SAS. The Commission authorised the aid measure on the grounds of Article 107(2)(b) TFEU, which allows Member States to grant "*aid to make good the damage caused by natural disasters or exceptional occurrences*" (Decision C(2020) 2416 final on State aid SA.56795 (2020/N)). It found that the "*notified measure aims to compensate SAS for losses suffered due to the cancellation or re-scheduling of its flights as a result of the imposition of travel restrictions linked to the COVID-19 outbreak*" (*ibid.*, para. 59), and that the aid measure would not overcompensate the damage resulting from the travel restrictions (*ibid.*, para. 68).

Finally, the Swedish case (Case T-379/20) concerns a similar measure to that adopted by Denmark, which was also granted in favour of SAS. The Commission authorised the Swedish aid to SAS on similar grounds as those relied upon in the Danish case (Decision C(2020) 2784 final on State aid SA.57061 (2020/N)).

Leaving the specificities of the three cases aside, the judgments concerning the aid measures in favour of Finnair and SAS are of considerable broader importance for the assessment of the lawfulness of measures adopted to tackle the consequences of the COVID-19 pandemic and appear to endorse the Commission's "liberal" approach to tackling the crisis.

1. *Member States can grant "individual aid" to certain companies affected by the economic consequences of the COVID-19 outbreak on the grounds of Article 107(2)(b) and (3)(c) TFEU, only insofar as such aid contributes to the overall objectives sought by those provisions*

The first plea in law raised by Ryanair in the three cases alleged a breach of Article 107(2)(b) TFEU (in Cases T-378/20 and T-379/20) and Article 107(3)(b) TFEU (in Case T-388/20). The applicant argued that the Commission could not authorise "individual aid" on the basis of those provisions, since such individualised financial support would not be appropriate to remedy the damage caused by the COVID-19 outbreak to the overall economy of the Member State. In short, according to Ryanair, those provisions require the aid measures to make good the damage caused to all comparable undertakings affected by the pandemic. Moreover, the adoption of "individual aid" in

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favour of only a selected number of beneficiaries contravened the principle of equality, as it discriminated against the other undertakings affected by COVID-19, which were not compensated for their damage.

The General Court rejected this claim brought by Ryanair. It clarified that those provisions of the TFEU do not require Member States to grant aid measures to remedy the damage caused by exceptional occurrences (Article 107(2)(b) TFEU) or disturbances to their economy (Article 107(3)(b) TFEU) – Member States may be authorised to adopt aid measures for those purposes, but they are not obliged to do so. This implies that Member States are not required to make good the entirety of the damage caused by COVID-19, and that they do not have to compensate all "victims" of that damage (see Cases T-378/20, paras 21-24, and T-379/20, paras 22-25). By implication, the Commission is, for its part, not required to consider whether the damage caused by the pandemic affected only the recipient, or also other companies (see Cases T-378/20, para. 39, and T-379/20, para. 51). In addition, the fact that an "individual aid" may by its nature discriminates between companies – because it is only granted to its recipient, and not also to all other companies in a comparable situation – does not contradict the principle of equality, provided that it meets the relevant conditions to be granted under Article 107(3) TFEU (see, to that effect, Cases T-378/20, paras 65-76, and T-379/20, paras 77-89, and T-388/20, para. 81-92).

Moreover, with specific regard to Article 107(3)(b) TFEU, the General Court specified that this provision applies both to "aid schemes" – in the sense of Article 1(d) of the State aid Procedural Regulation – and "individual aid" (see Case T-388/20, para. 32). Thus, "individual aid" may be authorised on the grounds of that provision, insofar as it meets the relevant conditions set out by the State aid rules (ibid., para. 34). In particular, the Court noted that an aid measure authorised on the ground of Article 107(3)(b) TFEU does not have to be "*capable, in itself, of remedying the serious disturbance in the economy of the Member State concerned. Once the Commission has established the reality of a serious disturbance in the economy of the Member State concerned, that State may be authorised, if the other conditions laid down in that Article are also satisfied, to grant State aid, in the form of aid schemes or individual aid, which help to remedy that serious disturbance*." (*ibid.*, para. 41, emphasis added). In short, an "individual aid" may be authorised insofar as it contributes to the overall objective of remedying the disturbance to the economy caused, in the present case, by the COVID-19 outbreak (and meets all the other relevant conditions).

For instance, the Court found that the aid measure granted to Finnair was such as to contribute to that objective, since in the absence of that measure the company would have likely become insolvent, which would have had major consequences for the Finnish economy. The Court emphasised, *inter alia*, that Finnair is essential for the proper functioning of the Finnish air transport network, and that a significant number of businesses, workers and individuals rely on its services. The Court also noted that because of the climate and the isolated geographical position of Finland in Europe, the other modes of transportation available are not always a satisfactory alternative to flying. Thus, if Finnair were to be insolvent, other economic operators would not be able to appropriately replace Finnair in the short term (see Case T-388/20, paras 57-59).

2. *The Commission must ensure that the aid amount does not overcompensate the damage caused by the COVID-19 outbreak, but it is not required to weigh the positive against the negative effects of the aid measure on trade and competition*

A second interesting set of arguments made by Ryanair concerned the amount of the aid measures. In particular, in the Danish and Swedish cases (Cases T-378/20 and T-379/20), Ryanair argued that the aid measures would lead to overcompensation for the damage suffered by SAS. In the Finnish case (Case T-388/20), Ryanair alleged that the Commission failed to weigh the beneficial effects of the aid measure on the achievement of the objectives set out in Article 107(3)(b) TFEU against its adverse effects on trading conditions and competition in the EU.

As regards the first issue, the General Court recalled that Article 107(2)(b) TFEU does not allow the Commission to authorise "*aid likely to exceed the losses incurred by the beneficiaries*" (Cases T-378/20, para. 30, and T-379/20, para. 40). In relation to the calculation of the amount of damage suffered by SAS, which the aid measures were intended to compensate, the Court noted that this amount was assessed by the Commission on the basis of several objective and appropriate factors, namely: (i) the loss of revenue; (ii) the avoided variable costs; (iii) the adjustment of the profit margin; and (iv) the period of time dur-

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ing which the damage could (prospectively) arise. Moreover, the Member States granting the aid committed to carry out an *ex post* evaluation of the amount of damage suffered by SAS, and, if necessary, to request SAS to pay back any overcompensation. Under those circumstances, the calculation method was sufficiently precise to comply with Article 107(2)(b) TFEU (see Cases T-378/20, paras 35-36, and T-379/20, paras 45-46).

With regard to the second issue, the General Court noted that Article 107(3)(b) TFEU does not require the Commission to weigh the beneficial effects of the aid against its adverse effects on trade and competition. The Court stressed that this is an important difference between this provision and Article 107(3)(c), which instead requires such a "balancing test" (Case T-388/20, paras 65-67).

Interestingly, the General Court noted that "*it follows from the wording of* [Article 107(3)(b) TFEU] *that its authors considered that it was in the interests of the European Union as a whole that one or other of its Member States be able to overcome a major or even an existential crisis which could only have serious consequences for the economy of all or some of the other Member States and therefore for the European Union as a whole*" (*ibid.*, para. 65, emphasis added). This significant passage of the judgment emphasises the solidarity *rationale* which underlies the State aid rules and their significance in the context of a major economic crisis, such as the one caused by the COVID-19 outbreak.

To conclude, it is evident that the three Ryanair judgments of 14 April 2021 provide important clarifications concerning the scope of the grounds for authorising "individual aid" under Articles 107(2)(b) and (3)(b) TFEU. Together with the previous Ryanair judgments of 17 February 2021 (Cases T-238/20, *Ryanair v Commission*, and T-259/20, *Ryanair v Commission*, see VBB on Competition Law, Volume 2021, No. 2 – both currently under appeal before the Court of Justice, Cases C-209/21 P and C-210/21 P), the judgments of 14 April appear to provide a relatively broad interpretation of the State aid rules, which favours the "relaxation" sought by the Commission in order to grant Member States wider scope to tackle the economic consequences of the COVOD-19 outbreak.

Finally, it should be noted that, as far as Ryanair is concerned, even though each case must be assessed in light of its own specific circumstances, the five judgments so-far delivered by the General Court are not encouraging for its other pending actions for annulment against State aid in the airline sector (e.g., among many others, Cases T-769/20, Recapitalisation and subsidised interest loan for Nordica, T-737/20, Recapitalisation of airBaltic, T-677/20, Aid to Austrian Airlines, T-665/20, Aid to Condor Flugdienst GmbH, T-657/20, Recapitalisation of Finnair), at least at the level of the General Court.

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