BRUSSELS À JOUR

The Roundup Before Christmas

Markus Röhrig, Christian Dankerl, Laura Stoicescu and Christoph Sielmann report on the latest developments from the European capital of competition law.

We don't want to repeat ourselves, but it's (again) the most wonderful time of the year (Andy Williams is not known to have been a lawyer, according to Wikipedia). As we finish decking our respective halls and celebrating the return of Commissioner Vestager to the Berlaymont, we are also looking back at 2023 and its takeaways for 2024. Like every year, we dedicate our Christmas issue to the main segments of EU Competition Law – this year, we will be looking at antitrust, merger control and the Foreign Subsidies Regulation. So, put down the tinsel and take a breather with us.

Antitrust

We are told that the coziness of festive gatherings does not apply to companies, and the European Commission tends to agree. Here are a few of the most important antitrust developments of 2023.

- The European Commission and the national competition authorities seem to have their eyes set on **industry associations facilitating cartels**. Following in the footsteps of the ICAP case, the European Commission is currently investigating the involvement of the European Automobile Manufacturers' Association in the carmakers' collusion regarding end-of-life vehicles. Not to mention its ongoing inquiry into Eurobat's assistance in the creation and functioning of price-setting indices used by starter battery firms to negotiate with carmakers. This is not to say that industry associations were ever shielded from the enforcement of cartel provisions (or that there is not broad scope for legitimate cooperation through industry associations), but with the adoption of the new Horizontal Guidelines, it seems that the European Commission is keen on road testing them as soon as possible.
- True to its (green) word, the European Commission has adopted **antitrust Guidelines for sustainable agreements in agriculture**, offering clarifications on how the agri-food sector can design sustainability agreements in agriculture without infringing EU Competition Law. The idea is not new – Art. 210a of Regulation 1308/2013

establishing a common organization of the markets in agricultural products excludes certain restrictive agreements in the agricultural sector from the Art. 101(1) TFEU prohibition when those agreements are indispensable to achieve sustainability standards going beyond the mandatory EU or national rules. Art. 210a itself was actually introduced in 2021, when the European Parliament and the Council adopted this new exclusion from competition rules for agricultural products, in the framework of the Common Agricultural Policy reform for 2023-2027. By publishing the Guidelines, the European Commission offered more guidance as to how exactly that can be done.

And as a side note, the European Commission continues its open-door policy to discussing cooperative sustainability agreements generally, and would also be willing to adopt an Article 10 decision to provide additional guidance. However, there appears to be somewhat of a chicken and egg problem – while companies would appreciate guidance, no individual company may be willing to enter an extended process with the European Commission if the outcome of the investigation is not clear.

- The trend regarding the sanctioning of **buyers' cartels** is gaining momentum in the shape of the sanctioning of **no-poach agreements**. Although still eons away from the U.S., Europe is now building its case-law with the European Commission's latest dawn raid earlier this autumn targeting no-poach agreements. In the meantime, various national competition authorities (France, Belgium) are already investigating no-poach agreements as hardcore by-object infringements, potentially having negative effects on innovation. Although for the moment the focus is on sectors which rely on highly qualified or skilled works such as engineering, technology consulting, or IT, enforcers do not exclude pursuing such setups also in low-skills sectors in the future. It appears that this latest wave of cases is just the start of a new category of antitrust cases, since more are expected in the near future.
- What spread like wildfire in The Bubble came to be confirmed – the **Market Definition Notice** will not be published as scheduled. Although due for the first week of December, there is some more uncertainty around the timetable for the Notice's adoption than was the case until now. In any event, we are keeping our ears to the ground and will report back as soon as we hear something.
- To end the section on a (New Year's) high, we'll have a quick look at **upcoming policy projects**. To begin with, with the 12 October DG COMP Interactive Workshop on the Evaluation of **Regulation 1/2003**, the European Commission has finished its tour of public consultations. In parallel, the evaluation support study tender was awarded a year ago, so the overall picture of the necessary reforms should be clear, once the European Commission draws the line. And considering the overdrive of the legal rumor mill in Brussels regarding the scope of the reform, we are eagerly waiting for the first draft to be published.

  Also on our radar are the **Guidelines on exclusionary abuses of dominance**, although only scheduled for adoption in 2025. In March, the European Commission has launched a Call for Evidence seeking feedback on the adoption of the Guidelines, the draft of which is due for publication before summer 2024. The new text will most likely focus on exclusionary conduct only (as opposed to exploitative abuses). While

the Commission is expected to continue to apply an economic approach to Article 102 cases (which is now firmly based on the EU Court's case-law), the role that quantitative price-cost tests will play is likely to differ depending on the specific type of exclusionary conduct. Also in March of this year, the European Commission published a Communication amending its 2008 Guidance on enforcement priorities concerning exclusionary abuses.

Merger control

2023 was an exciting year for the field of merger control, filled with groundbreaking developments, historic firsts, and – so you don't panic – some thrilling cliffhangers for 2024.

- One of the major merger-related developments in 2023 was the continuing **Illumina/Grail** saga ... with the grand finale (with respect to the jurisdictional issues) expected for 2024. As you will recall, the European Commission – based on its novel **Art. 22 EUMR approach** – prohibited the merger, but which the parties had already completed without waiting for clearance. The General Court, back in the summer of 2022, upheld the European Commission's decision to assess the case (see our July 2022 issue). Illumina appealed this decision, and the case is now pending before the Court of Justice. The oral hearing took place on 12 December; the Advocate General's opinion will follow in March, and the judgement is expected in the Summer, hopefully bringing much-needed clarity on the European Commission's jurisdiction to review transactions.
- In a storyline parallel to the Art. 22 EUMR question, the European Commission, in July 2023, imposed a **record-setting gun-jumping fine** of EUR 432 million upon **Illumina** (next to a symbolic, yet likewise unprecedented, EUR 1,000 fine upon **Grail**); Illumina has challenged this decision, too. And as if these weren't already enough landmark events, in October 2023, the European Commission – in another first-of-its-kind decision – obligated Illumina to **divest** Grail and to restore the ante-merger situation (on 17 December 2023, after a U.S. Circuit Court mostly sided with the Federal Trade Commission that had also required a divestiture of Grail, Illumina announced that it would sell off Grail). With the two cases pending before the EU courts, you may wonder how many more historic firsts this case will bring in 2024...
- Speaking of **gun-jumping**, another important event in the last months was the ECJ's judgement on **Altice's appeal of the General Court's decision** to largely uphold the European Commission's decision to fine Altice (the General Court had slightly reduced the European Commission's EUR 124.5 million fine – which was a record amount in the pre-Illumina/Grail era – by about EUR 6 million). In spring 2023, the Advocate General supported the European Commission's and the General Court's decisions.

  In its judgement issued in November 2023, the ECJ largely dismissed Altice's appeal, only reducing the fine by another EUR 3 million. The court confirmed the General Court in that the European Commission was entitled to fine both the infringement of Art. 4(1) EUMR (the obligation to notify a transaction before implementation) and of Art. 7(1) EUMR (the obligation not to implement a transaction before notification or clearance). The court argued that the two provisions pursued autonomous objectives

and underlined their differences: While a breach of Art. 4(1) EUMR automatically resulted in a breach of Art. 7(1), the same was not true in the opposite direction; and while an infringement of Art. 4(1) EUMR was instantaneous in nature, an infringement of Art. 7(1) EUMR was a continuous violation. Overall, the ECJ confirmed the European Commission's firm stance towards gun-jumping. However, the ruling does not seem to have any immediate effects on the transaction practice (in particular pre-closing covenants), leaving many questions to be answered in future decisions.

- And if you – too – can't get enough of these **gun-jumping** cases: There is a sequel in the making, starring French media companies **Lagardère and Vivendi**, which, in November 2023, have appealed before the General Court a European Commission request for information in their gun-jumping investigation of the Lagardère/Vivendi deal. To be continued…
- Christmas wouldn't be Christmas without some family drama. Or, in the case of the European Commission and the UK's CMA, without some **divergence between competition regulators**. The most recent major example was the planned acquisition of **eTraveli** by **Booking**, two online travel agencies ("**OTA**"): While the CMA had already cleared the transaction in Phase I in September 2022, the European Commission, in September 2023, blocked the merger after a Phase II investigation, citing concerns that the deal would strengthen Booking's dominance and result in higher costs, which were, in the European Commission's view, not sufficiently addressed by the remedies proposed by Booking (the situation, therefore, was the other way around as in the other major case of divergence in 2023: **Microsoft's acquisition of Activision Blizzard**, which had been cleared by the European Commission, while the CMA initially blocked the merger).

  The **Booking/eTraveli** case also made headlines because the decision was based on an untested but – if confirmed by the courts – consequential **conglomerate theory of harm**, referring to cases where there may not be horizontal or vertical overlaps, but the parties are active on neighboring markets: In the EEA, Booking is mostly active in the hotel OTA business; eTraveli mainly acts as a flight OTA. The European Commission argued that the transaction would have allowed Booking to become the main player in the flight OTA business, thereby generating significant additional traffic to its core hotel platform and strengthening its ecosystem. Booking has appealed the European Commission decision before the General Court (case no. T-1139/23).

Foreign Subsidies Regulation

It is not only the most wonderful time of the year, but also the time that is often used to reflect on key events of the year that is drawing to a close.

- In the field of foreign subsidies law, one of the key events in 2023 certainly was **the Foreign Subsidies Regulation's (FSR) entry into force** on 12 July with notification requirements for certain transactions since 12 October, and the adoption of the FSR Implementing Regulation. While dealmakers were hoping for the FSR Implementing Regulation to be a (very) early Christmas present that would ease the burden of having

to identify relevant financial contributions, gathering the data and reporting these financial contributions, this has not exactly turned out to be the case. Although the European Commission responded to heavy criticism from various companies and industry associations by raising the threshold for individual financial contributions that need to be reported to EUR 1 million (from EUR 200.000) and only having them report aggregated financial contributions per third country if they exceed EUR 45 million (previously EUR 4 million), identifying the relevant financial contributions and collecting the relevant data is still a very burdensome exercise for which most companies currently do not have a monitoring system in place. Moreover, first practical experiences show that DG COMP in pre-notification may request aggregated financial contributions to be broken-down and to be provided with detailed information for certain financial contributions. Not surprisingly, this focusses on financial contributions allocatable to specific countries.

- The first two months of application of the notification requirement have not brought much clarity on **how the European Commission is applying its newest tool**. DG COMP's Task Force on Foreign Subsidies still appears to be understaffed compared to the resources that had been promised to it. According to Eddy de Smijter, Head of the International Relations Unit which is home of the Task Force on Foreign Subsidies, some cases were brought to DG COMP's attention as a result of them having to "remind" some companies of the existence of the FSR. Since the notification obligation entered into force, DG COMP handled a medium double-digit number of cases under the FSR (all of which also notifiable under the EUMR). This number already surpasses the anticipated annual number of cases expected to trigger a notification requirement – and we are only just over two months into the application of the notification obligation!
- In addition to the cases notified to the European Commission and the cases currently in pre-notification discussions, the European Commission has received several informal complaints about allegedly distortive foreign subsidies. The public's attention was especially caught by **informal complaints in the football sector**, namely the Spanish La Liga's complaint about financial aid from Qatar to French outlet Paris Saint-Germain and the Belgian football club Royal Excelsior Virton's complaint about competing club Lommel SK, part of the City Football Group, having received "financial doping" in the form of "artificially inflated sponsorship agreements but also – more directly – through capital injections" from UAE. The European Commission, however, confirmed that it has so far not opened any proceedings on its own initiative, neither in the football sector nor in any other industry sector, but prioritizes the notifications of transactions it has received under the FSR.
- The FSR does not lead to **transparency in the processing of cases**. While the term "Foreign Subsidies" has its own policy area category in DG COMP's case search, a search in this category currently does not return any findings. Most cases handled by DG COMP under the FSR will fly under the public's radar: Unlike transactions notified under the EUMR, under the FSR transactions do not need to be published, unless the European Commission decides to carry out an in-depth Phase II investigation into a transaction involving foreign subsidies potentially distorting the EU internal market

(in which case a summary notice of the decision to initiate an in-depth review will be published). While this discretion may be welcomed by the companies involved, it restricts other stakeholders from voicing their concerns in Phase I proceedings. It also has downsides for the companies involved: as the European Commission does not issue clearance decisions in Phase 1 but clears notified transactions by lapse of the review period, obtaining early clearance (as is possible under the EUMR) seems difficult. Hopefully by our next Christmas edition of Brussels à Jour we will not only have more clarity on the practical hurdles when applying the FSR.

Until next time, enjoy the holidays and don't forget to follow us on LinkedIn for your favorite EU Competition Law topics!

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