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EU Competition Law Newsletter

Highlights

— Advocate General Rantos' Opinion In *Autoridade Da Concorrência and ECP* (Case C-331/21) On The Notion Of Potential Competition And The Distinction Between Restrictions "By Object" And "By Effect"

Advocate General Rantos' Opinion In *Autoridade Da Concorrência and ECP* (Case C-331/21) On The Notion Of Potential Competition And The Distinction Between Restrictions "By Object" And "By Effect"

On March 2, 2023, Advocate General Rantos delivered his opinion on the questions referred to the Court of Justice by the Lisbon Court of Appeals (referring court) in *Autoridade da Concorrência and EDP*.[1] The referring court seeks clarification on whether an association agreement between undertakings operating in different product markets can constitute an agreement with an anticompetitive object for the purposes of Article 101 TFEU,[2] and subject to what conditions. The case gives the Court of Justice the opportunity to address the circumstances under which two undertakings can be considered potential competitors, including in light of its recent judgment in *Generics (UK)*.[3] The case should also provide further clarity on whether proof of anticompetitive effects is needed for a non-compete agreement between potential competitors to qualify as an infringement. On these points, Advocate General Rantos advised the Court of Justice to rule that the standard to establish "potential competition" is not heightened where undertakings operate in separate product markets, and that the non-compete agreement at issue should be regarded as an infringement "by object."

[1] *Autoridade da Concorrência, EDP – Energias de Portugal SA, EDP Comercial – Comercialização de Energia SA, Sonae MC SGPS SA, formerly Sonae Investimentos and Sonae MC – Modelo Continente SGPS, Modelo Continente Hipermercados AS, other party: Ministério Público* ("Autoridade da Concorrência and EDP Opinion") (Case C-331/21), opinion of Advocate General Rantos, EU:C:2023:153.

[2] Treaty on the Functioning of the European Union, OJ 2012 C 326.

[3] *Generics (UK) and Others* (Case C-307/18) EU:C:2020:52. In that judgment, the Court of Justice found a manufacturer of originator medicines holding a disputed patent for an active ingredient in the public domain, and a manufacturer of generic medicines preparing its entry into the market for the medicine containing said active ingredient, to be potential competitors where it is established that the manufacturer of generic medicines has a firm intention and the inherent ability to enter the market, and that the market does not present insurmountable barriers to entry.

Background

The gradual liberalization of the market for the supply of electricity in Portugal was set to conclude from July 2012 to January 2013, with the expiry of regulated tariffs for the supply of low-voltage electricity to end consumers (small businesses and households).[4] In this context, in January 2012, *Energias de Portugal SA* ("EDP"), the former statutory monopolist and largest player in the markets for the production, distribution and supply of electricity, entered into an association agreement with MCH, a large food retailer part of the Sonae group. The agreement would enable MCH's customers with a loyalty card to benefit from a 10% reduction on their consumption of EDP-supplied electricity. Importantly, the association agreement between EDP and MCH contained an "exclusivity" clause that prevented MCH and any other Sonae companies from engaging in the supply of electricity and gas in Portugal until December 31, 2013.[5]

In May 2017, acting on an alert from the Ministry of the Economy, the Portuguese Competition Authority (*Autoridade da Concorrência*, "AdC") imposed fines totalling €38 million on EDP and MCH. It alleged the parties had entered into a market-sharing agreement by way of the non-compete clause in the association agreement – which the AdC characterized as an infringement by object of Article 101 TFEU. The AdC held that the implementation of the agreement in the midst of the liberalization of the market for the supply of electricity strengthened the anticompetitive nature of the agreement.

The fines were reduced on appeal in first instance, but both EDP and the AdC appealed the ruling before the referring court, which submitted eleven questions to the Court of Justice. In his opinion, Advocate General Rantos grouped the questions around the following four issues.

Clarification of the notion of "potential competition" between undertakings present on different product markets for the purposes of Article 101 TFEU

By its third to seventh and ninth questions, the referring court asks what evidence is relevant in establishing whether MCH and EDP were potential competitors on the market for the supply of electricity.[6] Advocate General Rantos observed that, in so doing, the referring court seeks to ascertain the scope of *Generics (UK)*, and whether the evidence examined in that case should be taken as a general criterion in assessing the existence of potential competition.[7]

Advocate General Rantos confirms the relevance of the recent case law related to "pay-for-delay" agreements in the pharmaceutical sector,[8] but argues that the standard of proof required to demonstrate a potential competitive relationship between undertakings operating in different product markets is the existence of "real and concrete possibilities" of market entry,[9] a standard already defined by the case-law,[10] to be established by reference to factual evidence or an analysis of the structures of the relevant market. Accordingly, Advocate General Rantos rejects EDP's submission that the Court of Justice departed in *Generics (UK)* from its previous case-law by raising the applicable legal test in establishing potential competition,[11] and defining three cumulative evidentiary conditions to that end, namely that:

[4] Since 1995, the regulatory framework applicable to the marketing of electricity in Portugal simplified the legal requirements to access and operate in the market for the supply of electricity to favor the entry of independent operators. As of 2006, consumers were allowed to choose between providers operating in the regulated market and in the liberalized market, and in January 2011, regulated tariffs for the supply of very high, high and medium voltage electricity to end consumers expired. The expiry of regulated tariffs for the supply of low voltage electricity to end consumers took place between July 2012 and January 2013, leading up to the conclusion of the liberalization in 2013.

[5] The clause also prevented EDP from concluding partnerships with other energy suppliers in Portugal, and contained corresponding obligations for EDP in the food retail market (the "non-compete clause").

[6] *Autoridade da Concorrência and EDP Opinion*, paras. 35-36.

[7] *Ibid.*, para. 37.

[8] *Ibid.*, paras. 49-51.

[9] *Ibid.*, para. 53.

[10] *See, e.g., Lundbeck v Commission* (Case C-591/16 P) EU:C:2021:243, para. 54 and case-law cited.

[11] *Autoridade da Concorrência and EDP Opinion*, para. 52.

(i) the undertaking concerned must have a real and concrete possibility of entering the market concerned; (ii) it must have the firm intention and the inherent ability to enter that market; and (iii) it must have taken sufficient preparatory steps to enter that market within a short period of time.[12] Rather, the Advocate General considers that, in *Generics (UK)*, these elements were simply part of the Court of Justice's assessment, in view of the particular attributes of the pharmaceutical market.[13] As such, they can provide useful guidance as to the various items of evidence that may establish a situation of potential competition, but cannot be characterized as "conditions" required to establish the existence of "potential competition".[14]

As regards the specific questions from the referring court, the Advocate General advised the Court of Justice to rule that, *inter alia*, the following factors might be relevant to establish the competitive relationship between two undertakings in different product markets:

i. an undertaking's intention to enter a market, as evidence of its ability to effectively enter that market;[15]

ii. the preparatory steps taken to enter a market, particularly regarding any constraints to start operating in a given market, which may reveal the ability of the undertaking to enter the market within a given timeframe (in this case, corresponding to the duration of the non-compete clause);[16]

iii. the perception of the undertaking present on the other relevant market, supported by other factors relating to the reality of the market;[17]

iv. any activities of other undertakings in the same group on adjacent product and geographic markets outside of the scope of the non-compete clause;[18]

v. the activities of the parties in the market object of the non-compete clause, insofar as such activities may confer an advantage to the undertaking in entering that market. Specifically, Advocate General Rantos found that undertakings present in the value chain are "often potential operators which are in a good position to enter a new market, including in the electricity and gas sector, in particular where those markets are vertically integrated".[19]

On the legal characterization of the association agreement and the existence of an ancillary restriction

The eleventh question referred to the Court of Justice asks whether the association agreement should be characterized as an "agency agreement" or, failing that, a "vertical" agreement within the meaning of Article 1(a) of the Vertical Block Exemption Regulation ("VBER").[20] The Advocate General views the objectives and attributes of the association agreement as different from those of an agency or vertical agreement, mainly because MCH and EDP act at the same level of the production chain because they both supply end-consumers.[21]

The Advocate General instead considers that the relevant question as to the anticompetitive nature of the agreement in this case is not the categorization of the overall agreement but rather whether the non-compete clause is ancillary

[12] *Ibid.*, para. 41.

[13] *Ibid.*, paras. 54-55.

[14] *Ibid.*, paras. 55-56.

[15] *Ibid.*, paras. 63-66.

[16] *Ibid.*, paras. 67-70.

[17] *Ibid.*, paras. 71-74.

[18] *Ibid.*, paras. 75-80.

[19] *Ibid.*, paras. 83-85.

[20] Commission Regulation (EU) No 330/2010, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ 2010 L 102/1.

[21] *Autoridade da Concorrência and EDP Opinion*, paras. 91-99.

in nature.[22] In that regard, Advocate General Rantos finds that the file does not reveal that the non-compete clause was "objectively necessary" for the implementation of the agreement and "proportionate" to the stated ends of protecting commercially sensitive information, as adduced by EDP.[23]

On the existence of a restriction of competition "by object"

Finally, the Advocate General addressed the referring court's remaining questions, which concerned whether a non-compete clause preventing the entry of another party into the market, where one of the parties is a major player, can be regarded as a restriction "by object."[24] His opinion recalls that, in order to determine whether an agreement can be considered anticompetitive "by object," regard must be had to the content and objectives of the provision, and the legal and economic context of which it forms part.[25]

On this basis, in so far as it is not considered ancillary to the agreement, Advocate General Rantos invites the Court of Justice to rule that the non-compete clause ought to be characterized as a market sharing agreement, constituting a "by object" infringement of Article 101(1) TFEU.[26]

Notably, the Advocate General considers that the application of the clause in the specific context of the liberalization of the market for the supply of electricity in Portugal would further reinforce the anticompetitive nature of the clause, and that while any procompetitive effects should be taken into account in characterizing the agreement as a restriction "by object," to the extent that the clause is not deemed ancillary to the association agreement, no consumer benefits can be attributed to the non-compete clause alone and cannot therefore be relied on as a justification.[27]

Conclusion

Advocate General Rantos' opinion brings welcome clarification on the relevance and applicability of the case-law in "pay-for-delay" cases to the assessment of "potential competition" between undertakings outside of the pharmaceutical sector. However, this necessarily limits the certainty brought by the developments of the test in those cases. The opinion also highlights the importance of the legal and economic context of relevant markets in assessing the anticompetitive nature of a given conduct, particularly in recently liberalized sectors. It remains to be seen whether and to what extent the Court of Justice will endorse the opinion.

News

Commission Updates

The Commission Looks Back at Aegean Airlines/Olympic Air

In 2021, the Commission announced that it would revisit 15-25 merger decisions adopted between 2012 and 2018 to evaluate whether its predictions during the merger control process regarding entry, expansion and imports materialized *ex post*, with the assistance of an external contractor.[28] In February 2023, the Commission issued a request for information in the context of this study, seeking information about the effects of the acquisition by Aegean Airlines of Olympic Air—one of the rare cases in which the regulator

[22] *Ibid.*, para. 98.

[23] *Ibid.*, paras. 107-113.

[24] *Ibid.*, paras. 107-113.

[25] *Ibid.*, para. 116.

[26] *Ibid.*, para. 117.

[27] *Ibid.*, paras. 118-119.

[28] Call for tenders COMP/2021/OP/0003, "Commission assessment of future market entry, expansion and import in EU merger decisions," June 18, 2021, available at: https://etendering.ted.europa.eu/cft/cft-documents.html?cftId=7775.

accepted the "failing firm" defense.[29] It has been reported that the Commission has also sent questionnaires regarding *Orange/Jazztel*,[30] *Ryanair/Aer Lingus*,[31] *Ineos/Solvay*.[32] The final report is scheduled for publication later this year.[33]

In its *ex post* studies, the Commission does not aim to conduct a second review of the transactions in question. Rather, the Commission intends to evaluate the economic effects of its decisions, including on prices, quality, and innovation. Taken together, these *ex post* evaluations provide the Commission with insights regarding the effectiveness of its past interventions.[34]

Ex Post Review of the *Aegean Airlines/ Olympic Air* Transaction

On October 9, 2013, the Commission unconditionally approved the acquisition of Olympic Air by Aegean Airlines after having prohibited the first attempt of the companies to combine their operations in 2011.[35] In February 2023, the Commission revisited its assessment of the transaction as a part of its *ex post* study on economic impact of merger-control decisions.[36]

The Commission has now sent questionnaires to market participants with a view to learning whether its prediction—that rival airlines were unlikely to enter or expand on Greek routes—was correct.[37] In particular, the Commission's questions focused on entry and expansion on 11 routes where the Commission identified competitive concerns.

In addition, prior to the clearance of the *Aegean Airlines/Olympic Air* transaction in 2013, the companies separately announced plans to leave four routes on which they were competing.[38] In this context, the Commission asked whether the companies would be likely to re-enter those routes before the end of 2016, absent the transaction.

Aegean Airlines/Olympic Air is not the only merger control decision that the Commission is revisiting. In January 2023, the Commission sent questionnaires to the market participants in the context of the *Orange/Jazztel* transaction, conditionally approved by the Commission in 2015.[39] In particular, the Commission has asked the market participants to explain whether its assessment as to barriers to entry and effect on future competition have proven correct.

The *ex post* review of the *Orange/Jazztel* transaction comes at the time when the Commission is reviewing the joint venture between Orange and MasMovil, Spain's second and fourth largest telecom operators, respectively.[40] It remains to be seen if and how the Commission will take its findings from the *ex post* evaluation of Orange/Jazztel into account in its review of the *Orange/MasMovil/JV*.

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[29] *Aegean Airlines/Olympic Air* (Case COMP/M.6796), Commission decision of October 9, 2013 ("*Aegean Airlines/Olympic Air*").

[30] *Orange/Jazztel* (Case COMP/M.7421), Commission decision of May 19, 2015.

[31] *Ryanair/Aer Lingus* (Case COMP/M.6663), Commission decision of February 27, 2013.

[32] *Ineos/Solvay* (Case COMP/M.6909), Commission decision of May 8, 2014.

[33] Call for tenders COMP/2021/OP/0003, "Commission assessment of future market entry, expansion and import in EU merger decisions," June 18, 2021, available at: https://etendering.ted.europa.eu/cft/cft-documents.html?cftId=7775.

[34] For example, in 2015 the Commission published the conclusions of the 27 *ex post* evaluations it conducted. It found that remedies accepted by the Commission are relatively effective in eliminating anticompetitive price effects: unconditionally approved concentrations result in a 5% price increase on average, compared to around 1% for remedied concentrations. *See* European Commission Report, "A review of merger decisions in the EU: What can we learn from ex-post evaluations?", July 2015, p. 11, available here.

[35] Although the Commission found significant competitive concerns, it eventually approved the *Aegean Airlines/Olympic Air* transaction because it found that Olympic Air was a failing company and would have exited the market without the transaction. *Aegean Airlines/Olympic Air*, para. 840. *See* our EU Competition Quarterly Report (January - March 2015) for a detailed analysis of the Commission's clearance decision.

[36] Mlex, "Predictions in Aegean's 'failing firm' takeover of Olympic Air revisited by EU watchdog", February 3, 2023.

[37] For example, in its 2013 decision, the Commission found that it was unlikely that a "countervailing entry (that is entry that would be timely and sufficient to discipline the merged entity) would occur in the foreseeable future" on 11 routes where the Commission identified competitive concerns. *Aegean Airlines/ Olympic Air*, para. 630.

[38] *Aegean Airlines/Olympic Air*, para. 40.

[39] *Orange/Jazztel* (Case COMP/M.7421), Commission decision of June 19, 2015 ("*Orange/Jazztel*"). MLex, "Orange-Jazztel deal revisited by EU Commission as part of analysis of past mergers", January 26, 2023.

[40] The joint venture between Orange and MasMovil was notified to the Commission on February 13, 2023. *See Orange/MasMovil/JV*, (Case COMP/M.10896).

Impact of the *Ex Post* Study on the Commission's Decision-Making

In the aftermath of the COVID-19 crisis, with the rise of digitalization, and increasing market concentration, European competition policy enforcement is under intense debate. The Commission's *ex post* evaluations will certainly feed into this debate. As noted by the 2019 Nobel Prize winners in economics, "[t]o make progress, we have to constantly go back to the facts, acknowledge our errors, and move on."[41] However, as the final report is not expected until later in 2023, it is yet to be seen whether it will have a meaningful impact on the Commission's enforcement. While these studies may help steer competition policy—and even potentially be used in the assessment of future transactions[42]—*ex post* evaluations may suffer from several shortcomings: [43]

— **Data**. Access to data, both prior to and after the Commission's decision, is key for the evaluation. While the Commission could rely on market participants, these may be reluctant to cooperate with the Commission.

— **Methodology**. The methodology used in the *ex post* evaluations may suffer from shortcomings. For instance, the robustness of a Difference-in-Differences analysis—often used in *ex post* evaluations[44]—is dependent on the suitability of the control group.

— **Experts**. The evaluation's credibility also depends on its experts. They must be independent from the decision being evaluated. At the same time, they must be knowledgeable about the decision and skilled in the evaluation methodologies.

Commission conditionally clears the acquisition of VOO and Brutélé by Orange

On March 20, 2023, the Commission conditionally cleared Orange's acquisition of VOO and Brutélé, two operators in the Belgian telecommunication market. The transaction was notified in the EU on June 22, 2022, following which the Commission opened an in-depth investigation in July of last year.[45]

Background

Orange is a provider and wholesaler of mobile and fixed telecommunication services in several European markets. In Belgium, Orange is one of three mobile network operators, and is present both on retail and wholesale mobile markets. Orange also provides fixed services through access to the Telenet, VOO, and Brutélé networks. In 2021, Orange agreed to buy VOO and Brutélé's telecommunication activities. VOO and Brutélé are present in the south of Belgium and provide fixed services through their own fixed networks. VOO also provides mobile services through third-party mobile networks. The combined entity would be, together with Proximus, one of the two main providers of fixed telecommunication services in the areas covered by the VOO and Brutélé fixed network.

The Commission's concerns

The Commission had two main concerns about the transaction:[46]

i. The proposed acquisition would reduce the number of operators on the Belgian market for fixed and mobile telecommunication services from three to two in areas covered by VOO and Brutélé's own fixed networks, thereby eliminating Orange as an independent, innovative and significant competitive constraint, and reducing competition, in

[41] Abhijit V. Banerjee and Esther Duflo, "Good Economics for Hard Times", PublicAffairs, November 12, 2019.

[42] European Commission Webinar, "Ex post Economic Evaluation of European Competition Policy", October 17, 2020, pp. 1-2, available here.

[43] Fabienne Ilzkovitz, "Ex-post economic evaluation of competition policy: The EU experience", August 27, 2020, available here.

[44] European Commission Report, "A review of merger decisions in the EU: What can we learn from ex-post evaluations?", July 2015, pp. 18-27, available here. The Difference-in-Differences methodology is used to estimate the causal effects of the Commission's decision.

[45] Commission Press Release IP/22/4762, "Commission opens in-depth investigation into the proposed acquisition of VOO and Brutélé by Orange", July 28, 2022.

[46] Commission Press Release IP/23/1722, "Commission clears the acquisition of VOO and Brutélé by Orange, subject to conditions", March 20, 2023.

particular, in the market for the retail supply of (i) fixed internet access, (ii) audio-visual services, and (iii) multiple-play bundles (including fixed-mobile convergent services); and

ii. The transaction would increase the likelihood of coordination on the affected retail markets between the remaining operators in the areas covered by VOO and Brutélé's own fixed networks.

Access remedies

Following a three-month long suspension of the deal review, Orange committed to provide Telenet—a leading telecommunication operator in the north of Belgium—for a duration of at least ten years, access to (i) the existing fixed network infrastructure it is acquiring from VOO and Brutélé, as well as (ii) Orange's future fiber-to-the-Premises ("FTTP") network, which it plans to introduce in the coming years. This last element, according to the Commission, makes the commitments "future-proof",[47] and in other words, ensures that the proposed commitments will ensure that Telenet will effectively replace Orange on the VOO and Brutélé networks in Wallonia and parts of Brussels.

In parallel to offering these commitments, Orange signed two commercial agreements with Telenet for reciprocal access to their respective networks, with Telenet granting Orange access to its network in Flanders and part of Brussels, and Orange offering Telenet access to the VOO and Brutélé networks in Wallonia and the rest of Brussels.[48] These commercial agreements also cover Orange's and Telenet's future FTTP networks. The agreements are concluded for a period of 15 years.[49]

The Commission concluded that the commitments alleviated the competitive concerns that triggered its in-depth investigation.

Conclusion

In accepting Orange's commitments, the Commission fulfilled two of its apparent objectives by addressing the concerns posed by the transaction, and by fostering competition in a market where, to date, only one player – Proximus – operates a nation-wide fixed and mobile network. The Commission's decision also shows the enforcer's willingness to pursue behavioral resolutions when other authorities continue to view them as too difficult to implement and enforce. This is particularly noteworthy in the telecommunication sector since the Commission's own historic practice has been to require a mix of structural (divestiture) and behavioral (access) remedies,[50] rejecting—often far-reaching—stand-alone access remedies offered.[51] Until today, the only exemption to that rule was *Vodafone/Certain Liberty Global Assets*, where a cable access remedy allowing access to Telefonica on the German market was approved by the Commission.[52]

This clearance decision also confirms that, in the Commission's view, virtual operators can exercise significant pressure on fixed network operators, and regulated access is thus a potentially important source of competition.

The Commission is yet to publish the full decision. In parallel, on April 3, 2023 the Commission opened an in-depth inquiry into the proposed acquisition of MásMóvil by Orange.[53]

[47] Commission Press Release IP/23/1722, "Commission clears the acquisition of VOO and Brutélé by Orange, subject to conditions", March 20, 2023.

[48] Orange Press release, "Orange Belgium and Telenet sign two commercial wholesale agreements providing access to each other's Hybrid Fiber Coaxial and Fiber to the Home networks", January 30, 2022.

[49] *Ibid.*

[50] *Orange/Jazztel* (Case COMP/M.7421), Commission decision of May 19, 2015; *Vodafone/Liberty Global/Dutch JV* (Case COMP/M.7978), Commission decision of August 3, 2016; *Hutchison 3G Austria/Orange Austria* (Case COMP/M.6497), Commission decision of December 12, 2012; *Hutchison 3G UK/Telefónica* (Case COMP/ M.6992), Commission decision of May 28, 2024; and *Telefónica Deutschland/E-Plus* (Case COMP/M.7018), Commission decision of July 2, 2014.

[51] *See, e.g., Hutchison 3G UK/Telefónica* (Case COMP/ M.6992) Commission decision of May 28, 2024, where the Commission blocked the merger between H3G and O2 in the UK in spite of the offer of far-reaching, capacity-based access remedies to powerful companies such as Tesco or Virgin Media.

[52] *Vodafone/Certain Liberty Global Assets* (Case COMP/M.8864), Commission decision of July 18, 2019.

[53] Commission Press Release IP/23/2101, "Commission opens in-depth investigation into the proposed transaction between Orange and MasMovil" April 3, 2023.

The Commissions Strips Back Concerns In A New Statement Of Objections To Apple Regarding Its App Store Practices

On February 28, the Commission issued a new Statement of Objections to Apple where it narrowed its concerns related to Apple's App Store practices.[54] The latest Statement of Objections focuses only on Apple's anti-steering provisions for music streaming app developers and no longer raises concerns about Apple's requirement for app developers to use its proprietary in-app payment system, a concern that had featured in the previous Statement of Objections.

Background

The Commission launched a formal investigation into Apple's App Store practices in June 2020 following a complaint submitted by Spotify, a popular music streaming service.[55] It issued a Statement of Objections in April 2021 which focused on two preliminary concerns:

— Apple's requirement for music streaming app developers to use its proprietary in-app payment system ("IAP") as a condition for distributing their app on the App Store. As Apple charges a 30% fee on subscriptions purchased through the IAP, the Commission raised concerns that the obligation to use IAP could result in app developers raising their prices for subscriptions and the knock-on effect for end users who end up paying higher prices for in-app services.

— The anti-steering provisions in Apple's contracts with app developers that prohibit app developers from informing users about alternative purchasing opportunities available outside of their apps (*e.g.*, via their websites). As these alternatives can be cheaper than those within the app, the Commission raised concerns that the anti-steering provisions could lead to users paying higher prices for services offered by app developers.

New Statement of Objections

The Commission's new Statement of Objections focuses only on Apple's anti-steering provisions. It no longer cites concerns related to Apple's IAP obligation. The press release does not provide reasons for dropping the IAP concern from the scope of the case, noting only that the Statement of Objections "no longer take[s] a position as to the legality of the IAP obligation for the purposes of this antitrust investigation."[56]

The Commission maintains, however, its preliminary view that Apple's anti-steering provisions are unfair trading conditions in violation of Article 102 as they are: (i) neither necessary nor proportionate; (ii) could be detrimental to users as they lead to users paying more; and (iii) could negatively affect the interests of music streaming app developers by limiting effective consumer choice.

Conclusion

The decision to remove concerns around Apple's IAP obligation and the associated fees in the amended Statement of Objections suggests that the Commission may have lacked sufficient evidence to build a case related to these practices.[57] An outcome that may have been influenced by the European Courts' increased emphasis on the Commission satisfying a high evidentiary standard for showing that a firms' conduct could result in anti-competitive effects.

This change in course is an unusual development at a time when Apple, amongst other large online platforms, is preparing for compliance with the rules in the Digital Markets Act ("DMA") which are expected to kick in during the first quarter

[54] Commission Press Release IP/23/1217, "Antitrust: Commission sends Statement of Objections to Apple clarifying concerns over App Store rules for music streaming providers", February 28, 2023.

[55] *Apple - App Store Practices (music streaming)*, Case COMP/AT.40437.

[56] *Ibid.*

[57] Margrethe Vestager, Executive Vice-President of the European Commission for A Europe fit for the Digital Age, and Commissioner for Competition, said during a conference: "We need to get the facts right, otherwise, our case won't stand up in court. [So] sometimes we refocus or reformulate our concerns." Keynote, Antitrust, Regulation and the Political Economy, Keystone, Brussels and online, March 2, 2023.

of 2024. This new competition-style regulation includes rules inspired by the case at hand which may prohibit gatekeeper conduct similar to that at issue in the IAP concern.[58] Unlike in an antitrust case, the Commission will not need to evidence that the practices result in anti-competitive effects to find an infringement.[59] Dropping the IAP concern from the scope of its case may therefore reflect a strategic view that the concern will more easily be dealt with in the forthcoming DMA framework as opposed to under existing antitrust rules.

Court Updates

Altice Defends its Appeal of the General Court's Decision to Uphold Record Gun-Jumping Fine in a Hearing before the Court of Justice

On February 1, 2023, the Court of Justice held a hearing in Altice's appeal against the General Court's decision in 2021 to largely uphold the Commission's record fine for gun-jumping in the *Altice/PT Portugal* transaction.[60] Altice's defense at the hearing hinged on three claims: (i) the Commission wrongly fined Altice twice for failure to notify and for breaching the standstill obligation; (ii) Altice did not acquire veto rights, and therefore control, by signing the Share Purchase Agreement ("SPA"); and (iii) the Commission breached the principle of proportionality by failing to explain its reasoning in setting the fines.

The General Court Ruling Upholding the Fine

On September 22, 2021, the General Court largely upheld the Commission's decision imposing a fine of €124.5 million on Altice for exercising control over PT Portugal before the acquisition had received merger control clearance.[61] In particular, the General Court dismissed Altice's arguments that the Commission had erred in law and fact by finding that Altice had acquired sole control of PT Portugal.

First, the General Court found that the SPA gave Altice the possibility to "co-determine the structure of the senior management of PT Portugal" which effectively amounted to veto rights conferring decisive influence over the target's commercial policy.[62]

Second, the General Court found that the SPA included "extremely broad" provisions on pricing policies, including standard terms and conditions that obliged PT Portugal to request Altice's consent to revise its pricing policies and make changes to customer contracts.[63]

Third, the General Court ruled that PT Portugal's obligation to obtain Altice's consent to enter into, terminate, or modify a broad range of its contracts enabled Altice to determine PT Portugal's commercial policy—an opportunity "which went beyond what was necessary to protect the value of PT Portugal."[64]

The General Court concluded that the veto rights provided by the SPA went beyond what was necessary to preserve the value of PT Portugal's business.[65] In addition, the General Court noted that Altice and PT Portugal exchanged competitively sensitive information before they signed the SPA and before the transaction's approval. Therefore, the General Court agreed with the Commission that the information exchanges "contributed to demonstrating that the applicant had exercised decisive influence over PT Portugal."[66]

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[58] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) OJ 2022 L 265/1, Articles 5(4), 5(5), and 5(7).

[59] For in-depth coverage of the Digital Markets Act and other current and forthcoming digital regulations, *see* the EU chapter of our Digital Markets Regulation Handbook.

[60] *Altice Group Lux v. Commission* (Case C-746/21 P).

[61] *Altice v. Commission* (Case T-425/18) EU:T:2021:607; *See* our August 2021 EU Competition Law Newsletter and our Alert Memo "Gun Jumping in M&A: General Court Judgment Affirms Strict Approach in Altice," November 19, 2021 for a detailed analysis of the General Court's judgment.

[62] *Altice v. Commission* (Case T-425/18) EU:T:2021:607, paras. 109-114.

[63] *Ibid.*, para. 115.

[64] *Ibid.*, paras. 117 and 121. This obligation applied to a broad range of PT Portugal's contracts subject to a monetary threshold of €1 million. *See Altice*, para. 109.

[65] *Ibid.*, para. 131.

[66] *Ibid.*, para. 235.

The General Court took into account that Altice had informed the Commission of the transaction before the SPA was signed and had sent a case-team allocation request three days after signing, followed by a draft notification form.[67] Accordingly, the General Court reduced the fine relating to the breach of Article 4(1) EUMR by 10% based on the principle of proportionality.[68]

The Hearing Before the Court of Justice

On February 1, 2023, the Court of Justice heard Altice in relation to its appeal against the General Court judgment. At the hearing, the Commission argued that Altice was aware of its conduct when it interfered in PT Portugal's business and that it acquired competitively sensitive information prior to clearance.[69]

First, Altice claimed that the Commission infringed the principles of proportionality and double jeopardy by imposing fines for: (i) failure to notify; and (ii) a breach of the standstill obligation. Altice argued that both obligations protect the same legal interest and should not, as such, be sanctioned independently and cumulatively.[70]

Second, Altice distinguished the *Altice* case from the Court of Justice's precedent in *Ernst & Young*, arguing that it did not obtain veto rights in signing the SPA.[71] It argued that the conditions for change in control were not fulfilled because the SPA did not confer on Altice the power to block commercial decisions—it only required Altice's consent on certain actions.[72] In fact, if Altice objected to any actions, it could only require PT Portugal to indemnify it for potential resulting losses, which did not amount to obtaining veto rights.[73]

Finally, Altice argued that the Commission breached the principle of proportionality in failing to abide by the requirement to disclose its reasoning for setting fines in a clear and unequivocal way. Advocate General Collins also noted that, while it was clear what factors the Commission took into account, it should also have been clear how these factors were balanced out for the applicant to defend their interests and for the court to review the legality of its decision.[74] The Reporting Judge, Küllike Jürimäe, also questioned how the Commission actually calculated the fine.[75] In response, the Commission argued that it need not engage in an "arithmetical exercise" to detail how it arrived at the fines, as the Court of Justice confirmed in previous cases.

Advocate General Collins will deliver his opinion on April 27, 2023.

[67] *Ibid.*, para. 367.

[68] *Ibid.*, para. 368.

[69] GCR, "EU defends record-breaking Altice gun-jumping penalty before Court of Justice" (February 1, 2023).

[70] *Ibid.*

[71] *Ernst & Young* (Case C-633/16) ECLI:EU:C:2018:371.

[72] *Ibid.*, para. 59. The judgment established that a "concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking." In particular, the termination of an agreement may be regarded as the implementation of a concentration.

[73] GCR, "EU defends record-breaking Altice gun-jumping penalty before Court of Justice" (February 1, 2023).

[74] *Ibid.*

[75] MLex, "Altice's merger gun-jumping fine based on faulty reading of early 'implementation,' top EU court hears" (February 1, 2023).

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