Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2023 – European Union

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2023 brought us a lot of developments in competition law and policy on the EU level. After 2020, 2021, and 2022, we continue to keep you up to date with the latest developments.

Article 101 TFEU

Have we figured out by object and by effect yet?

For their master or PhD thesis, students tend to look for the trendiest topics and sophisticated theories of harm. Yet, it is often the basics where there are still uncertainties and therefore an increased need for research with great practical relevance. In 2023, several cases raised pivotal issues on the difference between by object and by effect restrictions of competition under Article 101 TFEU. While the case law of the recent years continues to clarify both categories, the developments in 2023 delved into was about the categorisation of certain offences as more or less typical by-object or by-effect cases.

The question of by-object and by-effect categorisation was decisive in the June 2023 Super Bock Bebidas judgment (C-211/22, discussed on KCLB here). The preliminary reference case from Portugal concerned exclusive distribution agreements on resale price maintenance (RPM) between Super Bock and its independent distributors. The ECJ clarified the applicability of the by object category for vertical restraints. The court begins its assessment with an almost textbook-like presentation of the state-of-play on the by-object and by-effect categories. A restriction by-object is to be interpreted restrictively, is an exception compared to the by-effect restriction and cannot be presumed. For a by-object restriction, there needs to be a sufficient degree of harm to competition so that there is no need to examine the effects. In line with the case-law underlined particularly in Generics or Budapest Bank (discussed on KCLB here), a competition authority needs to examine the content of the agreement, its economic and legal context as well as its objectives. According to the ECJ, there is no closed or pre-defined list of restrictions by object that exempt competition authorities from the burden of proving a restriction of competition by object and in particular hardcore restrictions of block exemption regulations do not necessarily equal by-object restrictions. With regard to verticals, even if they are by nature often less damaging to competition, the ECJ underlined that a restriction by-object is possible, applying its aforementioned standards.

In the HSBC judgment (C-883/19 P, discussed on KCLB here) the ECJ inter alia ruled on The characterisation of the exchanges of information as an infringement by object. The case dates back to a 2016 decision in the Euro Interest Rate Derivatives cartel, which the Commission issued in a hybrid settlement scenario (more on this below). The following General Court decision largely upheld the Commission decision. The ECJ judgment now overturned the General Court's decision while affirming the European Commission's determination that HSBC had engaged in a cartel in the Euro Interest Rate Derivatives market. The ECJ dismissed this contention and upheld the GC's determination that the information exchange demonstrated an adequate level of detriment to competition and represented a violation by its very nature. Specifically, the ECJ emphasized that even if the information exchange did not directly impact consumer prices, it did disrupt the typical structure and operation of the market, thereby affecting competition itself.

In the Banco BPN/BIC Português case (C-298/22), another preliminary references case from Portugal, AG Rantos delivered a crucial opinion in October 2023 following the ECJ approach in HSBC (discussed on KCLB here). AG Ranto's opinion reads like an instruction manual for differentiating between the two types of restrictions, reiterating what the ECJ also has held in Super Bock Bebidas. AG Rantos stressed the analysis of the economic and legal context, which is different from the effects-analysis. The former requires (1) an analysis whether that agreement given its content and objectives and in light of reliable and robust experience falls within a category of agreements which are usually detrimental to competition, and (2) a "basic reality check" in order to verify whether specific circumstances of the legal and economic context of the agreement may cast doubt on the presumed harmful nature of that agreement. For a standalone exchange of information between competitors, AG Rantos held that a by-object restriction is possible, in case the exchange presents a sufficient degree of harm, for which he developed certain characteristics and factors built on HSBC.

Continued practical relevance of verticals

Verticals where again in the focus of the 2023 developments on EU level. Next to the already discussed Super Bock case, other important developments concerned vertical restraints.

Portugal kept on giving with another interesting preliminary ruling of October 2023. The EDP – Energias de Portugal judgment (C-331/21) inter alia concerned the distinction between horizontal and vertical restraints. In the case at hand, EDP, active in the production and supply of electricity and natural gas though a subsidiary entered into a partnership agreement with Modelo, a company managing a network of consumer goods retailers, with the aim of promoting and increasing sales of their respective products through a mechanism of promotion and cross-reductions, which included a non-compete clause. The Portuguese Competition Authority had categorized the partnership agreement not as a vertical or an agency agreement, but rather as a horizontal cooperation. The ECJ backed the national authority and held that a partnership agreement between two companies operating in different product markets are not directly linked in terms of supply chain – these markets are not directly connected upstream or downstream – and therefore cannot be considered vertical or agency agreements. Rather, the ECJ held that a company managing a network of consumer goods retailers should be considered a potential competitor of an electricity supplier, even if it was not active in that market at the time of the agreement as long as it can be demonstrated that the company intends to enter the market and compete with the supplier. The ECJ further underlined its standard case law on ancillary restraints by stating that the non-compete clause included in a commercial partnership agreement cannot be considered as a restriction that is inherent to the agreement, unless it can be objectively proven that the clause is necessary for implementing the partnership agreement and is proportionate to its objectives.

In September 2023, the General Court delivered its judgment on the action for annulment against the Commission decision in the Valve case (T-172/21). The Commission decision concerned cross-border sales restrictions after the adoption of the Geo-Blocking Regulation as well as the careful interplay of competition and IP law. In the decision, the Commission had established that Valve and five PC video game publishers (Bandai Namco, Capcom, Focus Home, Kock Media and ZeniMax) prevented gamers from purchasing PC games from Central and Eastern EU Member States or activating PC games purchased from these countries, where prices were lower than in other Member States. While the Geo-Blocking Regulation does not apply to such digitally supplied copyright-protected content, the Commission can investigate such practices as a competition case, thus complementing the Geo-Blocking Regulation. The General Court upheld the Commission decision. It held that the purpose of the geo-blocking practice was not aimed at protecting the copyright of the publishers, but rather to eliminate parallel imports of the video games from low-cost countries. On the overall relationship between EU competition law and copyright, the General Court emphasized that copyright protection is intended to ensure the commercial exploitation of protected subject matter and does not give right holders the opportunity to demand higher remuneration or create artificial price differences between national markets.

The Commission itself continues to enforce vertical cross-border sales restrictions. Already in 2022, the Commission had opened investigations into whether French Fashion company Pierre Cardin and its largest EU licensee Ahlers restricted cross-border offline and online sales. In July 2023 the Commission sent a Statement of Objections to Pierre Cardin and Ahlers over the investigated practice. According to this preliminary assessment, the agreements targeted both the restriction of cross-border sales into Ahlers' licensed territories within the EEA and sales to low-price retailers offering discounted prices in those territories. The Commission's preliminary view is that the objective of this coordination was to ensure Ahlers' absolute territorial protection in the countries covered by its licensing agreements with Pierre Cardin in the EEA.

And the games continue: sport and competition law

Three long-awaited judgments on the interplay of sports and Article 101 TFEU were delivered in the end of 2023. The ISU (C-124/21 P), European Super League (C-333/21) and Royal Antwerp (C-680/21) judgments certainly were a Christmas present from the ECJ (discussed on KCLB here (competition law aspects), here (arbitration aspects) and here (Wouters doctrine)). In essence, all three judgments concerned the sports' governing bodies' statutes compliance with EU competition law. The ECJ substantially limited any sports-exemption to competition law.

The ISU judgment concerned the ice-skating bodies' prior authorisation, arbitration, and eligibility rules. The Commission issued an infringement decision in 2017, which was backed by the General Court in 2020. In the appeal judgment, the ECJ once again backed the Commission's findings. The ECJ analysed the prior authorisation rules and eligibility rules according to the above-mentioned distinction between by-object and by-effect restriction. Interestingly, in this context the court held that the interpretation of Article 106 TFEU must be applied vis-a-vis Article 101 TFEU as well in the sense that the quasi-regulatory power of a sports association can imply a by-object restriction. Any regulatory power must be exercised without discrimination and must be proportionate. The ECJ determined that the prior authorization rules and eligibility rules of the ISU did not include the necessary substantive criteria and procedural rules to limit and regulate the ISU's regulatory power. Moreover, the much-discussed (on KCLB here) Meca-Medina test, which assesses competitive restraints that arise as a result of pursuing a legitimate objective, according to the ECJ only applies to restrictions of competition that have an effect on competition and not on by-object restriction, such as in the case at hand. Regarding the arbitration rules, the ECJ found that they reinforce both the prior authorisation rules' and eligibility rules' violation of Article 101 TFEU.

The judgment on the proposed **Super League** (discussed on KCLB **here**) concerned a **referral** from Madrid. In 2021, twelve of the largest European football clubs announced the creation of a so-called Super League. After severe backlash by fans and other clubs as well as FIFA-UEFA, nine clubs backed out of the project, which led to a broad discussion on the competition law implications of FIFA-UEFA's behaviour. FIFA-UEFA and national federations threatened to ban the clubs from playing in any other competition at domestic, European or world level, and their players could be denied the opportunity to represent their national teams. The ECJ assessed the issue under both Article 101 and 102 TFEU. For Article 101, in essence, contrary to AG Rantos opinion (discussed on KCLB here) held that the reveal a sufficient degree of harm to competition and are therefore by-object restrictions, which thus cannot fall into any Meca-Medina exemption.

The Royal Antwerp judgment concerned the UEFA rules according to which a minimum of 8 home-grown players must be part of the squat to participate in in UEFA's interclub competitions. On the one hand, the ECJ held that these rules restrict a fundamental aspect of interclub football competition, specifically the recruitment and composition of football players. On the other hand, the ECJ stressed that the unique nature of football may argue in favour of governing bodies such as UEFA and URBSFA having the authority to regulate the competitive aspects of interclub football competitions, such as the team composition process. Both has to be taken into account by the referring court when assessing a by-object restriction.

EU-Guidelines pave the way: horizontal agreements & sustainability

The discussion on sustainability and competition law does not dial down. In 2023, two long-awaited developments in the context of Article 101 TFEU paved the way for future assessments.

While the new Horizontal Guidelines (discussed on KCLB here, here, and here) cover more than sustainability, the latter has been in the focus of the discussion on the former. Practice has long been waiting on more guidance on horizontal sustainability cooperations (even though in 2023 we still wait for a wide-spread application of the competition sustainability rules developed in some EU Member States). The new Guidelines clarify which sustainability fall entirely outside of Article 101(1) TFEU (e.g., the organisation of industry-wide awareness campaigns without joint-advertisement of products), a so-called 'soft safe harbour' for sustainability standards that meet certain criteria, and clarifications on the application of Article 101(3) TFEU. Now it's up to the industry to bring forward all the sustainability initiatives that the uncertainties surrounding Article 101 TFEU prevented so far – we (and the commentators) are waiting. Next to sustainability cooperations, the new Horizontal Guidelines also modernised the guidance on information exchange, R&D, specialisation, purchasing, commercialization, standardization, and mobile infrastructure sharing agreements.

More rules on sustainability and competition followed in December with the Guidelines on sustainability agreements of agricultural producers (discussed on KCLB here). Article 210a of Regulation (EU) 1308/2013 on the EU's common agricultural policy provides an exemption for restrictions of competition in agreements that are essential for achieving sustainability standards in the agriculture sector that surpass EU or national mandatory standards. In the new Guidelines, the Commission clarifies the conditions under which agreements between actors in the agricultural and food chains can take advantage of the exemption from Article 101(1) TFEU's prohibition of anti-competitive agreements as provided by Article 210a. In particular, the Guidelines focus on an interpretation of the notion of indispensability, which requires a two-step test. Furthermore, the Guidelines provide rules on scope of the exemption, by-object restrictions, an opinion system and the competition authorities intervention powers.

More guidance: updated and dropped block exemption regulations

Other rules on the application of Article 101 TFEU equally required updating in 2023.

Together with the publication of the new Horizontal Guidelines, the Commission also updated the R&D and Specialisation Block Exemption Regulationsto support the EU's digital and green transitions (discussed on KCLB here). The R&DBER focused on the topic of innovation competition and specified that undertakings involved in an R&D agreement, even if they do not compete in markets for current products or technologies, could still be considered competitors in innovation. However, their collaboration would only eliminate competition in innovation under exceptional circumstances. The Commission also eliminated an exclusion related to R&D agreements where there would be fewer than three comparable competing R&D efforts. The SBER takes into account the updated need for specialisation agreements, for example, when it comes to digital and green technologies. It updates, e.g., the definition on unilateral specialisation agreement to cover more than just two parties.

Some rules were only updated marginally updated. The rules of the Motor Vehicle Block Exemption Regulation were prolonged in 2023 up until 2028. The MVBER provides the motor vehicle industry with a distinct exemption for vertical agreements related to the buying, selling, or resale of new motor vehicles, as well as for agreements concerning the provision of repair and maintenance services for these vehicles and the distribution of spare parts. Yet, the Commission updated the supplementary Guidelines on vertical restraints in the motor vehicle sector, e.g., on the exclusion of hardcore restrictions in line with the General Vertical Block Exemption Regulation.

Other rules were not prolonged because they did not appear to be fit for purpose anymore: the Consortia Block Exemption Regulation in the shipping sector. The CBER used to set out the conditions under which consortia – joint service agreements between carriers – were exempted from the prohibition set out in Article 101(1) TFEU. Overall, the evaluation revealed that the CBER did not result in significant cost savings for carriers in terms of compliance and was no longer achieving its intended objective of fostering competition by facilitating collaboration among smaller carriers to offer alternative services in competition with larger carriers.

Article 102 TFEU

Born free: Developments on the interpretation of refusal to access

The EU Court's case law has seen two main developments in the subject of the interpretation of refusal to access when the dominant undertaking has strong links with the national government: Lithuanian Railways (Case C-42/21) and Bulgarian Energy Holding and Others v Commission (Case T-136/19).

On the side of the Court of Justice's ruling, it upheld that the *Bronner* conditions were not fulfilled in the particular case that the dominant operator deliberately destroyed State-owned infrastructure, even if the undertaking managed it, and did so to avoid granting access to the infrastructure to its competitors. The case at hand could not be classified into the category of refusal to access but it did not escape scrutiny, either. Instead, the Court of Justice highlighted that the abuse was to be considered as an independent form of Article 102 TFEU that entailed sacrificing an asset with the view to preventing market entry. Thus, the balancing act required to analyse the dominant undertaking's conduct considering its dedicated investments to the infrastructure could not be performed. This was even more so the case since the infrastructure was funded via public means (see an overview of the ruling here).

The question of attributability was also touched upon in BEH and Others v Commission, where the General Court annulled the European Commission's decision sanctioning the Bulgarian gas holding company BEH and its subsidiaries for an unauthorised refusal of access to its services. The ruling particularly clarified the pronouncements of the EU Courts declaring that anti-competitive effects must be attributable to the impugned conduct that is considered. However, a nexus of full causality between the conduct and the anti-competitive conduct and effects would render enforcement unduly burdensome. This is precisely the role of the counterfactual exercise, the General Court declared. Along with its ruling, the General Court went over the *Bronner* requirements and disassembled the EC's reasoning. For instance, a refusal to deal could not be established to the standard of the likelihood of elimination of all effective competition where no evidence was presented that rivals requested access, or their intention was clear to enter the market. In that same vein, the General Court performed the counterfactual exercise over the case and stated that even bearing in mind that the dominant undertaking's conduct showed an exclusionary intent, the practice was incapable of restricting competition because its rivals would not have been able to compete anyway. After all, they lacked access to the only pipeline available to transport gas from Russia into those facilities.

Aside from resolving attributability, the General Court clarified that the State action defence applied to the undertaking's conduct since its practice exerted legitimate protection of its interests in light of its public services mission in taking measures to guarantee minimum capacity reflecting the public's needs as a public supplied (see the full review of the ruling here).

The million dollar question: competition on the merits, where and for whom?

A dominant operator's departure from competition on the merits (or normal competition) is the buzzword(phrase) of every antitrust case. At times, it is used as a clause to simply round up the European Commission's line of reasoning in demonstrating the existence an exclusionary behaviour. However, as Judge Wahl formulated in the Google Shopping hearing before the Court of Justice in September, one hardly can grasp a definition of competition on the merits – without being caught between a rock and a hard place, that is.

Despite the complexity, the Court of Justice has not stopped to delineate the outer boundaries of what can and cannot be factored into the wider analysis of the means by which a dominant undertaking departs from competition on the merits. Even though the Google Shopping case (Case C-48/22 P) has not yet been resolved, AG Kokott's Opinion and the case's hearing advocated in favour of considering that abuse may be correlated with the principle of equal treatment to establish its deviation from the means of competition on the merits due to its unreasonable and discriminatory nature.

From the practical perspective, the Court of Justice clarified that the competition authorities must demonstrate the undertaking's capacity to restrict competition on the merits based on tangible evidence which establishes, beyond the threshold of mere hypothesis, that the operator's practice is capable of producing such effects. To that end, the competition authority is not automatically compelled to perform the AEC test over the conduct but may do so pre-emptively on a voluntary basis or reactively as a response to the undertaking's allegations in the administrative procedure (see the rest of the analysis of the Court of Justice's preliminary ruling here).

Within this wider account of things, the Court of Justice also recognised that compliance with other pieces of regulation may be taken into account to consider whether a dominant operator's conduct departs from competition on the merits. It is yet early to establish whether the recognition will encompass all types of EU regulation since the preliminary ruling in Meta Platforms and Others (Case C-252/21) only remarked that the GDPR could be factored into this wide analysis due to the fact that it could constitute a vital clue for that end. Simultaneously in the same ruling, the Court of Justice gave some breathing space to both data protection advocates and competition authorities by establishing that the access and processing of personal data constitutes a relevant parameter of competition which cannot be ignored anymore from antitrust analyses. Still, we counsel to read the Court of Justice's ruling with caution, as opposed to enthusiasm (see our call for caution here).

The Soul of antitrust in the European Commission's sanctioning proceedings

As Olivier Guersent was adamant in defending before the antitrust community, enforcement of Article 102 TFEU in digital markets is not dead, so (no?) long live the DMA. Given the presumed (although easily-to-be-conceived) complementarity between the DMA and digital enforcement over the same operators, sanctioning proceedings are still being carried out against digital operators which might bring all-encompassing repercussions on the functioning of their business models. The race for enforcement is not any less interesting if one takes charge of the similar action that the Federal Trade Commission and the US Department of Justice are undertaking before the US Courts by taking action against Google and Amazon for monopolising the ad tech market as well as the market for online marketplace services.

The European Commission is not lagging behind: Meta, Google, and Apple have received Statement of Objections from the EC on charges relating to their abuse of a dominant position in a myriad of markets and manifestations.

The most significant of the developments revolved around the EC's proceedings against Google over abusive practices in online advertising technology industry. In particular, the EC takes issue with Google favouring its own display advertising technology services at both sides of the value chain relating to display advertising. Although the leveraging rationale may be complex to prove by the competition authority in practice, the most relevant element of the Statement of Objections lies in the remedies that have been preliminarily discarded by the European Commission. The EC found that a behavioural remedy would be likely to be ineffective in preventing the risk that Google continues favouring its own ad tech-related services, due to the fact that it is active and dominant on both sides of the market with its publisher ad server and its ad-buying tools, leading to the presence of inherent conflicts of interest. Therefore, the only way out, the European Commission holds is that of ordering the mandatory divestment by Google of part of its services (see a discussion on these proposed remedies here). The case could potentially be concluded before the end of Vestager's mandate in the Commission in November 2023.

In a more modest fashion, the European Commission sent a Statement of Objections to Meta alleging that it was tying its Facebook services to its online classified ads service Facebook Marketplace and, simultaneously, it was imposing unfair trading conditions on Marketplace's competitors for its own benefit. The alleged tying practice is interesting since the European Commission is trying to sustain its case on the fact that users who log into Facebook are automatically also offered access to Marketplace via the display of a tile in the user interface. At face value, however, it seems as if the EC's presented case will, at least, be plagued by friction in terms of imbricating the case to the legal requirements for tying practices (see an in-depth analysis of this same argument here).

Striking as both those SOs might seem, the European Commission managed to astonish the public once more by reframing its initial 2021 SO aimed at establishing whether Apple's 30% fee imposed on the distribution of paid digital content through its proprietary in-app purchase system (IAP) constituted unfair trading conditions by raising the costs of competing music streaming app developers. Let's bear in mind that the case stemmed from Spotify's complaint way back in 2019 when it refused to charge users 30% more on iPhones than it did on other devices. The main claim of the complaint revolved around the IAP mechanism, although Apple's anti-steering provisions which limit the ability of app developers to inform users of alternative purchasing possibilities outside of apps were also considered in the European Commission's theory of harm sustaining that Apple distorts competition in the market for music streaming services by raising the costs of competing music streaming app developers which, in turn, leads to higher prices for consumers for their in-app music subscriptions on iOS devices. On a turnaround of events, the Commission's renewed SO drops its concerns of anti-competitive behaviour taking place as a consequence of the IAP obligation and maintains the charges against the anti-steering obligations. Although it would have provided great grounds for theoretical discussion, the EC's change of heart in terms of the IAP obligation demonstrates its wish to hide away from becoming a price regulator, setting out that a 30% is 'unfair', whereas a 15% fee (which Google charges on its Android ecosystem) is not (see an account of the EC's decision here).

Despite that the European Commission may be no Marty McFly, Microsoft and tying practices are making a comeback, starting in 2023! The European Commission opened an investigation into Microsoft's tying and bundling practices of its communication and collaboration product Teams to its cloud-based productivity suites Office 365 and Microsoft 365, as a consequence of a complaint received by competing Slack in 2020. A few days later, Microsoft published an official statement remarking on its intentions to change its distribution strategy of Teams to address the concerns of the European Commission by offering an unbundled version of Microsoft without the service as well as by increasing its interoperability with third-party solutions. Although it is early days, the EC's case may lead it to project a copy of the previous Microsoft cases, despite that Teams' customers may be deemed to be more sophisticated (see a discussion on the capacity to replicate the previous Microsoft cases here).

Guidelines-heimer: the Commission's Promethean efforts in setting down operable concepts for exclusionary abuses of dominance

The European Commission, once again, has opened Pandora's box that seemed for so many years closed relating to the review of the legal standards and settled case law around the analysis of exclusionary behaviour under Article 102 TFEU. The debacle of the EC's expectations finally crystallised in the Guidance on the Commission's enforcement priorities in applying Article 82 EC to abusive exclusionary conduct by dominant undertakings.

In early 2023, the European Commission endeavoured a distinct pursuit: to codify the existing case law to clarify the application of Article 102 TFEU. To that end, it: i) launched a Call for evidence seeking feedback on the adoption of Guidelines on exclusionary abuse of dominance; ii) published a Communication amending its 2008 Guidance; and iii) issued its Policy Brief on 'A dynamic and workable effects-based approach to Article 102 TFEU' explaining the background to the launch and the changes to the Guidance.

The shift to the codification of exclusionary abuse under Article 102 TFEU brought some salient developments, such as the fact that the European Commission explicitly embraced other objectives as the aim of EU competition law different to consumer welfare, such as fairness and a level-playing field, market integration, preserving competitive processes, plurality and democracy. The Policy Brief missed some of the major advancements that the case law has produced in recent years, notably the definition of foreclosure or a reference to causality or the attributability of the undertaking's conduct correlated to its anti-competitive effects.

On paper, however, the amendments to the Guidance align the European Commission's enforcement priorities away from the profitability of the dominant undertaking's abuse to the key factor of the practice adversely impacting an effective competitive structure. The EC picks upon the case law establishing that the price-cost AEC test is an optional tool in the hands of the competition authority but that it is not a mandatory requirement for the analysis of a particular conduct. Finally, the European Commission recognises that it will intervene in those cases where the dominant undertaking threatens an as-efficient undertaking as well as in those cases where genuine competition is undermined due to the fact that undertakings remain less efficient than the dominant firm in terms of their cost structure. These cases, the EC remarks, will be especially relevant in the context of those markets where barriers to entry and expansion are significant, including those with network effects and economies of scale.

Merger Control

Shake it off, shake it off: CK Telecoms and the 'swift' standard of proof to challenge a merger

Following the General Court's annulment in 2020 of the European Commission's decision prohibiting the acquisition of O2 by Three UK (now CK Telecoms) in *CK Telecoms UK Investments Ltd v European Commission* (Case T-399/16), one would have thought that the standard of review of the Commission's challenging over a merger substantially increased. Then, the General Court adopted the strict stance that the Commission must establish the significant impediment of effective competition (SIEC) – in those cases where the transaction would not create or strengthen a dominant position- by demonstrating that two cumulative conditions had been met. First, the elimination of the important competitive constraints that the merging parties had exerted on each other. Second, the reduction of competitive pressure on the remaining competitors. Thus, a strong probability threshold of the existence of significant impediments to effective competition was required by the General Court to consider mergers relating to concentrated markets.

In an appeal to that ruling, the Court of Justice provoked a tectonic movement just as large as the record-breaking seismic activity that was registered in one of Taylor Swift's concerns in Seattle in July 2023. The Court of Justice quashed the General Court's findings and decided that the GC should review the merger again in *Commission v CK Telecoms UK Investments* (Case C-376/20 P). By doing so, the Court of Justice set out the interpretative criteria of a range of concepts included under the analysis of the EUMR.

First of all, it discarded that a strong probability threshold was required of the EC by merger control rules to challenge a merger. Instead, the standard of proof was that of likelihood: the European Commission ought to be more likely than not that the merger would result in a SIEC, basically due to the logical assumption that strong probability was not realistic before the uncertainty faced by competition authorities when considering the prospective analysis of a merger case. The Court of Justice also highlighted that the standard of proof is symmetrical regardless of the outcome of the analysis, due to the fact that there is no general presumption that a particular type of acquisition or the complexity of a theory of harm pre-empts that the merger is compatible or incompatible with the internal market. Stemming from this same finding, the Court of Justice lowered the bar for considering those mergers that lie below the dominance threshold by stating that the two cumulative requirements established by the General Court were not necessarily needed for assessing the potentiality for significantly impeding effective competition.

Even though the findings that the Court of Justice produced with relation to the standard of proof were the more salient, it also resolved the interpretation of the concepts of 'close competitors and 'important competitive force' that the Horizontal Merger Guidelines set forth to assess whether significant non-coordinated effects are likely to result from a merger. The Court of Justice lowered the bar again as opposed to the GC's findings that an important competitive force must be established with reference to the undertaking's capacity to stand out from its competitors by being particularly aggressive in terms of price. In the terms presented by the Court of Justice, it is sufficient for it to have more of an influence on the competitive process than its market share or similar measures would suggest. By this same token, the Court of Justice established that closeness of competition is not a *sine qua non*-requirement to produce a finding of a SIEC because it is only one of the factors that the Horizontal Merger Guidelines factor into the mix for the analysis of non-coordinate effects. This entails that the Commission does not necessarily have to demonstrate a high level of substitutability between the merging parties' products or services in a differentiated product market to determine a SIEC.

Finally, the Court of Justice strongly denied that certain standard efficiencies are specific to all concentrations and, thus, that the Commission must automatically and proactively consider them in its analysis. Bringing forward the merger's efficiencies is a possibility open to the merging parties and it is in that same context that they must demonstrate that they apply to this particular case so that the Commission takes them into account for their review.

The Phantom of non-notifiable mergers: Article 22 EUMR, expanded

Following the Commission's repurposing of the Dutch clause ingrained into merger control via Article 22 EUMR, which mainly took place via the Illumina/GRAIL saga last year, the provision's expansive reach is still permeating the scrutiny of regional and national competition authorities over acquisitions that fall outside of the scope of the notifiable thresholds.

As a consequence of the EC's prohibition decision in September 2022 against the merger as well as due to the fact that the US Fifth Circuit supported the FTC's determination that the acquisition threatened competition in the market for cancer detection tests, Illumina finally notified in December 2023 that it would divest GRAIL. Despite the news, a few months prior to that, the European Commission still fined Illumina and GRAIL due to the fact that they closed their transaction prior to receiving the Commission's approval (although it did, actually, never get to that). The latter decision of the European Commission is particularly noticeable given that it has triggered a myriad of 'first times' in merger control: this is the first decision to fine the target of a concentration for breaching the stand-still obligation alongside the acquiring company, as well as first fine to be imposed by the European Commission in its expansive interpretation of the referral clause contained in Article 22 EUMR. Moreover, it is also one of the first occasions where the maximum possible fine for gun-jumping has been imposed, namely approximately 10% of Illumina's global turnover.

Stemming from the Illumina/GRAIL case law, the European Commission accepted to examine two additional mergers that were not notifiable in the Member States' jurisdictions: the Nasdaq Power/EEX (following submissions from Denmark and Finland, that Sweden and Norway joined later on) and Autotalks/Qualcomm transactions (as a consequence of submissions presented by Belgium, France, Italy, the Netherlands, Poland, Spain and Sweden). No further developments were registered on the progression of the EC's analysis at the moment of writing.

However, the European Commission pursued again the way of prohibition by accepting the referral via Article 22 EUMR of the merger relating to Adobe's acquisition of Figma. In late 2023, the EC issued a Statement of Objections declaring that the transaction would have significantly reduced competition in the global markets due to Adobe's resulting market power in the market which would have taken place via the form of a reverse killer acquisition. Given that Adobe would have acquired Figma, which is the market leader for interactive product design software tools, it would have discontinued its own tool (Adobe XD) because of the merger. Moreover, in the related field of vector editing tools, Adobe would have had the capacity to eliminate Figma, which held the role of its potential competitor and was likely to grow into an effective competitive force. Simultaneously, the UK CMA also provisionally found competition concerns in its own merger investigation. As a result, Figma and Adobe notified that they abandoned the pathway to their proposed merger (which requires Adobe to pay Figma a reverse termination fee of $1 billion).

However, the most consequential ruling relating to Article 22 EUMR related to its absence. In

Towercast (Case C-449/21), the Court of Justice confirmed that national competition authorities can apply abuse of dominance rules to mergers that do not trigger EU and national merger control thresholds and were not referred to the Commission under Article 22 EUMR. By rescuing the rationale underlying the seminal *Continental Can* ruling, the Court of Justice did not provide a *carte blanche* to NCAs, but the possibility to analyse whether a merger could substantially impede competition by applying the prohibition of abuse. The analysis of every single merger would not do. To be analysed under this possibility, the acquisition must make a material difference in the competitive landscape. The Court of Justice's expansive interpretation even projected its effects on the ruling's temporal effects, given that the Court decided to not impose limitations on the retrospective analysis of those mergers that fell under the radar of both NCAs and the European Commission (for a full review of the ruling see here). Shortly after the Court of Justice responded to the preliminary questions addressed in *Towercast*, the Belgian competition authority opened an ex officio investigation into the potential abuse of dominance by Proximus in the context of its takeover of edpnet.

Ecosystem theory of harm, come again?

Merger control has always been about horizontal, vertical, and conglomerate overlaps. There is no denying that. It was, then, surprising that the European Commission formulated that a significant impediment to effective competition did not take place across any of those vectors, but under the lens of a digital ecosystem's expansion. The EC put forward this line of reasoning in a prohibition decision, no less, that prohibited Booking from acquiring eTraveli due to the fact that it strengthened its dominant position on the market for hotel online travel agencies (OTAs) (for a tentative analysis of the terms of the prohibition decision see here).

The Commission's prohibition decision has not yet been published but Booking has already confirmed that it has appealed it before the General Court. The EC's press release, however, remarks on the fact that one of the main concerns leading to the prohibition entailed that the transaction would have allowed Booking to expand its travel services ecosystem, which revolves around its hotel OTA business, that is, in turn, a crucial growth avenue for the acquirer. From these words, one can derive that the concept of ecosystem is nothing else than the phenomenon where the undertaking caters for more and more secondary services distinct from its core product or service, following the terms of its definition in the draft revised Market Definition Notice.

Two for the price of one: the breach of the standstill obligation

Following the EC's decision fining Illumina and GRAIL for gun-jumping, the Court of Justice reinstated the case law in *Mowi ASA v Commission* (Case C-10/18 P) by resolving that the principles of proportionality and double jeopardy are not infringed when two separate fines are imposed by the EC due to the fact that the acquirer has breached two distinct obligations, that is, the obligation to notify the merger and the obligation to obtain clearance prior to implementation of the merger.

In *Altice Group Lux v Commission* (Case C-746/21 P), the Court of Justice identified the autonomous objectives of both types of obligations: the former relates to an obligation to act which is breached instantaneously, whereas the latter is an obligation to not to act which is committed continuously. The infringements, thus, do not bear the same legal nature and cannot be considered to be the double punishment for the same set of facts. Within the same ruling, the Court of Justice also remarked that information exchanges contributing to the implementation of the concentration were relevant for the assessment of those breaches, and it should not only be appraised exclusively under the lens of Article 101 TFEU (see a review of the ruling here).

Anatomy of a (digital and extraterritorial) fall

The European Commission's application of the EUMR resulted in reviewing those mergers that concerned burning issues, such as UBS's acquisition of the largest bank until that moment Credit Suisse (despite the Swiss Government's support in financing the operation) -which was unconditionally approved– or the much-anticipated merger of Microsoft of Activision Blizzard.

Due to the ramping up of video games as one of the most demanded forms of entertainment worldwide, the proposed acquisition provoked the immediate reaction of competition authorities across the Globe. The maker of one of the three most popular consoles (Microsoft) was proposing to acquire one of the leading developers of blockbuster games such as Call of Duty or World of Warcraft, no less.

The European Commission, the FTC and the CMA went full speed ahead to capture the potential impediments to competition that the merger would pose. The CMA was the first to reach the finish line in April 2023 by blocking the transaction as a result of the merger's substantial lessening of competition in the supply of cloud gaming services in the UK due to the non-horizontal effects that would have resulted from input foreclosure. In the past, the prohibition would have meant that the merger could not have been completed. End of. However, the EC nor the merging undertakings took notice. The EC cleared the acquisition conditional on Microsoft's compliance with the commitments that it had offered, despite that its main concerns lay with the harm to competition in the distribution of games via cloud game streaming services and in the market for PC operating systems. To that end, it accepted Microsoft's commitments to freely license to consumers in the EEA all current and future Activision Blizzard PC and console games via any cloud game streaming services with a 10-year duration. Thus, the competitive concerns for input foreclosure were addressed, despite that other looming problems still prevail, such as the possibility that the merger provides the building blocks for the metaverse.

Despite the CMA's initial blocking of the deal, the EC continued its path towards approval, and it succeeded in doing so. Regardless of the overlap between both approaches relating to the competition authorities, the CMA finally backtracked its opinion and approved the transaction conditional upon the fact that Ubisoft, and not Microsoft, would buy Activision's cloud gaming rights.

In a related (but more mundane) acquisition, Amazon proposed to acquire robot vacuum maker iRobot. The link of the merger with the physical world is cut clear, but it demonstrates the acquirer's intentions to strongly boost its grip on data deriving from the Internet of Things (IoT). The European Commission is currently scrutinising the anti-competitive concerns of the merger in phase II, notably Amazon's capacity to foreclose iRobot's rivals.

The expansion of the European Commission's reach about extraterritorial mergers also reached the analysis of Korean Air's acquisition of Asiana Airlines, which raised significant concerns since it would entail the approval of a two-to-one merger of the main operating airlines in South Korea. The merger raised the European Commission's suspicions and went on to analyse it under a phase II investigation where it undertook the flight route approach to determine whether the merger would substantially impede competition. At the moment of writing, the merger seems to have been conditionally approved by the European Commission, despite that a press release is not yet available.

Two's company and three's a crowd: the review of the Commission's E.ON Assets decision

In 2019, the European Commission cleared the transaction involving a complex asset swap that entailed three distinct concentration operations between two renewable generation businesses.

A third party to the concentration appealed the European Commission's green light in *Enercity v Commission* (Case T-321/20) although it did not directly participate in the administrative procedure. The claimant argued that it was impeded from being actively involved in the proceedings due to the fact that the European Commission did not send a market test questionnaire to it (as it did with other competitors), despite its position in the market. The General Court dismissed the action since this third party was not individually concerned by the EC's decision finding that the concentration was compatible with the internal market. In the GC's own words, for that requirement to be fulfilled, the claimant should have demonstrated that its market position was directly impacted thereof as well as its direct participation in the administrative procedure. In the absence of both circumstances, the General Court declared that it lacked standing to bring proceedings against the decision and dismissed the case as inadmissible.

On the basis of a distinct action, the competing firm EVH also appealed the EC's decision seeking its annulment in *EVH v Commission* (Case T-312/20) based on the fact that the three operations should not have been considered as a single concentration in the eyes of the EUMR. Due to the fact that the claimant was individually concerned with the decision (as opposed to Enercity), the General Court reviewed the merits of the claimant's arguments and established that the concept of a single concentration does not apply to interdependent undertakings gaining control of different targets. Moreover, for the first time in its history, the General Court resolved the Commission's obligation to publish its decisions under the lens of the claimant's allegation that the EC had infringed its right to effective judicial protection due to its delay. The GC upheld that the untimely publication of the decision does not invalidate it and, thus, the plea was rejected.

The beauty in simplicity: the EU Merger Simplification Package

The efforts to simplify the merger control procedure have been ongoing for a while now. Subsequent to the Commission's launching of an impact assessment in 2021 where it gathered evidence from the public, stakeholders and national competition authorities, the EC adopted a new Merger Implementing Regulation and a New Notice on a Simplified Procedure.

The changes overhaul the assessment of simplified cases and their notification process by expanding and clarifying the categories of simplified cases (and those categories that benefit from super-simplified treatment) and introducing flexibility clauses so that the European Commission possesses discretion to treat under the simplified procedure concentrations which, *a priori*, do not fall under any of the categories of cases that qualify for the simplified treatment by default. Moreover, the Simplification Package introduces a new short-form CO redesigned to a tick-the-box format featuring multiple-choice questions and tables for the notifying parties to fill out when notifying a transaction.

State Aid and Foreign Subsidies

Tax measures and tax rulings

In 2023, tax measures, specifically tax rulings, took centre stage in state aid law. In September 2023, the Belgian Excess Profit case entered another round (T-131/16 RENV). Since 2005, Belgium has allowed Belgian entities within multinational groups to obtain advance tax rulings exempting excess profits from corporate income tax. The European Commission determined this system to be unlawful state aid in 2016 and ordered the recovery of aid granted to 55 beneficiary companies. Despite initial challenges and annulment of the decision in 2019 and the successful appeal in 2021, the General Court's 2023 judgment now followed the Fiat approach and upheld the Commission's findings, affirming that the scheme provided tax advantages to its beneficiaries and was selective, treating multinational group entities differently from other Belgian entities subject to corporate income tax according to the relevant reference scheme. The Court also dismissed the 29 actions brought against the European Commission's decision, affirming the unlawfulness of the tax scheme.

A day later, in the Fachverband Spielhallen case (C-831/21 P), the ECJ set aside the General Court's order and referred the case back. The appellants, a trade association and an operator of gaming machines, challenged the Commission's decision not to initiate a formal investigation under Article 108(2) TFEU regarding the tax treatment of operators of public casinos in Germany. The Court emphasized the criteria for qualifying a national measure as state aid, outlined a three-step process for determining the selectivity of such measures, and criticized the General Court for not examining the arguments presented by the plaintiffs regarding the Commission's incorrect identification of the reference system in the contested decision. Again, the ECJ ruled in line with the Fiat case law, stating that both elements of a selective advantage must be subjected to a comparative assessment against the reference system, i.e. also the advantage arising from a direct fiscal measure is evaluated in relation to the standard taxation.

In 2020, the Apple decision of the General Court was considered a landmark ruling (discussed on KCL here and here). In 2016, the Commission determined that Ireland had provided Apple with improper tax advantages amounting to €13 billion. This decision centered on two tax rulings benefiting two Apple subsidiaries, which were registered in Ireland but not considered tax residents. These rulings allocated a significant portion of the taxable profits, including income from Apple's intellectual property, to the two subsidiaries instead of their taxable local branches, leading the Commission to find that the tax rulings conferred a selective advantage upon both subsidiaries. In 2020, the General Court annulled the decision because the Commission had not proven to the required standard that Ireland had granted any selective advantage to Apple. Since the Commission appealed, we will soon hear the ECJ's opinion on the matter. In 2023, AG Pitruzzella already delivered a trailblazing opinion in the matter. Overall, the AG advised to set aside the General Court decision in line with the recent case law of the ECJ. The AG particularly criticized methodological errors of the General Court when it determined that the Commission had not demonstrated the need to assign the intellectual property licenses and the associated profits from the sales of Apple products outside the USA to the Irish branches for tax purposes.

In December, the ECJ already followed with another pertinent decision on tax rulings in the Amazon appeal case (C-457/21 P). In 2021, the General Court had annulled the 2017 Commission decision, which had found the tax ruling granted by Luxembourg to Amazon to be incompatible state aid. The case concerned the arm's length nature of a royalty paid by Amazon's Luxembourg operating company to another Luxembourgish group company in exchange for the use of certain intangibles. Now, the ECJ upheld the judgment under appeal despite some errors of the General Court. The ECJ clarified that the arm's length principle does not have an independent existence in EU law and can only be relied upon by the Commission if it is incorporated into Luxembourg's national tax law. The ECJ held that the Commission's decision nevertheless had to be annulled due to this incorrect definition of the reference system, rather than for the reasons given by the General Court.

Not so Temporary Framework

Already in 2022, the Commission also issued a Temporary Crisis Framework after Russia invaded the territory of Ukraine (discussed on KCLB here). In March 2023, the Commission turned the State aid Temporary Crisis Framework into a Temporary Crisis and Transition Framework to support transition towards net-zero economy, also to react to the US Inflation Reduction Act (discussed on KCLB here). On the one hand, the Framework continues to provide guidance on Member State's financial assistance in the context of the Russian invasion of Ukraine. Recently, the Framework was amended again following a consultation with the Member States "to prolong by six months a limited number of sections of the Framework aimed at providing a crisis response following Russia's aggression against Ukraine and the unprecedented increase in energy prices." Other sections of the Framework adopted in the context of the Russian Invasion of Ukraine were phased out by the end of 2023. On the other hand, the Framework consists of guidance for Member States to grant aid to accelerate the transition to a net-zero economy by supporting the roll-out of renewable energy, storage, and renewable heat, as well as decarbonizing industrial production processes and accelerating investments in key sectors for the transition towards a net-zero economy, including the manufacturing of strategic equipment and production of related critical raw materials. These measures remain in force until the end of 2025, for now.

Up in the sky: airports, airlines, and how many Ryanair cases are there?

The aviation sector continues to be at the core of current developments in state aid law and policy. On the one side, many of the Ryanair appeals against Member States' Covid measures in the aviation industry were (again) discussed in the EU courts. The aviation industry, in particular, has been severely impacted by the pandemic due to travel restrictions and decreases in demand. Yet, Ryanair specifically criticized the unequal treatment of (former) state airlines and the inadequate justifications for the aid measures. While Ryanair, inter alia, lost the appeals at the ECJ against the GC judgments in the Swedish and French airline scheme cases and the Danish and Swedish SAS as well as the airBaltic, Nordica and Brussels Airlines cases at the General Court, it also secured huge wins at the General Court concerning the recapitalization of Lufthansa by Germany or the guarantee and shareholder loan by France to Air France.

On the other side, aids to airports, especially in low-populated areas continued to be relevant in 2023. The Commission, for example, continues to approve aid in the context of airport infrastructure measures, such as for Vilnius airport, while the General Court annulled a Commission decision, which which approved public funding for Timi?oara Airport between 2007 and 2009. Given the continued importance of that sector, the Commission also extended the transitional period during which airports with annual average traffic of up to 3 million passengers could receive operating aid in the Guidelines on State aid to airports and airlines. Inter alia given the difficulties experienced during the Covid pandemic, the transitional period was extended until 2027.

Another year, another regulatory redo

Same procedure as every year. Also in 2023 did the Commission amend the regulatory framework applicable to state aid.

Just before the year closed, the Commission redid the de minimis rules applicable in the context of state aid. This included on the one hand the General de minimis Regulation. The recent revisions result in notable adjustments, such as the increase of the ceiling per company from €200,000 to €300,000 over a three-year period to accommodate inflation. Additionally, Member States are now obligated to register de minimis aid in a central register at national or EU level from 1 January 2026, reducing reporting obligations for companies. Furthermore, safe harbours for financial intermediaries have been implemented to simplify aid in the form of loans and guarantees, eliminating the necessity for the complete transfer of benefits from the intermediaries to the end beneficiaries.

At the same time, the Commission also revised the SGEI de minimis Regulation. The recent amendments also included raising the ceiling per company from €500,000 to €750,000 over three years to account for inflation. Additionally, Member States are now also in the context of SGEI obligated to register de minimis aid in a central register at national or EU level from 1 January 2026, reducing reporting obligations for companies.

In October, the Commission had further already amended the Regulation on the de minimis aid in the fishery and aquaculture sector. The updated regulation will raise the de minimis aid limit per company over a span of three years, from €30,000 to €40,000, contingent upon the establishment of a central national register. Furthermore, the modification involves adjustments such as concentrating solely on the primary production of fishery and aquaculture products, revising the national caps for de minimis aid, and permitting specific operations in the EU’s outermost regions to support the modernization of small vessels and address safety issues. As discussed in last years’ recap post, the Commission had already implemented a new Fisheries Block Exemption Regulation. In 2023, it followed with the new sectoral Guidelines for State aid in the fishery and aquaculture sector. The Guidelines, inter alia, bring about several key changes, including an expanded range of measures addressing animal diseases in aquaculture, permitting aid for emerging animal diseases and specific invasive alien species.

In the context of Brexit, the Commission issued a Notice to stakeholders on the withdrawal of the

United Kingdom and EU rules in the field of state aid. In the Notice, the Commission clarifies that after the conclusion of the transition period on December 31, 2020, EU State aid oversight no longer extends to any State aid provided by the United Kingdom, except in cases where it impacts trade between Northern Ireland and the EU under the Windsor Framework. The Commission also highlights that it maintains the ability to continue existing procedures and commence new administrative actions related to State aid granted by the United Kingdom before the conclusion of the transition period.

Taking state aid externally: the FSR entered into force & further clarifications

In January 2023, the EU Foreign Subsidies Regulation (see all pieces on KCLB here) entered into force. I have said much on this Regulation in my academic papers (see here, 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?". The majority of the FSR started to apply on 12 July 2023, while the two notification-based tools for concentrations and public procurement procedures started to apply on 12 October 2023. While the FSR is fully operational now, we are still awaiting the first application cases. Although the FSR does not provide for an official complaint procedure, a Belgian football club complained about alleged Middle Eastern subsidies to its competitors with the Commission already in May 2023. Thus, maybe another sport-related case is just around the corner for the competition and sport nerds amongst us. Despite the lack of case law, in 2023, the Commission published further guidance on the FSR. This included the Implementing Regulation and a "frequently asked questions" document. The Implementing Regulation outlines specific procedures for the Commission's handling of proceedings under the FSR, encompassing notifications, investigations, commitments and redressive measures actions, submission of parties' observations, the Commission's handling of information and confidentiality, parties' access to the Commission's documents), and timelines. The Annex contains two notification forms for each of the notification-based tools. The subsequently supplemented Q&A document tries to provide guidance on not-established concepts of the FSR, mainly to help identify and quantify their financial contributions.

Sanctions and Procedures

Procedural guarantees applied to hybrid settlements

With the rise of hybrid settlements came the rise of procedural problems. In the HSBC judgment (C-883/19 P, discussed on KCLB here) the ECJ also ruled on procedural guarantees in the context of hybrid settlements. Next to the mentioned substantive considerations surrounding information exchange, the decision also concerned rights of defence, particularly concerning the presumption of innocence and the right to good administration. The ECJ followed its principles established on hybrid settlements in **Pometon** (discussed on KCLB **here**) and reaffirmed its previous support for the Commission's approach in such cases. The ECJ clearly emphasized the distinction between the principle of impartiality (as a component of the right to good administration) and the presumption of innocence. According to the ECJ, the latter presumption of innocence is only violated if a competition authority made a clear declaration of the undertaking's guilt in the absence of a final conviction. Accordingly, the presumption of innocence was not violated, as explicit disclaimers regarding HSBC's responsibility were included in the settlement decision, and HSBC was only referenced when essential to understand the factual context of the case. The principle of impartiality as part of the good administration obligation of the Commission was also not breached, as the statements on HSBC in the settlement decision did not exhibit bias toward HSBC's liability but instead pertained to general information.

Meta cares about privacy after all, at least in competition proceedings

In 2020, Meta (back in the day: Facebook) filed an action for annulment and interim measures at the general court in an ongoing investigation, challenging that two formal RFIs that the Commission has sent them relate to wholly irrelevant or personal documents of Facebook users and employees. In the RFIs, the Commission has asked Meta to produce all kinds of electronic documents corresponding to far-reaching keywords, for example, 'grow' or 'advertising' (so-called keyword RFIs). While Meta provided most of the initially identified documents, it withheld roughly 10% of the documents. In the interim procedure, the President of the General Court had **endorsed** Meta's concerns in two almost identical orders from 2020 (discussed on KCLB **here** and **here**). The General Court now dismissed Meta's action for annulment (T-451/20 and T-452/20, discussed on KCLB here). Meta's action focused on the necessity and the vagueness of the search terms. The General Court underlined that the necessity requirement is satisfied if the Commission could reasonably suppose, at the time of the request, that the information may help it to determine whether an infringement of the competition rules has taken place. For the search terms at hand, the Court decided that even if some of the Commission's search terms could be too vague, other search terms appeared sufficiently precise to satisfy the necessity requirement. However, an annulment of the search terms which were too vague would have no effect on the obligation to produce the documents identified as relevant from the application of the other search terms. Furthermore, with regard to Meta's privacy concerns, the General Court held that the Commission can process the personal data necessary for the investigation of anti-competitive conduct. This was given in the case at hand.

Interview with a cartelist

In March 2023, the ECJ issued a number of judgments on the Commission's power to conduct interviews according to Article 19 of Regulation 1/2003 and Article 3 of Regulation 773/2004: Les Mousquetaires and ITM Entreprises v Commission (C-682/20 P), Casino, Guichard-Perrachon and Achats Marchandises Casino v Commission (C-690/20 P) and Intermarché Casino Achats v Commission (C-693/20 P) (discussed on KCLB here). Yet, the applications concerned the inspection decision of the Commission, which the General Court had partly dismissed. The ECJ set aside the General Court's ruling and annulled the Commission's inspection decisions. The ECJ based its decision on two main reasons. Applying Intel, it ruled that the Commission is required to document any interviews conducted to gather information related to an investigation, irrespective of whether the interviews took place before or after the formal opening of the investigation (i.e. also those conducted during a dawn raid). Consequently, off-the-record interviews are excluded altogether from Commission investigations.

Fine fines

2023 also came with a few clarifications on the fining power of the Commission. In the Clariant case (T-590/20), the General Court issued a judgment on the Commission's discretion in setting fines. The case related to the 2020 ethylene cartel decision of the Commission. In the fine calculation, the Commission applied the Fining Guidelines (particularly paras. 28 and 37) and augmented the base amount by 50% to account for the aggravating circumstance of recidivism, further increased it by 10% to achieve an adequate level of deterrence in the fine, but subsequently granted a 30% reduction to ensure that the fine did not exceed the 10%-cap, and anther 10% reduction for cooperation in the settlement procedure. The General Court backed the Commission's discretion of increasing the base amount in line with the Fining Guidelines. At the same time, it underlined the undertakings right to appeal against fining decision in settlement cases. In the General Courts proceedings, the Commission had requested the Court based on its unlimited jurisdiction to raise the fine by an additional 10% to nullify the impact of the reduction obtained through settlement. The General Court held that the applicants contested the fine increases, which were not part of the settlement. Logically, what is not part of the settlement can be appealed later on without losing the benefits of the settlement itself.

Leniency is back in town

Who said good-old cartel investigations dating back to leniency applications were a thing of the past? Two 2023 cartel cases beg to differ.

In September, the Commission issued a decision in the military hand grenades cartel. It has fined defence company Diehl €1.2 million for participating in a cartel by spitting national markets concerning the sale of military hand grenades together with its rival RUAG. RUAG was not fined under the Commission Leniency Programme. Diehl received a 50% discount under the Leniency Program for its extensive cooperation. It received a further 10% discount for settling.

Furthermore, in November, the Commission issued a decision in the denominated bonds trading cartel. It fined Rabobank €26.6 million for sharing commercially sensitive information and coordinating their trading and pricing strategies with Deutsche Bank via its traders. The latter benefited from leniency immunity. In a textbook cartel case, the traders used Bloomberg emails, instant messages, and online chatrooms to share information and adjusted their pricing and trading strategies, e.g. by aligning prices to be offered and displayed on Bloomberg AllQ screens, a dealer-to-client electronic trading platform, or alerting each other when the other bank's indicative price on screen was deemed to be too low or too high.

Private Enforcement

Clarifications on the Damages Directive

In the course of 2023, three main judgments led to clarifications on the 2014 Damages Directive and overall private enforcement of competition law (see on these developments also here).

The year started with the ECJ decision on RegioJet (C-57/21, discussed on KCLB here). On 12 January 2023, the decision was issued in the RegioJet case, which was based on antitrust damages proceedings brought by the private train company RegioJet against ?eské dráhy, the Czech national railway company, for abuse of a dominant market position. The initial situation in the national legal dispute between RegioJet and the Czech national railway company is relatively complex, as both the Czech competition authority and the EU Commission had initiated proceedings, neither of which had been concluded at the time of the civil action. However, the judgement contains some important general statements on the relationship between public and private antitrust enforcement and the practical handling of parallel proceedings. In particular, in RegioJet the court underlined that Article 6 of the Damages Directive knows three categories of documents: the white, grey, and black list. Specifically, the Court ruled that a Czech national rule that included all information submitted in the administrative procedure under the grey list was not compatible with Article 6(5) of the Damages Directive, since the concept of information 'produced' specifically for the administrative procedure under Article 6(5) is much narrower.

In February, the ECJ followed with its landmark Tráficos Manuel Ferrer judgment (C-312/21, discussed on KLCB here). The case at hand stems from the famous trucks cartel (Commission decision of 19 July 2016) and was referred from one of the many Spanish courts who have to deal with the follow-on damages cases. Based on the principle of effective enforcement of Article 101 TFEU, the court ruled that EU law does not preclude a national cost rule under which, if the claim is upheld in part, each party bears their costs and half of the common costs. Yet, the judgment makes clear that national cost rules can be assessed under the principle of effectiveness and must therefore be adequate. Nevertheless, the judgement fails to recognize the continuous difficult situation for claimants, which AG Kokott has brought forward in her opinion. In Tráficos, the ECJ also clarified Article 17 Damages Directive on judicial estimation of harm. The ECJ held that damages estimation requires that the existence of harm has been established and it is practically impossible or excessively difficult to quantify with precision, which involves taking into consideration all the parameters leading to such a finding, in particular, the unsuccessful nature of steps such as the request for disclosure. The information asymmetry influences the application of the judicial estimation provision insofar as the specified measures in the Damages Directive designed to address information asymmetry, such as estimation and disclosure, are interconnected (paragraph 56). Initially, a claimant should pursue disclosure, as the evidence and information obtained through this process may enable precise quantification. Only if precise quantification remains unachievable thereafter, for example, due to practical impossibility or excessive difficulty, can the claimant request judicial estimation.

In Repsol (C-25/21, discussed on KCLB here), the ECJ ruled on yet another preliminary reference case from Spain but in a pre-Damages Directive context. The case dealt with the binding effects of national competition authorities' decisions for private enforcement as evidence before national courts. The Court ruled based on the principle of effectiveness. Thereunder, NCA decisions need to be regarded as providing sufficient proof of an infringement if the facts of the decision and of the civil liability action coincide. This does not go as far as Article 9(1) of the Directive but allows for a more nuanced approach leaving significant leeway to national jurisdictions.

Private enforcement aftermath of Google Shopping

Following the 2016 decision in Google Shopping, private enforcement was expected. With AG Kokott's opinion in the Heureka case (C-605/21, discussed on KCLB here), the first of the multiple national cases reached the EU courts. Given that the Commission held in its decision that Google had violated Article 102 TFEU between February 2013 and June 2017, the question of the temporal application of the Damages Directive was decisive as well as the limitation periods. Kokott opined that, based on Volvo, that article 10 Damages Directive on limitation periods are substantive and not to be applied retroactively. The portion of the infringement that occurred after the deadline for transposing the Damages Directive generally falls within the scope of Article 10. In the event that the Damages Directive was not transposed by that time, the national law should be interpreted in alignment with the Damages Directive. For the period predating the Directive, once again the principle of effectiveness was to be considered. This principle prohibits national legislation from allowing the limitation period for compensation for harm resulting from competition law infringement to commence (i) before the cessation of the entire conduct and (ii) before the injured party is aware of or can reasonably be expected to know the information necessary to pursue its damages claim, including the existence of the relevant competition law infringement.

Digital regulation: DMA and DSA developments

The European Union's digital strategy to capture behaviour in markets and across digital platforms has been brought to a start. The Digital Services Act's provision has started to kick in at full speed, whereas the Digital Market Act's obligations will be enforceable starting in March 2024.

DSA: Big fish to fry: designation of VLOPs and VLOSEs

The DSA is wide-encompassing in its desire to capture providers of intermediary services, with the exception of small and microenterprises, in its objective to prevent illegal and harmful activities online and the spread of disinformation.

However, a distinct degree of regulatory capture is engrained into the DSA for very large online platforms (VLOPs) and very large online search engines (VLOSEs) due to their huge reach in the number of the recipients of their services in facilitating public debate, economic transactions, and dissemination to the public of information, opinions and ideas and influencing how recipients obtain and communicate information online. In February, the Commission issued a non-binding guidance to help online platforms and search engines falling within the scope of the DSA to comply with their requirement to report user numbers in the EU.

In April 2023, the Commission designated the first 17 VLOPs and 2 VLOSEs, and the specific and additional obligations tailored to these designated undertakings started at the end of August. In December 2023, the Commission adopted a second set of designation decisions in relation to 3 additional VLOPs. These VLOPs and VLOSEs need to comply with a full set of obligations, including conducting risk assessments, implementing content moderation tools, and ensuring user empowerment, protection of minors, diligent content moderation, transparency, and accountability. Both Amazon and Zalando appealed their designation as VLOPs before the General Court. The General Court granted Amazon interim measures concerning the application of the public advertising repository disclosure obligations (see a review of the General Court's interim findings here).

By February 2024, all platforms will have to comply with the general obligations introduced by the DSA. The supervision, enforcement and monitoring of the DSA is in the hands of both national authorities and the EC. The EC only enjoys exclusive competence in the monitoring of compliance with the obligations set out for VLOPs and VLOSEs. However, regarding the rest of the obligations imposed via the DSA, the national authorities are competent to supervise and enforce compliance by providers of intermediary services established in their territory, regardless of their number of users. To that end, the Member States must designate by the date of expected compliance their Digital Services Coordinators (DSCs) and other national authorities competent for ensuring compliance with the DSA. The EC issued a Recommendation encouraging the Member States to do so in October. For the time being, only Italy and Hungary have appointed their DCSs (ironically, the Italian national competition authority -with a double mandate in antitrust and consumer protection- was appointed).

It's all about transparency: the standardisation of the DSA

For the DSA to be future-proof, the accountability of the providers of online platforms regarding the spread of illegal content online is key. To that end, the DSA established that the EC should maintain and publish a database containing the decisions and statements of reasons of these providers when they remove or otherwise restrict the availability of and access to information.

The DSA Transparency Database was launched in September 2023 to store all this information so that stakeholders and third parties can track content moderation decisions taken by providers of online platforms in almost real-time. To facilitate this task, the European Commission opened a public consultation on the template of transparency report that the providers of intermediary services should publish every six months on the content moderation activities in which they engage.

Let's get ready to rumble: hell unleashed upon VLOPs

The DSA is much closer to a principles-based piece of regulation than the DMA. That does not necessarily mean that enforcement is merely neglected to administrative action without the support of a punitive framework. In fact, the EC is already considering opening proceedings against some of the VLOPs (even before the whole set of obligations of the regulatory instrument become applicable), despite that the obligations do not become applicable until February 2024.

In response to the events in Israel and Gaza, the European Commission strongly condemned the havens of disinformation and illegal content that plagued social networks such as Facebook, Instagram, TikTok and X (formerly known as Twitter), but its reaction encompassed wider repercussions. Immediately after the political condemnation took place, the European Commission sent a trove of requests for information to Meta, TikTok and X so that they could provide an explanation of how they were moderating the spread of illegal content and disinformation in the wake of the events.

As a result of the responses derived from those requests for information, the European Commission triggered its first-ever formal proceedings against X to analyse whether the VLOP has breached the provisions of the DSA in areas linked to risk management, content moderation, dark patterns, advertising transparency and data access for researchers. Despite that the request for information was narrower in scope, the European Commission decided to expand the reach of the investigation to a catch-all scoop on basically the most relevant provisions of the DSA.

A range of VLOPs have also been contacted via requests for information (TikTok and YouTube as well as Meta and Snap) relating to the measures they have adopted to comply with their obligations related to the protection of minors under the DSA, namely the obligations related to risk assessments and mitigation measures to protect minors online and, in particular, with regard to the risks to mental and physical health. In this same vein, the Commission also issued an additional request for information related to the measures that AliExpress was implementing to comply with the consumer protection-related obligations enshrined in the DSA, especially in relation to illegal products. No further action has been pursued by the European Commission.

DMA: Keep the gate – the European Commission's designation decisions

Despite that the DMA rules entered into force in November 2022, they did not start to apply until May 2023, when the undertakings that considered that they would fall within the definition of a gatekeeper had to notify the EC of their position in the market.

The DMA's do not apply horizontally to all the operators in the digital arena. Instead, a few undertakings are designated as gatekeepers and the DMA's provisions become applicable six months after the initial designation decision. In September 2023, the European Commission designated its first gatekeepers via six different decisions in relation to 22 core platform services (see review of the designation decisions here). Starting in March 2024, those six gatekeepers will have to comply with the substantive obligations of the regulatory instrument and document that they have done so via reporting.

Apple, Meta and ByteDance have already appealed the designation decisions before the General Court (see an overview of Apple's appeal before the General Court here). In particular, ByteDance has filed for interim measures before the General Court seeking to annul the effects of the designation decision (see details on ByteDance's interim measures here). Despite that all the designated gatekeepers appealed the designation decision in itself, Apple alleges within its appeal that the obligation to comply with the interoperability obligations enshrined in Article 6(7) DMA is inconsistent with the requirements of the Charter of Fundamental Rights of the European Union and the principle of proportionality. By doing this, Apple seeks to go through the back door of the appeals to achieve the Court's suspension of the provision.

Merry-template-making: the expansion of the European Commission's powers and discretion

The proscriptive and prescriptive mandates that are ingrained into the flesh and blood of the DMA do not get across as cosmetic requirements that the gatekeepers shall scarcely comply with, but substantial obligations that transform the configuration of their business models. Up to 23 obligations will be directly enforceable in March 2024. Notwithstanding, the European Commission has not stood by in minimising the nitty-gritty of the required efforts for compliance imposed on the targets of the regulation.

On the contrary, it has published seven different templates to flesh out the technical implementations of some of the obligations and nuance that is bread into the DMA. At the start of the year, the EC followed the procedure of adopting an implementing provision under Article 46 and issued its First Implementing Regulation establishing the common framework for the regulatory instrument's procedure and the technical details surrounding the undertaking's notification of their potential status as gatekeepers before the European Commission (see a comment of the final version of the Implementing Regulation here). The rest of the implementing acts that the EC issued do not bear the legal value of a binding implementing regulation but of templates that were not subjected to public consultation and that can be updated at any given point in time by the European Commission (for a review of the last templates that have been issued see here and here). In some instances, those templates substantively expand the terms of the DMA in contrast to the regulatory instrument's mandated stringent interpretation that must appraise the principles of proportionality and necessity.

Aside from the EC's expansion of its powers, it also launched a call for tenders for commissioning a study on mobile ecosystems to comprehensively map the possible security concerns stemming from compliance with the obligations relating to the un-installation of software applications, side-loading and vertical interoperability. The EC is, thus, keen on maintaining gatekeeper conduct on a leash so as to avoid any potential 'objective justification-like' reasons that could hinder their effective compliance with any one of the obligations set out under Articles 5, 6 and 7.

The High(spirits)-Level Group holds its first two meetings

In preparation for the DMA's expected compliance deadline in March 2024, the High-Level Group of the DMA was created early on in the year via an EC decision counting with representatives of the national competition authorities (via the ECN), the Commission, BEREC, EDPB, CPC Network, ERGA and the EDPS.

Two meetings were held during the year: the first on May 2023, which consisted of discussing the state of implementation of the DMA's provisions and the developments in the relevant area relating to the DMA, and the second on November 2023 (at the moment of writing, the minutes to the meeting have not yet been released). The second meeting was more substantive than the first and the High-Level Group focused on how to enhance its own governance, the identification of areas for further cooperation as well as the impact of Artificial Intelligence on the regulatory landscape and the presence of such technologies across various fields.

Ombuds-man! Lack of transparency in the DMA's trilogue negotiations – but ex-post workshops should do the trick

The trilogue negotiations of the DMA were nothing but tranquil, and the views of most civil society organisations were not even heard by the legislators in drafting the final version of the regulatory instrument. This was confirmed by a recent opinion from the European Ombudsman denouncing that the European Parliament had failed to comply with a request for public access to the latest version of a document tracing the progress of the negotiations once they were taking place. After the statutory limit had expired and the trilogue negotiations had ended, the European Parliament granted full access to the civil society organisations.

Before the EP's attitude, the Ombudsman held that failure to comply with the limits laid down in EU legislation on public access to documents cannot be good administration, especially given the relevance of timeliness in the case at hand, since those requesting access wished to influence EU law-making according to their democratic right to participate in the law-making process.

Despite the reprimand, the European Commission – as opposed to the European Parliament – has been adamant in proving its own transparency in relation to the technical implementation and details that are required from the gatekeepers in the application of the DMA's rules. To that end, it held several workshops during the year to flesh out before the public the theoretical and practical challenges that the DMA posed for the transformation of business models, albeit the EC's officials did not actively participate in the debate.

Others: Various, Legislation, Consultation and Reports

To regulate or not to regulate: dramatic and marathon-like trilogue negotiations

The buzzword for regulators across the Globe is generative AI. The rapid user adoption of the technology raised all the possible alarms for stakeholders, regulators and Governments and posed the question: should generative AI fall under the scope of regulation in the hopes that it does not pose too high a risk in the near future from a societal perspective?

Whilst some are still discussing the merits of the question, the European Union has already responded in the positive by adopting the first set of rules that will start substantially regulating AI in the world. Although the text has not yet been published in the Official Journal of the European Union, MEPs reached a provisional agreement with the Council on the Artificial Intelligence Act. No one would advise in favour of making hasty decisions for setting out the rules to regulate the future of AI, but the trilogue negotiations seemed to do just that. Following 36 hours of negotiations over three days, the rules of the AI Act were provisionally agreed upon, especially relating to the most divisive topics on predictive policing, facial recognition and the use of AI by law enforcement authorities (see a couple of posts here and here on the impact of AI on developers and the implications on the wider competition landscape).

A less topical progress was also made in the area of data governance when the Council adopted in November 2023 its harmonised rules on fair access to and use of data (Data Act), relating to the data generated by the use of connected devices. The Data Act's main objective is to ensure that the value generated by this data among all of the actors in the digital environment, ranging from SMEs to end users, is fairly allocated (see a comprehensive post on its consequences on competition law analysis here).

In the background, the Union's regulatory efforts are also progressively focusing on the potential enactment of a Digital Network Act to redefine telecoms regulation and provide a safe haven for EU telecom champions. In the meantime, the Member States' authorities with the support of

ENISA issued a report covering the implementation of the 5G Toolbox. As a response, the European Commission encouraged Member States to complete its implementation and backed the decisions adopted by Member States to restrict or exclude Huawei and ZTE from 5G networks due to the risk they pose to the security of mobile network communication equipment in the Union.

The Brave New World: Virtual worlds and AI

OpenAI's meltdown following the firing of CEO and co-founder Sam Altman in November made its fair share of headlines. In early January 2024, the European Commission launched two calls for contributions on competition in virtual worlds and generative artificial intelligence and sent requests for information to several digital players. The EC seeks to determine: i) the level of competition prevailing in both sectors and to enquire stakeholders on whether competition law tools are sufficient to ensure that these markets remain competitive; and ii) the agreements that have been concluded between large digital market players and generative AI developers and providers.

On a separate but related note, the EC is reviewing whether Microsoft's investment in OpenAI (that dates back to 2019 through successive rounds of investment) should be scrutinised under EU merger control rules. Altman's dismissal unveiled the strong ties between both companies since Microsoft shortly responded that it would hire him (and anyone who followed from OpenAI) so to lead a new advanced AI research team. The move uncovered OpenAI's worst fears and Altman was reinstated as CEO to OpenAI whilst Microsoft joined its board as an observer.

Chair Scott game: the ins and outs in DG Comp

Following Pierre Régibeau's completed mandate as a Chief Economist at the EC, in July, the EC announced that it had appointed American economist Fiona Scott Morton. Parliamentary groups (notably Renew Europe) called on the European Commission to reconsider Scott Morton's appointment, due to its contradiction with the "*general principles, and objectives of (the European) Union*", given Scott Morton's condition as a non-EU citizen and the impending conflicts of interest that loomed over her resumé. The EC fought tooth and nail in reinstating its decision, despite the public backlash. However, days after the public outrage, VP Vestager informed about Scott Morton's withdrawal from the position. In the interim, the position has been covered by Lluís Saurí as Acting Chief Competition Economist, with no forthcoming appointment foreshadowed in the near future.

Alternatively, VP Vestager took unpaid leave in September from her position at DG Comp to pursue the race for the presidency European Investment Bank and both Didier Reynders and Olivier Guersent took over her responsibilities in the interim, notably in their interventions before the antitrust community in international conferences. At the ICN Annual Conference held in Barcelona in October, Reynders basically compromised to take the Court of Justice upon its word to integrate data protection considerations into the antitrust analysis. In a similar vein, Director General Guersent confirmed at the 27th International Conference of the IBA held in Florence that "*more DMA does not mean less digital antitrust (enforcement)*".

Once it became evident that Spanish VP Nadia Calviño would be appointed, VP Vestager made its return to DG Comp with renewed energy to finalise the sanctioning proceedings that are ongoing at the EC level as well as to stay strong before the first wave of expected compliance for the DMA starting in March 2024. Despite that the European elections are approaching rapidly, it is yet unclear whether Vestager will be a part of the new European Commission that comes out of them.

Agreeing to agree: defence but not Mercosur

In light of the new geopolitical context and the Member States' increased defence expenditure, the Council reached a provisional agreement with the European Parliament on the European Defence Industry Reinforcement through the Common Procurement Act to incentivise EU Member States to jointly procure weapons and to ensure interoperability, economies of scale and strong European defence industry.

However, the European Union did not manage to finalise its agreement with the Southern Common Market (Mercosur) for an association agreement involving the bloc comprising Argentina, Brazil, Paraguay and Uruguay. Although Javier Milei's appointment as President would have prompted the agreement would fall through the cracks, reporting documented that in a telephone call with German Chancellor Olaf Scholz in early December, Milei was adamant about concluding the deal shortly.

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