BRUSSELS À JOUR

La Rentrée – Things to Have on Your Radar When Returning to Your Desk after the Summer Break

Leave in July and say good bye, but remember to come back in September! While we are sure that a good part of our readers had a busy summer break, we hope that at least some of you were able to disconnect and relax a bit over the past weeks. In any case, the inevitable return to the desk is approaching quickly. This piece is meant to make your life a little easier by providing an overview of selected upcoming developments in terms of antitrust, merger control and State aid law that might be of interest in the upcoming weeks and months.

Markus Röhrig, Christian Dankerl, Lukas Ritzenhoff and Joachim Burger report on the latest developments from the European capital of competition law.

Cartels & Private Enforcement: Top Down Liability

Under the EU's antitrust rules on parental liability, the European Commission can hold parent entities liable for infringements of their subsidiaries if these do not determine their market behavior independently from their parents but essentially carry out their instructions. A presumption applies to that effect if parents hold (almost) a subsidiary's entire equity – the "Akzo doctrine". Over time, the European Courts have applied the doctrine to joint ventures and, in Skanska (C-724/17), extended it from public to private enforcement. In the upcoming judgment Sumal v Mercedes Benz (C-882/19) the ECJ will have to rule on whether a private plaintiff can bring a follow-on cartel damage claim against a subsidiary where the European Commission has addressed its decision only against the subsidiary's parent. Advocate General Pitruzella, proposes that the Court should answer in the affirmative and establish the concept 'top-down liability'. He would have the subsidiary be liable if its activities pertain to the same business area as the parent's cartel behavior and were necessary to give effect to the cartel arrangement, for example because the subsidiary sold the cartelized goods. The opinion is not binding on the Court. However, if confirmed, Sumal v Mercedes Benz could have far-reaching consequences for both private and public cartel enforcement.

WHEN? Likely in Q4 2021.

Antitrust: Revision of Vertical Block Exemption Regulation and Vertical Guidelines

On 9 July 2021, the European Commission published drafts of its revised Vertical Block Exemption Regulation ("**VBER**") and the accompanying Vertical Guidelines. The European Commission's evaluation phase showed that a revision was necessary to reflect changed market dynamics, especially in light of the fast moving developments in the e-commerce and online platform business. Accordingly, the proposed revised rules aim to reflect these market developments with a focus on four major areas:

— With respect to **dual distribution**, the European Commission acknowledged that suppliers increasingly sell their products online to end customers and thereby compete with their distributors at the retail level. The draft VBER provides for a more restrictive, staggered safe harbor from the general rule that competitors do not benefit from the VBER.

— The rise of online intermediary platforms and inconsistent application of the current VBER across Member States has caused the European Commission to provide for explicit rules on **most-favored-nation and parity obligations**. In general, these rules differentiate between obligations relating to direct sales by the supplier, which continue to benefit from the safe harbor if the general requirements for the VBER's application are met, and indirect sales via intermediation services, which may no longer benefit from a block exemption.

— The draft VBER aims to clarify the terms **"active" and "passive" sales**, especially in the digital environment. Notably, the concept of "active sales" includes targeted online advertising and promotion, *inter alia*, by using online media, price comparison tools, specific website language options or advertising on search engines targeting customers in specific territories or customer groups. As a general rule, restrictions imposed by the supplier that aim at restricting the effective use of the internet as an advertisement or sales channel will be considered "hardcore" restrictions. Further changes aim at strengthening the position of exclusive distributors and distributors within a selective distribution system.

— Certain proposed changes relate to **indirect measures that restrict online sales**. The European Commission acknowledges that online sales have developed into a functioning sales channel and do not require special protection. In that vein, dual pricing by charging different wholesale prices for online and offline sales by the same distributor is no longer considered a "hardcore" restriction if the price difference incentivizes or rewards investments and relates to costs incurred in each channel. With respect to selective distribution, the criteria imposed by suppliers in relation to online sales no longer have to be equivalent to the criteria imposed for "offline" sales. The draft Vertical Guidelines lists other measures that have as their object to restrict online sales and, therefore, cannot be exempted under the draft VBER. These measures include, inter alia, outright online sales bans, while online marketplace bans may be admissible under the VBER. The draft VBER and the draft Vertical Guidelines further provides guidance with respect to the platform economy.

WHEN? Public consultation until 17 September 2021. Entry into force of the revised VBER and Vertical Guidelines expected on 1 June 2022.

Antitrust: Revision of Horizontal Block Exemption Regulations and Horizontal Guidelines

On 13 July 2021, the European Commission opened a public consultation on its policy options relating to the revision of the Horizontal Block Exemption Regulations ("**HBERs**") and the Horizontal Guidelines. These policy options were set out in the European Commission's inception impact assessment published on 7 June 2021.

In general, the revision of the HBERs and the Horizontal Guidelines shall allow for a clearer and simpler self-assessment of horizontal cooperation. In certain areas, the policy options were considered to be too strict. To that end, the policy options relating to the HBERs focus on three main areas:

— Not discouraging the participation of SMEs, research institutes and/or academic bodies in R&D and specialization agreements that do not raise competition concerns;

— Not discouraging the conclusion of R&D agreements which are unlikely to raise competition concerns and can be pro-competitive in general; and

— Clarifying the uncertainty relating to the scope of the Specialization Block Exemption Regulation.

The revised Horizontal Guidelines shall provide specific guidance for horizontal cooperation resulting from market developments such as digitization (e.g. with respect to data pooling and data sharing) and the pursuit of sustainability goals.

WHEN? Feedback on the policy options can be submitted until 5 October 2021. The draft revised HBERs and Horizontal Guidelines are scheduled to be released for public consultation early 2022 and shall be finalized by the end of 2022.

Merger Control: Gun Jumping (I)

In *Altice v Commission* (T-425/18), the General Court will have an opportunity to weigh in on the permissible scope of pre-closing covenants. In its 2018 decision, imposing a record fine of 125 million Euros, the European Commission concluded that certain pre-closing covenants, which effectively granted the acquirer veto rights over decisions pertaining to the target's ordinary business, were tantamount to gun-jumping. The European Commission also took issue with several instances in which the acquirer had allegedly issued instructions to the target on how to carry out a marketing campaign and sought – and received – detailed commercially sensitive information. Here, the General Court's judgment will hopefully offer guidance on whether, and in which circumstances, the exchange of commercially sensitive information can amount to gun jumping, as opposed to "only" a concerted practice under Article 101 of the Treaty on the Functioning of the European Union.

WHEN? Judgment to be handed down on 22 September 2021.

Merger Control: Gun Jumping (II)

Another case to watch out for in this respect is *Canon v Commission* (T-609/19). In 2019, the European Commission imposed a fine of 28 million Euros alleging that the parties had implemented a warehousing scheme in breach of the stand-still obligation. Under the arrangements, an interim buyer had acquired 95% of the target's equity for 800 Euros, while Canon – the ultimate purchaser – paid 5.28 billion Euros for the remaining 5% and an option to purchase the interim buyer's stake after the European Commission would have approved the deal. For many years, there has been significant uncertainty as to whether or not warehousing structures might be permissible under the EU Merger Regulation's stand-still obligation, and how these would need to be designed. *Canon v Commission* will hopefully offer much needed guidance in that space.

WHEN? Likely in Q4 2021.

Merger Control: The Fate of the European Commission's Article 22 Guidance

After a complete reversal of its policy with respect to referrals under Article 22 of the EU Merger Regulation ("**EUMR**") in March 2021, the European Commission did not have to wait long for the first referral requests to arrive. Following its new guidance and targeting mainly "killer acquisitions", i.e. deals where the turnover of at least one of the merging firms does not reflect its actual or future competitive potential (e.g., with certain start-ups and important innovators), the European Commission actively solicited Member States to refer Illumina, Inc.'s proposed acquisition of GRAIL, Inc. The European Commission was concerned that the transaction would lead to a reduction of competition and innovation in the emerging market for cancer detection tests. Even though the deal was not reportable in any Member State and the Parties were just about to close, France –later joined by Belgium, Greece and the Netherlands, and the EFTA States Norway and Iceland– shared the European Commission's view and requested a referral under Article 22 EUMR. In the meantime, an in-depth investigation of the proposed acquisition was opened (Case M.10188).

Illumina has however challenged the referral before the General Court. The case, Illumina v Commission (T-227/21), is certainly one of the judgments that should be on companies' and practitioners' watch list. It will determine the fate of the newly revised Article 22 guidance, as the General Court will –besides other critical issues such as the timing of the referral shortly prior to closing– have to assess whether a referral is possible if none of the referring Member States have jurisdiction over the transaction in question. The question whether the referral is covered by Article 22 EUMR will however not only keep the General Court busy: On 18 August 2021, Illumina publicly announced the completion of the acquisition of Grail, but decided to hold it as a separate company during the European Commission's merger control review.[1] Nonetheless, only two days later, the European Commission has decided to open an investigation as to whether this constitutes a breach of the standstill obligation under Art. 7 EUMR.[2]

WHEN? Oral hearing possibly in Q4 2021 (if expedited), Judgement expected in 2022.

1 See here: https://investor.illumina.com/news/press-release-details/2021/Illumina-Acquires-GRAIL-to-Accelerate-Patient-Access-to-Life-Saving-Multi-Cancer-Early-Detection-Test/default.aspx.

2 Press release of 20 August 2021: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_4322.

Merger Control: Revision of Market Definition Notice

On 12 July 2021, the European Commission has published a staff working document that sets out the findings of the evaluation of the current Market Definition Notice ("**Notice**"). The evaluation indicated that the Notice adopted in 1997 is still a relevant instrument in antitrust and merger cases, provides comprehensive and clear guidance on key issues of market definition, but may not sufficiently reflect the developments in best practices in market definition, especially in light of digitalization and globalization. While not warranting a radical change to the European Commission's approach to market definition, the evaluation identified potential areas that may be subject to changes, namely (i) the use and purpose of the SSNIP (small significant non-transitory increase in price) test in defining relevant markets; (ii) digital markets (iii) the assessment of geographic markets in conditions of globalization and import competition; (iv) quantitative techniques; (v) the calculation of market shares; and (vi) non-price competition (including innovation). As the next step, the European Commission will publish a draft of the revised Notice. In that context, the European Commission faces the challenge that the revised Notice must retain its relevance despite fast-moving developments of innovative markets.

WHEN? Publication of the draft revised Notice expected at the beginning of 2022.

State Aid: Guidelines on State aid for climate, environmental protection and energy ("CEEAG")

The EU gets "fit for 55". How to make sure the EU's plan does not share the fate of the too familiar fitness-related New Year's resolutions? The European Commission not only relies on specific measures set out in its 2030 Climate Target Plan, but also reaches deeply into its State aid toolbox. Since the ambitious bill associated with transforming the EU's economy into a sustainable one cannot be footed by public investment alone, the European Commission recognized the crucial role of a more flexible approach towards "green investment." To underpin the European Green Deal and facilitate private investments, the European Commission recently put forward a far-reaching CEEAG proposal[3] and closed the corresponding public consultation on 2 August 2021. The current proposal entails significant changes to the previous 2014 guidelines on environmental aid, in particular:

— The extension of CEEAG to new areas, in particular clean mobility, energy efficiency in buildings and newly introduced renewable energy sources (e.g. hydrogen);

— Higher aid amounts allowed (up to 100% of funding gap, i.e. net extra cost necessary to achieve climate objective of aid) and introduction of new aid instruments (e.g. so-called Carbon Contracts for Difference);

— More flexible approval processes under section 4.1 CEEAG, eliminating individual notification for large green investment projects within pre-approved aid schemes.

In parallel, the European Commission aims to also partially revise the General Block Exemption Regulation ("**GBER**") complementing the final CEEAG, with a public consultation for such provisions expected to take place still in 2021. In the same vein, the

3 Proposal from 16 June 2021, retrievable here: https://ec.europa.eu/competition-policy/system/files/2021-06/CEEAG_Draft_communication_EN.pdf.

European Commission recently broadened the scope of the GBER, exempting financing and investment operations supported by the 372 billion Euros-equipped InvestEU Fund as well as support for certain sustainable projects (e.g. energy efficiency, recharging infrastructure for zero/low emission vehicles) from an individual notification.[4]

WHEN? Publication of CEEAG expected in Q3 2021, early Q4 2021 the latest, with the new CEEAG entering into force on 1 January 2022.

State Aid: Revised "Notice on the enforcement of State aid rules by national courts"

On 30 July 2021, the European Commission issued a new notice on private enforcement of State aid rules, aiming to encourage a closer cooperation between the European Commission and national courts.[5] This follows an in-depth study published in 2019,[6] which showed that until 2017 existing cooperation tools were not used to a significant extent. The revised Notice incorporates relevant case law by Union courts on private enforcement (e.g. with respect to the standstill obligation, Case C-284/21 - *Deutsche Lufthansa*) and includes various dedicated tools for closer cooperation (transmission of information, opinions and amicus curiae observations). To safeguard the implementation in practice, the European Commission also introduced a new single contact point to which national courts or parties can address their requests.

WHEN? Not necessarily in 2021, but first impacts and interventions by the European Commission in national proceedings can be expected sooner than later.

Contact

Markus Röhrig
Partner
T +32 2 7885 525
markus.roehrig@hengeler.com

Christian Dankerl
Senior Associate
T +49 211 8304 734
christian.dankerl@hengeler.com

Lukas Ritzenhoff
Senior Associate
T +32 2 7885 520
lukas.ritzenhoff@hengeler.com

Joachim Hannes Burger
Associate
T +32 2 7885 547
joachim.burger@hengeler.com

Follow us

Don't miss any edition of our Brussels à Jour Newsletter.

You can simply follow the hashtag **#Brusselsajour** on LinkedIn to make sure you receive our updates in your feed.

www.hengeler.com

4 Press release of 23 July 2021: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3804.

5 Communication from the Commission, Commission Notice on the enforcement of State aid rules by national courts, OJ C 305, 30.7.2021, page 1 – 28.

6 Study on the enforcement of State aid rules and decisions by national courts (COMP/2018/001), retrievable here: https://op.europa.eu/en/publication-detail/-/publication/264783f6-ec15-11e9-9c4e-01aa75ed71a1.