> "The firm's reputation in Brussels and throughout Europe is unmatched. Van Bael & Bellis is always my first call in the EU."
>
> Client feedback
> **Legal 500 (2020)**

September 2021

VBB on Competition Law

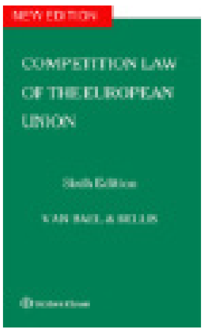
Highlights

MERGER CONTROL
Commission issues Statement of Objections in *Illumina/Grail* gun-jumping investigation as parties argue jurisdictional overreach
Page 3

European General Court upholds record-breaking gun-jumping fine against Altice
Page 4

STATE AID
European Court of Justice rules on when a "systematic administrative practice" becomes an "aid scheme"
Page 9

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS
DG Comp publishes policy brief on "green" competition rules
Page 15



Jurisdictions covered in this issue

vbb@vbb.com
www.vbb.com

VAN BAEL & BELLIS

VBB on Competition Law | Volume 2021, Nº 8 & 9

Table of contents

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels – Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com

MERGER CONTROL

– EUROPEAN UNION LEVEL –

Commission issues Statement of Objections in *Illumina/Grail* gun-jumping investigation as parties argue jurisdictional overreach

On 20 September 2021, the European Commission ("Commission") announced that it would issue a Statement of Objections outlining its preliminary findings that Illumina had breached the standstill provisions under the EU merger control rules by closing its acquisition of Grail without waiting to receive clearance.

Illumina is a leading supplier of next-generation sequencing systems for genetic testing. Grail is a start-up company that has developed an early-stage cancer detection test. Grail was previously spun-off from Illumina, and its cancer test relies on Illumina's sequencing systems.

This is the most recent chapter in the saga resulting from the Commission's first exercise of its "new approach" to Article 22 of the EU Merger Regulation ("EUMR") (see VBB on Competition Law, Volume 2021, No. 4). Article 22 allows the Commission to assert jurisdiction over transactions that do not meet the EU turnover thresholds but that are referred to it by one or more EU Member State competition authorities. Until recently, the Commission's established approach had been to accept cases only where the referring Member State had jurisdiction. This provided valuable legal certainty for companies whose deals were too small to require notification in any Member State.

Earlier this year, the Commission announced that it would now accept merger referrals even in cases where the referring Member States themselves did not have jurisdiction over the transaction at issue. The Commission contended that this "new approach" would ensure that competitively significant acquisitions could no longer escape all merger control within the EU simply because the turnover of the parties did not meet EU or national notification thresholds.

On 20 April 2021, within weeks of formally announcing this policy shift, the EU accepted jurisdiction to review the *Illumina/Grail* transaction following a referral request from a group of Member State competition authorities, none of which had jurisdiction to review the merger themselves. After losing challenges in French and Dutch courts to block the referral, Illumina filed an action for annulment with the European General Court ("EGC"), arguing that the Commission's acceptance of the referral constituted an overreach of its authority. That case is pending.

Meanwhile, Illumina formally notified the transaction to the Commission for review on 16 June 2021. On 22 July 2021, the Commission announced its intention to open an in-depth Phase II investigation of the deal. The Commission raised concerns that, following the merger, Illumina would have incentives to foreclose Grail's rivals from access to its sequencing systems, which could hamper the development of competing cancer tests.

Illumina reacted to the Commission's unprecedented exercise of jurisdiction with an equally unprecedented move of its own: it decided to close the acquisition even though it was actively being reviewed by the Commission. On 18 August 2021, Illumina announced that it would close the acquisition, but would hold Grail separate until the Commission's review was completed. However, Article 7(1) EUMR forbids an acquirer from implementing a notified transaction before receiving Commission clearance, regardless of whether the target is held separate. Failing to respect this standstill provision (so-called "gun-jumping") is punishable by fines of up to 10% of the acquirer's annual turnover.

On 20 August 2021, the Commission announced that it would be pursuing a gun-jumping investigation in this case. It has now issued a Statement of Objections, which offers a preliminary view that Illumina did breach the standstill provision and enables the Commission to impose interim measures to keep Grail and Illumina separate until it concludes its investigation. In doing so, the Commission underscored its view that the parties could not use self-imposed "hold separate" arrangements to avoid the EUMR's standstill obligation.

While it will likely conclude that the standstill obligation has been violated, the Commission's ability to impose a fine will ultimately turn on whether it has jurisdiction at all, as determined by the case pending before the EGC. A gun-jumping violation can only occur where the parties are under an obligation to wait for the Commission to approve their transaction, which is only the case where the Commission's exercise of jurisdiction is legitimate.

The Commission seized on the *Illumina/Grail* case as a first chance to flex its jurisdictional muscles under Article 22 EUMR. However, Illumina has shown that it will not accept this policy shift lying down and is fighting back at every turn. This deal will therefore prove to be an even more significant test-case than the Commission had anticipated.

If the Commission ultimately prevails in stretching its Article 22 powers to cover transactions that meet neither the EUMR filing thresholds nor those of any EU Member State, this will likely usher in an era of substantially greater uncertainty for merging parties in Europe. While Illumina closed its deal during the Commission's review (essentially inviting a gun-jumping investigation), the Commission has indicated that it intends to use Article 22 to accept the referral of deals that parties have already closed based on neither the EU nor any national merger control thresholds being met. This will likely result in the Commission increasing its use of interim measures to hold companies separate and decisions to unwind already completed transactions. Such complex processes can already be seen in the UK, *Facebook/Giphy* (see VBB on Competition Law, Volume 2021, No. 4) being the most recent example. In short, it has never been more important for merging companies, in addition to the standard jurisdictional analysis, to also carefully consider any substantive competition issues arising from deals affecting the EU or UK – no matter how small.

European General Court upholds record-breaking gun-jumping fine against Altice

On 22 September 2021, the European General Court ("EGC") dismissed Altice's appeal against a € 124.5 million fine imposed by the European Commission ("Commission") for gun-jumping in its acquisition of PT Portugal (Case T-425/18, *Altice v Commission*). This was the largest gun-jumping fine ever issued (see VBB on Competition Law, Volume 2018, No. 4). Altice appealed both the Commission's finding that it had implemented the acquisition of PT Portugal in violation of the EU Merger Regulation ("EUMR") and the legality of its decision to issue fines for violations of both the EUMR notification requirement and the standstill requirement. While Altice's appeal was pending, the European Court of Justice ("ECJ") had the opportunity to clarify the meaning of "implementation" within the context of a preliminary ruling in the *Ernst & Young* case, and the EGC issued a judgment assessing gun-jumping fines in *Marine Harvest.* The *Altice* judgment therefore provides an insight into the EGC's application of both these precedents and underscores the importance of close adherence by merging parties to EU merger control rules before closing a deal.

By way of background, Altice – a multinational telecoms company – entered into a share purchase agreement ("SPA") to acquire sole control of telecom operator PT Portugal in 2014. In 2015, Altice notified the transaction to the Commission, received clearance, and closed the deal. However, the Commission concluded that Altice had violated the EUMR's procedural rules by beginning to implement the acquisition after the SPA was signed but before clearance was received. Specifically, the SPA contained certain preparatory clauses that governed the parties' conduct during the period between the signing of the SPA and closing. These preparatory clauses granted Altice a number of rights over the activity of PT Portugal during the period before closing, including the right to appoint and terminate PT Portugal's senior management, to amend a wide range of its contracts, and to consent to changes in PT Portugal's prices. The Commission found that Altice had acquired the possibility of exercising decisive influence over PT Portugal through the pre-closing rights granted in the SPA, that it had in fact exercised those rights by becoming involved in PT Portugal's decision-making practice before clearance, and that Altice's control over PT Portugal was evidenced by the systematic exchange of sensitive information between the parties. As a result, the Commission fined Altice an unprecedented € 124.5 million for gun-jumping: € 62.25 million for infringing the requirement to notify a concentration before implementation under Article 4(1) EUMR, and another € 62.25 million for violating the stand-still obligation under Article 7(1) EUMR that requires parties to wait for Commission clearance before implementing a transaction.

Altice appealed the Commission's decision to the EGC, challenging both the Commission's finding that the transaction was implemented before notification and clearance, and its basis for the fine. Altice raised a number of substantive challenges to the Commission's finding that it had implemented the transaction before notification and clearance as a result of the rights conferred in the SPA, their exercise, and the exchange of information with PT Portugal:

1. Altice firstly claimed that the EUMR's gun-jumping prohibitions applied only to the "full consummation" of a transaction, but did not prohibit agreements that merely gave rise to the possibility to exercise decisive influence over the target pre-closing or to transactions that did not require dissolution measures in the sense of Article 8(4) EUMR. The EGC summarily rejected these arguments, noting that under the EU merger rules, a concentration is deemed to arise through the acquisition of control, as defined by the possibility of exercising decisive influence over the target. Therefore, situations in which the right to exercise such influence is acquired pre-closing will constitute "implementation" of a transaction, even if the transaction itself is not fully consummated until closing.

2. Altice further contended that the pre-closing rights granted to Altice pursuant to the SPA's preparatory clauses could not be considered implementation, as these clauses were merely ancillary to the SPA. Moreover, the SPA clauses could not bring about a *lasting* change on the market as they governed only the pre-closing period and would terminate with the closing of the deal itself. Altice also relied on the EGC's prior ruling in *Ernst & Young*, in which the EGC considered that certain ancillary agreements that went into effect before closing (in that case an agreement terminating the target's relationship with its international parent company) did not constitute implementation even if they were conditionally linked to the completion of the merger (see [VBB on Competition Law, Volume 2018, No. 5](#)). Altice also argued that the Commission erred in determining that such pre-closing ancillary clauses could only be justified if they were strictly limited to measures necessary to preserve the value of the target, and that pre-closing covenants ought to be allowed to preserve the "commercial integrity" of the target more broadly.

The EGC rejected each of these arguments in turn. While the SPA preparatory clauses at issue were of short duration, the EGC noted that it is the underlying change of control which must occur on a lasting basis for a transaction to constitute a concentration within the meaning of the EUMR. By contrast, the measures by which that change of control is achieved need not be indefinite. The EGC also clarified that its ruling in *Ernst & Young* should not be interpreted to mean that ancillary agreements entered into before closing can never constitute the implementation of a transaction. Rather, in the *Ernst & Young* case, the specific ancillary agreements at issue were not considered implementation because they did not contribute to a change in control over the target pre-closing, unlike those in Altice's SPA. Finally, the EGC considered that the Commission's Notice on Ancillary Restraints does not inherently limit pre-closing agreements to only those which are necessary to preserve the value of the target, and that other criteria might be considered relevant. However, Altice had not submitted any evidence to indicate that there was a risk to the "integrity" of PT Portugal that the SPA preparatory clauses were designed to avert.

3. Altice further argued that even if the Commission was correct in its assertion that pre-closing agreements could constitute implementation if they conferred a right to exercise decisive influence, the SPA clauses at issue did not in fact do so. Altice argued that the SPA only conferred limited consultation rights with regard to the appointment or dismissal of management, the determination of pricing policies and the conclusion of commercial contracts, which did not amount to a veto power sufficient to exercise decisive influence over PT Portugal. In any event, Altice argued that any control rights that it might have acquired pre-closing pursuant to the SPA's preparatory clauses were insufficient to give it sole control over the target.

   The EGC, however, agreed with the Commission that Altice was able to assert decisive influence over each of these key aspects of PT Portugal's business pre-closing and before notification and Commission approval. With regard to management, the EGC acknowledged that pre-closing agreements may justifiably grant some pre-closing oversight rights over the retention of the target's key personnel to preserve a target's business value and prevent changes to its cost base. However, the SPA preparatory clauses granted Altice the possibility of co-determining the structure of PT Portugal's management, amounting to a veto right. Likewise, the Court found that the SPA required PT Portugal to seek Altice's consent on a wide range of pricing decisions and client contracts, essentially giving Altice the ability to object to any changes in the target's client contracts – regardless of scope or size – and so determine the target's commercial policy. These rights went far beyond any measures that might have been necessary to preserve the value of the target until closing. The EGC also rejected Altice's argument that the SPA clauses could not constitute gun jumping as they did not give it sole control over PT Portugal. The EGC emphasized that, to find implementation of the transaction, it was sufficient for the Commission to determine that the SPA contributed to a change in control over the target, and not that Altice had acquired full control.

4. Altice also challenged the Commission's finding that it had, in fact, intervened in the day-to-day management of PT Portugal through the exercise of its rights under the SPA. In particular, Altice argued that PT Portugal had only consulted it on very few matters pursuant to the SPA, and that none of these matters – for example, the renewal of certain PT Portugal contracts – related directly to the implementation of the transaction itself.

   The EGC rejected these arguments as well. The fact that Altice only exercised its rights under the SPA preparatory clauses to determine PT Portugal's conduct pre-closing in a limited number of instances does not diminish the fact that the acquisition (and exercise) of such rights constitutes an infringement of the notification and standstill provisions. Moreover, the EGC noted that it was not relevant whether the specific matters in which Altice interfered in PT Portugal's business related to the implementation of the forthcoming merger. The interference itself – regardless of the subject matter – constituted the implementation of the merger through the exercise of decisive influence. Altice could not show that any of these interventions were necessary to prevent a material change in PT Portugal's business strategy or to otherwise preserve the value of its investment.

5. Altice contested the Commission's use of evidence regarding the exchange of sensitive information between it and PT Portugal in order to determine the exercise of decisive influence. Altice argued that the exchange of information was commercially inevitable in the context of an acquisition, and that the Commission had failed to demonstrate that the transmission of information to Altice resulted in any transfer of control to Altice. The Commission, Altice argued, merely assumed that because sensitive information was transferred, such information must have been used to exercise control over the target, in violation of the principle of the presumption of innocence.

   Once again, the EGC rejected Altice's arguments. In particular, it noted that the Commission did not rely on the existence of information exchanges as sufficient evidence to establish that Altice was guilty of gun-jumping. Nor did the Commission need to demonstrate that the transfer of information itself led to the exercise of decisive influence over PT Portugal. Instead, the exchange of such commercial information was used as one element, among others, to demonstrate that Altice was, in fact, exercising decisive influence over PT Portugal. While acknowledging that exchanges of information were commercially necessary to assess the value of the business to be acquired, the Commission and the EGC noted that such exchanges continued well after the SPA was signed and the decision to buy the target had been taken, and also appeared to be unrelated to the preservation of PT Portugal's value. Interestingly, the Commission and the EGC pointed to internal Altice emails noting the legal risk inherent in the exchange of information as proof that the parties should have known that the information at issue was sensitive and should not be exchanged before closing.

6. Finally, Altice also raised a number of arguments relating to the legality of the fine. First, Altice had argued that the Commission erred in issuing two fines – for the violation of both Article 4(1) and Article 7(1) EUMR. As a violation of the failure to notify before implementation would inherently also lead to a violation of the standstill obligation, Altice argued that fining it twice for the same conduct would violate the principle of *ne bis in idem* and of proportionality. However, in 2017 the EGC had addressed the same issue in *Marine Harvest,*

upholding the double fine (see VBB on Competition Law, Volume 2017, No. 10). Consistent with this prior ruling, the EGC found the fine against Altice for each violation to be legal. The notification and standstill requirements pursue distinct objectives, and violations of each are different in nature (the former being an instantaneous infringement and the latter a continuous one).

Altice also challenged the fines on the grounds that they were disproportionate and unlawful due to an absence of negligence or intent on Altice's part. Though rejecting these arguments, the EGC nonetheless exercised its unlimited jurisdiction to grant a partial reduction of the overall fine due to mitigating factors. Specifically, the EGC took note of the fact that Altice did formally notify the transaction of its own volition in 2015 and commenced pre-notification discussions with the Commission a mere three days after the SPA was signed. This, in the Court's view, should lead to a 10% reduction in the fine originally imposed by the Commission for violation of the notification requirement, Article 4(1) EUMR.

In summary, the EGC has confirmed the Commission's largest gun-jumping fine to date, in a case in which the acquirer did, in fact, notify the transaction and wait to receive clearance before legally closing the deal. Unfortunately for Altice, the SPA's preparatory clauses governing interim arrangements between signing and closing granted sufficient pre-closing rights for Altice to acquire the possibility of exercising decisive influence over PT Portugal before it notified the deal and received clearance. The Commission and EGC have sent a clear message that any gun-jumping, including through the conferral of decisive influence over some elements of the target business before closing, will be severely punished. This ruling therefore underscores the importance of parties' paying meticulous attention to ensuring that EU merger control rules are followed, both when concluding preliminary agreements and in any contacts between parties in the period before closing. The mere fact that preliminary agreements and information exchanges are routine elements of any commercial deal will not exempt them from close Commission scrutiny.

– MEMBER STATE LEVEL –

AUSTRIA

Austrian Competition Authority weighs in on Facebook's controversial acquisition of Giphy with € 9.6 million gun-jumping fine and phase II review

On 31 August 2021, the Austrian Federal Competition Authority ("FCA") announced that a gun-jumping fine of € 9.6 million imposed on Facebook in relation to its acquisition of Giphy, a provider of animated images and stickers ("GIFs"), had become final. Facebook cooperated with the FCA throughout the process and the Austrian Cartel Court issued a decision imposing the fine on 22 July 2021, which Facebook did not appeal.

Facebook acquired sole control of Giphy in May 2020 but did not notify the deal to the FCA until 20 July 2021, despite meeting the relevant merger notification thresholds in Austria. During its phase I review, the FCA found that the merger might increase Facebook's potentially dominant position in the social media and online advertising markets and initiated a phase II review. Now, the Cartel Court has until mid-January 2022 to carry out the in-depth investigation. Moreover, other competition authorities around the world, including in Australia, Brazil, the UK and the US, are already investigating the merger's effects on competition or expected to do so.

In particular, on 1 April 2021, the UK Competition and Markets Authority ("CMA") referred the transaction for a phase II review (see VBB on Competition Law, Volume 2021, No. 4). Following its in-depth probe, the CMA provisionally blocked the deal on 12 August 2021, stating that the acquisition would harm competition on the markets for social media and digital display advertising. Further, the CMA provisionally concluded that the only effective remedy to address its concerns would be for Facebook to unwind the deal and sell off Giphy in its entirety to a pre-approved purchaser. The CMA is now considering all interested parties' responses and submissions on remedies. The deadline for the CMA's final decision is 1 December 2021.

VERTICAL AGREEMENTS

– EUROPEAN UNION LEVEL –

Commission considers results of consultation on Draft VBER and Vertical Guidelines

Following the end of the public consultation on the draft revised Vertical Block Exemption Regulation and draft revised Guidelines on Vertical Restraints, the Commission is now starting the process of finalising the texts for adoption and entry into force by 1 June 2022. In this context, Van Bael & Bellis submitted a paper to the Commission focusing on a number of areas where we consider that either further reflection, or further clarification, is warranted. By way of introduction, the paper identifies two overarching concerns with the draft texts: an overly cautious approach to determining the limits to various intra-brand hardcore restrictions and, in this context, the use of imprecise legal tests which are liable to frustrate the key purpose of the block exemption which is to provide legal certainty. The paper then makes specific comments in respect of four particular topics: dual distribution, online sales restrictions, RPM and agency.

STATE AID

– EUROPEAN UNION LEVEL –

European Court of Justice rules on when a "systematic administrative practice" becomes an "aid scheme"

On 16 September 2021, the European Court of Justice ("ECJ" or "Court") delivered its judgment in Case C-337/19 P, *Commission v Belgium and Magnetrol International*. In this judgment, the ECJ ruled on the appeal brought by the Commission against the judgment of the European General Court ("EGC") in the case of *Belgium and Magnetrol International v Commission* of 14 February 2019 (Cases T-131/16 and T-263/16) (the "Judgment under appeal"), which had annulled Commission Decision (EU) 2016/1699 of 11 January 2016 on the excess profit exemption State aid scheme implemented by Belgium (the "Contested Decision") (see VBB on Competition Law, Volume 2019, No. 2).

The background of the dispute concerns the Belgian rules on the adjustment of the profit made by a resident company that is part of a multinational group, which are set out in the Belgian income tax code of 1992 ("CIR 92"). As a general rule, Article 1(1) of the CIR 92 establishes, *inter alia*, an income tax liability based on a resident company's total income. The basis of this corporate income tax liability is defined in Article 185 of the CIR 92. In particular, the second paragraph of this Article establishes a so-called "correlative adjustment" mechanism. In short, on one hand, Article 185(2)(a) allows for an upward adjustment of the profit made by a resident company that is part of a multinational group, to ensure compliance, *inter alia*, with the arm's length principle. On the other hand, Article 185(2)(b) allows for a downward adjustment of the profit made by a resident company that is part of a multinational group, in order to, *inter alia*, avoid double taxation (the so-called "excess profit exemption"). This adjustment must be carried out on a case-by-case basis by the Belgian tax authorities, in light of the information available and provided, in particular, by the tax-payer concerned.

Against this background, in the Contested Decision the Commission found that certain tax rulings granted on the basis of Article 185(2)(b) of the CIR 92, in the period between 2004 and 2014, constituted an "aid scheme" within the meaning of Article 1(d) of Regulation 2015/1589.

According to the Commission, the systematic practice of the Belgian authorities of adjusting profits, beyond the scope of Article 185(2)(b) of the CIR 92, constituted an aid scheme. In particular, the aid scheme was based on the consistent administrative practice by the Belgian tax authorities, which – according to the Commission – consisted of systematically applying Article 185(2) of the CIR 92 and doing so *contra legem*. The Commission also found that this aid scheme was illegal – i.e., in breach of the requirements set out in Article 108(3) TFEU – and incompatible with the internal market, and ordered the recovery of the aid.

The Judgment under appeal annulled the Contested Decision, inter alia, on the ground that the Commission had wrongly classified the above-mentioned tax rulings as an overall "aid scheme" within the meaning of Article 1(d) of Regulation 2015/1589. On appeal, the ECJ disagreed with the EGC, set aside the Judgment under appeal, rejected part of the application for annulment, and referred back the rest of the case to be adjudicated at first instance. Below we describe the most important takeaways of the Judgment on appeal.

A systematic administrative practice can be considered as an "aid scheme"

At the heart of the dispute lies the interpretation of Article 1(d) of Regulation 2015/1589. In its relevant part, this provision defines an "aid scheme" as "[(i)] *any act on the basis of which, [(ii)] without further implementing measures being required, individual aid awards may be made to undertakings [(iii)] defined within the act in a general and abstract manner* […]". This definition is particularly important: in relation to measures which qualify as an "aid scheme" the case law allows the Commission to limit itself to study the general characteristics of the measure, for the purpose of establishing whether it falls within the scope of Article 107(1) TFEU. In essence, the Commission has more leeway in its State aid analysis when it comes to "aid schemes", compared to "individual aid".

In this ground-breaking judgment, the ECJ provides a detailed interpretation of the notion of "aid scheme" and its possible application to a systematic administrative practice. It concludes that, contrary to what the EGC had found, the Commission rightly considered the practice by the Belgian tax authorities as an "aid scheme". In this regard, the ECJ analysed the three conditions on which the "aid scheme" notion is based: (i) the existence of an "act"; (ii) the fact that the "act" does not require implementing measures; and (iii) the fact that it defines the aid beneficiaries in a "general and abstract manner".

As a first step, the ECJ examined whether the scope of the term "act" set out in Article 1(d) of Regulation 2015/1589 may cover an administrative practice – more precisely, as the ECJ and the Commission put it, "*a systematic contra legem application of a Member State's tax provision by the tax authorities of that Member State as part of a consistent administrative practice*" (para. 73, C-337/19 P). This question was evidently not an easy one. At least prima facie, it appears counter-intuitive that a "practice" may be considered as an "act". In fact, on a conceptual level, a "practice" seems to consist in the application of a given "act" to certain situations, and cannot correspond to the "act" itself.

The ECJ, however, found that a systematic practice may fall within the definition of an "act" in the sense of Article 1(d). After clarifying that the wording of that provision does not provide any conclusive indication – since the various language versions of Article 1(d) use different terms, which, depending on the context, may or may not cover such an administrative practice, the Court turned its analysis to the purpose and general scheme of the rules of which it forms part. In this regard, the Court made two interesting remarks.

First, it noted that the notion of an "aid scheme" is to be distinguished from that of an "individual aid", in that "[u]*nlike individual aid, which concerns a State aid measure requiring individual examination in the light of the criteria referred to in Article 107(1) TFEU, use of the concept of an 'aid scheme' enables the Commission to examine, in the light of that provision, a set of individual grants of aid to undertakings on the basis of a common provision which constitutes, in principle, the legal basis for it.*" (para. 76, Case C-337/19 P). In this sense, "*the term 'act' in Article 1(d) of Regulation 2015/1589 refers to the measures constituting an aid scheme from which it is possible to identify the essential characteristics necessary for that act to be classified as a State aid measure, for the purposes of Article 107(1) TFEU*" (para. 78, Case C-337/19 P). This implies that if a systematic application of a tax provision by the national authorities allows the essential characteristics of the relevant aid measure to be identified, it can be considered as an "act" in the sense of Article 1(d) of Regulation 2015/1589.

Second, as regards the purpose of that provision, the Court observed that "*the effectiveness of the rules on State aid would be considerably reduced if the term 'act', within the meaning of Article 1(d) of Regulation 2015/1589, were limited to referring to the formal measures constituting an aid scheme*" (para. 84, Case C-337/19 P). If the Commission were not allowed to consider that a *contra legem* administrative practice (i.e., one that is contrary to and/or finds no basis in the relevant tax rules) constitutes an "act", it would be impossible to consider such a practice as an "aid scheme". This means that the scope of the review carried out by the Commission would depend on the regulatory technique adopted by the Member State and may lead such practice to fall outside the scope of the State aid rules.

With all that in mind, the Court found that the Commission may demonstrate that a systematic practice by the national authorities constitutes an "act" within the meaning of Article 1(d) of Regulation 2015/1589, insofar as such finding is justified by a set of circumstances indicating the *de facto* existence of an "aid scheme". However, what these "circumstances" may be is unclear – meaning that the Court will most likely have to provide its guidance on these "circumstances" in the future.

Insofar as the other requirements to classify a measure as an "aid scheme" are concerned, the Court found that the national authorities did not have any discretion in granting the profit exemption accorded on the basis of the *contra legem* administrative practice. In fact, according to the Court, the practice of the Belgian tax authorities shows that they "*systematically granted the excess profit exemption when the conditions* [...] *were satisfied*" (para. 112, Case C-337/19 P). The consistency of this practice shows that the "*tax authorities did not have any discretion in the application of Article 185(2)(b) of the CIR 92 and that, consequently, no 'further implementing measure' within the meaning of Article 1(d) of Regulation 2015/1589,* *was necessary when granting the excess profit exemption at issue*" (para. 113, Case C-337/19 P).

Finally, the Court found that the beneficiaries were defined in a "general and abstract manner" in the practice, and that the errors made by the EGC in relation to the assessment of the first and second conditions to qualify as an "aid scheme" also affected the findings related to the third condition.

If it looks like an "aid scheme" and it functions like an "aid scheme", then it is an "aid scheme"

Overall, this interesting judgment provides much needed guidance with regard to the notion of an "aid scheme". At the same time, however, it also gives rise to certain doubts that will probably require clarification in the future. In fact, the reasoning followed by the Court resembles a State aid version of the so-called "duck test": if it looks like an "aid scheme" and it functions like an "aid scheme", then it is an "aid scheme".

There are obviously some merits to this "pragmatic" approach. The most evident one being to ensure the effectiveness of the State aid rules, regardless of the regulatory technique adopted by Member States (para. 85, Case C-337/19 P) – this way *de facto* schemes may also fall within the scope of Article 1(d) of Regulation 2015/1589, even though they are not based on any specific legal act. In other words, the Commission does not need to demonstrate that the advantage was granted on the basis of a general tax provision – it suffices for it to be based on a series of rulings which form a "systematic" administrative practice.

The problem is, however, that the criteria developed in the judgment under discussion appear to be random and likely to lead to ambiguity about the notion of an "aid scheme". The judgment suggests, in particular, that an administrative practice must be considered as "systematic" for it to qualify as an "aid scheme". The Court then explained that a practice is "systematic" where it is supported by a sufficiently representative sample of tax rulings. When it comes to the number of rulings that may be considered as being "representative", the Court noted that 22 out of 66 rulings is sufficient to consider the administrative practice as "systematic", and to constitute an "aid scheme". Yet, it is difficult to understand why one third would be enough to consider the practice as sufficiently representative – especially if one considers that in two thirds of cases the practice was not followed by the national authorities. This, at the very least, casts some doubt as to whether the administrative authorities were effectively left without any discretion as to whether to grant the tax exemption under examination in the Contested Decision.

European General Court clarifies conditions for standing to challenge Commission decisions not to raise objections to State aid measures

On 15 September 2021, the European General Court ("EGC" or "Court") (sitting in extended composition) delivered two interesting judgments, which provide additional guidance as to the definition of "interested parties" in State aid proceedings under Article 1(h) of Regulation 2015/1589 (Case T-777/19, *CAPA and Others v Commission*), and as to the standing of those parties to bring an annulment action against a Commission decision not to raise any objections (Case T-24/19, *INC and Consorzio Stabile Sis v Commission*).

The notion of "interested party" is not limited to competitors of the aid beneficiary, but it is not much broader either

In *CAPA and Others v Commission*, the dispute concerned an aid measure granted by France for the construction of offshore wind farms off its northern coastline. Between 2011 and 2013, the French authorities tendered out projects for six wind farms to different companies. The projects involved the grant of operational aid in the form of an obligation upon the public energy company EDF to purchase electricity from the selected wind farms at prices above market rates. The French authorities notified the measure to the Commission between 29 April 2016 and 12 April 2017.

On 18 December 2018, certain fishing companies that operate in the sea areas concerned by the wind farm projects submitted a complaint to the Commission against the aid measure. The fishing companies challenged the compatibility of the envisaged aid measures with the State aid rules. On 23 January 2019, the Commission rejected the complaint, on the ground that the complainants did not qualify as "interested parties" under Article 1(h) of Regulation 2015/1589.

On 26 July 2019, the Commission adopted a decision not to raise objections to the aid measure. It concluded that the measure constituted State aid within the meaning of Article 107 Treaty on the Functioning of the European Union ("TFEU"), but that it was compatible with the internal market under Article 107(3)(c) TFEU. On 12 November 2019, a number of fishing associations and companies lodged an annulment action against the Commission decision before the European General Court ("EGC" or "Court").

The case at hand gave the EGC the opportunity to clarify certain aspects of the notion of "interested party" set out in Article 1(h) of Regulation 2015/1589. The question arose as to whether the fishing companies and the related association could be considered as having an interest in the State aid investigation, even though they were not competitors of the wind farms, the beneficiaries of the aid measure.

The Court first recalled that in order to be considered as an "interested party", the natural or legal person concerned must prove that the aid is likely to have a concrete impact on its situation. In this regard, it clarified that the impact on the situation of a person, company or association can be determined, first, by whether it competes – either directly or indirectly – with the aid beneficiary. More specifically, indirect competition refers to situations where two companies compete, for instance, for the sourcing of the same raw material.

In the case at hand, the Court found that the applicants did not compete – either directly or indirectly – with the aid beneficiaries, as the markets where the fishing companies operate are completely different and separate from those of wind farms. The Court noted that the fact that they share the same sea area cannot be considered as if they were competing for the same raw material – and could not by itself justify considering the fishing companies as an "interested party".

Second, recalling previous case law, the Court clarified that the notion of "interested party" is not limited only to competitors of the aid beneficiary. In past cases, applicants were considered as "interested parties" because the aid had a concrete impact on their situation, irrespective of whether or not they competed with the aid beneficiary. In the case at hand, however, the Court concluded that the applicants could not be considered as "interested parties", since they did not demonstrate the concrete risk of the aid's impact on their situation and the fact that the impact would result from the aid itself. In particular, the Court held that the impact would not derive directly from the aid, but from the previous decision of the French authorities to carry out the wind farm project. In other words, the fishing companies could perhaps be considered as affected by the setting-up of the wind farms – however, this would not derive from the envisaged aid measures, but from the underlying decision to allocate that sea area to such a project.

The withdrawal of an envisaged aid measure excludes the applicant's interest in the annulment of the authorisation decision

In *INC and Consorzio Stabile Sis v Commission*, two Italian companies brought an annulment action against a Commission decision which closed a preliminary State aid probe concerning Italian measures to support a motorway investment plan.

On 13 October 2017, the Italian authorities notified to the Commission certain measures to support an investment plan regarding a number of Italian motorways. The plan envisaged additional investment for sixteen motorways to be carried out by *Autostrade per l'Italia S.p.A. and two by Società Iniziative Autostradali e Servizi S.p.A.* (the "concessionaires"). As compensation, the plan envisaged a prolongation of certain existing concessions, coupled with a limitation of toll tariffs in order to avoid the risk of overcompensation. On 27 April 2018, the Commission found that the prolongation of the concessions at issue constituted State aid within the meaning of Article 107 TFEU, but that it was compatible with the internal market pursuant to Article 106(2) TFEU.

On 11 January 2019, two competitors of the concessionaires – *INC S.p.A. and Consorzio Stabile Sis S.p.A.* (the "applicants") – brought an annulment action against the Commission decision. According to the applicants, the Commission should have had serious doubts as to the compatibility of the Italian measures with the internal market and, therefore, it should have initiated formal investigations.

The case before the European General Court ("EGC" or "Court") took an interesting turn as, in the context of the hearing, the Commission informed the Court that the Italian authorities had decided not to implement the aid measures approved by the contested decision. This raised the question as to whether the applicants still had an interest in bringing proceedings against the decision of the Commission that closed the preliminary State aid investigation. In fact, the annulment of that decision would not lead to any result – in particular, it would not procure any advantage to the applicants. The aid measures would no longer be implemented by the Italian authorities, whether the Court would uphold or reject the action for annulment.

In its judgment, the Court recalled that an annulment action is admissible insofar as the applicant has an interest in having the contested act annulled. In a case such as the one at hand, the annulment of a decision not to open a formal State aid investigation is capable of procuring an advantage to the applicants, only if the envisaged aid measures are still intended to be implemented by the Member State. The absence of any plan to grant the approved aid measures renders the annulment sought by the applicants no longer capable of procuring an advantage. In fact, the advantage that the applicants could derive from such an annulment would be the reopening of the State aid investigation – but this could not occur because the intention to grant the aid measure had, in the meantime, disappeared.

Interestingly, the EGC added that if Italy were to re-consider the adoption of the measure at issue in the future, it could not rely on the contested Commission decision not to raise objections. A new notification to the Commission would be necessary pursuant to Article 2 of Regulation 2015/1589, in respect of which the Commission would have to exercise its scrutiny under that Regulation. In that context, the applicants could eventually participate in the investigation, and, where necessary, challenge the resulting acts before the Court.

With that in mind, the Court found that, even though the applicants could initially have had an interest in bringing the action, the fact that Italy decided not to implement the relevant aid measures removed the existence of an interest in bringing proceedings. Hence, it was no longer necessary to adjudicate on the action.

LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

German, French and Dutch governments continue to push for stronger NCA enforcement powers under Digital Markets Act

On 7 September 2021, the German, French and Dutch ministers for the economy, jointly acting as the "Friends of an Effective DMA", published a position paper in relation to the Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector ("DMA") entitled *Strengthening the Digital Markets Act and its Enforcement* ("Position Paper").

Although the ongoing discussions on the proposed DMA in the European Parliament and the Council cover a wide range of highly contentious issues, shared enforcement powers for national competition authorities ("NCAs") under the DMA remains one of the greatest concerns for Member States (and especially for their NCAs). The recently published joint paper by the heads of the NCAs (see VBB on Competition Law, Volume 2021, No. 6) already sought to address the risk that enforcement of the DMA could end up being centralised in the hands of the European Commission ("Commission"), leaving little to no responsibilities to NCAs. The Position Paper complements the arguments in favour of greater NCA involvement made by the joint heads of the NCAs.

The Position Paper points to the need to dedicate substantial human resources to enforce the proposed instrument to "match the resources of the gatekeepers". While acknowledging that the Commission should remain primarily in charge of DMA enforcement, it argues that certain enforcement powers under the DMA should be allocated to NCAs. In particular, NCAs should be allowed to make use of certain investigative and monitoring powers (e.g., issue requests for information, carry out interviews and on-site inspections) on their own initiative and to impose certain measures under the DMA (e.g., tailor-made remediation measures, interim measures, non-compliance decisions) upon referral by the Commission.

As we have already discussed before (see VBB on Competition Law, Volume 2021, No. 6), joint DMA enforcement powers for the Commission and the NCAs would come with considerable risks. Practices of digital platforms will rarely affect one Member State in isolation and, therefore, the case for intervention at Member State level and for a multiplication of DMA enforcement powers is far from obvious. This concern remains valid even with the more limited enforcement powers envisaged by the Position Paper, such as NCA powers to adopt remedies and interim measures.

The Position Paper also makes substantive proposals for the DMA. It notes the heterogeneity of gatekeepers' business models and of the markets in which they operate. It raises concerns that the self-executing duties of gatekeepers listed in Articles 5 and 6 DMA appear insufficiently future-proof. To further safeguard contestability and fairness in digital markets, the Position Paper suggests expanding the powers of the Commission and allowing the Commission to impose remedies adapted to the business model of each gatekeeper. Specifically, if a preliminary market investigation showed that the obligations of Articles 5 and 6 DMA do not safeguard market contestability and fairness in the case under investigation and that competition law is insufficient to adequately and timely address the identified practices, the Commission should be able to impose certain measures from a limitative list of pre-defined categories:

- measures relating to access to platforms, including interoperability obligations, obligations to grant access to essential application programming interfaces (APIs) and obligations to use common standards;
- measures consisting in data-related interventions, including data portability obligations and obligations to provide access to essential data and data silos;

- fair commercial relations, including non-discrimination obligations, bans on self-preferencing and obligations to make use of fair contractual terms; and
- end-users and business-users' open choices, including obligations to proactively offer options to users, regulation of defaults and design of choice architecture.

These proposals would further widen the scope of intervention in digital markets by the Commission. The proposed DMA would already create numerous, highly prescriptive obligations for gatekeeper platforms. The Position Paper's proposals would, under the claim of "future-proofing" the DMA, further expand the powers of the Commission to regulate business conduct in digital markets.

DG Comp publishes policy brief on "green" competition rules

On 10 September 2021, the European Commission's Directorate-General for Competition ("DG Comp") published a policy brief presenting the ways in which competition law can support the green transition of the European economy. The EU's target of carbon neutrality by 2050 is expected to be reached through competition-driven innovation. The policy brief outlines how different areas of EU competition law, including antitrust, merger control, and state aid, can be aligned with the EU's Green Deal ambitions.

With regard to agreements supporting sustainability goals, the policy brief emphasises that sustainability initiatives are not necessarily contrary to EU competition law, specifically Article 101 Treaty on the Functioning of the European Union ("TFEU"). However, a major concern presented in the public debate related to the lack of certainty as to what forms of cooperation would comply with Article 101 TFEU. To ensure that competition law risks do not deter companies from pursuing sustainability projects, the Commission intends to provide clarification on sustainability cooperation, *inter alia*, in its revised Horizontal and Vertical Guidelines. Companies are also encouraged to consult directly with DG Comp on whether given collaborations would comply with antitrust rules. It is hoped that concrete examples will better guide European industry.

Importantly, the policy brief discusses DG Comp's approach to Article 101(3) TFEU. The policy brief clarifies that sustainability benefits can be characterised as qualitative efficiencies (for example, the sustainable product is longer lasting) as well as cost efficiencies (sustainable technology may save more costs than it takes to implement it). The policy brief suggests that Article 101(3) benefits can also occur in other forms, as long as consumers appreciate the environmentally friendly nature of a product and are willing to pay the associated higher price. This suggestion, of course, could quickly raise very complex questions in concrete cases, especially if consumers are heterogeneous and only some consider higher prices for sustainable products to be justified, whereas others do not.

On the controversial question of whether out-of-market sustainability benefits may be considered under an Article 101(3) assessment, the policy brief maintains a "conservative" approach. It stresses that sustainability gains can be relevant under Article 101(3) only if the consumers that could be harmed by a restrictive agreement and those benefitting from sustainability gains are "substantially the same". This more disciplined approach would, for example, rule out considering sustainability benefits for future generations under Article 101(3).

Additionally, the policy brief mentions that, for Article 101(3) to apply, the agreement must be indispensable for the achievement of the relevant sustainability benefits. Interestingly, the policy paper also emphasises that, when assessing the extent to which cooperation between undertakings is necessary, existing regulations that already incentivise sustainable behaviours should be taken into account. This reference to the importance of an appropriate regulatory framework to achieve sustainability goals could be seen as a clear signal by DG Comp that competition law should not be expected to be a key contributor to the EU's Green Deal ambitions, and that clear regulation could support these ambitions much more effectively.

The policy brief also recognises that State aid rules are one of the key means of achieving EU climate goals, especially in the post-pandemic economic recovery context. It summarises various initiatives by the Commission, including its review of the General Block Exemption Regulation and the rules on Important Projects of Common European Interest in accordance with Green Deal principles. Furthermore, the Climate, Energy and Environment Aid Guidelines should be updated to cover industries and technologies furthering climate goals, and to encourage the provision of State aid to industries and projects with smaller environmental impact, whilst discouraging aid to projects which have a high carbon footprint or rely on highly polluting fossil fuels.

Concerning mergers, the policy brief seeks to create a link between so-called "killer acquisitions" and sustainability, by explaining that these acquisitions could also encompass acquisitions by larger undertakings of smaller, sustainability-oriented, innovators. The policy brief seeks to use this quite tenuous link to sustainability as an argument to support its recent push for Member States to utilise Article 22 EU Merger Regulation where significant transactions fall under both EU and national thresholds. The policy brief's attempt to show an alignment between Green Deal ambitions and merger control only highlights that the often-used concept of "killer acquisitions" is a largely empty label with little practical relevance outside specific situations in the pharmaceuticals industry. Why any firm would have an incentive to kill a promising, sustainability-oriented innovation to prevent it from reaching the market, even though sustainability is increasingly becoming a widely shared policy goal and therefore offers increasingly commercial opportunities, remains to be explained.

The policy brief is particularly interesting in the context of the efforts by some national competition authorities to develop more permissive guidance on the application of competition rules to sustainability-oriented projects. In particular, the Dutch and Greek competition authorities jointly published a technical report on competition and sustainability in January 2021, and the Dutch Competition Authority has since published the second draft of its upcoming Guidelines on Competition Law and Sustainability. The Dutch draft guidelines would consider a wider range of sustainability benefits as relevant under Article 101(3) than suggested by DG Comp's policy brief. The policy brief may be an attempt by DG Comp to limit these initiatives and to ensure a harmonised interpretation of Article 101 when applied to agreements related to the green transition.

In the centre of Europe with a global reach

VAN BAEL & BELLIS

Chaussée de La Hulpe 166
Terhulpsesteenweg
B-1170 Brussels
Belgium

Phone: +32 (0)2 647 73 50
Fax: +32 (0)2 640 64 99

vbb@vbb.com
www.vbb.com