



## BRUSSELS À JOUR

**All I Want for Christmas...****A Brussels Year in Review**

Markus Roehrig, Philipp Neideck, Laura Stoicescu, Joachim Burger report on the latest developments from the European capital of competition law.

Another year has come and gone and although most of us are mentally still somewhere in March 2019, quite a few things happened in the meantime. Before you unwrap your gifts from Santa and kick back with a well-deserved mug of steaming Glühwein (as we like to call it), let's have a look at what 2021 brought in terms of EU competition law – through cartel enforcement, merger control, State aid and foreign subsidies, with a special shout-out to the digital economy developments.

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- The Commission broke cover, conducting its **first dawn raid** since the start of the pandemic. The subject of the raid was a German company active in the sector of garments manufacturing and distribution. The dawn raid in question was all the more relevant since on this occasion the Commission departed from its usual approach of only confirming inspections once a company makes them public. Instead, it confirmed the inspections in a press release, without naming the company involved, before the company put forward any press release. Throughout the rest of the year, the Commission undertook two other unannounced inspections regarding cartel suspicions in the field of wood pulp (October) and defence (November).
- The three cartel-related dawn raids are part of a larger upswing in the Commission's antitrust enforcement activity, which also included inspections related to a potential abuse of a dominant position in the animal health sector. Commissioner Vestager herself had already warned in October that more antitrust inspections were on the horizon. She specifically referred to a number of types of conduct the Commission would likely target, including **procurement** cartels, **no-poach** agreements, and collusion on sustainability.



- Commissioner Vestager confirmed the constant decrease in leniency applications, once the silver bullet in cartel detection. On leniency, the Commission suggested that cartel whistleblowers may need greater protection from civil damages claims to boost the number of leniency applications, although that is still a long way to go. At the same time, Commissioner Vestager indicated that it was time to step up the other detection methods, which have already shown their efficiency, in order to fill the detection gap. One such instrument is the anonymous whistleblower platform the Commission launched in 2017, and which provides it with around 100 messages every year. Another tool is the so-called “intelligence unit”, which, since its creation in 2016, has had an almost mythological existence. The launch itself was a rather footnote affair, after which its functioning or even efficiency were never brought up again. In October, Commissioner Vestager revealed that the James Bond-like structure has helped with investigations in more than 30 cartel and antitrust cases. And the Commission is planning for it to play an increasingly vital role in its work in the years to come.
- Notable developments in Luxembourg included:
  - *Sumal* – The Court of Justice confirmed that subsidiaries can be the target of follow-on damages actions over anticompetitive conduct by their parent companies if they sold cartelized products. The ruling promises to make it easier for claimants to bring cartel lawsuits. We covered the details in our November 2021 issue.<sup>1</sup>
  - *Google Shopping* – The ruling was the first major judicial test for the Commission’s approach to tackling Big Tech via antitrust powers. The judgment sets a framework for analyzing how power is wielded and deciding whether or not competition has been harmed.

### Merger Control

- In March, the Commission issued a communication giving “practical guidance” on the use of the referral provision of the EUMR (the now famous **Article 22**), particularly when referrals are appropriate even though the merger is not notifiable in the country in question. The Commission was specifically eyeing problematic deals such as “killer acquisitions”, where a large company buys up an innovative startup that may not yet have any significant revenue. We covered the details in our April 2021 issue.<sup>2</sup> 9 months later, the feedback on its enforcement is rather anticlimactic. Not only did some businesses and lawyers report that the guidance created significant uncertainty over which deals have to be notified, but also the anticipated flurry of guidance requests never happened, according to officials from the French and EU competition authorities. For instance, the Autorité de la Concurrence received only one formal request for guidance, on top of a few informal requests from companies that said they may come back for advice later. In the Brussels Bubble, rumor has it that everyone is following the *Illumina* saga, before making any moves of their own.

<sup>1</sup> [www.hengeler.com/en/2021-11-brussels-a-jour](http://www.hengeler.com/en/2021-11-brussels-a-jour)

<sup>2</sup> [www.hengeler.com/de/2021-04-brussels-a-jour](http://www.hengeler.com/de/2021-04-brussels-a-jour)



- Which brings us to the US gene-sequencing company **Illumina**, currently the only company to have had a merger referred to the EU under the new guidance. Illumina has taken the Commission to the bloc's General Court to challenge the move to claim jurisdiction to review its acquisition of cancer-detection specialist Grail. In the oral hearing of 16 December, Illumina went all out and argued that it was used as a guinea pig (their words, not ours) for a new method of asserting jurisdiction. The following 3 hours of Q&A with the judges covered everything from the philosophy behind the EUMR and subsidiarity, to whether Commissioner Vestager's speeches are legally binding. The case is currently being handled by the General Court under expedited procedure and its outcome might shed more light on the future enforcement of the Article 22 guidance. Although the Commission's review is still on-going (current deadline: February 2022), Illumina closed the Grail acquisition in August, prompting the Commission to adopt interim measures (*inter alia* a hold-separate obligation) due to the "*unprecedented early implementation of a concentration*", and also triggering an investigation for gun-jumping, i.e. a potential violation of the standstill obligation.
- The revision of the **Market Definition Notice** is making a strong comeback, under the impatient French and German eyes. Ever since the EU regulator vetoed the merger of Siemens and Alstom's railway business in 2019, the two governments argued that by taking such a narrow view of competition, the Commission was preventing the emergence of European companies that could compete on a global scale. In November, Commissioner Vestager pushed back confirming that European champions come in all shapes and sizes, and stressed that the debate was still open. The clarification follows up on the Commission's assessment notice of June, which largely confirmed the relevance of the Market Definition Notice, while at the same time identifying 20 areas where the Notice might need updating, to take into account changes in the global economy, evolutions in the Commission's decisional practice, and directives from the case law of the EU courts. Which way the revision will go is anyone's guess now, particularly since the Commission feels that EU markets are increasingly concentrated, so breeding European champions might turn out to be a *parcours du combattant*. The publication of the draft revised Notice is (still) expected at the beginning of 2022.
- In another case, the General Court chimed in with the Commission's conviction that, although crime does not pay in benefits, it pays high fines when caught. In September, Altice lost its appeal of a sanction levied by the Commission for the implementation of its buyout of PT Portugal before getting merger approval. Even if the Court reduced the fine by EUR 6 million, the ruling affirmed the Commission's view that pre-closing covenants, if not carefully tailored not to interfere with the target's business, can amount to **gun-jumping**, an important wake-up call for M&A dealmakers. The Court also confirmed that the obligations to notify a merger and not to close prior to clearance are two different sets of rules and that, where a company closed without even notifying its deal, the Commission could impose two fines. On 2 December, Altice challenged the judgment before the Court of Justice.



### State Aid

- Even though 2021 and a continuous inflow of COVID-19 cases continued to put its capacities to a stern test, the Commission – rather than throwing in the towel – kept pushing its agenda forward. What stands out are efforts aimed at preparing current State aid rules for the so-called “**twin transition**” of the European economy into a green and digital future.
- Christmas came three days early when the Commission published the cornerstone of its “Fit for 55” package on 21 December 2021, the “Guidelines on State aid for climate, environmental protection and energy 2022” (**CEEAG**), thereby replacing the previous 2014 guidelines. Entering into force on 1 January 2022, the CEEAG is an essential part of the Commission’s efforts to promote its Green Deal and aims to pave the way for increased public support towards green projects. The CEEAG comprises various new or revised sections (e.g. for renewables, energy efficiency, clean mobility and infrastructure) and allows for more flexible granting of aid, provided it contributes to the climate goals of the Green Deal. To ease the rules, the CEEAG foresees, *inter alia*, competitive bidding processes, the possibility of higher aid intensities (covering up to 100% of the cost difference to non-climate friendly projects) and even introduces new aid instruments such as Carbon Contracts for Difference.
- Besides its focus on its ambitious climate plan, the Commission has been all but silent on the second pillar of the twin transition. On digitalization, the Commission just recently – on 19 November – launched a public consultation on the proposed revision of the Guidelines on State aid rules for broadband networks (**Broadband Guidelines**), aiming to enable public support for deploying broadband networks particularly into remote and sparsely populated regions across Europe. In addition, specifically with a view to ease public support for digitalization-related research and innovation projects, the Commission tabled a proposal for a revised Framework for State aid for research and development and innovation (**RDI Framework**).
- To back up its efforts on the twin transition, the Commission also adopted and tabled several other frameworks corresponding to and complementing the aforementioned rules. This included the adoption of a Communication on Important Projects of Common European Interest (**IPCEI Communication**, entering into force on 1 January 2022) as well as a public consultation of proposed amendments to the General Block Exemption Regulation (**GBER**). Changes to the latter will prove to be of particular practical relevance, as it will under certain criteria allow to exempt various types of aid measures (e.g. “green” projects, green hydrogen, risk finance investment and various RDI projects) from the obligation to formally notify these to the Commission.
- Other noteworthy developments in the State aid area include the new private enforcement notice, encouraging a closer cooperation between the Commission and national courts (e.g. via new contact points) to facilitate competitor’s efforts in bringing State aid questions before national courts. Speaking of enforcement via court, also Luxembourg provided further insights beyond a number of COVID-19 cases (e.g. on discrimination through national aid (schemes), first in Case T-238/20). In Case C-57/19 P – *Tempus Energy v. Commission*, the Court of Justice handed down a



widely noticed judgment clarifying the Commission's investigative duties regarding notified measures under preliminary examination (*Phase 1*). According to the Court of Justice, contrary to the General Court's extensive interpretation in the now overturned judgment, when assessing whether to open a formal investigation (*Phase 2*), the Commission is not obliged to seek or research additional information on its own, but can limit its review to information in its possession. To seek annulment, an applicant must therefore show that the Commission should have had "serious doubts" as to the compatibility of the aid based on information available to it in Phase 1 or that such information warranted further enquiries.

### Foreign Subsidies

- On 5 May 2021, the Commission **proposed legislation** that would revolutionize the rules on foreign subsidies in the EU, essentially imposing a new regulatory notification regime akin to the EU Merger Regulation and State aid rules. For details, with a particular focus on implications in M&A transactions, please see our May 2021 edition.<sup>3</sup> The proposal is currently in the midst of the legislative process at the European parliament and the Council. It remains to be seen whether there will be substantial changes, in particular with respect to some of the question marks around the current draft.
- As far as the **interplay with the State aid rules** is concerned, one may ask whether the existing State aid rules and case law offer an appropriate blueprint for foreign subsidies, having in mind that such questions are also partially addressed by other frameworks (e.g. WTO rules). Furthermore, it remains unclear whether developments in one or the other field can – or even must – be translated into the respective counterpart.
- The foreign subsidies review comes on top of potentially applicable EU or national **merger control** proceedings and national FDI screenings. While with respect to EU Merger control proceedings, timelines and notification thresholds are largely aligned, it is unclear how a parallel review might pan out in practice. For instance, there is no guidance on potential remedies and whether merger control remedies might be accepted or in the Commission's view even sufficient to address additional competitive concerns caused by foreign subsidies. In addition, practical questions as to the gathering of information (RFIs to undertakings or third countries) or potential inspections of undertakings in – or outside the EU (possible under foreign subsidies regulation, n/a under merger control or State aid rules) and treatment in parallel proceedings remain unanswered.

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<sup>3</sup> [www.hengeler.com/de/2021-05-brussels-a-jour](https://www.hengeler.com/de/2021-05-brussels-a-jour)



### Digital Economy & Co.

- Ursula von der Leyen raised eyebrows and heartbeats when she delivered a very bold 2021 State of the EU speech before the European Parliament in September (**SOTEU**). In addition to backing up the upcoming Digital Markets Act (**DMA**), she also brought into the limelight a European solution to the global semi-conductors shortage, known since then as the **European Chips Act**. The Commission was remarkably tight-lipped about the new initiative, except for a brief mentioning in the Commission's 2022 work program. The initiative might see a very French revival with the 2022 French Presidency. Although semi-conductors are not mentioned in the Presidency's list of priorities published on 9 December, sources in the Brussels Bubble think that Commissioner Thierry Breton – in charge of the project – is likely to be supported in delaying the conclusion of the tech partnership with the US, in order to buy some time for Europe's industry. The next episode of the cloak and dagger drama is scheduled for spring 2022, with the 2<sup>nd</sup> EU-US meeting regarding the tech alliance. In the meantime, you can read more about the SOTEU in our September issue.<sup>4</sup>
- As for the **DMA**, discussions are close to the finish line and the French Presidency's enthusiasm to see it through is palpable – the DMA features front and center in its list of priorities. In the meantime, on 25 November, the Council agreed on a common position on the draft DMA, shortening the proposed deadlines, further defining the role of national competition authorities and confirming the Commission's role as sole enforcer of the regulation. The general approach completes the negotiating position agreed by the Council and provides the Presidency with a mandate for further discussions with the European Parliament, which are scheduled for 2022. You can read more about the DMA, including the German take on the debate, in our October issue.<sup>5</sup>
- Although the new **Vertical Block Exemption Regulation (VBER)** will have broad implications for all industries, the Commission's long awaited draft, published in July 2021, sure takes a special interest in the digital economy. VBER and guidance not only include extra provisions for "online intermediation services" – platforms in plain language –, effectively excluding certain business models from the safe-harbor. They also allow suppliers to apply dual-pricing (i.e. different sales prices for their retailers, depending on whether the goods will be sold online or offline) and abandon the long-standing principle that suppliers must not set materially different requirements for their retailers' online and offline sales channels. In the last 12 years since the adoption of the current VBER, e-commerce has certainly made a quantum leap (not just in respect to its importance for our daily life, but also technically) – and the Commission now clearly wants to protect and re-vitalize the "brick-and-mortar" competition. Unsurprisingly, the drafts were met with mixed feedback, but the time for changes is running out. The current VBER will expire on 31 May 2022 and the Commission is determined to have a follow-up legislation duly in place.

<sup>4</sup> [www.hengeler.com/en/2021-09-brussels-a-jour](http://www.hengeler.com/en/2021-09-brussels-a-jour)

<sup>5</sup> [www.hengeler.com/en/2021-10-brussels-a-jour](http://www.hengeler.com/en/2021-10-brussels-a-jour)



2022 is shaping up to be an exciting time for EU competition law.

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