Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – European Union

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After the last two editions of the Main Developments in Competition Law and Policy in the European Union (see for 2021 here and for 2020 here), I know you cannot wait for the 2022 edition. Let's go!

Article 101 TFEU

Are We There Yet? Single and Continuous Infringement

Just when you think every story has been told on a competition law doctrine, further developments come along. In 2022, the single and continuous infringement doctrine was revived and applied in multiple cases. In the judgment of the General Court regarding the hybrid settlement decision on Scania from 2 February 2022, the court further clarified the doctrine (discussed on the KCLB here).

By relying on pre-existing case law, the General Court held that there are three categories to establish an infringement as single and continuous: (1) there needs to be a plan pursuing a common objective, which must be assessed on the level of the undertaking, (2) the undertaking must intentionally contribute to that plan, and (3) the undertaking must be aware of the offending conduct of the other participants of the infringement. Single infringements must not in themselves constitute a violation of competition law as long as there is an overall plan alluding to such an infringement.

The ECJ then further delved into the doctrine of single and continuous infringement in its judgments on the Optical Disc Drive Cartel case (discussed on the KCLB here). In the 2015 decision, the Commission held that the conduct at hand consisted of several stand-alone infringements which in addition formed another infringement, the single and continuous infringement. The 2019 General Court judgments confirmed the findings of the Commission and (contrary to what it stated in 2022 in Scania) held that a single and continuous infringement necessarily consists of multiple separate infringements. On 16 June 2022, the ECJ asserted that a single and continuous infringement necessarily includes "*a complex of practices*". Yet, these practices can but do not, contrary to the findings of the General Court, necessarily have to amount to separate infringements themselves. In other words, a single and continuous infringement can but

does not always need to consist of distinct competition infringements. The cases were referred back to the General Court.

Furthermore, the Commission applied the single and continuous infringement doctrine in a settlement decision regarding the Metal Packaging Cartel. It found a single and continuous infringement by Crown and Silgan consisting of two parts: (1) regular exchange of information on annual sales volumes of metal lids to individualized customers between 2011 and 2014, and (2) coordination on surcharge and shorter minimum durability recommendation concerning metal cans and closures coated with BPA-free lacquer between 2013 and 2014. The single and continuous infringement is alive and kicking – and 2022 brought further clarifications on the issue.

Not so Super? AG Rantos Opinions on the Super League and the International Skating Union

The proposed Super League (discussed on the KCLB here) brought the delicate relationship between competition rules and sports governing bodies back to the table. On 15 December 2022, AG Rantos delivered his opinions on both the Super League referral from Madrid and the appeal on the General Court's decision on the International Skating Union case (discussed on the KCLB here). In both opinions, Rantos sides with the sports federations and did not find a violation of EU competition (or free movement rules).

In essence, Rantos endorsed the so-called European Sports Model, in which sports governing bodies such as FIFA/UEFA and ISU play a dual role as the regulator and commercial actor organising international competitions. Such a dual role and the accompanying conflicts of interest are not in themselves problematic under EU competition law, in the view of Rantos.

In the Super League case, Rantos applied these principles and held that the FIFA/UEFA rules requiring authorisation for competing events do not restrict competition by object as they aim to preserve the European Sports Model; they only constitute ancillary restraints. When it comes to the ISU, Rantos also applied the ancillary restraints doctrine and proposed to refer the case back to the General Court for an effects analysis. Rarely have the commentators been so divided on an issue (see for discussion here, for example) – we have something to look forward to in the coming months!

New Old Rules: Revision of the Vertical and Horizontal Rules

2022 was dominated by revived rule books for Article 101 TFEU enforcement. After quite some time drafting and consulting (discussed on the KCLB here, here and here), the European Commission finally published a new Vertical Block Exemption Regulation (VBER) and Guidelines on Vertical Restraints, which entered into force on 1 June 2022 (discussed on the KCLB here).

The VBER provides a safe harbour exemption for vertical agreements under Article 101(3) TFEU. Neither party's market share can exceed 30% on the relevant markets and vertical agreements cannot contain any hardcore restrictions, such as RPM, to automatically benefit from the exemption under the VBER. Vertical agreements falling outside of the VBER conditions require an

individual assessment under Article 101(3) TFEU. Here, the Vertical Guidelines come into play. They help undertakings in their self-assessment of whether their agreements are covered by the VBER or may qualify for an individual exemption.

The update of both the VBER and the Vertical Guidelines aims to adapt the vertical competition rules to digital markets and e-commerce, particularly the activities of online manufacturers and platforms, including their sales through online intermediaries. The instruments contain changes in the rules on dual distribution, most favoured nation clauses, dual pricing, online sale and advertising restrictions, exclusive and selective distribution models, RPM, MAPs, agency, non-compete clauses, online intermediation services, and – of course – sustainability. And further vertical rules are to be expected soon: in July 2022, the Commission launched a public consultation on a renewed Motor Vehicle Block Exemption Regulation (MVBER) and Supplementary Guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles (discussed on the KLCB here). Since the existing MVBER will expire on 31 May 2023, new rules are expected soon.

Next to vertical rules, also updated horizontal rules are on the horizon. After some heated discussions during the consultation period on the drafts (discussed on the KLCB here, here and here), the Commission apparently needed more time to properly revise the R&D and Specialisation Block Exemption Regulations (together HBERs) and the Guidelines on Horizontal Cooperation Agreements. Just before Christmas and just in time for the expiration date of the HBERs, it prolonged the expiration dates of both R&D and Specialisation Block Exemption Regulations to 30 June 2023.

Sustainability is the focus of the review of the horizontal rules (discussed on the KLCB here, here and here). Underpinned by the multitude of initiatives on the national level, such as Austria (discussed on the KLCB here), and the sheer unlimited volume of academic articles and blog posts on the issue, a current lack of legal certainty seems to deter companies from introducing sustainability initiatives – even though practice still waits for a wide-spread application of new competition sustainability rules on the national level. The new HBERs and Guidelines are expected in the imminent future and should help to clarify the scale of possible cooperation and the type of benefits that could outweigh restrictive effects on competition when it comes to sustainability initiatives. Furthermore, the drafts envisage clarifications and new rules on information exchange, R&D, specialisation, purchasing, commercialization, standardization, and mobile infrastructure sharing agreements.

Work it: Guidelines on Collective Bargaining for the Solo Self-Employed

Around the globe, the issue of labour market restrictions is one of the hot topics. After deliberating on the matter for two years, the Commission published its Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons on 29 September 2022 (discussed on the KLCB here, here, and here).

The Guidelines want to address the growing possibilities for private individuals to sell their labour as freelancers and solo self-employed through online platforms and the accompanying competition law problems. The growing importance of such practices might undercut adopted collective agreements. Labour unions showed interest in extending collective agreements to such freelancers

and self-employed that provide their services through online platforms. The Guidelines now apply to digital labour platforms in particular but also to solo self-employment in general. It takes into account the case law of the ECJ and legal developments around Europe by trying to find a careful balance between the protection of solo self-employed on the one hand and anticompetitive collective bargaining agreements on the other hand.

The Guidelines foresee a competition law exception for collective agreements on behalf of three types of solo self-employed who find themselves in a position comparable to workers and are based on the Albany jurisprudence. These three types include solo self-employed (1) who are economically dependent on their clients because they derive a large portion of their income from one client, (2) who are working side-by-side with the counterparty's workers, or (3) who use digital labour platforms.

For those solo self-employed not falling into one of these categories, the Commission provides a non-enforcement commitment – the legal qualification and value of such a commitment being unclear and quite exceptional for an EU instrument – in two cases: (1) when the solo self-employed in question faces buyer power, or (2) when the agreement is permitted under EU legislation or national law in pursuit of a social objective. For all the other collective agreements competition law continues to apply and might even fall in the by-object category.

Article 102 TFEU

Competition and Regulatory Law Overlapping in Private Enforcement (and a Bit of General EU Law Principles): The DB Station Case

The DB Station case (discussed on the KLCB here and here) led to huge debate amongst competition scholars this year (see, inter alia, here and here). The case concerned the relationship between railway and abuse of dominance law applied in a private enforcement case. The underlying case from Germany has been the subject of multiple proceedings.

ODEG, a client of DB Station, the German railway infrastructure undertaking, found that the 2005 railway infrastructure access tariffs were too high and unfair. In 2009, the German railway regulator (Bundesnetzagentur) declared the tariffs invalid under the national rules transposing the Railway Market Directive. However, the Bundesnetzagentur did not order restitution but invited injured companies to bring civil suits for reimbursement. DB Station appealed, and in 2010, the Higher Administrative Court, North Rhine-Westphalia, granted the action suspensory effects. In the meantime, injured parties such as ODEG indeed filed for civil reimbursement actions before the Regional Court Berlin for overcharges, which allowed those actions on equity grounds. DB Station appealed this judgment, and the appeal court considers applying Article 102 TFEU and thus referred the case to the ECJ, which is the underlying case at hand. In the meantime, the Regional Court Berlin later referred a case to the ECJ, which in its CTL Logistics judgment held that national civil courts cannot examine railway charges if they fall under the competence of a railway regulator.

Regarding the case at hand, the ECJ went against the opinion of AG Capeta and held that national courts in private reimbursement actions can only apply Article 102 TFEU – which otherwise generally has direct effect and national courts usually have jurisdiction to apply the abuse of dominance provision directly – if the competent railway authority has first ruled on the lawfulness

of the charges in question.

According to the ECJ, the technical nature of the railway sector, the exclusive competence of national railway authorities under Article 30 of the Railway Market Directive to regulate access to the infrastructure, and their purpose of guaranteeing the effectiveness of those access rules, warrants such primacy of the regulatory decision before a private reimbursement action Article 102 TFEU might serve to guarantee a victim's effective protection against abusive excessive pricing. Next to the important implication of the relationship between regulatory and competition law, for those of you who look beyond competition law issues (the others can jump to the next case), the case is also noteworthy concerning the general EU law direct effect theory.

Following DB Station, the direct effect of primary law (i.e., Article 102 TFEU) seems to depend on the prior use of secondary law procedures, thus secondary law might limit the direct effect of primary law. This decision was deliberately issued for the railway sector and also focuses on the special features of the railway sector. It remains to be seen whether the ECJ will apply this doctrine to other areas of regulatory law.

Data Leveraging Abuses in Newly Liberalised Markets: Servizio Elettrico Nazionale

We stay in the regulated/liberalised markets area, this time on the topic of non-pricing abuses. In May, the ECJ issued its judgment in the preliminary reference case Servizio Elettrico Nazionale from Italy (discussed on the KLCB here and here). The ECJ held that the use of customer data legitimately collected by the ENEL group during the time it held a legal monopoly to target offers to the same customers after the liberalisation of the Italian energy market can constitute an abuse of dominancy under Article 102 TFEU.

On the verge of establishing an overall abuse of dominance doctrine, the ECJ focused on the anticompetitive exclusionary effects of such a practice. It stated that in a market liberalization phase, an undertaking that loses its legal monopoly cannot use means or resources, including customer data, that it only obtained through its monopoly position since such data is not available to competitors; such a practice falls outside competition on the merits. Yet, a dominant company can bring forward arguments to objectively justify its practice. In December 2022, the guidance provided by the ECJ was already applied by the referring Italian court (discussed on the KLCB here).

If You Do an AEC, Do an AEC: The Intel Renvoi Judgment

After 20 years, the Intel case continues to bring joy. Although one can certainly ask what else can be said about the case after the Commission's decision, the General Court ruling and the ECJ ruling, the Intel renvoi ruling of the General Court has nevertheless produced further developments (discussed on the KLCB here, here, here and here).

The General Court largely followed the principles set out by the ECJ ruling but refined the legal test for exclusivity rebate abuses, clarified the necessary standard of proof and required a rigorous economic assessment, particularly for the "*as efficient competitor*" (AEC) test. It held that there is a rebuttable presumption that exclusivity rebates produce anticompetitive effects. It is upon the

dominant undertaking to rebut the presumption based on supporting evidence. Subsequent to such a rebuttal, the Commission must conduct an effects-based analysis, applying certain criteria, of which the AEC test can but does not have to be part of. Yet, if the Commission actually carries out an AEC test, it must take it into account in the decision.

The judgment and general evolution of Article 102 TFEU case law increasingly establish a proper doctrine for abuse of dominance. We will know if the findings will hold up since the Commission once again appealed the renvoi judgment. The Intel case – is far from over!

Let's Google it Again: The General Court's Judgment in Google Android

The General Court's ruling in the Google Android case was certainly a highlight of 2022 (discussed on the KLCB here, notable discussion on the judgment here).

While the General Court partly annulled the Commission decision of 2018 by reducing the record fine by roughly € 200 million from € 4.343 billion to (still a record) € 4.125 billion, the Commission won on the majority of grounds. The case concerned the whole plethora of Google services and, thus, four interconnected product markets were concerned; (1) the market for the licensing of smart mobile device operating systems (AndroidOS); (2) the market for Android app stores (Play Store); (3) the market for the provision of general search services (Google Search), and (4) the market for non-OS-specific mobile web browsers (Google Chrome).

Rather than looking at the whole ecosystem, the General Court followed the Commission and defined individual product markets but recognized the interconnectivity of the Google service. It confirmed the Commission's findings that Google was dominant except in the market for non-OS-specific mobile web browsers.

The case concerned three abuses: (1) pre-installation conditions, where Google required manufacturers of mobile devices through distribution agreements to pre-install Google Search and Google Chrome to get a licence to use the Play Store on their devices (= tying); (2) anti-fragmentation agreements, where Google granted the operating licence for the pre-installation of Google Search and Play Store only to manufacturers that did not sell devices running on Android versions not approved by Google (so-called non-compatible forks) (=bundling); and (3) advertising revenue sharing agreements with mobile device manufacturers and mobile network operators under the condition that no competing general search services would be pre-installed on the devices (= exclusivity payments).

The General Court largely confirmed the Commission's findings, but partly annulled the infringement on the revenue-sharing agreements. The General Court held that the Commission failed to consider the full scope of the relevant markets in the assessment of the practice and, following recent precedents, the Commission erred in the AEC test. Google Android, thus, follows the previously mentioned Intel renvoi judgment and once again underlines the importance of the AEC test.

Be Aware of Anticompetitive Effects: Qualcomm

The June 2022 General Court decision in the Qualcomm case (discussed on the KLCB here) is not only interesting for its procedural implications discussed below. The General Court also annulled the 2018 Commission decision due to substantive errors.

Qualcomm claimed that the Commission erred in concluding that its exclusivity payments to Apple had anticompetitive effects. The General Court sided with Qualcomm. It held that since Qualcomm was the only supplier that was even capable to satisfy Apple's chipset requirements for iPhones, the Commission did not sufficiently prove that the exclusivity payments reduced Apple's incentive to switch to other chipset suppliers. The General Court highlights a but-for effects analysis: would Apple still have sourced from Qualcomm but for the infringement? The case highlights once again, next to the Intel saga, the importance of a rigorous effects-based analysis under Article 102 TFEU for all those abuses, that are not "by-object" abusive.

Non-Reportable Transaction? Too Bad You Might Fall Under Article 102 TFEU Instead!

2022 gave us a few interesting AG opinions on Article 102 TFEU. One of them is AG Kokott's opinion in the Towercast case (discussed on the KLCB here and here). The case stems from France where the television transmission service operator TDF Infrastructure acquired its competitor, Itas. The transaction did not exceed the notification thresholds in either France or the EU. Nevertheless, the acquisition led to considerable market consolidation, since after the transaction only TDF and the competitor Towercast would be left in the market.

The latter complained to the French Competition Authority, relying on Continental Can, where the ECJ pre-EUMR held that an abuse of a dominant position may occur if a company in a dominant position strengthens such position by way of an acquisition. The French Competition Authority rejected the complaint based on the finding that Continental Can did not apply any more post-merger control regime. Towercast appealed with the Paris Court of Appeal, which referred the case to the ECJ. AG Kokott now sided with Towercast and essentially upheld Continental Can by opining that Article 102 TFEU could be used as an instrument of ex post merger control in cases where transactions are not already examined under a merger control regime, including Article 22 EUMR referrals. The ECJ will decide on this bridging of the regulatory gap in EU merger control in the coming months

Data Protection Breach as an Abuse of Dominance: AG Rantos Sides with the German Bundeskartellamt

Europe waits on the outcome of an experimental case by the German Bundeskartellamt regarding Facebook's (now Meta) data abuse (discussed on the KLCB here, here, here, here, and here). The Facebook saga might come to a preliminary end on the EU level soon.

In 2019, the Bundeskartellamt qualified Facebook's practice of collecting, processing, and matching data of its users from third-party websites without explicit consent contrary to the GDPR as an abuse of dominance under German law (Article 19(1) GWB). The case went through the German courts. The Higher Regional Court Düsseldorf finally referred the case to the ECJ.

In September 2022, AG Rantos sided with the Bundeskartellamt (discussed on the KLCB here).

Essentially, he backed the authority's novel theory of harm finding an exploitative abuse that focused on the imbalance between the users and the social network itself due to the latter's dominant position in the national market for social networks and the corresponding impaired consent in the meaning of the GDPR. Most importantly, Rantos opined that the GDPR can incidentally be examined in a competition law assessment, provided that the competition authority informed and cooperated with the competent data protection supervisory authority and possibly awaited the outcome of that authority's investigation of the same conduct. Here, too, a decision by the ECJ is expected in the next few months.

If the ECJ decides to agree with the Advocate General and the Bundeskartellamt, and one elaborates this case and the theory of harm further, this could mean that any infringement of any law, not only GDPR infringements, committed by a dominant undertaking and causally traceable to dominance would also always constitute an abuse of a dominant position – competition authorities, the future super watchdogs?

Cementing Self-Preferencing as a Theory of Harm (and Other Things): Amazon and Facebook Marketplace (and Amazon Buy Box/Prime)

In 2022, two GAFAM cases kept the Commission busy, where self-preferencing played a major role: the Amazon and Facebook Marketplace cases.

In the Facebook Marketplace case (discussed on the KLCB here), the Commission sent a statement of objections to Meta in December 2022. The case concerns an alleged (1) on-platform tying on a multisided platform (as compared to cross-platform tying), where Facebook's users are automatically and without any possibility to opt-out part of the Facebook Marketplace, and (2) a self-preferencing practice in the form of unfair trading conditions on competing online classified ads services advertising on Facebook or Instagram, which authorise Meta to use ads-related data derived from competitors for the benefit of Facebook Marketplace. Not only might the alleged infringement (1) constitute a novel theory of harm in terms of on-platform tying, the alleged infringement (2) could further cement the self-preferencing theory of harm brought forward by Google Shopping (discussed on the KCLB here).

The investigations against Amazon in the Marketplace and Buy Box/Prime cases ended with a commitment decision (discussed on the KLCB here, here, and here). The two investigations concerned (1) Amazon's use of non-public data of its marketplace sellers that allowed Amazon to change its own retail offers to the detriment of other marketplace sellers, i.e., conduct similar to the above-described alleged self-preferencing practice of Facebook, and (2) Amazon's criteria for selecting the winner of the featured Buy Box or who could offer products under its Prime Program, which could unduly favour Amazon's retail business and Amazon's logistics and delivery services, i.e. another self-preferencing case. The Commission confirmed the preliminary findings in a Statement of Objections in 2020, which prompted Amazon to propose commitments in July 2022. After a market test in July and September 2022, the Commission made the commitments offered by Amazon legally binding under article 9 Regulation 1/2003 in December 2022. Essentially, Amazon is now barred from using marketplace seller data and needs to ensure equal access to Buy Box and Prime.

Divisional Patent Games and Disparagement in The Pharma Sector: Teva and Vifor Pharma

In 2022, two 102 TFEU investigations in the pharma sector are particularly noteworthy.

The first, Teva concerned the delicate relationship between competition and IP law in the pharma sector as well as disparagement practices. After opening a formal investigation in 2021, the Commission sent a Statement of Objections to Teva in October 2022 (discussed on the KLCB here). The case deals with two alleged abuses. The first relates to a misused patent procedure, a so-called "divisional patent game".

In 2015, the original basic patent covering Teva's glatiramer acetate, the main component of Teva's Copaxone, expired, which would have allowed generics to enter the market. Yet, Teva allegedly misused the patent procedures by filing and withdrawing secondary patent applications, so-called "divisional patents", thereby forcing its competitors to file new lengthy legal challenges each time, which can effectively block or delay the entry of generics. The second alleged infringement concerns a disparagement campaign in the form of false or misleading information towards healthcare professionals about the safety and efficacy of competing generics.

Disparagement also played a role in another case. In June 2022, the Commission opened a formal investigation into Vifo Pharma's possible abusive disparagement of a rival's iron medicine. The investigation was lodged through a complaint by Vifor Pharma's competitor Pharmacosmos. The latter's iron deficiency treatment, Monofer, competes with Vifor Pharma's iron treatment medicine Ferinject. Allegedly, Vifor Pharma has been disparaging Monofer by spreading misleading information towards healthcare professionals regarding Monofer's safety, thereby potentially hindering Monofer's uptake in the EEA and, thus, competition against Ferinject. So far, precedents sanctioning disparagement only exist on the national level and have been taken on in a preliminary references case.

Vifor Pharma is the first European Commission investigation exclusively relying on a disparagement theory of harm. Together with the Teva investigation, this case seems to indicate the Commission's willingness to pursue the novel disparagement theory of harm in the future. However, the conditions of such a disparagement theory are still unclear. One can eagerly wait for the outcome of these two cases.

Merger Control

Illuminating Merger Developments: Illumina/Grail Goes On (and More on Article 22 EUMR)

The Illumina/Grail saga continues to fascinate us (for an elaborate podcast discussion on all aspects of the case on the KCLB see here). The case dates back to the 2020 Commission Guidance on the application of the referral mechanism set out in Article 22 EUMR, the so-called Dutch clause (discussed on the KCLB here, here, and here).

Under Article 22 EUMR in the view of the Guidance, the Commission can particularly review certain transactions where it may have concerns (in particular suspected so-called killer acquisitions), even where the transaction does not fulfil any merger control thresholds in the EU upon referral by a Member State.

The acquisition of Grail, a US company that develops blood tests for the early detection of cancer by Illumina, a US company that manufactures sequencing- and array-based solutions for genetic and genomic analysis, was the first use case for the Article 22-referral mechanism in practice (discussed on the KCLB here). To reiterate what I said last year – for details, have a look at last year's post – so many things happened in this case, it is hard to keep track – from an Article 22-referral, a phase II investigation, gun-jumping, interim measures, and corresponding appeals with the General Court.

2022 brought us three other important developments on Article 22 EUMR. First, in July, the General Court confirmed the Commission's Article 22 EUMR referral policy (discussed on the KCLB here). Particularly, the General Court applied a detailed literal, contextual, teleological, and historical analysis of Article 22 EUMR, and held that the Commission can accept a referral from a Member State even though that Member State is not entitled under the national merger control rules to examine the transaction. While this new Article 22 EUMR policy will generally lead to less legal certainty in transactions, at least the Commission policy laid down in its Guidance is now endorsed by the General Court, which gives undertakings some perspective. In the vein of creating further legal certainty, the Commission published further information on Article 22 EUMR referrals as a Frequently Asked Questions and Answers document in December 2022 (discussed on the KCLB here).

Second, in September 2022 the Commission prohibited the acquisition of Illumina/Grail (discussed on the KCLB here). For practice, it is important to see that Article 22 EUMR referrals in killer acquisition cases can actually lead to a prohibition, even though the target does not have any revenues in the EU. This will increase the mentioned legal uncertainty for sub-threshold mergers. In terms of substantive law, the Commission took recourse to its still-novel innovation theory of harm. Further decisions and developments in the case still await us this year. Illumina/Grail will not become boring.

Third and lastly, 2022 taught us that not all Article 22 EUMR referrals lead to a prohibition on the EU level. In January 2022, the Commission conditionally cleared the Meta/Kustomer acquisition after a Phase II investigation. The Commission voiced concerns over possible foreclosure strategies of Meta vis-à-vis Kustomer regarding the access to application programming interfaces for Meta's messenger services in the markets for the supply of customer service and support software.

The commitments include comprehensive 10-year access commitments, a public application programming interface access commitment and a core application programming interface access-parity commitment. The referral originally came from Austria, which a few other Member States joined. Germany, on the other hand, did not join the referral because it first wanted to decide whether the merger would be notifiable under national merger control rules, in the view of the Bundeskartellamt, a requirement before it could refer. In December 2021, it decided that the merger meets the national transaction value threshold in Germany. The German watchdog, therefore, assessed the Meta/Kustomer merger under national law but took account of the EU Commission's findings, next to further aspects. It cleared the acquisition in February 2022.

Warehousing as Gun-Jumping: Canon/Toshiba

Like in 2021, also in 2022 gun jumping continues to be a relevant topic. In 2019, the Commission fined Canon for gun-jumping by using a so-called warehousing scheme, a two-step transaction, which includes an interim buyer (discussed on the KCLB here). In May 2022, the General Court confirmed that the particular warehousing structure put in place by Canon and Toshiba constitutes gun-jumping, so that even a partial implementation of a transaction is sufficient, as long as this structure contributed to a lasting change of control in the target (discussed on the KCLB here).

The judgment in Canon joins a series of recent decisions on gun-jumping, most notably Marine Harvest (discussed on the KCLB here) and Altice (discussed on the KCLB here). This shows the increased importance of gun-jumping and the accompanying increased vigilance for companies; especially evasion tactics are to be avoided against the background of Canon.

What Degree of Probability For SIEC? Thyssenkrupp/Tata Steel and CK Hutchison 3G UK/Telefonica UK

The ECJ will soon for the first time have the chance to rule on the substantive merger control test, the SIEC test (significant impediment to effective competition), and particularly its corresponding standard of proof. The SIEC test was introduced in Article 2(3) EUMR to prohibit anti-competitive mergers, particularly in oligopolistic markets on account of non-coordinated or unilateral horizontal effects where the merged entity is below the dominance threshold, so-called gap cases.

In 2016, the Commission blocked the CK Hutchison 3G UK/Telefonica UK 4-to-3 merger, a typical gap case, because it feared that the merger could create a new market leader while at the same time, it would remove an important competitor. On appeal, the General Court quashed the Commission decision in 2020 (discussed on the KCLB here and here). The GC focused specifically on the standard of proof and held that "*the Commission is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration. Thus, the standard of proof applicable in the present case is therefore stricter than that under which a significant impediment to effective competition is 'more likely than not', on the basis of a 'balance of probabilities', as the Commission maintains. By contrast, it is less strict than a standard of proof based on 'being beyond all reasonable doubt'*". The Commission subsequently appealed the General Court decision.

In October 2022, AG Kokott already issued her opinion (discussed on the KCLB here). AG Kokott opined that the General Court erred in law by requiring a "*strong probability*" regarding a significant impediment to effective competition. Rather, she suggested a "*balance of probabilities*" test, so the Commission could prohibit a merger when it is "*more likely than not*" to constitute a significant impediment to effective competition. The ECJ decision is expected in the coming months.

In the meantime, the June 2022 General Court decision in Thyssenkrupp/Tata Steel might already constitute a move away from the General Court's "strong probability" test (discussed on the KCLB here). The General Court held that the Commission must show, "*with a sufficient degree of probability, in its decision declaring a concentration incompatible with the internal market that the transaction significantly impedes effective competition in the internal market or in a substantial part of it.*"

Whether the difference between "sufficient degree of probability" and "strong probability" actually

alludes to two different standards of proof, remains to be seen. In any case, the ECJ judgment in CK Hutchison 3G UK/Telefonica UK will bring the necessary clarifications.

It's Only Over When Its Truly Over: UPS/TNT Damages Claim Against the Commission

UPS continues to go after the Commission at every chance that it gets after the Commission blocked the UPS/TNT merger in 2013. The General Court later annulled the prohibition decision in 2017, which was backed by the ECJ in 2019. In February 2022, the General Court had to decide on the following € 1.7 billion damages actions by UPS against the European Commission because of the prohibition decision.

Building on the famous Francovich case law, the General Court rejected the claim because UPS did not sufficiently demonstrate causal damage in the sense that it would have obtained approval for the transaction absent the procedural breaches relating to the Commission's failure to communicate the final version of the econometric model used or infringements relating to the right of access to information. The decision demonstrates the importance of causality and the mitigated role of procedural breaches in a but-for analysis concerning the outcome of an essential substantive assessment of SIEC in merger control procedures.

FDI v Merger Control: The Commission's Article 21(4) EUMR Decision in VIG/AEGON

An Article 21(4) EUMR decision of the Commission is not a daily encounter. In February 2022, the Commission issued such a decision in the VIG/AEGON merger case (discussed on the KCLB here). In Summer of 2021, the Commission unconditionally cleared the merger with EU dimension under the EUMR. Previously, in March 2021, the Hungarian government had vetoed the transaction based on an emergency foreign direct investment legislation in the context of the coronavirus pandemic, since Hungary held that the merger threatened the country's legitimate interests.

After the Commission clearance decision, the EU watchdog opened investigations against Hungary for a possible breach of Article 21(4) EUMR. This provision gives the Commission the exclusive competence to examine transactions with a Union dimension; Member States can only exceptionally intervene to protect legitimate interests, while at the same time abating EU law.

In its 2022 decision, the Commission held that Hungary did not establish its legitimate interest, because it did not sufficiently argue that the VIG/AEGON acquisition would pose a threat to a fundamental interest of society, that in any case, Hungary failed to meet the principle of proportionality, and that Hungary failed to communicate their intended veto to the Commission prior to its implementation.

This implies that even though the European Commission generally plays a subordinated role in the EU FDI system (discussed more below), for concentrations with an EU dimension, the Commission still has the last word and Union principles play an important role.

Other Notable 2022 Case Developments

As the Commission's EU merger interventions graph shows us, 2022 was a particularly busy year when it comes to prohibition and commitment decisions. Will the Commission (finally) take a tougher stand on mergers? We will see!

In 2022, the Commission issued another prohibition decision in the Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering merger. In a straightforward manner, the Commission established that the merger would have created a dominant position on the worldwide market for the construction of large liquified gas carriers. Interestingly, the parties did not offer any commitments to mitigate the anticompetitive concerns.

In the considerable amount of Phase-2 cases in 2022, the vertical NVIDIA/Arm merger was especially noticeable. The transaction in the semiconductor sector attracted regulatory interest around the globe, including the US. The Commission was particularly worried that NVIDIA would have the ability to restrict access by NVIDIA's rivals to Arm's input technology. NVIDIA subsequently abandoned the plan to acquire Arm and withdrew the merger notification. Nevertheless, the case shows the increased vigilance of merger authorities around the world.

Let's Make it Simpler: The EU Merger Procedure Simplification Implementing Regulation

Last year, the Commission took a further step in its overall review process of the merger procedural and jurisdictional rules (discussed on the KCLB here). In May 2022, it published the Draft Revised Merger Implementing Regulation and the Draft Revised Notice on Simplified Procedures. The Commission wants to further target and simplify the merger review for cases without competition concerns. The Commission rather wants to focus on the most complex and relevant cases in an environment of further market consolidation. The consultation period on this generally welcomed development ran until June 2022. Therefore, final rules are expected soon.

State Aid

Big Bang of State Aid Law: The ECJ's Fiat Chrysler Judgment on Transfer Pricing

For years, the European Commission pursued several transfer pricing State aid cases, of which many ended up at the European courts.

The Fiat Chrysler judgment from November 2022 (discussed on the KCLB here) can certainly be described as a landmark ruling and a considerable further development of the state aid law doctrine on transfer pricing cases. The ECJ set aside the General Court judgment of 2019, which endorsed the overall Commission case law. The transfer pricing cases of the Commission, such as Starbucks, Apple or Amazon, usually concern advance transfer pricing agreements between certain Member States' tax authorities and the financing company of a multinational undertaking (discussed on the KCLB here, here, here, here, here, here, and here).

In the case at hand, the Commission had previously decided that Luxembourg granted a selective tax advantage to the financing company by agreeing to transfer prices for financing and treasury

activities it would provide to the Fiat group companies, such as intra-group loans, that deviated from market practices.

In the judgment from November 2022, the ECJ, in essence, rather backed the autonomy of Member States regarding their tax law. Primarily, the ECJ rejected an autonomous EU-wide arm's length principle as a reference system for an advantage. The principle only applies when a Member State has incorporated it into its national legal system. Thus, "only the national law applicable in the Member State concerned must be taken into account in order to identify the reference system".

The End and the Beginning of State Aid Crises Measures

In the previous two years, the Commission had adopted and prolonged a Temporary Framework to support economic recovery in the context of the coronavirus outbreak (discussed on the KCLB here, here, here, here and here). With the pandemic phasing out, the Commission also decided in May 2022 to phase out the Covid Temporary Framework; the Framework was not extended beyond 30 June 2022, with a few exceptions for investment and solvency support measures, which will run until 31 December 2023.

On the contrary, and since the Commission has gotten used to reacting to a crisis with a temporary state aid framework, the Commission also issued a Temporary Crisis Framework after Russia invaded the territory of Ukraine (discussed on the KCLB here). The Temporary Crisis Framework has been amended and prolonged twice and is currently applicable until 31 December 2023.

The Framework is based on Article 107(3)(b) TFEU and wants to primarily react to the disturbance of the EU economy as a consequence of the war. Like in other frameworks before, the Temporary Crisis Framework contains a rule on the limited amount of aid (it is currently capped at € 2 million per undertaking), rules on which aid measures are allowed, such as liquidity support in form of State guarantees and subsidized loans, and focuses on increased energy prices, in particular also in light of sustainable developments.

Recently, the Commission even decided to consult Member States on a draft proposal to transform the State aid Temporary Crisis Framework into a Temporary Crisis and Transition Framework to facilitate and accelerate Europe's green transition and also to react to the US Inflation Reduction Act (discussed on the KCLB here). The consultation process results were finally reflected in the Commission's adoption of a Temporary Crisis and Transition Framework to support transition towards net-zero economy and the amendment to the General Block Exemption rules to further facilitate and speed up green and digital transition.

Guidelines, Guidelines, Guidelines

2022 was certainly a year of new State aid rules in the context of the EU's twin green and digital transition. Next to green and digital, also the simplification of the State aid framework was the EU Commission's focus.

As of January 2022, the newly revised Communication on State aid rules for Important Projects of Common European Interest is applicable. The Communication especially wants to promote

projects relating to the EU Green Deal and the Digital strategy. It addresses the criteria for Member State support to important cross-border projects of common European interest that overcome market failures and enable breakthrough innovation in key sectors and technologies and infrastructure investments. 2022 did not only mark the start of the application of the instrument but with the so-called IPCEI Hy2Tech project, also a very prominent and fitting important application case in future clean technology. The project concerns support to R&D and the first industrial deployment in the hydrogen technology value chain. As an Important Project of Common European Interest, the project was jointly prepared and notified by 15 Member States (Austria, Belgium, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Italy, Netherlands, Poland, Portugal, Slovakia and Spain). IPCEI Hy2Tech truly shows why it is important that Member States work together on financing such projects: supporting innovative technologies can be very risky for one Member State alone.

State support for R&D and Innovation also was at the core of a further 2022 State aid development. After a consultation in 2021, the Commission finally adopted a revised Communication on State aid rules for research, development and innovation in October 2022. The RDI Communication updates the rules under which a Member State may grant State aid to RDI activities. The Communication again focused on the importance of RDI for the EU Green Deal and the Digital strategy. While it widely allows State support to RDI, the new revised Communication also contains safeguards to ensure that aid is limited to what is necessary and a level playing field is kept. The Communication updates the definition of RDI, it includes new rules on state aid for testing and experimentation and overall simplifies the practical application of the RDI Communication.

We stay with a focus on the green transition. Just before Christmas 2021, the Commission endorsed the new Guidelines on State aid for climate, environmental protection and energy. Similar to the above-mentioned IPCEI-Communication, the new CEEAG is applicable from January 2022. It provides even further guidance on State support EU Green Deal and other environmental protection initiatives, including climate protection and energy aid measures. It modernizes and broadens the categories of investments and technologies of Member State support measures, for example, clean mobility infrastructure, resource efficiency, biodiversity, renewable hydrogen, electricity storage, and decarbonizing production processes. The Guidelines also include limits to guarantee a level playing field, such as a public consultation requirement for support measures above a certain threshold. Further increased flexibility with regard to the practical application is also introduced.

A further EU Green Deal related overdo of the State aid framework came just before Christmas in 2022. The Commission adopted revised State aid rules for the agricultural, forestry and fishery and aquaculture sectors, in particular, the Agricultural Block Exemption Regulation and Fishery Block Exemption Regulation as well as the Guidelines for State aid to the agricultural and forestry sectors and in rural areas and the new Guidelines for State aid in the fishery and aquaculture sector. The Commission has also decided to prolong the Fishery de minimis Regulation. The revised Block Exemption Regulations declare specific categories of agriculture or fishery aid compatible with EU State aid rules and exempt them from the requirement of prior notification. It includes new categories of block-exempted measures, for example for animal protection.

Overall the Commission expects that the new rules block-exempt up to 50% of cases which before were subject to notification. The Guidelines include – again – simplified procedures and a broader scope of measures. Overall, the rules also try to align with other EU policies in the area, such as

the Common Agricultural Policy and the Common Fisheries Policy.

We stay in the modernization spirit, this time with a focus on digital. Equally, in December 2022, the Commission then adopted a revised Communication on State aid for broadband networks. The Commission wants to specifically make sure that Member States can financially support the deployment and take-up of broadband networks in the EU, including gigabit connectivity and 5G coverage. The Guidelines include an alignment of the threshold for public support to fixed networks with the latest technological and market developments, an introduction of a new assessment framework for the deployment of mobile networks, a clarification of the incentivization model, and, again to simplify the rules.

Sanctions and Procedures

Uniform EU ne bis in idem Principle: Nordzucker and Bpost

After AG Bobek as one of its last official acts as AG already alluded on Nordzucker and bpost (discussed on the KCLB here) in 2021, the ECJ followed the opinion with the judgments in Nordzucker and bpost in April 2022 (discussed on the KCLB here).

Both cases are similar but not entirely overlapping. In the Nordzucker case, the German Bundeskartellamt fined Nord and Südzucker for an infringement of Article 101 TFEU and national competition law in the form of agreements on sales areas, quotas and prices. The Austrian Bundeswettbewerbsbehörde then subsequently relied on the same facts (and proof!) and applied with the Austrian Cartel court for a declaration that Nord and Südzucker had breached Article 101 TFEU and national competition law.

The bpost case, on the other hand, concerns the question of the parallel application of competition law and sector-specific regulation. bpost was first fined by the Belgian Postal Regulator, which held that the bpost rebate system breached sectoral postal rules. Subsequently, the Belgian Competition authority also found that this rebate system constituted an abuse of dominance. Such a sequence, at least, seems to be in the right sequence according to the DB Station doctrine described above.

With regard to the principle of ne bis in idem enshrined in Article 50 of the European Charter of Fundamental Rights, the ECJ is now on the path to a proper and overall EU ne bis in idem doctrine moving away from a competition-specific assessment. It held that a defendant could rely on the principle subject to two conditions: (1) there is a prior "*final*" decision (bis-condition), and (2) both proceedings relate to the identical "*material facts, understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned*" (idem-condition).

Note that the ECJ stressed the finality of the decision on the one hand, and focused on the identical, not just similar facts.

However, the ECJ then moved away from its prior Toshiba case, the prior gold standard of ne bis in idem in competition law, where it held that "*in competition law cases, that the application of this principle is subject to the threefold condition that in the two cases the facts must be the same, the offender the same and the legal interest protected the same*".

In Nordzucker and bpost it seemed to have dropped the third criterion of the same legal interest. Rather, the ECJ held that "*the legal classification under national law of the facts and the legal interest protected are not relevant for the purposes of establishing the existence of the same offence, in so far as the scope of the protection conferred by Article 50 of the Charter cannot vary from one Member State to another. […] The same is true of the application of the non bis in idem principle […] in the field of EU competition law, inasmuch as […] the scope of the protection conferred by that provision cannot, unless otherwise provided by EU law, vary from one field of EU law to another*".

Consequently, the jurisprudence could have a wide impact on the parallel application of the Digital Markets Act and competition law in the future; ne bis in idem could be violated because it does not matter anymore the DMA is regulatory law that wants to ensure contestable and fair markets, while the competition rules focus on undistorted competition.

Defendants Just Wanna Have Fundamental Rights

Here we meet some familiar faces again, which underline the importance of procedural rights and the rights of defence in Article 27 Regulation 1/2003, which the European courts take very seriously (discussed on the KLCB here).

First, the above-mentioned Qualcomm case (discussed on the KLCB here). The General Court did not only find substantive but also procedural errors relating to Qualcomm's right of defence. The first procedural error the Court found concerned a failure to disclose relevant evidence to the defendant. The case file only constituted no or very general information on the topics discussed in meetings between the Commission and third parties. Since the meetings concerned the collection of information on Qualcomm's conduct, the General Court held that they fell within the scope of Article 19 Regulation 1/2003 and therefore must be properly recorded, and defendants must have proper access to the records. The second procedural error concerned the possibility of Qualcomm to commenting on differences between the statement of objections and the decision. The statement of objections still contained two markets; the final decision focused only on the LTE chipsets market. The General Court followed Qualcomm's arguments and held that any change of scope can have an effect on the defendant's defence and therefore the defendant needs to be able to know and comment on any revised scope. This judgment shows us that the statement of objections is just a preparatory document but on any major and influential changes, a defendant should have the possibility to comment.

Second, we come back to the ECJ judgment on the Optical Disc Drive Cartel case (discussed on the KCLB here) and the importance of the statement of objections in competition law investigations. As mentioned above, the case relates to the doctrine of single and continuous infringements under Article 101 TFEU. In the 2015 decision, the Commission held that the conduct at hand consisted of several stand-alone infringements which, in addition, formed another infringement, the single and continuous infringement. Regarding the rights of defence, the ECJ in its judgment established that when the Commission plans to fine an undertaking not only for the single and continuous infringement but also for separate infringements, the Commission must clearly set this out already in the statement of objections, so the defendant can properly defend itself in the comments.

Lastly, we also come back to Scania (discussed on the KCLB here). The General Court followed the jurisprudence in Pometon (discussed on the KCLB here) on the principle of impartiality and the presumption of innocence in hybrid settlement cases. In Pometon, the ECJ had held that in hybrid settlement cases, the Commission must take sufficient drafting precautions in the settlement decision to avoid a premature judgment as to the non-settling party's participation in the cartel and must only refer to the non-settling party were necessary. Scania now builds on these findings. The General Court underlines that it is important to clearly articulate and describe the events and their legal value in the settlement decision, which can include an indirect but also a direct reference to the non-settling party. However, this must not amount to an expression of liability on the part of the non-settling party and needs to be restricted to the references that are absolutely necessary.

Keep Complaining? Sped-Pro and PGNiG

In 2022, two peculiar complaint cases reached the General Court. They show that although the Commission has a broad margin of discretion to turn down complaints, it is crucial to observe the procedural rights of complainants.

The first decision relates to the Gazprom case the Commission launched in 2015. The Commission investigation already related to the potential abuse of Gazprom through unfair pricing practices and export bans in the wholesale supply of gas market in Eastern Europe. In 2017, Polskie Górnictwo Naftowe i Gazownictwo (PGNiG) further claimed that Gazprom had made its gas supply contract with PGNiG dependent on certain conditions, including veto rights over Gaz System, the joint venture between PGNiG and Gazprom that owns the infrastructure of the Polish section of the Yamal gas pipeline. In January 2018, the European Commission notified PGNiG of its intention to reject the complaint in a so-called Intention Letter. PGNiG disputed this decision, arguing that it was not privy to all the information on which the Commission's preliminary stance was based.

In April 2019, the Commission formally rejected the complaint, citing the possibility to apply the state compulsion defence and the fact that the Polish Regulatory Authority had certified Gaz System as an independent system operator, demonstrating that Gazprom had no influence over the pipeline and was incapable of engaging in any abusive conduct. PGNiG subsequently appealed to the General Court, arguing that the Commission had violated its right to information and its right to be heard by rejecting the complaint based on the state compulsion doctrine which was not explicitly mentioned in the Intention Letter. In the first annulment decision over rejection of a complaint in over a decade, the General Court sided with PGNiG. The General Court found that the Commission had failed to inform the applicant that its preliminary assessment was based on a possible application of the State action defence. In this aspect, the case is comparable to the above-mentioned judgments, where the ECJ and General Court held that the Commission must clearly set out the full alleged substantive violation already in the statement of objections to not violate the rights of defence. In this case, the General Court further found that the Commission made a manifest error of assessment in relying on the certification decision in support of its finding that there was a limited likelihood of establishing an abuse by Gazprom. As a result, the General Court annulled the contested decision.

The Sped-Pro judgment just days later in February 2022, concerned a 2016 complaint of the Polish shipping company Sped-Pro against the state-owned PKP cargo with the EU Commission (discussed on the KCLB here). Sped-Pro accused PKP Cargo of refusing to enter into a

cooperation contract at market conditions, thereby abusing its dominant position in the rail freight market in Poland. The complaint was rejected by the Commission in August 2019, under Article 7(2) of Regulation 773/2004. The Commission stated that the Polish Competition Authority was better placed to examine it according to the criteria set out in the Notice on cooperation within the Network of Competition Authorities. Sped-Pro then contested the decision by filing an action for annulment, arguing that the Commission was in a better position to investigate the matter due to systemic and generalized issues with the rule of law in Poland that affected the independence of the Polish competition authority and courts.

The General Court sided with the claimants and extended the so-called Aranyosi and C?ld?raru / L.M. doctrine from the field of judicial cooperation in criminal matters to cooperation between competition authorities. In the Aranyosi and C?ld?raru and L.M. cases, the Court of Justice established that the judicial authority of a Member State must determine if there are substantial grounds to believe that there is a real risk of a breach of the prosecuted person's fundamental right to a fair trial, on account of systemic or generalized deficiencies concerning the independence of the judiciary of the issuing Member State, before executing a European Arrest Warrant.

If such risk cannot be discounted, the judicial authority must refrain from executing the European arrest warrant, thus providing an exception to the principle of mutual recognition under the Council Framework Decision on the European Arrest Warrant. Applied to competition law in Sped-Pro, this means, in the view of the General Court, that the Commission must carefully consider the specific evidence provided by the complainant, which may demonstrate widespread and systematic deficiencies in the rule of law in that a particular Member State, before rejecting a complaint based on the competition authority of a Member State being better placed.

Consequently, even though the General Court did not mention this specifically, this also entails that if the Commission finds widespread and systematic deficiencies in the rule of law in that particular Member State, specifically affecting the independence of the competition authority and (review) courts, the Commission cannot reject a complaint based on the competition authority of a Member State being better placed.

Extra, Extra, Extraterritoriality: Application of the Qualified Effects Theory in the Airfreight Cartel

When will the airfreight cartel end? It has a long procedural tradition with previous annulments on the General Court level as well as re-adopted decisions. In March 2022, the General Court partially annulled the Commission's decision from 2017 in the airfreight cartel. While the General Court upheld the Commission's decision, it found that in six out of the 13 appeals against the decision, the Commission violated procedural rights and/or failed to prove the participation of certain air carriers in specific parts of the infringement. As a result, the General Court decreased the associated fines and rejected the remaining seven appeals in their entirety.

However, the interesting aspect concerns the extraterritorial application of competition law and the implementation test as well as the qualified effects test, recently backed in Intel. The European Commission had found that carriers had formed a worldwide cartel on the airfreight market, violating EU competition laws by conspiring about fuel and security surcharges and commissions which affected intra-EU, inbound and outbound routes. The carriers appealed, inter alia, on

grounds of an alleged lack of EU law jurisdiction with regard to inbound freight services.

The General Court underlined that the qualified effects and implementation test are alternative, not cumulative. With regard to qualified effects, the General Court applied the Intel jurisprudence that qualified effects in the EU must be foreseeable, immediate and substantial. However, the General Court also held that probable effects are sufficient, which plays an important role in by-object infringements.

Let's Redo it: Re-Evaluation of Procedural Rules

After almost 20 years of practice and experience, in 2022, the Commission started the review process of the main tools for antitrust proceedings, Regulation 1/2003 and Regulation 773/2004, with a round of public consultation. The goal of the Commission is to modernize proceedings overall, reducing investigation times, providing companies with greater clarity during investigations, and allowing for more decentralized enforcement. By the end of 2022, the Commission had contracted a study to assist in its evaluation. A staff working document is expected in 2024.

Furthermore, the Commission started a review of its leniency policy. It watches the apparent decline of leniency applications. To further boost leniency applications, it published an FAQ document in October 2022. Notably, the Commission recommends that companies inquire about the possibility of receiving immunity or reduced penalties under their Leniency Policy on a confidential basis, without revealing their identity. Moreover, the Commission encourages undertakings to submit a hypothetical immunity application, where they can disclose the sector, estimated duration of the potential cartel, and a descriptive list of evidence to be shared at a later agreed-upon date, without revealing any identifying information about the participants. Additionally, the Commission has appointed a Leniency Officer to serve as the primary point of contact for prospective applicants and their legal representatives, including providing informal advice.

Lastly, the Commission also revised the Informal Guidance Notice in October 2022 (discussed on the KCLB here and here). The previous version of the informal guidance notice outlined strict criteria that limited when the Commission could issue guidance letters. The tool was never used for this reason. After consulting on the issue earlier in 2022, in October 2022, the Commission published a summary report of the results of that consultation.

The revised version now allows the Commission to provide guidance letters to undertakings facing novel or unresolved questions, or in situations of crisis or emergency. This is beneficial for those businesses involved in emerging ways of doing business, as well as those facing a crisis or emergency, as the tool increases the Commission's flexibility to address a wider range of issues in guidance letters. Especially for the prominent topic of sustainability and competition law, guidance letters could play a larger role in the future.

Private Enforcement

While 2023 already brought us important developments in private enforcement law, 2022 was a bit

quieter, albeit only on the EU level. 2022 brought us two important judgments.

The first cases of the 2014 Damages Directive concerned mainly the temporal application of the Directive, which provides for special rules in Article 22. Only procedural provisions can be applied retroactively. In Volvo and DAF (discussed on the KCLB here), the ECJ issued that the determination of substantive and procedural law provisions is subject to EU and not national law. While the limitation periods and the presumption of harm are substantive provisions, judicial estimation of harm is procedural. In PACARR (discussed on the KCLB here and here), the ECJ further held that the disclosure provisions are also procedural.

Moreover, the ECJ conducted an extensive interpretation based on the text, context and purpose of the disclosure provisions and held that the Directive does not prohibit the disclosure of non-existent documents or information, which would need to be produced by the defendant in ex-novo cartel damages proceedings. Rather, the ECJ emphasized a need for a proportionality exam that the national court should conduct. Unfortunately, the ECJ did not pick up the idea provided for by AG Szpunar, that disclosure itself contributes to the effectiveness of EU competition law and, thus, might be necessary for EU primary law reasons. Yet, the extensive interpretation of the ECJ already demonstrates the importance of this new procedural tool for the private enforcement of competition law. More on this in the 2023 recap post.

Other Legislation, Consultation and Reports

Let's Bring Market Definition to the 21st Century!

In November 2022, the Commission released a draft revised Market Definition Notice and called for interested parties to submit their comments (discussed on the KCLB here and here). In the update of the 1997 Market Definition Notice, which outlines the principles and evidentiary considerations involved in defining a market, the Commission wants to include its own decisional practice and the recent case law of the ECJ to address the challenges arising from non-price factors of competition (such as quality and innovation), the evolution of innovation-based and digital markets, in particular, multi-sided platforms, as well as the global nature of business transactions.

Market definition plays a crucial role in the plethora of competition law fields. In the vein of ensuring transparency and legal certainty for undertakings, it is much welcomed to bring the Notice up to speed with the actual market developments. The consultation period ended in January 2023, and now we wait for the Commission to analyse the results and come back to us, hopefully still in 2023!

Let's Keep It Digital!

We stay in the digital realm. While the revised Market Definition Notice also concerned digital developments, 2023 otherwise also heavily focused on other digital-related progress.

The year 2022 started with the Final Report on the consumer Internet of Things sector inquiry (discussed on the KCLB here). The sector inquiry focused on: (1) the characteristics of consumer IoT products and services, (2) the features of competition in these markets, (3) the main areas of

potential anti-competitive concern. With regard to (1), the sector inquiry's results demonstrate that consumer IoT is rapidly expanding and becoming an integral part of our daily routines. In (2), the sector inquiry demonstrated that the high cost of technology investment is a significant obstacle for companies seeking to enter or expand in this sector. Another major challenge faced by companies is competition from vertically integrated big players like Google, Amazon, and Apple, who have established ecosystems within and beyond the consumer IoT domain. Regarding the anti-competitive concerns discussed in point (3), the market test showed, inter alia, exclusivity and tying practices related to voice assistants, as well as limitations on the use of different voice assistants on a single smart device. The Commission now aims to use this information in future competition enforcement measures but also for any activities under the DMA.

Speaking of which, in 2022, the long-awaited Digital Markets Act got adopted (discussed on the KCLB here). Already in March 2022, the EU legislators had reached a political agreement on the text. It took some months until September 2022, when the DMA was formally adopted. It entered into force on 1 November 2022 and will become applicable on 2 May 2023 with regard to the gatekeeper designation; the substantive obligations will start to apply in March 2024.

The DMA, in essence, provides a definition for so-called gatekeepers, which covers large digital platforms that act as a gateway between business users and consumers, giving them considerable power to act as private rule makers and potentially creating a bottleneck in the digital economy. In response to these concerns, the DMA imposes a set of obligations on gatekeepers, including prohibiting certain behaviours. This includes, inter alia, that users have the right to unsubscribe from core platform services under similar conditions to subscription, that gatekeepers must ensure the interoperability of their instant messaging services' basic functionalities, or that gatekeepers are no longer allowed to rank their own products or services higher than those of others (self-preferencing). If gatekeepers fail to comply with the DMA provisions, they may face fines of up to 10% of their worldwide turnover and 20% for a repeated offence. Furthermore, the DMA provides more procedural tools and specifications.

Since the Commission wants to make the process of the DMA's future implementation, monitoring and oversight of compliance as transparent as possible, it already held several workshops on specific DMA obligations, the first already in December 2022 on self-preferencing (discussed on the KCLB here). Self-preferencing, as indicated above, raised and continues to raise a huge debate in practice and academia following the Google Shopping case (discussed on the KCLB here). Its inclusion in the DMA, the question of whether under the DMA, there is a stand-alone assessment not based on precedents, and the future relationship between DMA self-preferencing and competition law self-preferencing raise concerns. The first workshop gave some food for thought but the discussion on self-preferencing is far from over.

Next to seminars on the DMA, the Commission already published a first Draft Implementing Regulation on the DMA, just before Christmas 2022 (discussed on the KCLB here). The DMA consistently does not contain many procedural rules itself. With the first Draft Implementing Regulation on the DMA, the Commission wants to create further rules for the transmission of information within the framework of the procedure for the appointment of gatekeepers according to Article 3 DMA. Chapter II of the first Draft Implementing Regulation on the DMA now proposes to lay down detailed rules on the type of information, the format of the application, the maximum length of documents, their language, and the procedure for transmission and receipt. The annex contains a new form for the application, the so-called "Form GD". On the other hand, the First Draft Implementing Regulation on the DMA regulates hearing and access to the file rights in

the various DMA procedures. However, several aspects do not seem to be fully developed yet. For example, the First Draft Implementing Regulation on the DMA does not provide for a hearing officer or rules on third-party rights. The Commission must now return to the desk and incorporate the comments provided by third parties.

Next to the DMA, also the Digital Services Act got adopted in October 2022 (discussed on the KCLB here) and entered into force on 16 November 2022. Albeit being less related to competition law than the DMA, the DSA aims to significantly change the digital landscape in the EU. The DSA establishes unambiguous duties and responsibilities for providers of intermediary services including social media, online marketplaces and very large online platforms or search engines. The provisions of the DSA entail that intermediary platforms must uphold increased transparency and accountability for their role in the distribution of illegal or harmful content. Inter alia, they have to prevent the sale of illegal goods or services, measure for wrongful content proliferation response, with respect to fundamental rights or are prohibited to conduct certain forms of targeted advertising. In the coming months, we will likely already see some activities under the DSA. For example, online platforms already had to report the number of active end users on their websites to the Commission until 17 February 2023.

Lastly, in February 2022, the EU Commission also published a Draft Data Act, the last important part of the Commission's EU strategy for data (discussed on the KCLB here). In general, the Data Act is part of the larger EU digital agenda, which includes already discussed initiatives like the consumer IoT sector inquiry, the DMA and the DSA. The Draft Data Act aims to make it easier for consumers and businesses to access data. It, inter alia, contains rules to allow government usage of data in cases of exceptional need (sometimes without compensation), to simplify the process of switching between cloud and edge services, to prevent unlawful data transfer by cloud service providers, to promote interoperability across European data spaces, and to establish standards for smart contracts between data holders and recipients. Specifically, the Draft Data Act contains significant obligations regarding data sharing. However, companies that share data under these acts are still bound by EU competition rules, including restrictions on the sharing of sensitive information that could affect competition. In this aspect, further competition law guidance will be necessary.

How Open is the EU Open Strategic Autonomy?

Another regulatory focus of the last years connects to the interplay of competition, state aid, trade, and investment law. 2022 brought us major developments in this area as well.

On the one hand, the Commission issued its annual report (discussed on the KCLB here) on the quite novel 2019 EU FDI Screening Regulation (discussed on the KCLB here, here, and here). The FDI Regulation established both minimum standards for individual EU Member States FDI screening mechanisms and a coordination mechanism for harmonizing those mechanisms across Member States. FDI screening often has to be conducted at the same time a merger control filing in cases involving third-country entities and critical infrastructure. Most importantly, the report shows that the FDI Screening Regulation has led to a significant increase in the number of FDI screening mechanisms in the EU Member States from 11 in 2019 when the FDI Screening Regulation was adopted to now 25 out of 27 Member States. Although Bulgaria and Cyprus are not currently implementing such mechanisms, the Commission anticipates that all 27 Member States

will ultimately adopt FDI screening mechanisms.

On the other hand and last but not least, the EU adopted the Foreign Subsidies Regulation in 2022 (see all pieces on the KCLB here). I have said much on this Regulation in my academic papers (see here and here) as well as, together with many others, in the comprehensive and practice-oriented Kluwer Competition Law compendium on "How will the Foreign Subsidies Regulation Work?".

Shortly: The new Regulation entered into force on 12 January 2023. The majority of the FSR will start to apply on 12 July 2023, while the two notification-based tools for concentrations and public procurement procedures will start to apply on 12 October 2023. The FSR constitutes a new investigatory review tool for the European Commission. It will focus on economic behaviour on the internal market by companies who received foreign subsidies from non-EU States. It will step next to the established competition, merger control, state aid, FDI and trade rules of the EU. The Commission possesses broad authority to take corrective action, including the ability to impose measures that rectify distortions, prevent deals or public procurement procedures from moving forward and, in certain cases, dissolve concentrations that have already been agreed upon. The FSR will have a huge impact and has the possibility to seriously limit the business of third state-funded companies in the EU.

Businesses and transaction lawyers should start to familiarize themselves with this new Regulation, which is also applicable retroactively and will impact their ongoing business in the EU.

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