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Main Developments in Competition Law and Policy 2024 – European Union

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2020, 2021, 2022, 2023, we continue to keep you up to date with the latest developments in competition law and policy on EU level. To say it with Philip Marsden 'step back, nibble some chocolate' and read on the competition law developments in 2024 – competition law made easy!

Article 101 TFEU

In 2024, the developments on Article 101 TFEU focused on the old-but-still-gold notions of by-object and by-effect restrictions of competition, sometimes with a new spin, e.g., when it comes to the continued application of the beloved sports case law on the (dis)application of the public interest exemptions to by-object cases. Commission enforcement focused on traditional conduct but already opens up to new developments.

By Object Again

Similar to the 2023 developments, the Court of Justice again shed light on the notion of restrictions of competition by object under Article 101 TFEU. Let's remind ourselves of the basics: the strictly-to-be-interpreted notion is limited to agreements for which the only plausible explanation is the restriction of competition. This has to be assessed in light of the content, objectives as well as the economic and legal context of the agreement.

After *Generics* and *Lundbeck* (see comments here), 2024 came with another long awaited pay-for-delay cases for the books: *Servier*. While the ***Servier*** appeals include many interesting developments (parallel cases, amongst others C-201/19 P, see comment here), the pay-for-delay aspect highlights the ever-evolving by-object doctrine. By following the precedents in *Generics* and *Lundbeck*, the ECJ in *Servier* underlined once again that pay-for-delay agreements can be classified as restrictions by object as long as the value transfers involved can only be explained as incentives for the parties to refrain from competing. In that context, once again the role of potential competition was discussed. This is a significant factor in pay-for-delay cases, as these agreements are aimed at generic manufacturers that have yet to enter the market – effectively a compensation for a market-entry postponement. As we know from *Generics* and *Lundbeck*, the evaluation of whether a generic manufacturer qualifies as a potential competitor – a manufacturer's 'real and concrete possibilities of entering the market at the relevant time' – must take into account valid patents that may inhibit market entry, concentrating on the manufacturer's genuine capacity to compete rather than the robustness of the patent itself. According to the ECJ in *Servier*, subjective perceptions of generic manufacturers regarding the strength of its patents are irrelevant to assessing a manufacturer's actual ability to enter the market and the existence of objective barriers to entry.

But back to the core of the by-object doctrine. Building on last year's *HSBC* case, in ***Banco Português*** (C-298/22, see comment here), the ECJ followed AG Rantos (see comment here) and applied its by-object doctrine to a standalone – without a link to a wider anti-competitive practice – exchange of information between competitors. The by-object box is ticked when the exchange concerns 'confidential' and 'strategic' information so it eliminates uncertainty on the market (para 62). Consequently, exchange of information relating to future prices, or some of the factors determining those prices, easily falls in the by-object category (para 64). Yet, the Court of Justice goes beyond that: the concept of strategic information is broader and encompasses any data not already known to economic operators that could diminish participants' uncertainty about each other's future actions concerning the current conditions and structure of the market (para 64). Additionally, information pertaining to current or past events can also be considered strategic if, based on market realities, another firm can accurately infer the future behaviour of other participants or their responses to potential strategic moves within the market (para 65).

Public Interest Exemption (*Wouters/Meca-Medina*) After the 2023 Sport Hattrick

We stay with issues surrounding by-object restrictions but widen the angle. Just before Christmas 2023, the Court of Justice gifted us with *ISU*, *European Super League (ESL)* and *Royal Antwerp* (see comments here, here, and here). Amongst many notable developments of these cases (discussed in the 2023 recap), one stands out and was much-discussed: by-object restrictions cannot benefit from the otherwise applicably unwritten *Wouters/Meca-Medina* public interest exemption (e.g. *ESL*, para 186).

The discussions were immediately silenced by subsequent ECJ actions, which clarified any inherent uncertainties. In January 2024, the Court of Justice decided the ***Lithuanian Notaries*** (C-128/21) and ***Bulgarian Lawyers*** (C-438/22) cases (see comments here and here). *Lithuanian Notaries* concerned a decision of the Lithuanian Chamber of Notaries on fixing the methods for calculating fees charged by notaries in Lithuania. *Bulgarian Lawyers* dealt with a decision of a professional association of lawyers fixing the minimum amount of fees in Bulgaria. Similar to the sport hattrick cases, the restrictions were conducted by decision of private bodies and constitute restrictions of competition by object. In both cases, the ECJ followed their prior sports case law and decided that while the public interest exemption is still law, it does not apply to by-object restrictions of competition (e.g. *Lithuanian Notaries*, para 98).

Another sports case – named the *Bosman* case of our times – followed in the footsteps: ***Diarra*** (C-650/22, see here for comments on the AG opinion). The case concerned former footballer Lassana Diarra, who tried to sign with a new club (Sporting Charleroi) after his contract with Lokomotiv Moscow was terminated prematurely and in disagreement. According to FIFA transfer rules, Diarra and his new club would have had to pay compensation to Lokomotiv Moscow. This ultimately prevented the new contract from being finalised. Amongst other issues surrounding the free movement of workers under Article 45 TFEU, Article 101 (and 102) TFEU was again at stake. The ECJ again followed the *ISU/ESL/Royal Antwerp* case law. Before coming to the public interest exemption issue, the ECJ – by explicitly referring to *European Super League* – dismissed a specific sport exemption in the sense that the FIFA transfer system is not related to the rules of the game and, thus, not extraneous to any 'economic activity' (para 80). Rather, the practice was ultimately viewed to restrict competition by object (para 148). Consequently, the ECJ held once again: no public interest exemption for by-object restrictions (paras 149, 150).

From the early developments in *Wouters/Meca–Medina*, to the 2023 hattrick in *ISU/ESL/Royal Antwerp*, followed up early in 2024 by *Lithuanian Notaries* and *Bulgarian Lawyers* and finished in October 2024 with *Diarra* the doctrine seems clear: the public interest exemption now applies only if the four cumulative conditions are met:

1. no restriction by object (i.e., a restriction by effect),
2. the agreement/concerned practice/decision pursues a legitimate objective in the general interest
3. suitability (i.e., the anti-competitive effects are inherent to a legitimate objective)
4. necessity (i.e., the anti-competitive effects do not go beyond what is necessary to attain the pursuit of that objective, in particular by not eliminating all competition)

Hold Your Horses, By Effect is Also Still of Debate

Albeit being of less controversy lately as compared to Article 102 TFEU, the Court of Justice has not forgotten about by effect restrictions under Article 101 TFEU. The ***KIA Auto case*** (C-606/23) is a preliminary reference from Latvia, dealing with the boundaries of by-effect restrictions for vertical agreements in the context of potential effects. Kia Auto, the sole authorized importer of Kia vehicles in Latvia, included warranty provisions in its agreements requiring car owners to use authorized representatives for maintenance and original spare parts, restricting consumer choices. The Latvian Competition Authority found these provisions to be anti-competitive under Latvian and EU competition laws, determining they inherently restricted competition without needing proof of actual effects. The Latvian Competition Authorities' arguments were a bit confusing and demonstrate that the doctrine of by-object and by-effect still needs some work. The Latvian Competition Authority considered the agreement to restrict competition by effect but emphasised that 'the standard of proof applicable does not require actual effects to be demonstrated'. Rather, potential effects should be sufficient. (para 8).

The ECJ went through the usual explanations on the distinctions between by-object and by-effect. For a by-effect analysis, the Court of Justice highlights once again the value of a counterfactual analysis, which includes 'defining the market(s) in which that conduct is liable to produce its effects' and 'by identifying those effects, whether they are actual or potential' in light of all the relevant facts and economic and legal context (para 29). Furthermore, the ECJ clarified that even though the counterfactual scenario in the by effect analysis should be 'realistic and credible' that does not prevent 'the possibility of taking into account purely potential effects of an agreement', which are 'sufficiently appreciable' (paras 32, 33). Interestingly, the ECJ referred case law and doctrine on Article 102 TFEU in its analysis and explicitly states that both Articles have to be assessed correspondingly (para 36). This demonstrates, that we are finally more and more arriving at an aligned by-object and by-effect doctrine for both Articles 101 and 102 TFEU.

The EC's Enforcement: Rail Passenger Transport, Branded Clothing – And Possibly Future Action on Labour Restrictions?

In the European Commission enforcement, two cases on rail passenger transport and brand clothing stand out.

Despite their alleged predatory pricing conduct in connection with the provision of rail passenger transport services in the Czech Republic that was handled both on Commission as well as on NCA level and led to the *RegioJet* private enforcement preliminary reference (see comment here), it does not get quiet for *?eské dráhy (?D)*, the Czech public train company, when it comes to its behavior vis-à-vis the new entrant on the Czech market RegioJet. In 2024, the Commission has fined both ***?D* and *Österreichische Bundesbahnen*** (ÖBB, the Austrian public train company) €48.7 million over collusion to exclude RegioJet, also a common competitor, from accessing used wagons, thereby restricting competition on the rail passenger transport market (AT-40401). Between 2012 and 2016, the European Commission discovered that ?D and ÖBB coordinated wagon sales processes to block RegioJet from accessing ÖBB's high-quality, Czechia-approved wagons, critical to RegioJet's expansion efforts. Their actions included timing sales to exclude RegioJet, rigging sales procedures to favor ?D, agreeing on alternative buyers for unwanted wagons, and exchanging confidential bid information. The case demonstrates the continued effort of the EC to enforce rather classical cases of collective boycotts.

The ***Pierre Cardin/Ahlers*** €5.7 million fining case (AT.40642) concerns vertical territorial restrictions of sales of Pierre Cardin-branded clothing via the licensee Ahlers and is in line with the long-standing case on practices in any sector that divide the EU internal market. The EC held that the overall strategy ensured Ahlers' 'absolute territorial protection,' restricting parallel trade and enabling higher prices in those regions. In essence, they found that the agreements concluded effectively shielded Ahlers from rivals in its licensed EEA territories and prevented other licensees and their customers from selling Pierre Cardin-branded clothing outside designated territories or to low-price retailers, such as discounters. The EC emphasized that territorial restrictions are among the most severe breaches of competition rules and by that highlights the overall role competition law place within the big picture of the EU internal market.

Future action might be incoming for **anti-competitive labour restrictions**. After publishing its Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons in 2022 (see comments here, here, and here) and mentioning wage-fixing and no poach agreements, e.g., in para 279 of the new 2023 Horizontal Guidelines (see comments here, here, and here), the Commission followed in 2024 with a Competition Policy Brief on Labour Markets (see comments here and here). This policy brief can be seen as a sign of ramping up efforts to combat anticompetitive agreements in labour markets. Under the existing legal framework, the EC highlights, decisive action can be taken against practices like wage-fixing and no-poach agreements, which harm competition and limit opportunities for workers. The Commission also hinted at their assessment of both practices. Wage-fixing agreements, where employers collude to set wages, are particularly harmful and could generally be classified as restrictions by object. These agreements are at the same time unlikely to qualify as ancillary restraints or meet the exemption criteria outlined in Article 101(3) TFEU. No-poach agreements, which restrict employers from hiring each other's workers, may have limited legitimacy if they serve as ancillary restraints or qualify for exemptions under Article 101(3)

TFEU. However, satisfying these criteria is challenging, making it rare for such clauses to be lawful.

After much-discussion on labour restrictions around the globe and additional guidance by national authorities in 2024, e.g. in Poland (see comments here), we are now eagerly awaiting first case practice. We might not have to wait that long: In 2024, the Commission already carried out a dawn raid at the premises of companies active in the data centre construction sector and sent out corresponding RFIs. A focus of the investigation lies in 'a possible collusion in the form of no-poach agreements'.

Article 102 TFEU

If anything, 2024 bore gifts for all abuse enthusiasts. Different interpretations of the prohibition under Article 102 TFEU were presented by the European Commission and the EU Courts touching on important factors, such as the AEC test and principle and the concept of competition on the merits.

From Guidance to Guidelines: A Match Made in Heaven?

Following the European Commission's long-standing policy of not giving many clues of how it may innovate when interpreting Article 102 TFEU, the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings remained practically untouched for more than 15 years straight.

August marked the largest revolution in the EC's application of the provision. The EC launched its Draft Guidelines on exclusionary abuses of dominance (see here and here for comments upon its release) with the aim of summarising the EU Court's case law around the prohibition. As opposed to setting out the enforcement priorities, the EC establishes how it will apply the prohibition as stemming from its enforcement, both from a substantive and procedural perspective.

On the substantive aspect, the Draft Guidelines do away with the concept of foreclosure and rescue the notion of competition on the merits for determining the anti-competitive nature of conduct. Regarding the procedural aspects of the Draft Guidelines, they systematise the prohibition under Article 102 TFEU into three categories: i) naked restrictions; ii) conduct with a high potential to produce exclusionary effects; and iii) the rest of conduct. By doing this, the Guidelines introduce presumptions of the conduct's deviation from competition on the merits as well as the capacity of that particular conduct to produce exclusionary effects. Regarding the first two categories, the EC establishes that the fulfilment of the legal requirements set out by case law to demonstrate their existence (e.g., predatory pricing or margin squeeze in the presence of negative spreads) is enough to trigger the finding of their departure from competition on the merits. A presumption on the conduct's capability of producing exclusionary effects applies thereof. In turn, the Draft Guidelines confirm that such conduct will rarely be justified either by an objective justification or due to the presence of sufficient efficiencies compensating for their negative effects. For the rest of the conduct falling outside of these two categories, the EC will still be compelled to perform its regular analysis, with the need to establish how the behaviour departs from competition on the merits and its capacity to produce exclusionary effects.

The period of consultation with stakeholders finished in October 2024. The EC is now expected to issue a finalised version of the Guidelines, perhaps clarifying, to a broader extent, what competition on the merits means to make the application of the prohibition more workable. Conversely, it may well be the case that their presumption-driven structure falls apart, as a response to the Court of Justice's rulings surrounding the EC's necessary enforcement action.

The Court of Justice's Stance on Presumptions and the AEC Test

The second half of the year was particularly fruitful for the Court of Justice. It concluded two of its long-standing sagas: *Google Shopping* (C-48/22 P, see comments here and here) and *Intel* (C-240/22 P).

The former ***Google Shopping*** case relates to the EC's 2017 decision fining Google for promoting its Shopping results on its general search page (in reserved 'boxes') vis-à-vis those of comparison search results, which were demoted on those same pages. The general search results for competitors were included in blue links without the rich format enjoyed by Google's proprietary services. Thus, the EC declared that Google had enjoyed an unlawful advantage over its competitors.

Four years later, the General Court agreed with the EC and refurbished the conduct into the self-preferencing category against the background of the principle of discrimination. Thus, the GC established that the EC was not forced to apply the legal requirements of *Bronner*, since the behaviour did not entail a refusal to supply. The Court of Justice fundamentally agrees with the GC, since not every issue of access necessarily requires the application of the refusal to supply test. In the particular case of *Google Shopping*, access was granted on discriminatory terms. As such, the *Bronner* requirements could hardly be reconciled with such a category of conduct (para 111).

Furthermore, the Court of Justice discussed in length the necessary conditions to establish the finding of an abuse of a dominant position. The ECJ declares it necessary to demonstrate both i) the actual or potential anti-competitive effects arising from such conduct; and ii) the existence of competition not based on the merits. To that particular end, the Court of Justice acknowledges that the favourable treatment applied by Google Shopping did not automatically depart from competition on the merits as a matter of principle. Instead, the characteristics of the upstream market as well as Google's promotion of its own services vis-à-vis the demotion of the rest pointed to the conduct's discriminatory component. As such, discriminatory conduct falls outside of the scope of competition on the merits (para 187).

Google also raised questions about the EC's assessment relating to the causal link between those potential effects and the conduct in hand, since the enforcer had not carried out a counterfactual analysis. The Court of Justice points out that the counterfactual analysis is just one of a number of tools at the EC's disposal to demonstrate the causal link between conduct and its effects. However, when drawing a credible counterfactual scenario can be 'arbitrary or even impossible', then the EC is not compelled to systematically establish such a counterfactual scenario (para 231). Correlation is enough to demonstrate the existence of such potential effects.

Finally, the Court of Justice also provided a bit more clarification on the significance of the as-efficient competitor (AEC) test and principle. The ECJ repeated that the objective of Article 102 TFEU deviates from ensuring that competitors less efficient than the dominant undertaking remain on the market (para 263). In turn, this does not mean that any finding of abuse is subject to proof that the conduct concerned is capable of excluding an as-efficient competitor (para 264). To produce a finding of the actual or potential effects of the conduct, the EC may use the AEC test, but it is not a mandatory requirement, especially for non-price practices. On top of that, the Court of Justice acknowledges that, sometimes, performing such a test may not even be possible, in scenarios where the EC cannot obtain objective and reliable results concerning the efficiency of Google's competitors.

Aside from *Google Shopping*, the Court of Justice also concluded (?) a 24-year-long saga on the European Commission's 2009 assessment of ***Intel***'s loyalty rebate schemes. The ruling touches upon two points that the Court of Justice already remarked on its *Google Shopping* judgement: the application of the AEC test and the necessary conditions to produce a finding of abuse.

Despite the EC's reluctance to conduct an AEC test insofar as it did not prove any anti-competitive effects on its decisions, the Court of Justice noted that the capability of loyalty rebates to foreclose (forbidden word in the Draft Guidelines!) a competitor must be assessed, as a general rule, using the test. However, the ECJ recognised it as one of the ways to assess the undertaking's conduct (which is price-based) vis-à-vis its deviation from the scope of normal competition (para 181). After such a disclosure, it set forth how the results of the AEC test (whether positive or negative) may be determined, with reference to the contestable and required shares of the rebate and the effective price offered by an as-efficient competitor. Even though the AEC test is mainly based on these parameters, the Court upheld that the assessment must, in any case, consider the wider economic context of the scheme, including its time span and its coverage regarding the overall market.

The Court of Justice's ruling came shortly after the EC's publishing of the Draft Guidelines on exclusionary abuses. It presented quite problematic statements for the EC to incorporate into its final draft, especially with regard to the application of its procedural presumptions for naked restrictions and conduct that is likely to constitute abuse. In fact, the Draft Guidelines align quite well with the General Court's findings insofar as it declared that loyalty rebates may be presumed to be illegal (although not *per se* infringements of Article 102 TFEU). The legal consequence of such a statement did not go unnoticed by the EC, since it basically incorporated the GC's proposal in allocating the 'burden of providing evidence with sufficient probative value to reserve (such a) presumption of illegality (upon the undertaking)' (paras 165-166).

The Court of Justice contradicts both the GC and the EC's Draft Guidelines in its ruling by asserting that in order to produce a finding of abuse, the EC must, as a rule, demonstrate that the conduct: i) does not entail competition on the merits; and ii) has the actual or potential effect of restricting competition by excluding or hindering the growth of, competitors that are as efficient as the dominant undertaking (paras 176-177). Those actual or potential restrictive effects do not operate by means of a presumption, the Court of Justice believes. Rather, the relevant conduct must be demonstrated based on 'specific, tangible points of analysis and evidence, that that conduct, at the very least, is capable of producing exclusionary effects' (para 179).

At the very least, the Court of Justice closes off two sagas that have both made the case law evolve and trumped some of the EC's efforts in allocating its burden of proof elsewhere. The most interesting tenet to watch for in the coming months is that of the EC's reconciling of both these rulings with the spirit and letter of its Draft Guidelines.

Heads you Lose, Tails I win: the General Court's Google Ad Sense Annulment Decision

The General Court's ruling in *Google AdSense* (T-334/19) reiterated~~, perhaps au contraire to the Draft Guidelines~~, the high threshold imposed on the EC to produce the finding of an infringement of Article 102 TFEU. Even though the case sounds digital it is, based on price-based conduct, i.e., exclusivity, imposed by Google in its AdSense contracts which provoked, according to the EC's decision, to lock in Google's customers into its proprietary intermediary advertising services.

The General Court acknowledges that the standard to show foreclosure (yet again!) of exclusivity clauses might be low, but that does not necessarily excuse the EC from showing the capability of such foreclosure. Needless to say, exclusivity ranks as conduct likely to produce exclusionary effects under the Draft Guidelines, i.e., the presumption applies. In this particular case, the General Court annulled the EC precisely because it had failed to consider all of the conduct's relevant factors, notably its duration and coverage. To the extent that the EC's assessment lacked those tenets, the GC established that the competition authority had failed to find that the exclusivity clauses had produced a foreclosure effect.

The EC's Enforcement: Digital, Chocolate and Pharma

Whilst the General Court and the Court of Justice slayed a few foreclosure dragons, the European Commission kept on enforcing Article 102 TFEU via its decisional practice.

Despite the DMA's full application starting on March 2024 (more on that later), the EC followed through on its promises and finalised its ongoing cases relating to Facebook's tying of its ***Facebook Marketplace*** (AT.40684, see a broader comment on the initial press release here) and ***Apple***'s long-lasting case relating to its **anti-steering clauses** (AT.40437, aka its feud against Spotify, see comments here and here).

At the moment of writing, the EC's decision to fine Facebook has not been released yet, but the case sets out hard questions to answer. According to the EC's press release, the social network platform tied its Facebook Marketplace by automatically providing access and exposing its social network users to the tied service (Marketplace). The leveraging potential of the conduct at hand seems to be, at least, doubtful, since the users do not, in theory, leave the platform nor are they coerced to access one service alongside the other one.

Article 102(a) TFEU made its definitive comeback both through this particular case and the EC's decision on Apple's anti-steering clauses imposed on music streaming services. The EC interpreted that Facebook had unilaterally imposed unfair trading conditions on other online classified ads service providers who advertise on Meta's platforms, in particular to its Facebook and Instagram. These conditions allowed Meta to use ads-related data generated by other advertisers for the sole benefit of its proprietary Facebook Marketplace. In a similar vein, the EC interpreted that Apple's imposition of anti-steering clauses upon music streaming providers also were unfair trading conditions due to two main reasons. First, they were neither necessary nor proportionate for the protection of Apple's commercial interests in its App Store on its iPhone devices. Second, they negatively affected the interests of iOS users. They could not make informed and effective decisions on where and how to purchase music streaming subscriptions for use on their device, given that the anti-steering clauses hindered the providers of such services from communicating promotional offers via other means. The most salient aspects of the EC's decision were particularly its timing and connection to the DMA. The EC issued its decision on the 4th of March 2024, three days prior to the DMA's compliance deadline, where the same type of conduct (anti-steering) was to be captured -and prohibited- via the means of Article 5(4) DMA. Alternatively, the EC was adamant in defending that unfairness in the sense of Article 102(a) TFEU is well off the meaning intended by the DMA. In any case, however, the EC supported the nature of the condition's unfairness by taking recourse to the fact that those same clauses were subject to the regulatory instrument.

The application of Article 102 TFEU was also set at a crossroads by the impending enforcement of the DMA relating to the case that the EC had brought forward relating to Apple's abuse of a dominant position in refusing to supply the Near-Field Communication (NFC) input on iOS to competing mobile wallet developers while reserving such access only to ***Apple Pay*** (AT.40452). Just as other competition authorities had raised in the past, the EC preliminarily considered that Apple had breached the prohibition because it only catered to its 'tap and go' functionality to its proprietary Apple Pay payment processing service. Instead of choosing the adversarial path, the undertaking decided to offer commitments to the European Commission regarding the opening up of those functionalities to third-party wallet providers free of charge and subject to fair, objective, transparent and non-discriminatory criteria. Those commitments will remain in force for ten years, despite Apple must comply with a similar version of them under Articles 5(7) and 6(7) DMA.

Moving away from the digital space, the European Commission fined ***Mondel?z*** under both Articles 101 and 102 TFEU for imposing cross-border trade restrictions (AT.40632). On the side of Article 102 TFEU, the EC considered it had incurred refusals to supply both in Germany and in the Netherlands to prevent the resale of chocolate tablet products in other territories such as Austria, Belgium, Bulgaria and Romania. Despite the EC's decision has not yet been released, the tenet relating to the undertaking's abuse seems to be quite a bread-and-butter manifestation of refusal to supply, impacting on cross-border trade of chocolate.

Finally, the European Commission also unleashed its full punitive powers into one of the most egregious behaviours to have been recently uncovered: ***Teva***'s delay of competition to its medicine for the treatment of multiple sclerosis (AT.40588). The fined undertaking implemented such a strategy on two different fronts. On one side, it misused patent procedures before the European Patent Office (EPO) on divisional patents to artificially extend the patent protection of its own treatment. Teva filed multiple divisional patent applications to create a web of secondary patents to impede competitors from competing in the same market. Rivals, thus, challenged those patents whilst the undertaking enforced them via interim injunctions against them. Before the prospect of their revoke, Teva strategically withdrew so as to force its rivals to start a legal challenge anew, complicating the access to the market. Procedurally, the EC continued to enforce Article 102 TFEU by taking recourse to the lack of privilege of communications of in-house lawyers vis-à-vis their firms. Thus, it relied on documents from Teva's in-house lawyers, who were directly involved in the design of the abusive strategy.

On the other side, Teva implemented a systematic disparagement campaign against a competing medicine for the same treatment by spreading misleading information to doctors and national decision-makers about its safety, efficacy and therapeutic equivalence to its own proprietary medicine. The EC managed to prove the conduct's exclusionary effects impacting on public health budgets. Once the conduct ceased to produce its effects and its competitors managed to enter the market, the treatment's list of prices decreased by up to 80%. The decision follows the EC's previous acceptance of commitments on its ***Vifor*** case in July 2024 (AT.40577), which marked the first decision in its history to sanction a disparagement campaign.

Merger Control

For merger control, 2024 brought us a turn of events for Article 22 referrals, but otherwise not too much. In Ribera's term, things might look different, thought.

Give me a Break! What is Left of Article 22 EUMR Referrals?

In all of our recap posts from 2020 onwards on, we reported an expanding policy on Article 22 EUMR referrals – the so-called Dutch clause (the ECJ came back to that!). The decisive Article 22(1) EUMR reads: 'One or more Member States may request the Commission to examine any concentration as defined in Article 3 that does not have a Community dimension within the meaning of Article 1 but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.' The European Commission reinterpreted Article 22(1) EUMR to allow NCAs to refer transactions to the EC even if they do not meet the filing thresholds or otherwise be reportable in the referring Member State, as long as it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States. Already the March 2024 opinion of Advocate General Emiliou did not bode well (see comment here). The expansion came to a crashing halt with the infamous Court of Justice ***Illumina/Grail*** judgment (C?611/22 P and C?625/22 P) in September 2024 (see comment here).

To remind you of just a few basics of the case (see the other recap posts with further references for more details on all that happened surrounding *Illumina/Grail*, really it's too much), just the Article 22 developments can be summarised as follows: *Illumina/Grail* was the first use case of the revived and expanded European Commission Article 22 EUMR policy and its 2021 Guidance, which followed 2020 indications to revamp the clause with killer acquisitions in mind. The 9 March 2021 referral in *Illumina/Grail* came from France, joined by Belgium, Greece, Iceland, the Netherlands, and Norway. Illumina first applied with the French Council of State to suspend the French national competition authority's referral of its acquisition of Grail to the European Commission. However, the French Court declined to block the Article 22-referral to the Commission. Then, on 19 April 2021, the Commission accepted the referral. Consequently, on 28 April 2021, Illumina applied to annul the acceptance decision with the General Court. In July 2022, the General Court confirmed the Commission's Article 22 EUMR referral policy and declined the appeal.

Following a further appeal, the ECJ now – quite surprisingly for many – quashed the decision of the General Court and the Commission referral acceptance decisions. With that, the expansive interpretation of Article 22(1) EUMR in light of the 2021 Guidelines of the EC and the GC for *Illumina/Grail* is dead ~~or is it? more on this below~~. In its judgment, the Court of Justice particularly criticized the broad interpretation of the referral mechanism, stating that it undermines the effectiveness, predictability, and legal certainty required in merger proceedings (para 206). Friends of methodological rigour are sure to be pleased with the ECJ's approach, who applied the doctrinal method with literal, historical, and teleological interpretation. A to the letter reading of Article 22(1) EUMR supports the historical purpose of the referral mechanisms for Member States without a merger control system, therefore, the Dutch-clause (paras 148 – 150). Further, its purpose nowadays also encompasses extending the 'one-stop-shop' principle, allowing the Commission to review a concentration that is either notified or notifiable in multiple Member States, thereby avoiding the need for multiple national-level notifications (paras 182, 199). However, the Article is not intended as a 'corrective mechanism' as interpreted by the Commission in this case and the 2021 Guidance (para 201). In a bigger picture, the ECJ underlined the legal certainty purpose of the (quantitative) thresholds in merger control, which at the same time prohibits an acceptance of a referral by a Member States with a system of merger control and thresholds, were, under those national rules, these Member States are not entitled to examine the concentration (paras 217, 222).

For the outgoing competition commissioner Vestager, this was certainly a crushing defeat in the last months of her otherwise successful and innovative term of office. The Commission had to withdraw several of the decisions in the Illumina/Grail case. The consequence of the Court of Justice judgment extends to *Illumina/Grail* alone. Following the ECJ ruling, the seven NCAs that had recently submitted referral requests regarding the *Microsoft/Inflection* case withdrew their requests. The Commission also withdrew its 2021 Guidance in the beginning of December 2024.

Yet, Article 22 EUMR does not seem fully dead yet. In the end of October 2024, the Commission accepted an Article 22 EUMR request submitted by Italy in ***NVIDIA/Run:ai*** (M.11766, see comments here). NVIDIA develops and provides Graphics Processing Units (GPUs), a specialized type of semiconductor designed for data center applications. Run:ai offers GPU orchestration software that enables corporate customers to efficiently schedule, manage, and optimize their artificial intelligence computing infrastructure, whether deployed on-premises, in the cloud, or in hybrid environments. The case is of particular relevance also from a policy side, given that the EU intends to regulate the emerging AI market through its competition rules and catching digital as well as AI killer acquisitions were one of the reasons for the EC expansion of the Article 22 EUMR policy. Still, it might also be decisive on the overall future of Article 22-referrals after the *Illumina/Grail* judgment. Similar to *Illumina/Grail*, the *NVIDIA/Run:ai* transaction does not meet the quantitative notification thresholds based on national turnover of the Italian competition law. This would run against the mentioned purpose of thresholds for legal certainty in merger control, which the ECJ mentioned. However, since 2022, the Italian Competition Authority has the power to call in under-threshold concentrations, if specific, by law (and supported by a communication) pre-defined conditions are cumulatively satisfied. Consequently, *NVIDIA/Run:ai* does not fall outside of national competences to review the transaction. Rather, it seems that the Italian call-in power would be one of the solutions for revisions of Member States competences indicated in para 217 of *Illumina/Grail* and noted by Vestager herself, that would allow the Commission to keep receiving referrals under Art. 22 EUMR in compliance with the *Illumina/Grail* ruling.

Just before Christmas 2024, the *NVIDIA/Run:ai* merger was approved unconditionally by the EC. The European Commission investigated the potential effects of the merger on the markets for discrete GPUs for datacenters and GPU orchestration software. It determined that while NVIDIA likely holds a dominant position in the GPU market, it lacks the technical ability or incentive to disrupt compatibility with competitors' GPU orchestration software, and customers have credible alternatives to Run:ai's offerings. Consequently, the Commission concluded that the transaction would not raise competition concerns and cleared it.

All Quiet on the Merger Front

Otherwise, 2024 was a quiet year for merger control, both on the level of the Court of Justice of the European Union and on European Commission level.

At the ECJ, the ***thyssenkrupp/Tata Steel*** (C-581/22 P) appeal judgment upheld the European Commission's decision to prohibit the proposed merger between thyssenkrupp and Tata Steel, citing concerns over competition in the flat carbon steel and electrical steel markets. This ruling affirms the General Court's judgment from June 2022 (see comment here), which rejected thyssenkrupp's appeal against the Commission's decision. The Court dismissed all grounds of thyssenkrupp's appeal, including arguments related to market definition and the standard of proof applied by the Commission. On the latter, the ECJ again followed the move from the former 'strong probability' standard for the EC to prove the existence of significant impediments to effective competition following a concentration. Siding with its *CK Telecoms* judgment of 2023, the Court of Justice highlighted once again that 'it is sufficient for the Commission to demonstrate, by means of a sufficiently cogent and consistent body of evidence, that it is more likely than not that the concentration concerned would or would not significantly impede effective competition in the internal market or in a substantial part of it' (para 127).

The GC, in the ***Netcologne*** case (amongst others T-58/20), upheld the European Commission's decision authorizing Vodafone's acquisition of Liberty Global's telecommunications activities in Germany, the Czech Republic, Hungary, and Romania. The Court found that the Commission correctly concluded that Vodafone and Liberty Global were not competitors in the German retail TV signal transmission services market prior to the merger, and that the transaction would not significantly impede effective competition.

On Commission level, we did not see any prohibition decision in 2024 and only a few commitment decisions, most of them concluded in phase 1. A few notable cases include, for example, the ***Orange/MásMóvil*** transaction (M.10896), involving a joint venture combining the mobile and fixed telecommunications businesses of the two Spanish telecom operators. The transaction was cleared with commitments to divest spectrum assets to Digi, a small but fast-growing mobile virtual network operator, enabling it to build a competitive mobile network. The remedies also included a roaming agreement to maintain competition in mobile and fixed telecom services. It was the first 'gap case' (involving mergers in oligopolistic markets that do not create or strengthen a dominant player) that involved mobile network operators after the mentioned CK Telecoms judgment and required a thorough assessment of efficiencies and remedies. The merger raised significant concerns about reduced competition, potentially leading to price increases exceeding 10%. The efficiency assessment focused on the claimed cost and network synergies but found that many projected benefits were unverifiable or non-specific to the merger.

The ***CMA CGM/Bolloré Logistics*** (M.11143) case concerned the acquisition of Bolloré Logistics by CMA CGM, two international transport and logistics companies, with CMA CGM active in the container liner shipping and port terminal services business and Bolloré Logistics in the freight forwarding and contract logistics services business. The acquisition particularly raised concerns about vertical links between CMA CGM's upstream container lining shipping activities and

Bolloré Logistics' downstream sea freight forwarding activities in particular territories with limited alternatives (Martinique, Guadeloupe, and French Guiana). To address these concerns, the Commission approved the merger with a structural remedy package including multiple divestures that removed the described vertical link.

In August, the EC conditionally approved the acquisition of ***Viterra by Bunge*** (M.11204). Both companies are vertically integrated global agribusinesses, active in the origination, trading and processing of agricultural products, with significant overlaps in the sector of oilseeds. The acquisition raised competition concerns in the oilseed value chain, especially in Central and Eastern Europe where both parties are active across the whole supply chain. The investigation revealed that the merger could strengthen market power in this 'hourglass-shaped' industry, where a few traders and processors dominate between numerous upstream farmers and downstream consumers. Concerns focused on the concentration in the rapeseed and sunflower seed markets, potentially disadvantaging farmers and consumers by limiting competition. Again, structural commitments were at stake. Bunge agreed to divest Viterra's oilseed-related businesses in Hungary and Poland and a number of logistical assets linked to these operations, ensuring competitive structures remained intact in the region.

Looking Back and Looking Forward

To celebrate the 20th birthday of the EUMR, the Commission organised a conference in April 2024 (see also the corresponding merger brief). One focus was to look back on the workings of merger control in Europe under the EUMR. The event focused on the adaptability of the EUMR to dynamic economic realities, especially, the rise of digital markets. Its 2004 reform introduced the SIEC (significant impediment to effective competition) test, empowering it to better handle complex cases and diverse merger impacts. Procedurally, the handling of the EUMR, the conference has emphasized the importance of transparency, independence, and robust economic analysis in merger reviews. This flexible and case-by-case approach has ensured the regulation's ability to safeguard competition in diverse market contexts, according to the participants. Another focus of the event was to look forward. During the event, participants discussed challenges of the EUMR in addressing novel market dynamics, such as digital ecosystems and non-price competition factors (more on this in a minute) as well as killer acquisitions (also more on this in a minute), especially in dynamic and technology-driven markets. Experts discussed updating the Merger Guidelines, to address these new risks – something that was later picked up in Commission President Von der Leyen's mission letter to the new competition Commissioner Teresa Ribera Rodríguez (see comment here and more on this below) and expected focus of her tenure in terms of merger control, clarified in the hearings.

On these looking-ahead-topics, 2024 provided further developments. Almost anticipating the Mission letter and discussions on revisions of the Merger Guidelines, the Commission earlier this year published a policy brief on non-price competition in EU merger control (see comments here). It identified non-price competition factors like innovation, quality, data protection, sustainability, supply reliability, and capacity and their growing importance in modern merger assessments, especially in industries, such as pharmaceuticals or digital markets. The EC described that these non-price factors are already assessed in market definitions, competitive impact analyses, and the design of remedies. Yet, more can be done and industry specific action might be needed.

Connected to this, the Commission also published a study on EU competition enforcement and acquisitions of innovative competitors in the pharma sector leading to the discontinuation of overlapping drug research and development projects with a focus on killer acquisitions in the pharma sector. Concerns are that transactions potentially lead to the discontinuation of overlapping drug research and development projects, with significant implications for competition and innovation. Further concerns relate to an overall market consolidation, which can be linked to reduced research spending, fewer patents, and lower inventor productivity in acquired firms, though alliances between small biotech firms and larger companies show promise in fostering innovation. In the study, not only mergers and acquisitions *strictu sensu* were assessed, but also other types of transactions such as licensing deals and R&D cooperation agreements. The study identified 6,315 pharmaceutical transactions not only mergers and acquisitions, but also other types of transactions such as licensing deals and R&D cooperation agreements from 2014 – 2018, with 240 involving potentially substitutable drug R&D projects; 37% of these resulted in unexplained discontinuations of overlapping projects, warranting further scrutiny, with many potentially aligning with killer acquisition concerns. The study uses a comprehensive methodology, including a large-scale automated analysis of publicly available evidence, followed by a manual screening of transactions, to identify cases that may involve killer acquisitions and explores their effects on market competition. Methodologically, findings reveal that public data alone often cannot conclusively assess killer acquisitions, highlighting the need for access to non-public company information and better regulatory tools like a transaction registry. Policy recommendations emphasize maintaining vigilant regulatory oversight, refining merger remedies, and exploring new mechanisms, such as the mentioned registry, to preemptively identify and address potentially harmful transactions. Some work ahead for our new Commissioner.

State Aid and Foreign Subsidies

For State aid and foreign subsidies, 2024 certainly advanced the tax rulings with the seminal Apple case. In terms of FSR, it was a year of the firsts: in-depth investigation, closed cases, dawn raids, and court proceedings.

Don’t Upset the Apple Cart

The ***Apple Ireland*** case (C-456/20 P, see comments here) certainly was the landmark ruling of 2024 in State aid law. Ultimately, the ECJ set aside the 2020 ruling of the GC (see comments here and here), followed AG Pitruzzella and sided with the Commission in finding that two Irish subsidiaries of Apple Inc. received unlawful state aid from Ireland in the form of a tax advantages amounting to €14.1 billion.

As to the background: In 2016, the Commission had decided that two tax rulings benefiting two Apple subsidiaries, which were registered in Ireland but not considered tax residents, considered to be unlawful state aid. These rulings allocated a significant portion of the taxable profits, including income from Apple’s IP, 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 its analysis, the EC had heavily relied on the so-called arm’s length principle. In 2020, the General

Court had annulled the EC decision finding that the Commission had not proven to the required standard that Ireland had granted any selective advantage to Apple.

In this appeal case, the ECJ found that Ireland's tax rulings for Apple deviated from normal tax rules, effectively granting Apple a selective advantage. In particular, Ireland had misapplied its national tax laws, including the arm's length principle, by failing to assess whether the Apple IP should have been assigned to the Irish branches rather than the foreign head offices. The Court supported the Commission's reasoning that Irish law required a comparison of the respective roles of the head office and the branches to determine profit allocation. While the Irish branches performed activities warranting the assignment of the IP to them, the head offices lacked the capacity to oversee or manage the relevant IP licenses. Consequently, the profits from those licenses should not have been attributed to the head offices. Significantly, the Court reached this decision despite the absence of an explicit incorporation of the arm's length principle into Irish tax law at the time and the later adoption of the OECD's authorized approach, which occurred after the Apple tax rulings were issued. This contrasts to some degree with previous cases involving *Fiat* (see comment here), *Amazon*, and *Engie*, where the ECJ annulled the Commission's decisions for not adequately considering national tax laws, which needs to explicitly reference the arm's length principle.

In the ECJ's Apple ruling, however, the Commission's definition of the relevant reference framework had already been upheld by the General Court and was no longer open for debate during the appeal. This marks a distinction from earlier cases and makes the *Apple* ruling very case specific, not necessarily giving an outlook to future developments. The ECJ continues its reasoning in *Fiat* etc. that the arm's length principle does not exist as an autonomous standard unless it is incorporated into domestic law. However, in *Apple*, the Commission's interpretation did not contradict the relevant domestic tax provisions, held the ECJ. Furthermore, Ireland itself had conceded that its tax rules were essentially aligned with the arm's length principle and failed to provide an alternative justification during the EC's investigation. As a result, the ECJ determined that the Commission was justified in using the arm's length principle as an analytical tool in this specific instance.

IPCEI: Investing in Progress, Cooperation, and European Innovation

On the European Commission level, many cases concerned green and industrial state aid, without a significant advancement of any doctrinal stakes. In line with objectives of the Draghi report, however, industrial policy concerns are at the forefront of state aid policy nowadays.

This is best shown by the rise on developments regarding Important Projects of Common European Interest (IPCEI) based on Article 107(3)(b) TFEU and the 2021 EC Communication. IPCEIs are designed to support large-scale, cross-border, innovative projects that contribute significantly to the EU's strategic objectives, economic development and social goals These projects typically involve collaboration between multiple Member States and aim to address market failures by supporting research, innovation, and infrastructure development in areas of strategic importance for the EU. IPCEIs are specifically to be aligned with any overall EU industrial strategy. Several significant developments occurred.

Three IPCEI were approved in 2024. Two concerned the hydrogen value chain, which are helping to achieve the objectives of the European Green Deal and the REPowerEU Plan. In February, the IPCEI Hy2Infra project involving seven Member States—France, Germany, Italy, the Netherlands, Poland, Portugal, and Slovakia – was approved. This IPCEI allocates up to €6.9 billion aimed to deploy 3.2 GW of large-scale electrolysers, establish approximately 2,700 km of hydrogen pipelines, develop storage facilities with at least 370 GWh capacity, and construct terminals for liquid organic hydrogen carriers. The project is expected to unlock an additional €5.4 billion in private investments, with completion targeted by 2029. As part of this IPCEI, 32 companies with activities in one or more Member States will participate in 33 projects. In May, the IPCEI Hy2Move by support large-scale, cross-border projects that are critical for the EU's economic, social, and environmental goals was also approved. The Member States will provide up to €1.4 billion in public funding, which is expected to unlock additional €3.3 billion in private investments. As part of this IPCEI, 11 companies with activities in one or more Member States will undertake 13 innovative projects on development of mobility and transport applications, of high-performance fuel cell technologies, next generation on-board storage solutions and technologies to produce hydrogen for mobility and transport applications. The last IPCEI approved in 2024 was the IPCEI Med4Cure, the first IPCEI to support research, innovation and the first industrial deployment of healthcare products, as well as innovative production processes of pharmaceuticals, thereby contributing to the European Health Union's objectives. It was jointly notified by six Member States: Belgium, France, Hungary, Italy, Slovakia and Spain. Those Member States will provide up to €1 billion in public funding, which is expected to unlock additional €5.9 billion in private investments. As part of this IPCEI, 13 companies with activities in one or more Member States will undertake 14 projects.

In terms of the advancement of IPCEI altogether, the Joint European Forum for IPCEI (JEF-IPCEI) also advanced this year. The JEF-IPCEI, composed of Member State authorities and European Commission representatives, should identify areas of strategic EU interest for potential future IPCEIs and increase the effectiveness of the designing, assessment and implementation of IPCEI. On the 27 November meeting, the JEF-IPCEI acknowledged the significance of IPCEIs in advancing EU strategic objectives and reducing internal market fragmentation. The forum endorsed the initiation of design work on four new IPCEI candidates: Circular Advanced Materials for Clean Technologies, Continuum of Federated and Distributed Artificial Intelligence Services, Deploying Large-Scale Federated Edge Computing Infrastructure and Services, and Advanced Semiconductors Technologies. Additionally, the forum adopted a recommendation on the roles of indirect and associated partners within IPCEI ecosystems to streamline processes and encourage broader participation.

First Cut is the Deepest

The first full year of application of the whole Foreign Subsidies Regulation (FSR) saw many significant developments (see comments here and here). The Commission established a new Directorate within DG Comp to handle the concentration procedure. The procurement procedure is handled on DG Grow level. Both are also competent for *ex officio* cases.

The year started with the first Commission FSR brief on the first 100 days of application (from 12 October 2023 to 20 January 2024) of the Regulation (see comments here) with a focus on transaction procedure. In the brief, the EC noted that overall 53 cases underwent pre-notification discussions. Out of these, 14 cases proceeded to formal notification, 9 were fully assessed, 1 was abandoned during pre-notification. Over half of the cases reported to the Commission involve non-EU to EU transactions. However, the FSR also appears to capture purely EU-to-EU transactions and even some non-EU to non-EU deals. Additionally, around 1/3 of the pre-notification M&A cases include an investment fund as the notifying party.

In February, the EC also launched the first in-depth investigation under the procurement procedure FSR concerning a bid submitted by the infamous CRRC, a Chinese state-owned train manufacturer, in a public procurement process conducted by Bulgaria's Ministry of Transport and Communications for the supply of 20 electric trains, along with related maintenance and staff training services (see comments here). The EC did not even had to yield any proper FSR power, since CRRC gave up without a fight and withdrew from the public procurement procedure, something the Commission still sees as a symbol for a working FSR. Two other in-depth investigations under the FSR procurement tool in the solar photovoltaic sector followed in April. The investigation concerned the same public procedure launched by a Romanian contracting authority and involved on the one hand the ENEVO Group including LONGi Solar Technologie GmbH, and on the other hand Shanghai Electric UK Co. Ltd. and Shanghai Electric Hong Kong International Engineering Co. Ltd. Both were equally closed later in 2024.

The first in-depth investigation under the concentration tool followed on 10 June, in a case concerning the acquisition of the Czech telecom operator PPF by the Emirates Telecommunications Group Company PJSC, also known as the *PPF/e&* case (FS.100011, see comment here). e& is a United Arab Emirates telecommunications operator controlled by a sovereign wealth fund controlled by the UAE, the Emirates Investment Authority (EIA). PPF, headquartered in the Netherlands, is a telecommunication operator in Czechia, Bulgaria, Hungary, Serbia, and Slovakia, serving more than 10 million customers in that sector. This case was actually followed through until the end and was cleared with commitments in September. While the case is not public yet, the press release alone offers a lot to better understand the FSR doctrine. It indicates a special two-step test only when assessing distortions in a concentration: (1) a distortion to the acquisition process, and (2) a distortion to the activities of the merged entity post-transaction. Furthermore, it does not appear that the EC conducted a balancing exercise per Article 6 FSR. In *PPF/e&,* while the EC did not see any problems on (1), it found distortions regarding (2), namely, 'foreign subsidies benefiting e& and the EIA would thus have artificially improved the capacity of the merged entity to finance its activities in the EU internal market and increased its indifference to risk. As a result, the merged entity could have engaged in investments, for instance in spectrum auctions or in the deployment of infrastructure, or acquisitions, thus distorting the level-playing field relative to other market players by expanding its activities beyond what an equivalent economic operator would engage in absent the subsidies.' To address these concerns, the buyer committed to eliminating the unlimited guarantee, prohibiting parent-company financing of the target's activities within the internal market, and notifying the Commission of any future acquisitions.

The *ex officio* tool is also already in use, albeit only marginally. As we know from a speech by Vestager, the Commission launched its first *ex officio* investigation under the FSR regime for public procurement, which targets Asian suppliers of wind turbines and investigates the conditions for the development of wind parks in Spain, Greece, France, Romania and Bulgaria.

Procedurally, 2024 was also a significant 'first' of the FSR: From 23 to 26 April 2024, the European Commission conducted its first dawn raid under the FSR and searched *Nuctech Warsaw and Netherlands*'s premises in Warsaw and Rotterdam to investigate evidence of market-distorting foreign subsidies (see comments here). Nuctech manufactures security equipment such as baggage and people scanners for seaports and airports. Nuctech Warsaw and Netherlands are wholly owned subsidiaries of Nuctech Hong Kong Co. Ltd, a company registered in Hong Kong (China), which is rumoured to have close links to a Chinese state-owned company. As part of the investigation, the Commission has also requested access to the electronic mailboxes of several employees who are Chinese citizens and whose correspondence is stored on the parent company's servers in China. Nuctech applied for interim relief with the General Court. However, the president in his August order rejected interim relief based on the lack of a *prima facie* case. In particular, the GC president held that the Commission's jurisdiction under the FSR encompasses all companies conducting activities within the EU, regardless of their place of incorporation. Furthermore, the order statet that the Commission may request access to or copies of documents held by such companies, regardless of the documents' physical location. Rather, companies must provide justification if they cannot access information stored on servers located outside the EU. Furthermore, companies must explain why complying with document requests would violate non-EU law and how such a breach would contravene international public law. The Commission is bound solely by EU law and international public law. While we wait for a final decision in the main proceedings, the interim decision alone offers insight into vast extraterritorial nature of the FSR.

In terms of further guidance of the FSR, the Commission regularly updates the FSR Q&A section, including in 2024. Moreover, it published a first guidance, offering additional insights into distortions and the balancing test (see comments here). In the guidance, for example, the EC clarified that to assess whether a foreign subsidy adversely distorts competition in the internal market (either actually or potentially), the Commission may examine its effects on any activities the beneficiary is currently engaged in or is likely to engage in within the internal market. A foreign subsidy is considered to negatively affect competition when it creates an unlevel playing field by distorting market dynamics, such that support from a third country gives one or more market players an unfair advantage. On balancing, the guidance is almost as opaque as the Regulation itself. It mentions a non-exhaustive list of possible positive effects, such as environmental protection, social standards, or the promotion of research and development. Furthermore, the EC highlights the closeness specifically of the balancing test to the existing State aid guidelines and practices, a proposal that is not necessarily dogmatically sound. Here, further case practice will likely path the way.

Further case practice will be the focus of the new year, given the priority to continue to enforce the FSR for the new Commissioner Teresa Ribera Rodríguez, as outlined in her mission letter from President Von der Leyen. Stay tuned for more, 2025 is likely going to be big in terms of FSR!

Sanctions and Procedures

Long-standing issues in competition law, such as obstructing inspections, handling sensitive RFIs, and judicial review of antitrust fines, continue to dominate public enforcement. This section provides an overview of the fresh decisions by the EC and ECJ.

Obstructing Inspections is (still) not a Good Idea and can Lead to Procedural Fines

The European Commission has imposed a €15.9 million fine on ***International Flavors &***

Fragrances Inc. and its French subsidiary (AT.40882) for obstructing a Commission inspection in 2023. The fine, representing 0.15% of IFF's total turnover, was reduced from 0.3% due to the company's proactive cooperation in recovering deleted data. The Commission found that a senior IFF employee intentionally deleted WhatsApp messages exchanged with a competitor after being informed of the inspection, which was a serious infringement of EU competition rules. This decision marks the first time the Commission has imposed a fine for deleting messages exchanged via social media apps on a mobile telephone, and it highlights the Commission's ability to detect and penalize such actions through its forensic capabilities.

Let's see whether we will see inspections and procedural decisions by the Commission also in DMA or DSA-related cases in the near future (see comments here).

RFIs Limited by ECJ (and National Criminal Laws)

Regarding the 2023 cleared merger between ***Vivendi and Lagardère***, the Commission had first cleared the merger subject to certain conditions, but then launched a separate investigation into Vivendi's possible early execution of the merger. As part of this investigation, the Commission issued a Request for Information (RFI), requiring the companies to provide detailed information about its employees' personal communications and documents. This RFI was significant because it would require Lagardère to access and collect sensitive personal data without the consent of its employees, potentially breaching French law and exposing Lagardère to criminal sanctions. The Vice-President of the ECJ has ordered interim measures on appeal (C-90/24 P(R)) and found that Lagardère has sufficiently substantiated its claim that it would be compelled to commit criminal offences in order to comply with the Commission's RFI.

On Cartel Fines and Evidence Standards

In ***Orlen*** (C-255/22 P), the European Court of Justice has dismissed Orlen's appeal against the European Commission's decision to make binding the commitments submitted by Gazprom to address competition concerns in the gas supply market in Central and Eastern European member states. The Court held that the Commission did not commit a manifest error of assessment in its evaluation of the commitments, which addressed concerns related to territorial restrictions, unfair pricing, and control over gas transport infrastructure. The Court also found that the Commission took due account of the Union's energy policy objectives, including the principle of energy solidarity, when assessing the adequacy of Gazprom's commitments.

In ***Scania*** (C-251/22 P), the ECJ rejected Scania's appeal against a €880 million fine for its participation in the truck cartel. Scania contested the procedural conduct of the Commission, particularly the use of hybrid settlement procedures, but the Court upheld the fine, emphasizing that procedural objections did not negate the substantive evidence of collusion. Furthermore, the Court confirmed once again its wide understanding of the single and continuous infringement that can exist even if an entity only participated in parts of the cartel activities but was aware of further areas of that same infringement.

In ***HSBC Holdings*** (T-561/21), the General Court validated the €33.6 million fine imposed on HSBC for its involvement in the Euro interest rate derivatives cartel. Despite finding that HSBC's contribution to the cartel's implementation, no higher reduction of the fine than already applied by the Commission was deemed appropriate and further mitigating circumstances were denied.

Finally, in ***Qualcomm*** (T-671/19), the General Court upheld the European Commission's decision to impose a fine on Qualcomm for abusing its dominant position in the UMTS-compliant baseband chipset market, but recalculated the fine amount due to the Commission's unjustified departure from its fining guidelines. As the Court agreed with the substantive Commission findings that Qualcomm engaged in predatory pricing to eliminate its competitor Icera, it was able to exercise its unlimited jurisdiction and set the recalculated fine itself.

These cases present an overall balanced and workable judicial review. The EU courts do not shy away from very detailed enquiry and assessment of complex competition cases and all (sometimes numerous grounds of appeal), but the Commission could still prevail with most of their arguments.

Private Enforcement

One might get the impression nowadays that we see even more private enforcement cases than public enforcement cases before the ECJ, including before the Grand Chamber. This mirrors the increasing relevance of cartel damages in the EU member states and the beginning application of those laws which transposed the damages directive. Unresolved or unclear legal questions of interpretation of the directive are now increasingly being sent to the ECJ in the preliminary ruling procedure. That is a welcome development as it fosters uniformity and coherence of private enforcement. Furthermore, the developing jurisprudence (mostly) increases legal certainty. By contrast, legal uncertainty can aggravate the already existing rational apathy of claimants to bring their cases and would risk resulting in under-enforcement.

Over the last year, the ECJ ruled on a number of different issues, including disclosure, limitation periods and collective actions. Still today, and besides the Damages Directive, the principles of effectiveness and equivalence remain highly important for these cases and can be applied either autonomously or in conjunction with the directive as guiding principles.

ECJ Limits National Limitation Periods

In ***Heureka*** (C-605/21, see comments here), the ECJ established that the limitation period for cartel damages cannot begin to run before the infringement has come to an end and the injured party knows, or could reasonably be expected to know, of the fact that the behaviour concerned constitutes an infringement. The Court also held that the publication of the summary decision in the Official Journal coincides with the moment in which knowledge of the relevant information by the claimant may usually be expected. Furthermore, EU law requires the possibility to suspend or interrupt the limitation period during the investigation of the Commission and any subsequent court procedures to enable injured parties to rely on the Commission's decision to support their action for damages.

Another Facet to the Single Economic Entity Doctrine – Not Always Serving the Claimant

In ***Volvo/Transsaqui*** (C-632/22), the ECJ ruled that a parent company cannot be validly served at the address of its subsidiary in another Member State, even if they form an economic unit. The ECJ held that the subsidiary is not automatically authorised to receive judicial documents on behalf of the parent company, and that the parent company's rights of defence would be adversely affected. The right to a fair trial under Article 47 of the Charter requires that judicial documents be delivered to the intended person, not just their subsidiary. This does, however, not preclude suing the subsidiary at its seat for the competition law infringements of the economic unit.

Access to Leniency Docs: Grey List, Not Blacklisted

AG *Szpunar*'s Opinion in ***FL & KM Baugesellschaft*** (C-2/23, see comments here) deals with the scope of protection of leniency documents in the context of criminal proceedings in Member States. He concludes that the Damages Directive does not apply to criminal proceedings, while the ECN+ Directive does, but only for access to evidence by third parties. The access to blacklisted documents can be restricted for civil parties, but not for accused parties, who have a fundamental right to access to all evidence. The AG also clarified that annexes to leniency applications are not protected as blacklisted documents, but as 'grey list' documents which may be disclosed to third parties, including civil parties, subject to a proportionality assessment. The ECJ's decision on this matter will be closely watched, as it will provide much-needed clarity on the scope of protection for leniency documents and the balance between the rights of accused parties and the interests of competition authorities.

National Laws on Collective Redress Still Struggling: EU Law Demands Effectiveness

AG *Szpunar*'s Opinion in ***ASG 2*** (C-253/23, see comments here and here) dealt with the compatibility of German laws prohibiting the assignment of claims to alternative legal service providers with EU law, particularly Article 101 TFEU and the principles of effectiveness and equivalence. The Opinion, following the referring court, argues that the prohibition of such assignments infringes the principle of effectiveness, as it renders the private enforcement of competition law claims excessively difficult. The 'assignment model' in Germany was developed as a response to the perceived lack of effective collective action regimes (see previous comment here) and may now be strengthened if the ECJ follows the AG in its judgment on 28. January 2025.

Digital regulation: DMA and DSA Developments

The EU's digital strategy is well underway, with both the Digital Markets Act and the Digital Services Act running at full speed. 2024 has delivered the first credible results of both regulations, even though the European Commission's enforcement units have much work to undertake to make both instruments fully effective.

All Aboard: the Application of the DMA's Substantive Obligations

Following the gatekeepers' (Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft) designation in September 2023 (see here), March 2024 was set as the compliance deadline for them to comply with most of the obligations enshrined in Articles 5, 6 and 7 DMA. Their compliance reports were due in early March, describing how their compliance would (and is!) take place (see comments on the first wave of compliance reports here). Articles 5(2), 6(4) and 6(5) have taken the limelight by storm, and the gatekeeper's technical implementations of those provisions have merited the most attention. Meta's subscription pay or consent model is a good example of them, alongside Apple's proposed compliance strategy to enable the alternative distribution of apps and app stores on iOS (see here) as well as Alphabet's proposed solutions (?) regarding the self-preferencing prohibition, which did not fundamentally meet the expectations of stakeholders following the *Google Shopping* saga.

Shortly after the gatekeepers submitted their compliance reports (and their consumer profiling reports) in early March, the European Commission organised a whole set of compliance workshops to attend to the demands of stakeholders, especially business users, regarding the proposed technical implementation (for a few examples of our coverage of those, see here, here and here). Those compliance workshops were quite useful in pointing out the main problems arising from the gatekeepers' compliance solutions with the DMA. Conversely, they were equally fruitful in setting out what provisions must not be attended to by the EC, since effective enforcement of some of the mandates has already been attained.

Business users to the gatekeepers are already seeing some traction of the gatekeepers' compliance with the DMA, since entries on the iOS ecosystem have crystallised in the form, for instance, of Epic Games' Store or into the first alternative to Apple Pay on the iPhone, Vipps MobilePay.

Stick AND Carrot: the EC Triggers Non-compliance and Specification Proceedings

Building upon the gatekeepers' compliance reports, the European Commission has exercised both its punitive and non-punitive powers during the year.

In total, the enforcer triggered six non-compliance procedures which may result, in the indicative timespan of 12 months, in the sanctioning of the gatekeepers for breaches with particular DMA mandates. The EC took issue with i) the gatekeepers' compliance with the anti-steering mandate under Article 5(4), i.e., it has triggered procedures against Alphabet (DMA.100075) and Apple (DMA.100109) for this reason; ii) Alphabet's compliance with the self-preferencing prohibition (DMA.100193); iii) Apple's compliance with its unbundling of services (DMA.100185) as well as its enabling of alternative app store and app distribution (DMA.100206); and iv) Meta's subscription pay or consent model (DMA.100055).

The EC released the decisions opening those non-compliance procedures and demonstrated a clear preference for bringing new legal standards to the fore, i.e., diverging from the antitrust standards that inspire the rules set out by the DMA (see comments here). To that end, the EC seeks to enforce the DMA's provisions on two fronts. First, it interprets the mandates as a cluster, where compliance with one of the obligations purports the protection of the legal interest of another one, and vice versa. This idea is particularly salient if one observes the EC's decision relating to the opening of the non-compliance procedure of Apple's 'new' business terms, applicable in the EU as a consequence of the DMA's enforcement. On that non-compliance procedure, the EC will not only strive to determine whether Apple complies with the alternative app distribution engrained under Article 6(4), but rather whether Apple's idea of compliance converges with the spirit and letter of the law of Articles 5(4), 5(7) and 6(7) DMA. Second, all the decisions opening the non-compliance procedures go hand in hand with the consumer protection-led spirit of the anti-circumvention clause under Article 13 DMA. In other words, the threshold of effective enforcement for those provisions must meet the requirement of not undermining consumer choice, in the sense of both antitrust, consumer and data protection.

For the moment, the EC has advanced in two of these non-compliance procedures, namely on Apple's compliance with the anti-steering mandate and Meta's subscription model in relation to the prohibition under Article 5(2) DMA. The EC issued its preliminary findings setting out its main concerns, such as Meta's technical implementation of Article 5(2) through a mechanism that does not provide for effective consent to be granted. To the extent that users are coerced into choosing between a paid version of Meta's social networks protecting their personal data and a free version catering to a version of the service relying on behavioural advertising, the enforcer interprets that the service's end users may not exercise their effective consent to override the prohibition under Article 5(2). The EC's preliminary findings surprisingly align with the EDPB's Opinion on pay or consent models, upholding a similar view on the granting of consent. In the coming months, the EC is expected to publish the non-confidential version of those preliminary findings to seek the stakeholder's views on the case's resolution.

Aside from its punitive powers, the European Commission has also demonstrated its interest in disposing of the tools provided by the DMA to secure the provisions' enforcement. Such an example is that of the retention orders it has issued to Alphabet, Amazon, Apple and Microsoft to safeguard the information it might need in the future to meter DMA compliance. Conversely, the EC triggered two specification proceedings to kick off a regulatory dialogue with Apple concerning its implementation of the vertical interoperability obligation under Article 6(7) DMA (cases DMA.100203 and DMA.100204, see comments here). The procedure entails that the EC sets out a whole range of measures aimed at securing vertical interoperability, both on the front of how interoperability works regarding third party physical connected devices and the process implemented by Apple to make it a reality. The EC has already issued the implementation measures it believes necessary and proportionate to accomplish such an objective, which it has forwarded to Apple for its reaction and has triggered a public consultation with stakeholders (see here and here).

All That and Then Some: the Current Designation Framework

The DMA is designed to accommodate changes in the market trends relating to the major digital players operating in them. Due to this reason, the EC may operate the designation of the gatekeeper either if it meets the quantitative thresholds (for the last three years) or the qualitative requirements for designation. Early on in the year, a number of undertakings notified their potential status as gatekeepers to the European Commission.

As a consequence, the list of gatekeepers has grown from 6 gatekeepers and 22 core platform services to 7 gatekeepers and 24 core platform services. Nothing particularly surprising, since Booking.com was expected to meet the quantitative thresholds once the pandemic year was not included in the mix. In May, the European Commission designated Booking.com as the seventh gatekeeper regarding its online intermediation service. Due to that reason, Booking.com submitted its compliance report in early November, including changes to its agreements with its partners, such as the presence of parity or anti-steering clauses. At the compliance workshop organised by the EC, stakeholders were quite unconvinced about whether Booking.com's technical measures to comply with the DMA met the threshold of effective enforcement (see comments here).

In parallel, the EC designated its first core platform service via qualitative means, namely Apple's iPadOS. Following its designation in April, its compliance deadline was set for early October. Apple did not seize the opportunity to make more profound changes to its ecosystem. Instead, it simply expanded its existing technical implementation from iOS to iPadOS.

Other undertakings did not meet the designation requirements, despite they had notified their potential gatekeeper status to the European Commission, namely X for its social network and ad services and ByteDance's TikTokAds. Both undertakings managed to rebut the presumption of their designation by presenting sufficiently substantiated arguments in the sense of Article 3(5) DMA, without the need to go to a further market investigation. In this same vein, the EC finally established that Apple's iMessage and Microsoft's Bing, Edge and Microsoft Ads did not merit designation, either, after conducting a thorough market investigation on their impact on the digital space (see comments here). A third party to the designation process (i.e., a business user) appealed the European Commission's decision to not designate Edge as a CPS under the DMA (T-357/24), being the first of its kind to do so.

The General Court Defers to the European Commission

Following the first designation decisions in September, some of the gatekeepers decided to appeal their capturing via the DMA.

Apple contested the designation decision on the grounds of arguing that iOS's designation may breach the principle of proportionality of the Charter of Fundamental Rights to the extent that it is, thus, forced to comply with a general vertical interoperability obligation under Article 6(7) DMA (to be adjudicated under T-1080/23). This tenet of the appeal before the General Court will be particularly interesting since it will uncover whether the court is willing to contradict the DMA on its own terms. Meta also appealed its designation decision relating to the European Commission's delineation of its core platform services. The undertaking takes issue with the fact that both its Messenger and Marketplace services should have been included under the broader Facebook CPS (under T-1078/23) The fact that they are currently separate brings quite substantial consequences since Meta must dedicate its efforts in setting dedicated technical implementation solutions for those individual CPSs (e.g., relating to tying or horizontal interoperability).

The General Court is set to rule on both those cases in the coming year, but it already provided a general impression of the direction of what its resolution will look like when ruling on ByteDance's appeal of its TikTok designation (T-1077/23, see comments here). ByteDance requested the case to fall under the expedited procedure, and the GC ruled on it in July 2024. The ruling was quite surprising in two respects. First, the GC displayed great deference with regard to the EC's margin of discretion exercised on the designation procedure. The GC did not substantially engage with the merits of the arguments presented by the applicant, since it basically replicated the

EC's interpretation of the qualitative and quantitative designation criteria. Second, the GC enshrined the doctrine of the exhaustion of administrative remedies in its ruling, by rejecting all those arguments submitted by ByteDance at the appeal stage which it had not presented to the European Commission at the administrative stage to rebut the designation presumption. This sets a worrying precedent. Instead of speeding up the administrative procedures, the incentives of gatekeepers will lie in stalling the EC's enforcement action.

Election Interference, the Protection of Minors and Consumers, and Social Networks

The Commission's DSA enforcement has been equally intense, which is set to be quite impactful in terms of the operations and functioning of digital platforms.

In July 2024, the EC sent its preliminary findings to X for breach of the DSA, relating to the lack of transparency relating to the way in which its advertising and 'verified accounts' mechanism works. If those preliminary findings fructify into a non-compliance decision, the undertaking could be fined up to 6% of its worldwide annual turnover. Additionally, the non-compliance decision would trigger an enhanced supervision period to ensure compliance with the remedies proposed by the undertaking. In parallel, the EC has also opened proceedings to a number of digital platforms for different reasons over the year, notably Meta's and TikTok's protection of minors on their social networks, AliExpress' management and risk mitigation tools and Temu's sale of illegal products alongside the potentially addictive design of its services.

On top of that, the DSA has demonstrated to have teeth, insofar as it resulted in TikTok's withdrawal of its new programme (TikTok Lite), which was designed to reward users for watching and liking videos. The EC immediately took issue with the addictive design of the 'task and reward' mechanism, launched in France and Spain early in 2024, and opened formal proceedings to enquire about the risk mitigation measures that TikTok had applied before rolling out the service. Roughly 100 days after the launching of the procedure, TikTok offered commitments to permanently withdraw the TikTok Lite rewards programme from the EU.

The last of the EC's DSA enforcement action has met great controversy. The Constitutional Court of the Member State cancelled the results of the first round of votes and announced entirely new elections will be held. The annulment follows its preoccupation deriving from the release of secret reports showing Russian involvement in influencing voters through an anti-Western propaganda campaign supporting one of the candidates. The EC has already opened formal proceedings against TikTok regarding its obligation to assess and mitigate systemic risks linked to election integrity, notably regarding how its recommender systems, political advertisements and paid-for political content displayed in the context of the Romanian presidential elections on 24 November.

Various, Legislation, Consultation and Reports

And now on what we could not fit into any other category…

Revised Market Definition Notice

The European Commission has published the final text of the revised Market Definition Notice, a comprehensive update to the 1997 Notice. The revised Notice clarifies the role of market definition, acknowledging its variability depending on the focus of the analysis and the different scopes and objectives of competition law instruments. It also introduces new concepts, such as the consideration of sustainability and digital markets, and provides guidance on forward-looking market definition, including the assessment of structural transitions and innovation. The Notice's expanded scope and clearer language will benefit legal certainty (see comments here).

Report on the Transposition of the ECN+ Directive and Evaluation of EU Antitrust Enforcement

The Commission has published a report on the transposition of the ECN+ Directive in November, which aims to empower national competition authorities to be more effective enforcers of EU antitrust rules. The report highlights that all Member States except Estonia (see pending infringement procedure before the CJEU) have transposed the main provisions of the Directive, although most of them have done so with a delay. The Directive demands a minimum set of independence guarantees as well as investigative, decision-making, and fining powers for NCAs. It harmonizes leniency programs, and enhances cooperation between NCAs. The Commission will now focus on addressing the remaining transposition issues, particularly in Estonia, and will also closely monitor the development of case law by the Court of Justice of the European Union to ensure that the Directive's provisions are effectively implemented in practice.

Besides, the European Commission has published the outcome of an evaluation of the EU Antitrust Enforcement Framework, conducted after 20 years of applying the modernized rules. It finds that the framework has been successful overall, with positive feedback on the removal of the old notification system and the shift to decentralized enforcement. However, the evaluation highlights the need for faster investigations, improved cooperation between EU and national competition authorities, and better coordination in the digital age, including the need to adapt investigation tools to handle larger, data-heavy cases.

EU and UK Competition Cooperation Agreement

In May, the UK and EU have concluded negotiations on a Competition Cooperation Agreement (see comments here), expected to enter into force in 2025 after ratification. The agreement will enable direct cooperation between the UK's Competition and Markets Authority and the European Commission, as well as EU national competition authorities, in antitrust and merger investigations. This two-tier cooperation is a first for the EU. The agreement will facilitate coordination and exchange of non-confidential information, but will not allow free exchange of confidential information without the merging parties' consent. The agreement builds on the foundation laid by the pre-Brexit ECN framework, introducing a new level of cooperation that helps to partially fill the gap left by the UK's departure from the EU.

Policy Brief on Competition in Generative Artificial Intelligence and Virtual Worlds

In September, the Commission has published a policy brief on competition in generative AI and virtual worlds, following a call for contributions and a workshop earlier in 2024. The brief highlights the importance of data-driven competition in these sectors, where access to high-quality training data is crucial for the development of generative AI models. It also notes the potential for self-reinforcing networks, where dominant platforms can use their market power to attract more users and further entrench their position. The Commission's analysis suggests that these dynamics may give rise to anticompetitive effects, such as reduced innovation and higher prices for consumers. The brief also touches on the role of interoperability and standards in promoting competition, and the need for regulatory approaches that balance innovation with competition concerns. It identifies potential tools to address them, including antitrust enforcement, merger control, and the Digital Markets Act (on the latter see also the comment here).

Several Reports on the State and Prospects of Competition in the EU

2024 also marked a year of intensive review and reflection on European competition policy, competitiveness and overall prospects for the internal market. **DG Competition** has published a report on the evolution of competition in the EU during the past 25 years, entitled 'Protecting competition in a changing world' in June 2024. It followed a general discussion of internal market policies and a 150 pages long report by former Italian Prime Minister **Enrico Letta** in April (here) and was complemented by an in-depth (328 pages) study of former ECB president **Mario Draghi** from September on the 'future of European competitiveness' (see Part A here and Part B here).

Enrico Letta's report on the **future of the Single Market** proposes a vision that may conflict with the EU's competition policy objectives (see comments here). While advocating for stronger enforcement against geo-blocking and price discrimination, the report's emphasis on promoting market integration and allowing for greater concentration in key sectors, such as telecoms and energy, may undermine the EU's commitment to promoting competition and diversity on markets. This approach aligns with a long-standing debate on the need to create larger, more competitive companies in Europe, but it may also lead to increased market concentration and reduced competition, potentially undermining the EU's ability to promote effective competition and prevent the abuse of market power. The EU's competition authorities have traditionally been wary of such concentration, and it remains to be seen how the Commission will balance the need for market integration with the need to protect competition and prevent the dominance of a few large players.

DG Competition presents and assesses new research on how the conditions of competition in the EU have evolved over time, as well as the main drivers of those changes in the **Report on protecting competition in a changing world**. It also presents new research on the impact of competition on competitiveness and overall economic growth. The report draws on contributions from the OECD, academics, consultants and DG Comp's staff. The report finds that both concentration and profits have increased, while business dynamism has declined over the past 25 years. The 'winner takes most' dynamics, driven by investments in proprietary IT solutions and data, have contributed to these trends. While this has led to efficiency gains and benefits for consumers, it has also raised barriers to entry and expansion for smaller firms, resulting in adverse effects on competition and consumers. The report concludes that the intensity of competition in the EU is weaker than in the past, with pronounced market power at the top.

The **Draghi report** (see comments here and here) commissioned by the outgoing European Commission, proposes substantial reforms in EU competition policy to address the challenges of digitalization and globalization. The report advocates for a new approach to competition policy, prioritizing innovation and future competition in merger decisions, and introducing an “innovation defence” to allow firms to pool resources and compete globally. It also recommends a more targeted approach to state aid, allowing for coordinated state aid in strategic sectors, and the introduction of a ‘New Competition Tool’ to address structural competition issues in rapidly evolving markets.

Margrethe Vestager – A Legacy

Margrethe Vestager’s tenure as European Commissioner for Competition had a profound impact on the development and direction of EU competition policy, leaving a lasting imprint on the regulatory landscape. Over the past decade, she has adapted EU competition law and policy to address modern challenges, including sustainability and digital innovation. Her commitment to fair markets and consumer protection is undoubted. Vestager has demonstrated the Commission’s ability to evolve and respond to changing market dynamics, particularly in the digital sector. Antitrust investigations and fines against companies like Google, Apple, Amazon and Meta complemented by the new Digital Markets Act as modern gatekeeper regulation are notable examples of her efforts to control big tech companies’ market power. Her leadership has also led to the adoption of the Foreign Subsidies Regulation, aimed at levelling the playing field for European companies competing with foreign subsidized entities. Vestager’s legacy will be remembered for her proactive enforcement and engagement in promoting a competitive, fair, and innovative European market.

Incoming Commissioner EVP Teresa Ribera

The new EC’s Executive Vice President, Teresa Ribera, has a particularly broad portfolio. Especially with regard to competition and the green transition, her impact could be substantial. Whereas it is open whether she will leave a lasting mark like her predecessor, her prospective policies were already widely discussed before and during her nomination. The discussion on the blog laid a focus on the future of merger review – as discussed above – which could considerably shape the state of competition in the EU (see the comments here and here). Furthermore, according to her mission letter, Ribera is expected to introduce a state aid framework supporting renewable energy and decarbonization while enforcing stricter antitrust rules against practices harming sustainability, particularly in agriculture and food. Her agenda also includes promoting cooperation in clean technologies by easing competition rules where necessary to advance green innovation.

Outlook for 2025

As we look ahead to 2025, the European competition landscape is on the cusp of significant developments, following a fundamental discussion in 2024 on the direction of EU competition policy, sparked by reports from DG Competition, Enrico Letta, and Mario Draghi, which highlighted concerns about market concentration and the need for reform. Building on these discussions, the new EC's Executive Vice President, Teresa Ribera, is expected to shape the Commission's competition policy, particularly in the areas of merger review, digital regulation, and the green transition.

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