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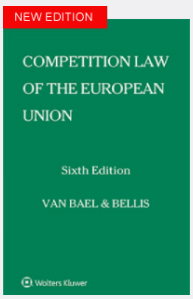
VBB on Competition Law

Issue Highlights



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MERGER CONTROL

European Union level

Commission prohibits Booking's acquisition of eTraveli on ecosystem theory of harm

On 25 September 2023, the European Commission ("Commission") announced its prohibition of Booking Holdings' planned €1.6 billion acquisition of Flugo Group Holdings ("eTraveli"). Booking is a US-based online travel agency ("OTA") that operates a variety of travel brands including Booking.com, Rentalcars and Priceline. In addition, Booking operates an online metasearch services ("MSS") businesses, primarily through its travel price comparison platform KAYAK. The target, eTraveli, is a Swedish OTA specializing in flight bookings.

The Commission opened an in-depth investigation of the deal in November 2022, citing concerns that the deal could harm competition by allowing Booking to leverage the acquired flight OTA capabilities to strengthen its already dominant position in hotel OTAs. The Commission found that Booking is the dominant hotel OTA in the EEA, holding a market share of over 60%. The network effects generated by this strong position have already inhibited rival hotel OTAs from exerting strong price constraints on Booking. Specifically, its larger commissions to hotels have enabled it to grow a broad network of hotel offerings, which in turn has led it to attract an ever-larger customer base.

Although eTraveli is not a major hotel OTA, it is the second largest flight OTA in the EEA. As the result of its investigation, the Commission noted that flights – the first step on a consumer journey – are the most important customer acquisition channel for hotel OTAs, with the greatest potential to cross-sell accommodation. By acquiring eTraveli, Booking's flight OTA business would benefit from these additional flight customers, who would be likely to stay on the combined platform when selecting a hotel. This dynamic, the Commission reasoned, would further reinforce Booking's network effects within the OTA ecosystem, raising barriers to entry and expansion for rival hotel OTA services. This, in turn, could strengthen Booking's bargaining position vis-à-vis hotels, potentially raising costs for participating hotels, which might ultimately raise prices for consumers.

Booking proposed a remedy to resolve these concerns, whereby an online customer would be presented with a hotel offer screen on the flight check-out page. This screen would display, alongside hotel offers from Booking, offers from four competing hotel OTAs and the ability to redirect to those OTA's websites. After an extensive market test, the Commission rejected this proposal as insufficient. Importantly, the proposed mechanism to display rival OTA offerings would be powered by KAYAK, Booking's subsidiary. As a result, the selection and ranking of competing OTA offers could not be sufficiently transparent and non-discriminatory. Moreover, the commitments would be difficult to monitor as KAYAK's algorithm worked "as a black box." Consequently, the Commission decided to reject this remedy and prohibit the transaction.

Discussion

This is the first time the Commission has prohibited a merger under a purely "ecosystem" based theory of harm. The parties publicly criticized the decision for, in their view, departing from the Commission's non-horizontal merger guidelines to endorse such novel theories of harm. The Commission, however, has countered that it does not view its approach as new. The non-horizontal guidelines do not expressly cover the variety of competition issues that arise in digital cases, and the Commission noted that it is standard policy to depart from the guidelines where necessary to properly capture competition harms in complex cases. The Commission also pointed to the body of practice set out in other digital ecosystem cases dealing with dynamic competition theories of harm.

In principle, the theory of harm the Commission has espoused in this case does not appear inherently novel or problematic. The Commission has considered direct and indirect network effects in previous digital merger cases such as *Facebook/WhatsApp*, *Microsoft/LinkedIn*, and *Google/Fitbit*. The Commission has also previously considered the effects of mergers at the level of the

MERGER CONTROL

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digital ecosystem and whether acquisitions within a broader ecosystem can have the effect of strengthening a party's dominant position in its "core market" within that ecosystem (for instance, in its unconditional clearance of *Amazon/MGM*).

While the Commission may have a sound basis to examine a merger under these theories of harm in principle, it is less clear whether it had sufficient justification to warrant prohibiting this transaction. The UK Consumer and Markets Authority ("CMA") also examined the merger and came to the opposite conclusion, declining to open an in-depth investigation. The fact that the CMA found that the transaction was unlikely to give rise to a realistic prospect of a substantial lessening of competition under largely the same facts and theory of harm raises questions about whether the Commission is able to support its conclusions that the deal would lead to a significant impediment to effective competition in the EU.

Both the CMA and Commission found that Booking is dominant in the OTA space and that barriers to entry were high, but differed on the competitive impact of the addition of eTraveli. In this respect, it will be interesting to see how the Commission has addressed the counterfactual in its decision (which is not yet available). Notably, the parties had already been operating under an agreement that allowed Booking to offer flights on its OTA platform through eTraveli since 2019. Therefore, the relevant counterfactual – as acknowledged by the CMA – would need to take into account the fact that Booking was already able leverage eTraveli's flight OTA capabilities. Any merger-specific effects would therefore only be the incremental gains to Booking (or exclusion of other market participants) that could arise by formalizing the existing contractual relationship through a merger.

If the Commission bore this counterfactual in mind, it would have needed to differ significantly from the CMA in how it examined and quantified the effect of any increasing traffic diversion to Booking and the resulting consumer harm. The CMA concluded that there was no clear evidence that adding a flight capability would provide a significant or meaningful additive advantage to cross-selling accommodation. In particular, the CMA found that there was limited evidence that flights are a significant customer acquisition method for accommodation OTAs given the variety of other acquisition channels (both OTAs and direct sales by airlines). Given eTraveli's non-dominant market position, any change in the flight acquisition landscape post-merger would be modest. As a consequence, the CMA concluded that the deal would not materially reduce the significance of other customer acquisition channels available to Booking's rivals or their ability to attract consumers.

In sum, the ecosystem theory of harm is a plausible one in this type of case, but one that also needs to be supported by compelling evidence of a significant resulting harm to competition. The CMA's decision that such evidence was simply not present throws into question why the Commission arrived at the opposite conclusion. The publication of the Commission decision will shed greater light on whether such strong evidence is present, or whether the Commission is instead (worryingly) adopting the position that merely holding a dominant position within an ecosystem is – in itself – sufficient to make any incremental addition to that ecosystem problematic if it could theoretically bolster a core market.

MERGER CONTROL

National level

THE NETHERLANDS

Dutch competition authority pledges improvements to merger review procedure following double court defeat

In March and in May 2023 the Dutch competition authority, *Autoriteit Consument & Markt* ("ACM"), suffered two defeats in healthcare merger cases before the Rotterdam court (*Mediq/Eurocept* and *Bergman Clinics/ Mauritskliniek*). ACM had blocked the two proposed concentrations, but the Rotterdam court annulled both prohibition decisions.

ACM then asked Luc Gyselen, former European Commission official and Senior Counsel with Arnold & Porter, to determine what went wrong in these cases and come up with remedies for ACM's shortcomings. The Gyselen report of July 2023 gave rise to several recommendations which ACM in September 2023 said it would implement.

Chief among these is the intention on the part of ACM to offer better and more elaborate reasons for its merger decisions. Additionally, ACM will run a more intensive and detailed pre-notification inquiry for complex transactions. In this informal part of the procedure, ACM indicated it would focus more on the possible theories of harm and the critical questions which will have to be addressed during the formal procedure. Finally, once it has issued the Statement of Objections ("*Punten van Overweging*") ACM stated that it would not exclude carrying out additional inquiries if necessary.

ABUSE OF DOMINANT POSITION

European Union level

Commission re-imposes fine on Intel for allegedly engaging in naked restrictions while an appeal on the case is pending before the Court of Justice

On 22 September 2023, the European Commission ("Commission") re-imposed a fine of €376.36 million on Intel alleging that it had engaged in three practices aimed at excluding its main competitor at the time, AMD, from the market for computer chips called x86 central processing units ('CPUs') in breach of Article 102 TFEU.

This decision is the latest chapter in a longstanding legal saga. The Commission adopted a decision in 2009 ("2009 Decision") in which it found that (1) Intel had granted rebates to computer manufacturers on condition that they bought all, or almost all, their x86 CPUs from Intel (i.e., "exclusivity rebates") and (2) Intel made direct payments to computer manufacturers to halt or delay the launch of specific products containing competitors' x86 CPUs and to limit the sales channels available to these products (i.e., "naked restrictions").

In 2017, the Court of Justice ("CJEU") annulled the 2014 judgment issued by the General Court, which had rejected Intel's appeal against the 2009 Decision, and referred the case back to it for reconsideration.

In 2022, the General Court annulled on remand the 2009 Decision insofar as the Commission had found that Intel's exclusivity rebates constituted an abuse but confirmed the illegality of the naked restrictions. However, since the General Court could not determine a separate fine for the naked restrictions, it annulled the fine in its entirety. The Commission is currently appealing the 2022 General Court judgment before the CJEU.

In the present decision, the Commission (re-)imposed a fine limited to the naked restrictions. It is worth emphasizing that, although the Commission is bound by Article 266 TFEU to implement the Court's judgments, it is very unusual for the Commission to re-adopt an amended decision while the proceedings against the judgment that partially annulled that decision are still pending.

ABUSE OF DOMINANT POSITION

National level

ITALY

Italian competition authority fines Roxtec for various disparagement, regulatory and IP strategies

On 16 August 2023, the Italian competition authority ("ICA") published a decision finding that Roxtec, a global leader in the manufacturing and distribution of tube and cable sealings, had abused its dominant position by implementing a strategy aimed to foreclose its main competitor ("Decision"). The Decision also imposed a fine of over €15 million on Roxtec.

Until 2010, Roxtec had held a patent for a tube and cable sealing system. The ICA found that, after the expiry of the patent, Roxtec started to engage in various actions, including asserting IP rights, unmeritorious litigation, and disparagement of rivals, that were part of a strategy to hinder entry and expansion by a competing supplier.

First, Roxtec registered several designs of its product as trademarks at the European Union Intellectual Property Office ("EUIPO"), substantially mirroring the technical characteristics of the expired patent but changing the colour with each application (including the colours used by its closest competitor, WallMax). The EUIPO declared only certain trademarks invalid.

Second, Roxtec initiated court proceedings (some of which were still pending) against WallMax in five different countries (India, Germany, Italy, the USA and The Netherlands) mainly based on unfair competition, trademark infringement and unjust enrichment claims. According to the ICA, these actions were initiated without good faith as they were not aimed at protecting Roxtec's legitimate interests, but only at harming its competitor. The ICA considered that this was corroborated by internal documents, which did not identify any risk of confusion of the trademark rights, as well as by the fact that – at the moment of the Decision – Roxtec had not obtained any favourable judgment before the said courts.

It is worth noting that the ICA expressly decided not to qualify the initiation of legal actions as sham litigation but – more vaguely – as part of a "complex exclusionary strategy". This allowed the ICA to avoid the criteria set out by the case law in *Promedia* (T-111/96) which had held that litigation could be considered abusive only if it was objectively baseless. Instead, based on documentary evidence found during the investigation, the ICA considered that Roxtec intended only to exclude its competitor, rather than to legitimately protect its rights.

Third, Roxtec also directly contacted WallMax's customers to spread allegedly disparaging comments, such as information about (i) quality tests carried out on behalf of Roxtec and in relation to which Roxtec had actively requested amendments to the corresponding report, and (ii) the legal actions undertaken against WallMax. To prove the exclusionary purpose of this conduct, the ICA deemed relevant that all of Roxtec's communications with WallMax's customers were oral (observing that Roxtec had drafted a letter just to be prepared in case a written communication was needed).

Following an assessment of anti-competitive effects, the ICA found that all the practices represented a single violation of Article 102 TFEU as they all aimed at foreclosing Roxtec's closest competitor, thus limiting the consumers' choice and effective competition on the market.

Conclusion

Although the Decision might at first sight appear justifiable – apparently internal documents showed that RoxTec may have aimed to hinder a rival's entry and expansion – the ICA is in fact pushing the boundaries of Article 102 TFEU

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enforcement. It appears highly questionable whether the ICA could have established an Article 102 infringement separately for each of the elements of RoxTec's conduct. Apparently, the ICA concluded that lumping together all elements under the label "anti-competitive strategy" would allow it to evade otherwise applicable stricter legal standards. It is thus not surprising that the reasoning of the ICA focuses mainly on the anti-competitive aim of the conduct, which emerges as the primary criterion to establish the infringement in the present case.

A parallel judgment by the Court of Milan ("Court") following an action for damages initiated by WallMax, *inter alia,* pursuant to Article 102 TFEU, highlights the problems with the ICA's approach. The Court – which was aware of the Decision – considered that the legal proceedings initiated by Roxetc in different jurisdictions could not be regarded as vexatious litigation as such proceedings were still pending. As a result, it did not consider them as abusive. The Court adopted the same approach when assessing the trademark filings at the EUIPO. It held that these filings were not abusive as only two of them were declared invalid with a final decision.

The ICA's approach is not only questionable as a matter of law as it appears to circumvent more demanding tests to establish an Article 102 infringement. It also creates significant uncertainty for dominant firms. Clearly, dominant firms are entitled to enforce their rights through court actions, as long as these actions are not objectively baseless, and to assert intellectual property rights. They also must be entitled to inform market participants about their and their competitors' products, as long as they are not providing misleading information. But the ICA's Roxtec Decision highlights that there remains a material risk that even if individual actions in themselves could be lawful, a competition authority may decide that the allegation of an overall, anti-competitive strategy can be sufficient to establish an Article 102 infringement.

CARTELS AND HORIZONTAL AGREEMENTS

European Union level

Commission imposes fine of €1.2 million for cartel in defence sector

On 21 September 2023, the European Commission ("Commission") announced in a press release that it had imposed a fine of €1.2 million on German weapons supplier Diehl for participating in a cartel with its rival RUAG, a Swiss defence company, on the market for military hand grenades.

According to the Commission, the two companies divided national markets in the European Economic Area by agreeing not sell into the territory assigned to the other, unless the other gave its consent. The Commission found that the behaviour consisted in a single and continuous infringement which had taken place from 7 November 2007 to 23 November 2021. The Commission considered that this conduct led to significantly higher costs and limited choice at a key point in time for defence and security.

The investigation began in 2021 following a leniency application filed by RUAG. RUAG received full immunity from fines under the Commission's 2006 Leniency Notice, thereby avoiding a fine of €2.5 million.

Diehl benefited from a 50% fine reduction for its cooperation as well as a further 10% reduction as a result of its acknowledgement of participation under the 2008 Settlement Notice. Notably, the Commission departed from the standard fining methodology and calculated the fine imposed on Diehl on the basis of point 37 of the 2006 Guidelines on Fines because the Commission considered that the resulting amount of the fine imposed on Diehl under the standard methodology would not have had a sufficient deterrent effect.

The case is notable as it represents the first EU cartel decision concerning the defence sector. Previous examples were only found at national level, such as in Germany, where Germany's Federal Cartel Office imposed €1.3 million in fines on a military hardware cartel in 2015.

The Commission's imposition of fines in this case provides a reminder that the EU competition rules apply to all industry sectors – including in the defence sector.

CARTELS AND HORIZONTAL AGREEMENTS

National level

BELGIUM

Belgian competition authority suspends investigation into "Gentlemen's agreement" in banking sector

On 25 September 2023, the Belgian competition authority ("BCA") announced the suspension of its investigation into a suspected anticompetitive agreement in the banking sector. This suspension will enable the BCA to focus its resources on the preparation of a report requested by the Federal Minister for Economy and Labour regarding the same practices.

This case started in August 2023, when Belgian media outlets reported on a "gentlemen's agreement" between banks not to compete with the State Treasury bond launched by the Belgian government through other financial products and not to raise interest rates on saving accounts during the subscription period for State Treasury bond. This information was denied by the banks and by the Federation of the Belgian Financial Sector (Febelfin). Febelfin published a press release stating that commercial agreements between banks on interest rates would be prohibited by the competition rules.

However, the BCA's preliminary investigation revealed that certain banks had "*a free, extensive and inaccurate interpretation*" of a provision of the contract between each of them and the Federal Debt Agency concerning the issuance of the State Treasury bond. According to the BCA, while this provision only restricts the release by banks of savings certificates during the subscription period of the State Treasury bond, the banks interpreted it as applying more broadly to "*a range of savings and investments products, and their yields*". The BCA points to the "*concomitant use by two of the country's leading banks of the term "gentlemen's agreement" to designate a specific contractual provision when, in the banks' own opinion, this term is not commonly used in the banking sector*". The BCA considers that these communications raise questions, particularly since they involved experienced individuals.

Although at a preliminary stage, this case appears to raise interesting questions on the signals that banks can send to each other to align their competitive behaviour. The BCA's investigation might resume once the BCA has issued its report to the Ministry of Economy and Labour, which is due by the end of October 2023.

VERTICAL AGREEMENTS

European Union level

The General Court's landmark ruling in Valve on technical measures used to prevent passive sales: the end of the road for the territorial protection afforded by unexhausted IP rights?

On 27 September 2023, the General Court handed down its judgment dismissing the action brought by Valve Corporation ("Valve") against a Commission decision adopted in 2021 finding that Valve's geo-blocking practices constituted a by-object infringement of Article 101(1) TFEU and imposing a fine of EUR 1.624.000. The judgment has far-reaching implications for copyright holders and for the territoriality of copyright in the face of parallel trade, which may extend beyond competition law. In rejecting the possibility to invoke copyright to justify restrictions of parallel trade under Article 101 TFEU, the ruling applies as strict an approach to intangible goods (and services) as to physical goods. More broadly, the extent of the Commission's success in defending its decision may be expected to inject even greater vigour to the Commission's already active enforcement policy against territorial restrictions, whether in the context of licencing or of distribution, in all sectors of the economy (See VBB on Competition Law, Volume 2023, No 7 & 8).

Background

Valve operates an online gaming platform for PC video games called Steam, on which users can play Steam-compatible PC video games, as well as enjoying additional features such as multi-player matchmaking, in-game events, and social and chat features. In order to play a Steam-compatible video game, a user must either acquire a game from Valve through Valve's own Steam Store or "activate" a game acquired from a seller other than Valve by using an alphanumeric code known as a Steam activation key. Valve provides publishers of Steam-compatible PC video games with Steam activation keys free of charge, which are then provided by the publishers to the independent distributors of their video games who, in turn, provide them to purchasers of the games.

According to the Commission decision, between 2010 and 2015 Valve provided five publishers, at the publishers' request, with geo-blocked Steam activation keys in respect of certain of their video game titles. These geo-blocked keys could only be used to activate – and in some cases to play after activation – a game within a designated territory. For example, a user in Germany would have been unable to activate in Germany a video game using a Steam activation key that had been geo-blocked to Poland (and, depending on the type of geo-blocking employed, to later play the game in Germany even if it had been activated in Poland). The Commission found that, through their respective conduct in relation to the supply of the geo-blocked keys, the publishers and Valve had participated in a series of agreements or concerted practices which had the object of making any passive sales outside the territory of certain EEA countries practically impossible, thereby infringing Article 101(1) TFEU. (It should be noted that Valve also acted as a distributor of PC video games supplied by the publishers, but the decision did not cover this aspect of Valve's relationship with the publishers.)

Before the General Court, in addition to contesting the Commission's findings of fact, Valve argued that the Commission was wrong as a matter of law to find that (i) Valve's conduct was sufficient for it to be held to be party to agreements or concerted practices with the publishers within the meaning of Article 101 TFEU and (ii) Valve's conduct amounted to a restriction of competition by object contrary to Article 101(1) TFEU.

Existence of agreements or concerted practices

The key question considered by the General Court was whether – in relation to the generation of the Steam activation keys in order to prevent passive sales of

the video games concerned – there was a sufficient concurrence of wills between Valve and each of the publishers in order for Valve to be held to be party to an agreement or concerted practice within the meaning of Article 101(1) TFEU, or whether this was instead unilateral conduct on the part of the publishers (to whom Valve merely provided the technical means to achieve the result of preventing passive sales). The General Court found that the facts established by the Commission disclosed a sufficient concurrence of wills because Valve had (admittedly in what seems to have been a limited number of communications with the publishers) proactively referred to the possibility of the publishers using the geo-blocking of Steam keys to restrict parallel imports and had complied with the publishers' requests to supply them with geo-blocked keys for the titles concerned by the decision – thus, in so doing, Valve was aware (or ought to have been aware) that the keys would be used for this purpose.

In reaching this conclusion, the Court referred to *Bayer* and noted that a concurrence of wills is established where the parties declare an intention to pursue the joint attainment of an anti-competitive object, such as preventing parallel imports. According to the Court, the applicability of this test is not limited to the context of relations between a supplier and a distributor and is capable of being met where the conduct at issue (as in this case) consists in one party implementing a technical measure requested by the other contracting party. However, according to the Court, the decisive factor is whether the specific conduct of the party implementing the technical measure reveals that it shared the anti-competitive object of the measure being implemented. On the facts of the case, and after a detailed analysis of the meaning of key pieces of evidence in relation to each of the publishers, the Court was satisfied – for the reasons set out above – that there was such a concurrence of wills between Valve and the publishers.

Irrelevance of copyright

A key submission made by Valve was that the Commission's analysis of why its conduct had the object of restricting competition incorrectly disregarded its argument that parallel trade in the relevant PC video games was precluded by the existence of unexhausted national copyright protecting the games. In Valve's view, the publishers were perfectly entitled to use territory control measures, such as geo-blocked activation keys, in order to prevent unauthorised (including passive) sales of their games by distributors in parts of the EEA where they were not authorised to sell because these sales amounted to unauthorised communication to the public infringing the publishers' copyright there. Valve's reasoning implied that a distributor which had been granted a copyright license (only) in Poland could be prevented by an action for breach of copyright before the German courts from selling, including passively, into Germany. In defence of the use of activation keys, Valve also argued that Article 6 of the InfoSoc (Copyright) Directive endorses the use of "technological measures" to prevent unauthorised acts in respect of copyright-protected works.

The General Court upheld the Commission's view that it is not decisive for the purposes of the application of Article 101 TFEU whether passive sales are liable to infringe unexhausted copyright in the importing Member State in circumstances where the exercise of that right would amount to a "*disguised restriction on trade between Member States*". The Court stated that, while – as established by the case law – the practice of granting exclusive copyright licences on a state-by-state (rather than EEA-wide) basis is not contrary to Article 101 TFEU (a possibility which was not strictly relevant in the case at hand as Valve had been granted a non-exclusive license by the publishers), the use of "additional measures" aimed at ensuring compliance with territorial limitations on the exploitation of those licences may have an anti-

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competitive object. Relying primarily on *Premier League* (a case concerning territorial passive sales restrictions of satellite TV decoders) and also *Groupe Canal +* (which concerned passive sales restrictions in pay TV licences involving internet transmission), the Court observed that such anti-competitive additional measures include measures making it impossible to access the protected subject matter of the copyright from outside the territory covered by the licence agreement, thereby creating – as had the use of geo-blocked activation keys – a form of absolute territorial protection.

On the facts before it, the Court found that the geo-blocking of the Steam activation keys was not used to protect copyright but instead to eliminate parallel imports in order to protect the high royalty amounts collected by the publishers (or the revenues earned by Valve when distributing through Steam Store) in certain EEA countries (where prices were higher than in the Member States from where cross-border sales were prevented). The Court observed that, while copyright entitles the right holders to exploit commercially the protected subject matter by granting licences in return for payment of remuneration, copyright does not guarantee the right holders concerned the opportunity to demand the highest possible remuneration or to engage in market partitioning with the object of creating artificial price differences. Given the facts of the case, it seems the Court considered that the use of copyright would amount to a "*disguised restriction on trade*".

The Court went on to reject Valve's various additional arguments (including in relation to alleged benefits to consumers) as to why, given the specific economic context, the conduct at issue should not be considered, by its very nature, to be harmful to competition (a pre-condition of the finding of a restriction by object). The Court therefore upheld in full the Commission's reasoning as to why the conduct amounted to a restriction by object.

Comment

The General Court's judgment appears to represent a thorough vindication of the Commission's view (previously expressed first in the *Ancillary Sport Merchandise* decision) that it is irrelevant for the analysis of whether territorial restrictions imposed on licensees infringe Article 101 TFEU that cross-border sales into other territories by licensees could infringe a valid (unexhausted) copyright in those territories. Whether this principle had already been established by the Court of Justice in *Premier League* was debated owing to the particularities of the regulatory regime governing satellite broadcasting, as was the question whether the apparently broader confirmation of this principle by that Court's subsequent ruling in *Groupe Canal +* could be considered definitive. The ruling confirms that contractual passive sales restrictions in copyright licenses, as well as agreements or concerted practices on technical measures taken to achieve the same outcome as contractual passive sales restrictions, are liable to be considered to amount to by-object restrictions of Article 101 TFEU even in the audiovisual sector, and despite the fact that such services are excluded from the scope of the Geo-blocking Regulation (a factor given short shrift by the General Court).

Whether unilateral actions to enforce copyright in the national courts will serve as an alternative strategy to protect the residual territoriality of copyright remains to be seen. As the exercise of intellectual property rights that amounts to a "*disguised restriction on trade*" is liable to violate the freedom of movement of goods and the freedom to provide services as guaranteed by the TFEU, and as the General Court characterised Valve's conduct as a disguised restriction on trade regardless of any underlying copyright, it could be that territorial protection provided by (national) copyright law would be considered incompatible with the TFEU regardless of the existence of any agreements to achieve this protection. If correct, this interpretation would give grounds to a national court to refuse to enforce an unexhausted national copyright against passive sellers from a different Member State on the basis of the freedom of movement of goods or the freedom to provide services under the TFEU.

STATE AID

National level

BELGIUM

Belgian excess profit tax exemption case: a rare victory for the Commission

On 20 September 2023, the General Court rendered its judgments in the well-known State aid cases concerning the Belgian excess profit tax exemption. In particular, the General Court ruled in cases *Belgium v Commission* (Case T-131/16 RENV) and *Magnetrol International v Commission* (T-263/16 RENV), which were referred back to the General Court by the Court of Justice in 2021. At the same time, the General Court also ruled on other related actions that were stayed at first instance.

In 2016, the Commission found that the excess profit exemption scheme pursuant to which Belgium had issued advance rulings to Belgian companies part of multinational groups constituted a State aid scheme that was incompatible with the internal market, and ordered recovery of the aid. In essence, the measure – which was adopted in 2002 – allowed Belgian companies (or permanent establishments in Belgium of foreign companies) that were part of a multinational group to reduce their tax base in Belgium by deducting the so-called "excess" profit from the profit that they had realized in the country. According to the Belgian tax authority, that excess profit derived from the synergies, economies of scale and other benefits resulting from membership in a multinational group, and was not attributable to the Belgian entities. Therefore, it should not be taxed in Belgium.

Following numerous applications brought against the Commission decision, the General Court decided to stay the majority of the cases pending the closing of the proceedings in *Belgium v Commission* and *Magnetrol International v Commission*. In its 2019 judgment, the General Court annulled the contested decision because the Commission had qualified incorrectly the measure as an "aid scheme". Essentially, according to the General Court, the legal basis of the measure at issue did not meet the requirements that would permit to qualify it as an "aid scheme" pursuant to Article 1(d) of Regulation 2015/1589[1] (see, paras. 85-88 of the judgment and VBB on Competition, Volume 2019, No. 2).

Following the appeal brought by the Commission, in 2021 the Court of Justice overturned the General Court's 2019 judgment, as it found that it was vitiated by errors of law. In particular, as regards the definition of "aid scheme", the Court observed that, although the measure at issue could not strictly be considered an "act" as prescribed by Article 1(d) of Regulation 2015/1589, the term "aid scheme" "*may, in certain circumstances, also refer to a consistent administrative practice by the authorities of a Member State, where that practice reveals a 'systematic approach', the characteristics of which satisfy the requirements laid down in Article 1(d) of Regulation 2015/1589*" (para. 73). Thus, by limiting its analysis of the conditions of Article 1(d) of Regulation 2015/1589 only to the official legal basis of the measure, the General Court misapplied the term "act" (see VBB on Competition, Volume 2021, No. 8 & 9).

Additionally, having found it impossible to adjudicate on all pleas, the Court of Justice referred the case back to the General Court for it to rule on them. In the judgments rendered on 20 September 2023 in *Belgium v Commission* and *Magnetrol International v Commission* (as well as in all the related cases that were duly resumed), the General Court found that the Commission did not make any error of law or manifest error of assessment when it concluded in the contested decision that the scheme at issue was incompatible State aid. Indeed, the measure was financed through State resources, it granted a selective advantage to its beneficiaries – which was not justified by the nature

1 "'Aid scheme' means any act on the basis of which, without further implementing measures being required, individual aid awards may be made to undertakings defined within the act in a general and abstract manner and any act on the basis of which aid which is not linked to a specific project may be awarded to one or several undertakings for an indefinite period of time and/or for an indefinite amount"

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or general scheme of the Belgian tax system – and it resulted in a distortion of competition. As a result, the General Court dismissed all the applications.

In general, although not definitive, these judgments leave the Commission with the upper hand in the Belgian excess profit tax exemption cases. More importantly, after a series of significant judicial setbacks in the field of advance tax rulings for multinational companies, these rulings represent a rare victory for the Commission in its efforts to tackle "unfair" fiscal competition among Member States.

UNITED KINGDOM

CAT hands down it first judgment under the UK Subsidy Control Act

On 27 July 2023, the UK Competition Appeal Tribunal ("CAT") issued its judgment on the first ever application for review of a subsidy decision under the post Brexit UK state aid/subsidy control regime. Following a review which lasted only around 6 months, the CAT dismissed the application made by a private waste collection company against Durham Country Council ("Council"), the local authority legally responsible to collect household and commercial waste in Country Durham funded by council tax and other public resources. The applicant argued that because the Council shares vehicles and employees for the collection of all waste, it can charge much less for its commercial waste services compared to what it would if it had to run the commercial waste collection service as a separate independent business.

The CAT did not accept that the advantage attributable to sharing underlying waste collection assets amounted to a subsidy as the term does not cover transfers within the same person/public authority, even if functionally separately. This approach is not in line with the EU State aid law approach which does not mandate a distinct legal personality when examining comparable activities. This said, if it can be demonstrated that the economic activity exercised by the public authority cannot be separated from the exercise of its own public powers, the outcome of the case might not have been different under EU State aid law since such activity would then effectively not be subject to state aid review. The CAT also held that, in any event, the advantage in question was enjoyed by the customers of the Council and not by the Council itself. Finally, it is worth noting that the CAT agreed with the applicant that although the Council's approach to charging for commercial waste collection services was set up in 2020, the relevant decision on the use of public resources was made every year when the Council sets its charging rates. As such, the Council's 2023 rates determination was a decision within the meaning of the Subsidy Control Act and, thus, capable of being challenged under the new UK subsidy control regime.

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