Q4 2024

EU Competition Law Newsletter

Editorial

Dear Readers,

This Q4 2024 quarterly edition of Cleary Gottlieb's **EU Competition Law Newsletter** covers the transition to the new European Commission (2024-2029) and therefore starts off with an article on the policy report prepared by former President of the European Central Bank and former Italian Prime Minister, Mario Draghi (the "Draghi Report"). The Draghi Report calls for a new EU industrial strategy, featuring several proposals for competition policy, including: (i) clear guidelines to foster beneficial intra-industry cooperation; (ii) antitrust enforcement in labor markets; (iii) an innovation defense and notification threshold based on transaction value for mergers; (iv) EU-focused enforcement of state aid and "effective" enforcement of the Foreign Subsidies Regulation and the Digital Markets Act ("DMA"); (v) a new tool to allow the Commission to impose binding remedies against structural competition problems in certain economic sectors; and (vi) new security and resilience criteria within competition assessments.

Moving from policy to digital enforcement, this edition also analyzes the main developments that occurred since the entry into force of the DMA in March 2024 until the end of 2024. It evidences the wide-ranging enforcement powers of the Commission in relation to gatekeepers and their designated Core Platform Services and how the Commission has applied these in the first few cases. From interoperability solutions to the use of end user personal data, including self-preferencing, anti-steering, and side-loading, the Commission has already opened several investigations to look into a range of practices governed by the DMA within the first months of implementation of the DMA.

In addition, this edition also looks at a number of preliminary rulings and judgments from the EU courts. We select a few highlights in this editorial. First, the Court of Justice's preliminary ruling in *Tallinna Kaubamaja Grupp and KIA Auto* (Case C-606/23) provides a useful clarification on the standard of proof required to demonstrate the existence of anticompetitive effects under Article 101 TFEU. The Court of Justice confirmed that the same standard as under Article 102 TFEU applies, meaning that it is not necessary for competition authorities to demonstrate actual and specific anticompetitive effects: it is sufficient to show the existence of potential effects, provided

that these are sufficiently appreciable. Second, the Court of Justice's preliminary ruling in *Federation Internationale de Football Association v. BZ* (Case C-650/22) ("FIFA") provides useful insights into the interplay between competition law enforcement in labor markets, the protection of freedom of movement of workers (including the self-employed), and the rules of professional sports associations. The Court of Justice concluded that certain provisions within FIFA's transfer rules, specifically those related to the termination of player contracts, had the same effect as no-poach agreements and, therefore, constituted "by-object" infringements of EU competition law. Third, the Court of Justice's judgment in *Ferriere Nord v. Commission* (Case C-31/23 P) gives welcome clarification on the application of the principle of equal treatment in setting fines (and fine discounts) in Commission cartel decisions. The Court of Justice reduced Ferriere Nord's fine to rectify the Commission's unjustified unequal treatment, recalling that the principle of equal treatment prohibits the Commission from both treating different situations in the same way and treating similar situations in a different way, without an objective justification. Finally, the General Court assessed the interplay between the SIEC test and the creation or strengthening of a dominant position in appeals brought by Deutsche Telekom, NetCologne, and Tele Columbus against a Commission's decision approving Vodafone's acquisition of Liberty Global (Cases T-58/20, T-64/20, and T-69/20).

We would like to thank all of the authors for their insightful contributions to this edition. We hope you enjoy reading this edition and that it fuels further debate on these exciting developments.

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Brussels, March 2025

Highlights

- Innovation, Resilience, Investment, and Scale: Draghi's Vision for the Future of European Competitiveness
- "Killer Acquisitions" Study in Pharma Calls For Stricter Scrutiny
- When the Rubber Hits the (Digital) Road: Developments Regarding the Digital Markets Act Since March 2024

Innovation, Resilience, Investment, and Scale: Draghi's Vision for the Future of European Competitiveness

On September 9, 2024, Mario Draghi, former President of the European Central Bank and former Italian Prime Minister, presented his report on the Future of European Competitiveness (the "Report"), with the objective to inform the work of the incoming Commission. Featured in President von der Leyen's Political Guidelines issued in July,[1] and in several mission letters for the new Commissioners, the Report revived the debate concerning the competitiveness of EU companies in global markets.

Background

The Report highlights the EU's need for higher economic growth and enhanced productivity to finance investments needed to pursue the bloc's key priorities: digitalizing and decarbonizing the EU economy, increasing the EU's defense capabilities, and preserving the EU social model.[2] To address these demands, the Report proposes a "New Industrial Strategy" based on four pillars: (i) full implementation of the Single Market; (ii) alignment of industrial, competition, and trade policies; (iii) "massive" investment on a scale "unseen for half a century in Europe"; and (iv) governance reforms deepening coordination and reducing the regulatory burden on companies.[3]

The Report combines ten sectoral policy proposals with five broader horizontal initiatives which apply to all sectors.[4] With respect to competition enforcement, the Report backs a strong competition policy that "delivers lower prices" and stimulates "greater productivity, investment, and innovation." However, it raises concerns about the rise in concentration around the world over the past few decades and argues that competition enforcement needs to adapt to a "radically changing world."[5]

[1] *See* President von der Leyen, "Political Guidelines For the Next European Commission 2024–2029," July 18, 2024, available here.

[2] Mario Draghi, "The future of European competitiveness," September 2024, available here, Part A, pp. 1–5.

[3] Draghi Report, Part A, pp. 17–18.

[4] The ten sectoral policy proposals concern: (i) energy; (ii) critical raw materials; (iii) digitalization and advanced technologies; (iv) energy-intensive industries; (v) clean technologies; (vi) automotive; (vii) defense; (viii) space; (ix) pharma; and (x) transport. The five horizontal initiatives concern: (i) accelerating innovation; (ii) closing the skills gap; (iii) sustaining investment; (iv) revamping competition; and (v) strengthening governance.

[5] Draghi Report, Part B, p. 298.

Articles 101 and 102 TFEU

The Report supports adapting competition enforcement so that it does not inhibit certain forms of intra-industry cooperation, by simplifying existing review processes, and issuing "clear guidance, templates and ease of access" from the Directorate General for Competition for specific sectors.[6] Additionally, it proposes that competition enforcement should enhance job mobility in labor markets, and recommends scrutinizing practices such as non-compete and no-poach agreements.[7]

The Report also favors *ex post* competition enforcement over *ex ante* national-level regulation in abuse of dominance cases,[8] as the latter "disincentivises investments and risk-taking."[9] It criticizes the new draft Guidelines on the application of Article 102 TFEU to abusive exclusionary conduct by dominant undertakings[10]—which are under review after being subject to public consultation—for the "excessive discretion" that they grant to the Commission in finding exclusionary abuses. In particular, the guidelines neither: (i) detail under which conditions tying can be presumed to have exclusionary effects; nor (ii) provide a safe harbor for dominant firms setting prices above average total cost.[11]

Merger control

The Report calls for "a change in operating practices and updated guidelines to make the current Merger Regulation fit for purpose."[12]

More specifically, the Report advocates for the introduction of an "innovation defence," which would allow the merging parties to show that their transaction increases their ability and incentive to innovate. The defense would entail an *ex post* monitoring mechanism of investment commitments and requirement for the parties to show that their merger "would cause no harm to consumers in the long run." Competition authorities would weigh the short term benefits to innovation linked to increased scale against future costs of lower innovation incentives.[13]

The Report also proposes additional reforms for simplifying and refining merger procedures, such as expanding the 2023 Merger Simplification Package[14] and clarifying the use of the Article 22 EU Merger Regulation,[15] especially after the Court of Justice's Illumina/GRAIL ruling.[16] Draghi considers that a "simple solution to the ambiguity" would be to set a threshold for mandatory notifications based on the value of the transaction, following the Austrian and German models.[17]

The Report calls for selected sectorial consolidation, notably in the telecommunication and defense sector. In Draghi's view, the proliferation of regulation is costly and disincentivizes investment in the telecoms sector.[18]

State Aid and the Foreign Subsidies Regulation ("FSR")

Draghi advocates for a return to a "normal" and "strong" enforcement of State aid rules, moving beyond the temporary frameworks triggered

[6] Draghi Report, Part B, p. 300.

[7] *Ibid.*, p. 247 and p. 255.

[8] Draghi Report, Part A, p. 35.

[9] Draghi Report, Part B, p. 75.

[10] *See* European Commission, "Guidelines on exclusionary abuses of dominance," European Commission, 2024, available here.

[11] Draghi Report, Part B, p. 304 and footnote 9.

[12] *Ibid.*, p. 299.

[13] *Ibid.*, pp. 299–300.

[14] *See* European Commission, "Simplification of merger control procedures," European Commission, 2023, available here.

[15] Draghi Report, Part B, p. 304.

[16] *See* Cleary Antitrust Watch Blog, "Illumina/GRAIL: ECJ Rules European Commission Lacks Jurisdiction to Review Merger Falling Below EU and National Merger Thresholds," September 6, 2024, available here.

[17] Draghi Report, Part B, p. 304 and footnote 9. *See* Cleary Alert Memorandum, "Germany and Austria introduce Transaction Value Merger Notification Thresholds," June 28, 2017, available here.

[18] *Ibid.*, p. 70.

by the COVID-19 and energy crises. While he acknowledges that these measures helped expand state support to ease "the pain of EU citizens and businesses", he critiques them for fragmenting the common market, distorting competition, deteriorating public finances, and triggering "inefficient" subsidy races. The Report supports reforming the State aid compatibility assessment to: (i) consider whether a measure is coherent with EU-wide industrial policies; (ii) allow for more aid where EU coordination is being enhanced and make it conditional on the enhancement of open access and interoperable solutions, and the development of Europe-wide standards; and (iii) give more weight to potential impacts on resiliency and innovation.[19] The Report also advocates for reforming and expanding the Important Projects of Common European Interest ("IPCEIs"). Draghi proposes that IPCEIs should benefit from a faster administrative approval process and finance a "broader" class of innovations in strategic sectors—instead of only breakthrough innovations.[20]

Draghi supports applying the FSR "effectively" so that it results in "the intended benefits for EU consumers and businesses." He warns that, otherwise, the EU would have lower credibility as a regulator and would suffer a "reduced appetite of multinational companies to invest in Europe and the delayed deployment of technological advances."[21]

The Digital Markets Act ("DMA")[22]

The Report praises the DMA's goals of facilitating competition, fairness, and contestability in digital markets. It warns that the DMA's implementation must not become an administrative and compliance burden, nor create legal uncertainties akin to GDPR, and must be enforced within shorter time frames.[23] The Report advocates resources for the Commission to apply its DMA powers "effectively".[24] Specifically, it proposes clarifying Article 1(6)(b), which allows national competition rules to impose additional obligations on gatekeepers, to prevent regulatory fragmentation within the single market.[25]

Additional competition proposals

The Report lays out a range of reform proposals, some of which are inextricably linked to competition enforcement and policy:

— **Adoption of the so-called New Competition Tool ("NCT").** The NCT was considered, but ultimately abandoned, by the Commission in 2020.[26] It is "a market investigation instrument designed to address structural competition problems and to determine a solution together with firms."[27] The NCT would allow the Commission to undertake market studies and investigations to identify competition problems, and impose binding remedies. It would be implemented across five priority areas.[28]

— **Security and resilience criteria in DG COMP's assessments.** This security and resilience assessment should be carried out exclusively in sectors where those dimensions are crucial (*e.g.*, security, defense, energy, and space), and outside of the competition unit, for instance by a Resiliency Assessment Body.[29]

[19] Draghi Report, Part B, pp. 301–302.

[20] *Ibid.*, p. 301.

[21] *Ibid.*, p. 302.

[22] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ 2022 L 265/1.

[23] Draghi Report, Part B, p. 79.

[24] *Ibid.*, p. 302.

[25] *Ibid.*, p. 304 and footnote 9.

[26] *See* European Commission, "Impact Assessment for a possible New Competition Tool," European Commission, 2020, available here.

[27] Draghi Report, Part B, p. 303.

[28] *Ibid.*, p. 302–304. The five areas are selected based on where current competition tools are known to be insufficient. These five areas are: (i) tacit collusion; (ii) markets where the need for consumer protection is more likely to be needed (*e.g.*, due to behavioral biases); (iii) markets where economic resilience is weak (*e.g.*, due to reliance on a single source of raw material); (iv) past enforcement actions where the information received from the authorities indicates that the commitments or remedies adopted are not delivering competition; and (v) digital markets where strong network effects and data barriers to entry impede competition, and these cannot be addressed by the DMA.

[29] *Ibid.*, pp. 300–301.

Conclusion

The Report has sparked considerable media interest and debate.[30] President von der Leyen's declaration that all Members of the College of Commissioners should draw on the Report to inform their tenure reinforced the Report's political importance, framing it as a key priority within the broader EU strategic agenda.[31] In particular, von der Leyen has endorsed the proposals that envisage linking competition enforcement to the EU's key goals of decarbonization and digitalization, emphasizing innovation in competition assessments, and reforming the EU merger guidelines.[32] The Report is already at the core of key initiatives of the new Commission, like the new Competitiveness Compass, which von der Leyen called "the translation of the Draghi report with inputs of the Letta report into a communication of the Commission."[33]

The report has also elicited reaction from EU governments,[34] legislators,[35] competition authorities,[36] the private sector,[37] academia,[38] and civil society.[39]

Executive Vice-President Teresa Ribera has similarly expressed support for Draghi's proposals.[40] In terms of regulatory reform, Ribera has promised to "significantly simplify and speed up processes" and "cut red tape," in line with Draghi's recommendations.[41] Specifically, she has highlighted that the Horizontal Merger Guidelines need to be revisited and killer acquisitions targeted, and that she will prioritize DMA and FSR enforcement "to deliver real added value for EU consumers and businesses."[42] Ribera has echoed Draghi's view of Chinese and US competition to "lead in green technology, microchips, and digital innovation" as an "existential challenge," and insisted, in line with the report, that "it's the investments we make today that shape the reality we live in tomorrow."[43] This alignment with Draghi's vision highlights a shared commitment to regulatory reform and strategic investment, reinforcing the urgency of addressing global competition and ensuring Europe's economic resilience in the years to come.

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[30] *See, e.g.*, The Editorial Board, "Whatever it takes to boost European competitiveness," Financial Times, September 9, 2024, available here and Catherine Laurence Martens-Preiss, "Mr Draghi's Report is a Wake-Up Call for Europe," Renew Europe, September 9, 2024, available here.

[31] *See* European Commission, "Speech by President von der Leyen at the European Parliament Plenary on the new College of Commissioners and its programme," European Commission, November 27, 2024, available here. Notably, President von de Leyen's Mission Letter to Teresa Ribera draws significantly from the Report in many of its directives, such as reforming merger policy to enable greater innovation and scale, making IPCEIs swifter and more focused on strategic sector innovation, and effectively enforcing both the FSR and the DMA. *See* European Commission, "Mission letter, Teresa Ribera Rodríguez, Executive Vice-President-designate for a Clean, Just, and Competitive Transition," European Commission, September 17, 2024, available here.

[32] *See* Statement by President von der Leyen at the joint press conference with Mario Draghi on the report on the future of EU competitiveness, September 9, 2024, available here, "...to be competitive, we need to master the clean and digital transition. We set the basis for this, as you know, the clean and digital transition, in my first mandate. Now it is time to see it through. We must support our industry to go through decarbonisation through innovation and turn this into a competitive advantage."

[33] *See* Statement by President von der Leyen on the EU Competitiveness Compass, January 29, 2025, available here.

[34] *See* Carlos Cuerpo, "L'Europe omnivore. La doctrine espagnole en réponse au rapport Draghi," Grand Continent, September 19, 2024, available here and Raphael Minder, "Mario Draghi's 'old Europe' mindset overlooked eastern dynamism, ministers complain," Financial Times, September 26, 2024, available here.

[35] *See* Magnus Lund Nielsen, Nicholas Wallace, and Nicoletta Ionta, "EU politicians weigh in on Draghi report," Euractiv, September 9, 2024, available here.

[36] *See* Tono Gil and Chris May, "EU competitiveness won't improve by reducing competition, Germany's Mundt says," MLex, September 11, 2024, available here and Sarah Cardell, "Driving growth: how the CMA is rising to the challenge," UK Government, November 21, 2024, available here.

[37] Markus Reinisch (VP Public Policy Europe at Meta) said in his LinkedIn post in October 2024 that "As it stands, companies looking to rollout AI products in Europe face fragmented and overlapping regulation, and an incomplete Digital Single Market. All things identified by Mario Draghi in his recent report on European competitiveness. It's a much needed wake-up call, as Europe is losing out on new generations of AI products and models as a result of this uncertainty," available here. Similarly, Matt Brittin (President, Google EMEA) highlighted that "Developing good policy and responsible AI will need close coordination between governments, the private sector, academia and civil society. Through our AI Opportunity Initiative and other partnerships we're committed to working with others to get this right. But, as Mario Draghi highlighted, change is also needed in the regulatory environment." Google Blog, October 1, 2024, available here. *See also* Lucy C. Cronin, "Poland's EU Presidency – A secure and resilient EU supported by a competitive Single Market," Amazon News, January 28, 2025, available here.

[38] Maciej Bukowski, "Draghi Deficit: Overlooking Europe's Eastern Strength," CEPA, October 31, 2024, available here.

[39] Paula Soler, "Critics slam Mario Draghi's landmark EU competitiveness report as 'one-sided,'" Euronews, September 20, 2024, available here.

[40] Questionnaire to the then Commissioner-designate, Teresa Ribera, Executive Vice-President for the Clean, Just, and Competitive Transition, October 2024, available here.

[41] *Ibid.*, p. 4 ("...in order to be successful in the current global environment, we need a well-functioning single market to boost prosperity, protect the consumers and build an appealing ecosystem for investment, innovation, clean industry and employment to compete globally").

[42] *Ibid.*, p. 13.

[43] *See* Speech by Executive Vice-President Teresa Ribera at the CRA Annual Conference on the Competition policy adapted to the new global realities, December 10, 2024, available here.

"Killer Acquisitions" Study in Pharma Calls For Stricter Scrutiny

On November 28, 2024, the Commission published the results of an extensive *ex-post* study examining its past enforcement of merger control rules in the pharmaceutical sector (the "Study").[44]

The Study assessed transactions (*i.e.*, M&As as well as licensing deals and R&D cooperation agreements) that took place between 2014 to 2018 and were not subject to merger control with a view to evaluating the pervasiveness of so-called 'killer acquisitions', whereby large, incumbent companies acquire smaller, innovative competitors "with the primary objective of discontinuing the target's overlapping innovation projects, to the detriment of future competition."[45] The Study also examined five pharmaceutical mergers that have been reported to the Commission to examine how effectively merger review had addressed the risk that the acquirer discontinue overlapping projects to eliminate competition. The Study concludes by outlining several reforms to better detect and deter 'killer acquisitions'.

Takeaways of the Study

— **Occurrence of 'killer acquisitions'.** The Study finds that, among the 3,193 pharmaceutical transactions that took place between 2014 to 2018, 240 involved overlapping R&D pipelines. Of those, 89 (37%) allegedly raised *prima facie* concerns because drug projects were discontinued post-transaction with no obvious legitimate reasons. The Study however acknowledges that further information (including access to parties' internal documents) would be needed to conclude whether any of those genuinely eliminated competition.

— **Lack of effectiveness of the current legal framework.** The Study opines that the current regulatory framework fails to effectively address problematic 'killer acquisition' deals that "escape" *ex-ante* review, either because they fall below merger thresholds or are not to be structured as concentrations.[46] A number of deals fall below the merger control thresholds. Article 22 EUMR[47] referrals have been useful to capture deals falling below the EU threshold, but limited in scope following the *Illumina/Grail* judgment[48] (which held that Member States must be competent under their own national merger control rules to refer deals). Antitrust tools (Articles 101 and 102 TFEU), which can examine deals *ex post*, are hard to apply effectively without insight into anticompetitive intent or effects.

— **Policy recommendations.** The Study outlines several proposals to better detect and defer 'killer acquisitions': (i) revising the EUMR to lower the notification threshold and/or granting 'call-in' powers to the Commission, allowing it to require the notification of below-threshold mergers that threaten to significantly impede competition; (ii) requiring parties to transactions involving overlapping R&D pipelines (including licensing deals) to notify their deal in a simplified type of form and provide periodic updates on post-deal development and planned discontinuations; (iii) introducing new interim injunction powers

[44] Commission, 'Ex-post evaluation, EU Competition Enforcement and Acquisitions of Innovative Competitors in the Pharma Sector Leading to the Discontinuation of Overlapping Drug Research and Development Projects,' November 28, 2024, available here.

[45] Study, pp. 4 and 79.

[46] *Ibid.*, pp. 14 and 292.

[47] Council Regulation 139/2004, on the Control of Concentrations Between Undertakings (EC Merger Regulation), OJ 2004 L 24 1, ("EUMR"), available here.

[48] *See Illumina and GRAIL v. Commission* (Joined Cases C-622/11 P and C-625/22 P) ECLI:EU:C:2023:227, paras. 150, 185, 201, and 205–218.

to preserve innovation during investigations; and (iv) enhancing remedies to better prevent the risk of post-closing anti-competitive discontinuation of drug projects.

Scope and methodology of the Study

Based on publicly available data sources,[49] the Study identifies over 6,000 transactions, including M&As and other transactions, such as licensing and R&D agreements, that occurred in the pharmaceutical sector between 2014 and 2018.[50] Of those for which sufficient information is available according to the authors (*i.e.*, 3,193 transactions), the Study identifies 240 transactions involving overlapping R&D projects.[51] Of these, the Study finds that 89 transactions (37%) led to the discontinuation of such projects with no obvious legitimate reason. The Study acknowledges that public information sources alone are insufficient to conclude whether the project was discontinued for a legitimate reason or to eliminate competition.[52]

To identify the total number of transactions that could potentially qualify as 'killer acquisitions', the Study employs a two-step methodology:[53]

— **Automated analysis.** The authors of the Study used statistical models to identify transactions that may warrant further scrutiny based on observed patterns of discontinuation. They assessed whether there was an ongoing commercialization or new clinical trial of the R&D projects of the parties.[54] They classified the discontinuations they identified into three types:[55]

- **Type A (No Discontinuation):** No evidence of discontinuation; the drugs are either still under development (*i.e.,* undergoing clinical trials) or the drugs are still on the market.
- **Type B (Inactivity-Based Discontinuation):** No evidence of new clinical trials initiated post-acquisition, and all trials "active" at the time the deal was signed are either completed or suspended for more than 24 months.
- **Type C (Discontinuation based on Termination/Withdrawal):** No evidence of ongoing development of the drugs; at least one clinical trial among those "active" at the time the deal was signed is terminated or withdrawn, suggesting potential strategic motivations.

— Once discontinuations are identified, they are classified as either 'benign' or *prima facie* relevant for further investigation as potential 'killer acquisitions'.[56]

- Benign discontinuations are those attributable to technical reasons, such as safety concerns or poor experimental design.[57] This includes situations where: (i) drugs from both parties are discontinued after the deal; (ii) one drug is discontinued and the other is redirected post-acquisition; or (iii) if the drugs continue to

[49] The Commission's analysis was based on the following publicly available data sources: Springer Nature's AdisInsight Database for pharmaceutical deals and drug information; clinical trial data from ClinicalTrials.gov and the EU Clinical Trials Register; data on marketed drugs from the FDA's Orange and Purple Books, as well as the European Medicines Agency's ("EMA") European Public Assessment Reports ("EPARs") and lists of approved generic and biosimilar drugs; and medical journals published online in PubMed Central. *See* Study, p. 84.

[50] *Ibid.*, pp. 81 and 138.

[51] The Study's findings are constrained by certain limitations. Of the 6,315 transactions of interest, 4,616 lacked sufficient information on deal value. Additionally, nearly half of the transactions did not provide information on the object of the deal, limiting the scope of analysis. Publicly available sources were the primary data inputs, which may not fully capture commercial incentives, internal business strategies, or the true competitive dynamics of the transactions assessed; *Ibid.*, pp. 300–306.

[52] *Ibid.*, pp. 12 and 149.

[53] *Ibid.*, p. 140.

[54] *Ibid.*, p. 110.

[55] *Ibid.*, p. 112.

[56] *Ibid.*, p. 113.

[57] *Ibid.*, p. 115.

overlap in the same or related MeSH terms,[58] indicating they are still being developed or marketed in the same therapeutic area.[59] For Type C discontinuations, the Commission review termination reasons. If the reasons are technical and unrelated to the transaction (due, *e.g.*, to the involvement of regulatory authorities), the discontinuation is considered as benign.[60]

- When a discontinuation is not classified as benign, it is considered *prima facie* relevant and flagged for further investigation.

— **Manual screening.** A detailed review of these transactions is conducted to assess whether the discontinuation of the R&D project could result in a negative effect on competition.[61] This entails (i) verifying the findings of the large-scale analysis and (ii) conducting research in public information on the transaction, the substitutability of the overlapping projects, the technical and clinical justifications for termination, the commercial viability of the discontinued R&D projects, and the potential impact on competition and innovation in the relevant market.[62]

— **Case Studies.** The Study conducts case studies on five pharmaceutical mergers involving human drug R&D projects that were notified to the Commission between 2014 to 2018.[63] The cases were selected based on overlapping R&D pipelines, market concentration levels, and potential anticompetitive risks.[64] These cases were *BMS/Celgene*,[65] *J&J/Actelion*,[66] *Novartis/GSK Oncology*,[67] *Novartis/GSK (Ofatumumab)*,[68] and *AbbVie/Allergan*.[69]

Effectiveness of competition law tools to address 'killer acquisitions'

The Study identifies several areas where existing tools allegedly do not allow regulators to review the potential anti-competitive effects of below-threshold mergers *ex ante*:

— **Insufficient public information.** Public sources lack insight into parties' internal strategies, commercial incentives, and development plans of the parties involved. The Study argues that without access to confidential company data, it is nearly impossible to assess *ex ante* whether a transaction may lead to the discontinuation of overlapping drug projects for strategic (anticompetitive) reasons, rather than for legitimate technical or commercial motivations.[70]

[58] Medical Subject Headings (MeSH) terms are used to categorize and organize information in clinical trials registered on ClinicalTrials.gov, an online database of clinical trials in the United States. These terms provide a numerical and hierarchical structure that clarifies the relationships between different pharmaceutical products or molecules, helping to identify whether they belong to the same therapeutic class, target similar diseases, or share other relevant characteristics. *See also* Study, p. 6.

[59] *Ibid*., p. 117.

[60] *Ibid*., p. 114.

[61] *Ibid*., p. 7.

[62] *Ibid*., pp. 132–135.

[63] Although *BMS/Celgene* and *AbbVie/Allergan* were notified to the Commission in 2019, the authors of the Study considered they would offer valuable insights and included them in the Study. *Ibid*., pp. 16 and 163.

[64] In selecting these cases, the Commission considered amongst the following factors: (i) the development stage of overlapping products, as late-stage projects tend to pose a greater competitive threat; (ii) the market structure, focusing on high levels of market concentration and limited competitors; (iii) the transaction value in relation to the turnover of the entities involved, which often signals strategic intent to acquire innovative but smaller competitors; and (iv) the presence of exclusivity clauses in licensing agreements which may limit competitive dynamics. *Ibid*., pp. 125 and 165.

[65] *Bristol-Myers Squibb/Celgene* (Case COMP/M.9294), Commission decision of July 29, 2019 ("BMS/Celgene"), available here. The Commission assessed overlapping oncology pipelines and cleared the deal with divestment remedies; *see also*, *Ibid*., pp. 206–230.

[66] *Johnson & Johnson/Actelion* (Case COMP/M.8401), Commission decision of June 9, 2017 ("*J&J/Actelion*"), available here. The Commission focused on ensuring competition in pulmonary arterial hypertension treatments, ultimately clearing the deal with behavioral remedies to prevent competition loss in the development of insomnia medication; *see also*, *Ibid*., pp. 166–179.

[67] *Novartis/GlaxoSmithKline Oncology* (Case COMP/M.7275), Commission decision of January 28, 2015 ("*Novartis/GSK Oncology*"), available here. The Commission investigated overlapping cancer treatment pipelines and cleared the deal without remedies; *see also*, *Ibid*., pp. 199–207.

[68] *Novartis/GlaxoSmithKline* (*Ofatumumab*) (Case COMP/M.7872), Commission decision of December 22, 2015 ("*Novartis/GSK* (*Ofatumumab*)"), available here. The Commission cleared the deal with divestment remedies to prevent competition loss in autoimmune treatments; *see also*, *Ibid*., pp. 179–199.

[69] *AbbVie/Allergan* (Case COMP/M.9461), Commission decision of May 5, 2020 ("*AbbVie/Allergan*"), available here. The Commission approved the deal with divestment remedies to maintain competition in immunology and gastrointestinal treatments; *see also*, *Ibid*., pp. 230–239.

[70] *Ibid*., pp. 135–141.

— **Discontinuation of overlapping projects in concentrated markets.** Transactions involving "narrow overlaps" (*i.e.*, cases where acquired and existing R&D projects "directly compete" in the same therapeutic areas)[71] pose the greatest risk to competition. The 89 transactions flagged as potential 'killer acquisitions' involved the discontinuation of overlapping drug R&D projects where, based on publicly available information, no technical, safety, or clinical justification for halting development could be identified. In such cases, the Study assumes the overlapping drug R&D projects may have been stopped for strategic motives, including eliminating future competition.[72] The Study concludes that closer scrutiny is needed for transactions in concentrated markets, especially when they involve overlapping projects in advanced development stages.[73]

— **'Killer acquisitions' beyond M&A deals.** The Study finds that 'killer acquisitions' are not limited to M&A. Licensing agreements and R&D collaborations accounted for 77% of the transactions identified as involving drug discontinuations.[74] However, the Study claims that these deal types are frequently structured in a way to avoid triggering a filing obligation. Given insufficient access to critical internal documentation, they often escape *ex post* regulatory scrutiny as well.[75] The Study suggests that licensing and R&D agreements may also warrant the same level of regulatory review as M&A transactions.[76]

— **Evaluating the current legal framework.** The Study formulates the following view on the current legal tools that allow to examine potentially relevant deals:

- **Articles 1 to 3 EUMR:** Most of the 89 transactions identified as potential 'killer acquisitions' were not notified to the Commission and involved early-stage, low-revenue targets. They generally involved high transaction value suggesting strategic value and potential competitive impact.[77] Turnover-based thresholds (alone) are not sufficiently apt to capture 'killer acquisitions', especially in the pharmaceutical industry where competition is driven to a significant extent by the innovations of relatively small firms.[78]

- **Article 22 EUMR:** The Study opines that this tool has been effective in capturing some problematic deals but lacks the scope to address all potentially harmful transactions. In particular, since *Illumina/GRAIL*,[79] referrals are only possible when the referring Member State has jurisdiction under its own national rules or no merger control regime of its own.[80]

- **Articles 101 and 102 TFEU:** These provisions capture more relevant deals, because they also apply to non-concentration agreements such as licensing deals and R&D collaborations. However, their ability to address complex agreements remains limited due to the high evidentiary burden imposed on regulators. In particular, it is often difficult to prove that such transactions have the object or effect of restricting competition, especially when they

[71] The Study defines a "narrow overlap" as the presence of two drug R&D projects that share both a therapeutic indication (TI)—the specific condition a drug is intended to treat—and a mechanism of action (MoA)—how the drug exerts its effect—indicating potential substitutability. In contrast, "broad overlaps" refer to projects that share only a TI or therapeutic area, without sufficient similarity in approach to support a direct competition assessment; Study, pp. 96–97.

[72] *Ibid.*, pp. 114; 148 and 149.

[73] *Ibid.*, pp. 145–149.

[74] Out of 83 transactions identified as having at least one *prima facie* relevant product discontinuation post-closing, 64 were identified as either stemming from a licensing agreement (27) or R&D collaboration (37). *See further Ibid.*, p. 138.

[75] *Ibid.*, p. 14.

[76] *Ibid.*, p. 285; *see further Ibid.*, pp. 163–164.

[77] *Ibid.*, pp. 161–162.

[78] *Ibid.*, pp. 258–260.

[79] *See Illumina and GRAIL v. Commission* (Joined Cases C-622/11 P and C-625/22 P) ECLI:EU:C:2023:227.

[80] Study, p. 259.

involve early-stage innovation, uncertain development outcomes, and limited public visibility into the parties' strategic intent.

What impact on future competition law enforcement?

To improve the effectiveness of competition tools and better prevent 'killer acquisitions' from happening, the Study identifies various areas of improvement:

— **Amending EUMR to expand the scope of the Commission's jurisdiction.** The Study proposes "targeted" amendments to (i) lower the thresholds set out in Article 1(5) EUMR, (ii) provide that Member States lacking jurisdiction under their own national merger control rules can refer a transaction *ex* Article 22 EUMR; or (iii) introducing "call-in" powers at EU level allowing the Commission to require the notification of a transaction falling below the threshold in the event the transaction threatens effective competition.[81]

— **Registry system.** The Study proposes a new notification system, whether voluntary or mandatory, requiring companies with a turnover above a certain revenue threshold[82] to file notice whenever acquiring an interest in a pharmaceutical pipeline giving rise to market-to-pipeline or pipeline-to-pipeline overlaps.[83] The reportability requirement would not apply only to acquisitions of "controlling interest (sole or joint)", but also acquisitions of "greater than 10% in voting shares or other management decision making", "assets comprising a business to which a market turnover can be attributed", or some "other" (undefined) interest.[84] The Study includes a proposed "Notice of interest" draft in Appendix A.5 of the Report, comprising of two forms:

- Form A would be used to register a new acquisition of interest to be filed prior to or within seven days of closing. The information required would be data that the registrant would have readily available following the transaction due diligence. Section 1 requires basic information about the parties, as defined under the EUMR. Section 2-4 require information about the interest being acquired, the type of transaction, the degree of exclusivity in any licenses, a summary of any collaborative arrangements, and a summary of the drugs in which the acquirer was obtaining an interest. Section 5-7 require information regarding the transaction value and payment means. Section 8 requires information on each overlapping product (where overlaps would be identified *e.g.*, according to therapeutic information and mechanism of action), including the most recent three trials at its most advanced stage of development, with summary details regarding its status and reason for any suspension or termination, if applicable.

- Form B is a single page form linked with Form A by the registrant's registration number, which is received upon completion of a Form A. The form is designed to allow the registrant to provide periodic (semi-annual or annual) updates on the status of each overlap product.

The Study finds that this reporting would help track licensing agreements and R&D collaborations in real time. After filing notice, for a two-year period post-acquisition, registrants would be expected to provide: (i) periodic updates on the development and commercialization of overlapping drugs through the submission of a Form B and (ii) submit a report should they intend to discontinue the drug. Following each entry and update, the Commission would have a limited time frame (*e.g.*, three or six months) to launch an

[81] Study, p. 260.

[82] *Ibid.*, p. 286. The Study does not propose a specific threshold but notes "a certain threshold" that would ensure the given company's nexus with the EU and likely competitive significance.

[83] *Ibid*. Potential competition between pipeline products and currently marketed products is often referred to as "pipeline-to-market" competition, while potential competition solely between pipeline products is referred to as "pipeline-to-pipeline" competition. *Novartis/GSK Oncology*, para. 47.

[84] Study, p. 286, Appendix A.5 'Notice of interest: Forms A and B' under section II. 'The Acquisition'.

inquiry,[85] after which any inaction would result in a tacit approval of the most recent activity engaged by the relevant party.[86]

— **New injunction powers.** According to the Study, the proposed new registry system for enforcement should be supplemented by new injunction powers, affording the Commission "some of the benefits of ex-ante review."[87] The Commission should be able to pursue interim measures (*e.g.*, hold separate and project-maintenance obligations) while it investigates whether actions taken by the company regarding overlapping drugs are aimed towards anticompetitive shelving of the drug in question.

— **Enhanced remedies.** The Study also examines the effectiveness of merger remedies in ensuring that R&D projects reach the market. The Study finds that remedies were "generally well-designed" in the three pharmaceutical mergers examined that were cleared subject to remedies.[88] However, in all three cases, at least one overlapping molecule was discontinued in the relevant therapeutic indication after the deal. The Study clarifies that the discontinuation of a divested pipeline does not necessarily mean that the remedies were ill-designed, as development of pipeline drugs is by nature uncertain.[89] Indeed, in all three cases, the project could have been discontinued due to technical reasons unrelated to the remedies, (*e.g.*, technical drug failure, safety concerns, low accrual, lack of funding or futility).[90] To overcome the inherent uncertainty to drug development, the Study suggests enhancing remedies to ensure pipeline projects are not discontinued post-closing with a view to eliminating competition but for valid motives. The Study suggests this could be done (i) conditioning the clearance of a transaction on the divestiture of a pipeline to a Commission-approved buyer, (ii) ensuring the viability of divested assets, and (iii) monitoring post-merger compliance.[91]

— **Antitrust enforcement powers.** The Study recommends deploying antitrust enforcement to address also non-M&A deals. The Study suggests reviewing, for example, exclusivity clauses[92] in licensing agreements or monitoring dominant firms engaging in "buy-and-kill" tactics.[93] However, the Study recognizes the importance of legal certainty and the issues that might arise if a regulator challenges *ex post* a transaction under Article 101 or 102 that was previously cleared *ex ante* under the rules of merger control, as "the legislature intended to exclude such a double assessment in principle."[94] "The conduct of a concentration which has been approved under the more specific rules of merger control […] could not as such be qualified (any longer) as an abuse of a dominant position within the meaning of Article 102 TFEU, unless the undertaking concerned has engaged in conduct which goes beyond that and could be found to constitute such an abuse."[95]

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[85] Study, p. 286. The Study does not provide the basis on which the Commission would open an inquiry but refers to a possible feature of the registry being suspensions for short periods of steps taken or proposed in a company's latest entry in the registry regarding the transaction. This could afford some benefits of ex ante review by allowing the Commission to pursue interim measures (e.g., hold separate and project-maintenance obligations) during the investigation period if the reported discontinuation raises concerns.

[86] *Ibid.*, pp. 286–288.

[87] *Ibid.*, p. 286.

[88] *Ibid.*, p. 292; *see further J&J/Actelion*, *Novartis/GSK Oncology*, and *AbbVie/Allergan*.

[89] *Ibid.*, pp. 292–293.

[90] However, the Study concluded in *J&J/Actelion* that the remedies could have been better designed to increase the likelihood that the relevant pipeline would reach the market. Specifically, the remedies were overly reliant on the active participation of J&J's partner (Minerva), which ultimately ended the collaboration. They were not effective in preventing Minerva from withdrawing from its co-developing role, nor were they successful in ensuring that J&J continued developing the overlapping indication. *Ibid.*, pp. 174–179.

[91] *Ibid.*, pp. 177–179.

[92] The authors of the Study hereby refer to exclusive licenses that ensure that no party other than the named licensee can exploit the relevant intellectual property rights (in general or in, e.g., a geographic region or field of use), thereby limiting the number of firms that can make use of the product; *Ibid.*, p. 123.

[93] *Ibid.*, pp. 269–271; *see also*, pp. 271–278.

[94] *Ibid.*, p. 268.

[95] *Ibid.*; *Towercast* (Case C-449/21), opinion of Advocate General Kokott, EU:C:2022:777, paras. 59–60.

Conclusion

The Study yields the following key conclusions:

— The methodology followed to identify so-called ‘killer acquisitions’ has several important limitations that make it difficult to conclude on the reality and magnitude of such ‘killer acquisitions’.

— While the Study finds that a number of transactions in the period 2014 to 2018 have been followed by discontinuation of overlapping projects, the Study does not assess—due to lack of information on the parties and the business concerns—whether those took place because of the merger and with a view to eliminating competition, or for other legitimate reasons (*e.g.*, technical or safety concerns, lack of funding, legitimate changes in strategic priorities).

— The Study outlines a menu of tools that could be introduced or enhanced to better detect alleged ‘killer acquisitions’. It, however, does not provide an assessment on the costs and benefits of each proposed measure and, as such, provides limited insights as to the most effective tools available to address the perceived risk.

When the Rubber Hits the (Digital) Road: Developments Regarding the Digital Markets Act Since March 2024

Since the obligations under the Digital Markets Act (“DMA”) started to apply to the first wave of gatekeepers in March 2024, there have been a number of important developments on the implementation and enforcement of the DMA by the Commission.[96] In particular, the Commission has: (i) adopted a second wave of designation decisions concerning Apple and Booking Holdings Inc. (“BHI”), while exempting other services of Apple, ByteDance, X Holdings Corp., and Microsoft; (ii) defended appeals before the European courts concerning a number of its designation and non-designation decisions; (iii) launched whistleblower tools for the DMA and the Digital Services Act (“DSA”); and (iv) opened non-compliance investigations against Meta, Alphabet, and Apple as well as specification proceedings into Apple’s compliance with DMA interoperability obligations.

Second wave of gatekeeper designations and exemptions

In a second wave of designation decisions, the Commission designated (i) Apple as a gatekeeper with respect to its iPadOS operating system, and (ii) BHI as a gatekeeper for its Booking.com online intermediation service. There are now seven undertakings designated as gatekeepers under the DMA—Apple, Alphabet, Meta, Amazon, Microsoft, ByteDance, and BHI—operating 24 core platform services (“CPSs”).[97] The Commission also accepted rebuttals from X, ByteDance, Apple, and Microsoft about seven of their services that,

[96] Regulation (EU) 2022/1925 of the European Parliament and of the Council of September 14, 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ 2022 L 265/1.

[97] The Commission explains that core platform services are those services in the digital economy that “exhibit certain features and where absent regulatory intervention the identified failures would effectively remain un-addressed.” The DMA covers ten categories of CPSs: online intermediation services, online search engines, online social networking services, video-sharing platform services, number-independent interpersonal communications services, operating systems, web browsers, virtual assistants, cloud computing services, and online advertising services.

despite meeting the quantitative thresholds, were ultimately found not to be CPSs. These seven "exempted" services are: X, X Ads, iMessage, Edge, Bing, and Microsoft Advertising.[98] These exemptions join the earlier outright exemptions of Google's Gmail, Microsoft's Outlook.com, and Samsung's Samsung Internet.[99]

Following the first round of designation decisions in September 2023, the Commission designated two additional gatekeepers in April and May 2024, Apple (in respect of iPadOS) and BHI (in respect of Booking.com), respectively. The two second-wave designation decisions followed different processes: BHI had notified the Commission of its potential status as a gatekeeper as it had now met the thresholds, while Apple was designated following a market investigation.

Apple's iPadOS

On September 5, 2023, the Commission designated Apple as a gatekeeper with respect to its operating system iOS, its web browser Safari, and its online intermediation service App Store.[100] On the same day, the Commission opened a market investigation to assess whether the operating system iPadOS should be designated, despite it not meeting the quantitative thresholds laid down in Article 3(2) of the DMA, and whether it constituted an important gateway for business users to reach end users.[101]

Under Article 3(8) of the DMA, the Commission can designate as a gatekeeper any undertaking providing a CPS that meets each of the criteria laid down in Article 3(1) of the DMA, even if that undertaking does not satisfy each of the quantitative thresholds set out in Article 3(2) of the DMA.[102] The Commission has a statutory deadline of twelve months to conduct its investigation to examine whether such an undertaking should be designated as a gatekeeper.[103]

On April 29, 2024, the Commission concluded that iPadOS constitutes an important gateway for business users to reach end users and that Apple enjoys "an entrenched and durable position" with respect to iPadOS.[104] Following the criteria laid down in Article 3(8) of the DMA, the Commission considered: (i) the number of end users and business users of iPadOS; (ii) the degree to which these users are locked-in to iPadOS; (iii) the network effects exhibited by iPadOS; and (iv) the scale effects from which Apple benefits in relation to iPadOS.

Based on this assessment, the Commission found that, although the number of iPadOS end users did not reach the quantitative thresholds, it was close to doing so and was expected to rise in the near future. Notably, the Commission explained that the number of end users was significant in absolute, as well as in relative terms, compared to those of other operating systems for tablets, with 30–40% of tablets sold within the EU being iPads in 2022.[105] In addition, the Commission found that end users are locked-in to iPadOS because, (i) Apple leverages its large and closed ecosystem within which users enjoy a seamless experience

[98] Article 3(1) of the DMA established cumulative requirements for an undertaking to be designated as a gatekeeper: "(a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future." These requirements are presumed to be met if the undertaking exceeds the thresholds set out in Article 3(2) of the DMA.

[99] In September 2023, the Commission exempted these three services "outright" (*i.e.*, without first opening a market investigation). *See* Commission Press Release, "Digital Markets Act: Commission designates six gatekeepers," September 6, 2023, available here.

[100] Commission Decision C (2023) 6100 of September 5, 2023, designating Apple as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

[101] Commission Decision C (2024) 2500 of April 29, 2024, closing the market investigation opened by Decision C(2023) 6076, pursuant to Article 17 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and amending Commission Decision C(2023) 6100 of September 5, 2023, designating Apple as a gatekeeper pursuant to Article 3 of that Regulation ("iPadOS Designation Decision").

[102] Article 3(1) of the DMA established cumulative requirements for an undertaking to be designated as a gatekeeper: "(a) it has a significant impact on the internal market; (b) it provides a core platform service which is an important gateway for business users to reach end users; and (c) it enjoys an entrenched and durable position, in its operations, or it is foreseeable that it will enjoy such a position in the near future." These requirements are presumed to be met if the undertaking exceeds the thresholds set out in Article 3(2) of the DMA.

[103] The twelve-month statutory deadline is laid out in Article 17 of the DMA.

[104] *See* iPadOS Designation Decision, and also Commission Press Release IP/24/2363, "Commission designates Apple's iPadOS under the Digital Markets Act," April 29, 2024, available here.

[105] iPadOS Designation Decision, paras. 33–36.

across Apple's own devices, while it denies or restricts interoperability with third-party products and services, and (ii) tablet owners tend to own and stick to one brand of operating system with relatively long replacement cycles.[106]

The Commission considered that business users are also locked-in to iPadOS due to: (i) the large and commercially attractive user base that can only be reached through iPadOS; (ii) the importance of iPadOS for certain activities (*e.g.*, gaming, note-taking, and word processing); (iii) the cost of switching and multi-homing, in particular considering Apple's proprietary programming tools and languages; and (iv) the fact that Apple facilitates cross-platform development between iOS and iPadOS.[107]

Finally, the Commission argued that iPadOS exhibits strong network effects because it benefits "from the positive feedback loop stemming from the increasing end user base drawn to the Apple OS ecosystem and the ensuing concentration of business users to reach this valuable customer population."[108] It also explained that iPadOS benefits from strong economies of scale in a market where "providing or launching a new operating system [...] entails very high development and other upfront costs."[109]

This is the first designation decision that does not rely on the quantitative presumption, as set out in Article 3(2) of the DMA. Apple had until October 29, 2024 to ensure that its iPadOS CPS was fully compliant with the DMA. On November 4, 2024, Apple published its revised non-confidential summary of its DMA compliance report, including its compliance measures for iPadOS.[110] On the same day, the Commission announced that it intends to carefully assess whether Apple's compliance measures, also with regards to iPadOS, comply with Apple's DMA obligations.[111]

Booking.com

On May 13, 2024, the Commission designated BHI as a gatekeeper for its Booking.com online intermediation service. This decision was adopted 45 working days following BHI's formal notification to the Commission that it met the DMA's quantitative thresholds.[112] The Commission published its designation decision on October 14, 2024.[113]

The Commission concluded that Booking.com constitutes a single online intermediation service CPS irrespective of the different types of travel services it offers (*i.e.*, hotels, flights, car rental, *etc.*), given that all such travel solutions are "used for the single purpose of intermediating travel services."[114] The Commission also found that RentalCars.com forms part of the Booking.com CPS because it is offered to users as a conduit into the same travel services. Conversely, the Commission concluded that BHI's other brands (Agoda, Priceline, Kayak, and OpenTable) constitute distinct online intermediation services, given that they are offered as distinct services and/or are used for different purposes by their respective users.[115] In the same vein, the Commission also concluded that Booking Network Sponsored Ads constitutes a distinct service from the Booking.com CPS, because the Commission considered it is offered as a distinct service, and is used for a different purpose by its users (*i.e.,* promoting offers with the objective of

[106] iPadOS Designation Decision, paras. 37–66.

[107] *Ibid.*, paras. 67–91.

[108] *Ibid*, para. 93.

[109] *Ibid.*, para. 105.

[110] *See* Apple's Non-Confidential Summary of DMA Compliance Report (November 1, 2024), available here.

[111] *See* Commission Daily News of November 4, 2024 MEX/24/5662, available here.

[112] *See* Summary of Commission Decision of May 13, 2024, relating to a decision pursuant to Article 3 of Regulation (EU) 2022/1925, OJ 2024 C/4360.

[113] *See* Commission Decision of May 13, 2024, designating Booking Holdings Inc. as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

[114] *See* Summary of Commission Decision of May 13, 2024, relating to a decision pursuant to Article 3 of Regulation (EU) 2022/1925 (C(2024) 3176 final), para. 8.

[115] *Ibid.*, *see* para. 7.

increasing the business users' likelihood of being booked).[116]

On November 13, 2024, six months after being designated as a gatekeeper, BHI published its first compliance report, describing the measures it has adopted to comply with the obligations of the DMA, which took effect on the following day.[117]

Exemptions from designations

Article 3(2) of the DMA provides quantitative thresholds that, if met, result in a rebuttable presumption in favor of designation as a CPS. Under Article 3(5) of the DMA, an undertaking can present, with its notification, substantiated arguments to demonstrate that it does not satisfy the requirements listed in Article 3(1) of the DMA and thus should not be designated, despite meeting all the thresholds set out in Article 3(2) of the DMA. The Commission has recently accepted such "rebuttals" for seven services, namely TikTok Ads, X, X Ads, iMessage, Bing, Microsoft Advertising, and Edge.[118]

TikTok Ads

On March 1, 2024, ByteDance notified the Commission of its potential status as gatekeeper with respect to its online advertising service TikTok Ads, while arguing that, despite meeting the quantitative thresholds laid down in Article 3(2) of the DMA, its service did not qualify as an important gateway between businesses and end users.[119]

ByteDance argued, among other points, that TikTok Ads: (i) had a small presence in the EU compared to the overall size of the online advertising market in the EU; (ii) had a smaller scale than Microsoft Advertising (which the Commission had previously decided not to designate) and possessed none of Microsoft's "distinctive factors" (*e.g.*, multiple advertisement properties and a "broad portfolio of CPS products in powerful positions"), while its scale was comparable to that of Samsung's Internet Browser (which the Commission also declined to designate); (iii) faced several factors that limited its ability to drive monetization, such as a lack of first mover advantage; (iv) lacked lock-in effects on its end users or business users (who often multi-home); and (v) did not have an entrenched and durable position.[120]

On May 13, 2024, the Commission announced that it had not designated TikTok Ads as a CPS because of, *inter alia*, (i) its limited scale in terms of advertising spend (in light of the overall scale of online advertising services in the EU), and (ii) the fact that its highest spending advertisers only allocate a low share of their total advertisement spend to the service.[121]

X and X Ads

On March 1, 2024, X Holdings Corp. notified the Commission of its potential status as a gatekeeper for its online networking service, X, and its online advertising service, X Ads.[122] The notification was accompanied by two rebuttals where X Holdings Corp. argued that it should not be designated as gatekeeper given that neither of the two services, despite meeting the quantitative thresholds laid down in Article 3(2) of the DMA, qualified as an important gateway between businesses and end users.

X Holdings Corp. argued for both X and X Ads that each, respectively, (i) operates on a small, decreasing scale, and (ii) lacks any ecosystem benefits as the Musk Group does not have a digital platform ecosystem. It also presented arguments

[116] Summary of Commission Decision of May 13, 2024, relating to a decision pursuant to Article 3 of Regulation (EU) 2022/1925 (C(2024) 3176 final), *see* para. 9.

[117] Booking Holdings, "Booking Holdings Inc.'s Digital Markets Act Compliance Report," November 13, 2024, available here.

[118] While the Commission accepted the rebuttals for TikTok Ads and X Ads without further assessment, it carried out market investigations to test the rebuttals for X, iMessage, Bing, Microsoft Advertising, and Edge.

[119] Commission News Announcement, "Booking, ByteDance and X notify their potential gatekeeper status to the Commission under the Digital Markets Act," March 1, 2024, available here.

[120] Commission Letter concerning ByteDance's notification under Article 3(3) of Regulation (EU) 2022/1925, available here, paras. 41–47.

[121] *Ibid*.

[122] Commission Press Release, "Booking, ByteDance and X notify their potential gatekeeper status to the Commission under the Digital Markets Act," March 1, 2024, available here.

relating to (i) a lack of reflection of the market value of the Musk Group in the monetization potential or financial capacity of X and X Ads, and (ii) the irrelevance of the market value of the other companies belonging to the Musk Group as these are not operating within the EU internal market.[123] In addition, X Holdings Corp. argued that, (i) X does not constitute an important gateway for businesses to reach end users, and that (ii) X's relative user engagement is low and declining.[124]

On May 13, 2024, the Commission announced its decision not to designate X Ads as a CPS and secondly, the opening of a market investigation to further assess the rebuttals submitted by X Holdings Corp. in respect of X.[125] Regarding X Ads, the Commission considered that X had provided sufficiently substantiated arguments demonstrating that X Ads did not constitute an important gateway between businesses and end users, *in part* because of: (i) its limited scale; (ii) its decline in advertising business users, pricing, and year-on-year EU revenue (going against the industry's overall growth); and (iii) the availability of many alternatives to the main advertisers on X Ads.

On October 16, 2024, the Commission concluded its market investigation, finding that X did not qualify as an important gateway for business users to reach end users.[126]

iMessage

On July 4, 2023, Apple notified the Commission of its potential status as a gatekeeper with respect to its iMessage communication service. At the same time, Apple submitted rebuttals, arguing, *inter alia*, that: (i) due to its relatively small scale, iMessage does not constitute an important gateway for business users to reach end users in the EU; (ii) business users do not depend on iMessage to reach end users; (iii) iMessage does not exhibit strong network effects, as Apple does not benefit from any data-driven advantages in relation to iMessage, and iMessage is integrated within Apple's Messages app together with SMS/MMS services; and (iv) iMessage is not designed, marketed, or used as a B2C service.[127]

On September 5, 2023, the Commission found that Apple's rebuttals sufficiently substantiated and manifestly put into question the presumption of gatekeeper status, so as to warrant the opening of a market investigation to assess whether iMessage, despite meeting the quantitative thresholds of Article 3(2) of the DMA, did not constitute an important gateway for business users to reach end users.[128] On November 16, 2023, Apple appealed the Commission's decision to open the market investigation, challenging the Commission's characterization of iMessage as a Number-Independent Interpersonal Communication Services ("NI-ICS"). The case is now pending before the General Court.[129]

On February 12, 2024, the Commission closed its market investigation, concluding that Apple should not be designated as a gatekeeper with respect to iMessage, due to, (i) iMessage's low usage intensity and end user numbers in the EU (especially when compared with those of competitors like WhatsApp and Facebook Messenger), and (ii) the limited importance of iMessage and its service Messages for Business as a B2C communication channel, given the latter's "extremely limited" business user base in the EU and the low importance business users attach

[123] Commission Letter concerning X Holdings Corp's notification under Article 3(3) of Regulation (EU) 2022/1925, available here, paras. 79–81.

[124] Commission Decision C (2024) 3117, opening a market investigation pursuant to Article 16(1), in conjunction with Article 3(5) and Article 17(3), of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, paras. 6–7.

[125] Commission Letter concerning X Holdings Corp's notification under Article 3(3) of Regulation (EU) 2022/1925, available here.

[126] Commission Press Release MEX_24_5324, "Commission concludes that online social networking service of X should not be designated under the Digital Markets Act," October 16, 2024, available here. The public version of the decision is not yet available.

[127] Commission Decision C (2024) 785, closing the market investigation opened by Decision C (2023) 6077, pursuant to Article 17 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, paras. 16–23.

[128] Commission Decision C (2023) 6077 of September 5, 2023, opening a market investigation pursuant to Articles 16(1) and 17(3) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

[129] *Apple v. Commission* (Case T-1079/23), action brought on November 16, 2023.

to both services as a way to reach customers.[130] On April 22, 2024, Apple also appealed the Commission's decision to close its market investigation insofar as it characterized iMessage as a NI-ICS—the case is now pending before the General Court.[131]

Edge, Bing, and Microsoft Advertising

On July 4, 2023, Microsoft notified the Commission of its potential status as gatekeeper with respect to its (i) web browser Edge; (ii) online search engine Bing; and (iii) online advertising service Microsoft Advertising, while simultaneously submitting rebuttals for the three services.

— Microsoft argued that Edge (i) has a relatively small scale, and (ii) can no longer influence the operations of business users to its advantage because business users did not optimize their websites specifically for Edge (following the decision to adopt Blink and discontinue its own browser rendering engine).

— Microsoft also argued that Bing has a relatively small scale, which is very dependent on the scale of Edge and Microsoft Advertising, which (i) are themselves limited, and (ii) neither benefit from strong positive feedback loops, nor exhibit strong monetization potential.

— With respect to Microsoft Advertising, Microsoft argued that: (i) it has a relatively small scale, which is very dependent on those of Bing and Edge, which are of a limited scale themselves; (ii) it does not enjoy strong data-driven advantages; (iii) its advertising tracking tool is used only by a minority of Microsoft Advertising's business users; and (iv) the importance of Microsoft Advertising is decreasing, since advertisers are moving from desktop to mobile advertising, where Microsoft's properties are less popular.[132]

On September 5, 2023, the Commission opened a market investigation to test Microsoft's arguments.[133] On February 12, 2024, the Commission closed its market investigation and accepted Microsoft's rebuttals,[134] owing to (i) Bing's limited scale, intensity of use, and low advertising spend in the EU; (ii) Edge's low scale of usage, its reliance on Chromium's Blink browser engine instead of on a first-party engine, and the lack of impact from Microsoft's platform ecosystem on Edge's gateway status; and (iii) Microsoft Advertising's limited scale in terms of overall usage, revenues, and number of business users, and the lack of sufficient scale effects derived from Microsoft's platform ecosystem.

Appeals against Commission (non-) designation decisions

Since November 2023, the Commission has been defending its decisions before the European courts against appeals lodged by ByteDance, Meta, and Apple. One third party, Opera, has also challenged the Commission's non-designation of Edge—the case is pending before the General Court.[135]

ByteDance

On July 3, 2023, ByteDance notified the Commission of its potential status as gatekeeper for its online social networking service, TikTok, while submitting a rebuttal request. ByteDance argued that, even if the quantitative thresholds were considered to be met (which ByteDance denied, as it argued that the threshold in Article 3(2)(c) of the DMA was not reached), ByteDance did not satisfy the gatekeeper requirements laid down in Article 3(1) of the DMA.

ByteDance argued, among other points, that TikTok: (i) is still building its customer base, so the company only meets the presumption from

[130] Commission Decision C (2024) 785, closing the market investigation opened by Decision C (2023) 6077, pursuant to Article 17 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, paras. 24–37.

[131] *Apple and Apple Distribution International v. Commission* (Case T-214/24), action brought on April 22, 2024.

[132] Commission Decision C (2023) 6078 of September 5, 2023, opening a market investigation pursuant to Articles 16(1) and 17(4) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, paras. 4–11.

[133] *Ibid*.

[134] Commission Decision C (2024) 806 of February 12, 2024, closing the market investigation opened by Decision C (2023) 6078, pursuant to Article 17 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

[135] *Opera Norway v. Commission* (Case T-357/24), OJ 2024 C/5640, action brought on July 11, 2024.

Article 3(2)(a) DMA on the basis of its global fair market value, which is driven by its China-focused business, with no connection to the EU; (ii) does not have an ecosystem that it could leverage and does not benefit from any significant network effects to lock in consumers and businesses; (iii) is a recent entrant and acts as a "challenger" in the market, and therefore invests in interoperability and facilitated multi-homing; (iv) faces a large number of competitors, both in advertising and video sharing; (v) has limited social networking offering for business users to reach end users; and (vi) has no advantages that would allow it to create an entrenched and durable position. ByteDance further claimed that: (i) the DMA should be aimed at levelling the playing field for challengers, including TikTok; (ii) TikTok's designation would impose a significant compliance cost on the company; and (iii) that the Commission had failed to apply Article 3(5) of the DMA correctly.[136]

On September 5, 2023, the Commission rejected ByteDance's arguments and designated the company as a gatekeeper with respect to its online social networking service TikTok.[137] On November 16, 2023, ByteDance lodged with the General Court, (i) an application for interim measures, and (ii) an application for annulment of the Commission's decision.

In its application for interim measures, ByteDance argued that compliance with obligations under the DMA would significantly harm its business and its users. First, Article 15 of the DMA would require it to disclose detailed, highly strategic and confidential information regarding its commercial strategy, which would enable competitors and other third parties to obtain insight into TikTok's business strategy in a way that would significantly harm its business and users. Second, compliance with the obligations under Articles 5 and 6 of the DMA would, (i) prevent it from innovating, offering new features and new products, or encouraging users to focus on its products, and (ii) force it to provide access to its services to all its competitors on equal terms. On February 9, 2024, the President of the General Court rejected ByteDance's application to suspend the Commission's designation decision. The General Court found that ByteDance had failed to establish that, as a result of the decision, its compliance with the DMA would lead to serious and irreparable harm, dismissing the company's claims about both, (i) breach of confidentiality (resulting from Article 15 of the DMA), and (ii) greater barriers to entry or expansion in the EU (Article 5(2) of the DMA).[138]

In its application for annulment, ByteDance argued that the Commission had applied an incorrect legal standard when assessing ByteDance's rebuttal arguments against the presumptions of Article 3(2) of the DMA. According to ByteDance, the Commission wrongly rejected rebuttal arguments, including that: (i) TikTok had been loss-making in the EU since its launch; (ii) it lacked network and lock-in effects; and (iii) its position had been contested by competitors such as Meta and Alphabet. ByteDance also argued that the Commission had, (i) failed to assess the evidence provided as a whole,[139] and (ii) had infringed ByteDance's rights of defense and the principle of equal treatment by accepting similar rebuttal arguments by other gatekeepers.

On July 17, 2024, in the first substantive judgment from the European courts on the DMA, the General Court upheld ByteDance's gatekeeper designation decision.[140] According to the General Court, ByteDance's rapid growth and consolidation in the past five years contributes to showing how TikTok fulfills the qualitative criteria set out in Article 3(1) of the DMA. While, in 2018, TikTok was a challenger against

[136] Commission Decision C (2023) 6102 of September 5, 2023, designating ByteDance as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

[137] *Ibid*., paras. 97-119.

[138] *See* Order of the President of the General Court of February 9, 2024 (Case T-1077/233 R) EU:T:2024:94. *See also* Cleary Antitrust Watch Blog, "The General Court Rejects ByteDance's Application for Interim Measures," February 9, 2024, available here.

[139] *ByteDance Ltd v. Commission* (Case T-1077/23) EU:T:2024:478 ("ByteDance Judgment"), hearing report of Judge Rapporteur Kornezov, paras. 28–38.

[140] *Ibid*. *See also* Court of Justice Press Release 114/24, "Digital Markets Act: The General Court dismisses the action brought by ByteDance (TikTok) against the decision of the Commission designating it as a gatekeeper," July 17, 2024, available here.

established operators like Meta and Alphabet, its position consolidated rapidly afterwards, to the point of exceeding the DMA's business user threshold and enjoying exponential growth in revenue and users.[141] The General Court agreed with the Commission that it was entitled to reject ByteDance's arguments, as they were not substantiated enough so as to manifestly call into question the quantitative presumption laid down in Article 3(2) of the DMA. The General Court also rejected ByteDance's arguments that the Commission misapplied the legal standard in the assessment of its arguments.[142] On September 26, 2024, ByteDance lodged a subsequent appeal against the General Court's judgment, which is now pending before the Court of Justice.[143]

Meta

On November 15, 2023, Meta appealed the Commission decision designating the company as a gatekeeper with respect to, (i) its NI-ICS service, Facebook Messenger, and (ii) its online intermediation service, Facebook Marketplace. Meta also challenged the designation of its online social networking service, Facebook, insofar as the Commission found it to be distinct from Facebook Messenger.[144]

In its notification to the Commission, Meta had already argued that both Facebook Marketplace and Messenger did not constitute standalone CPSs but rather formed part of its online social networking service Facebook.[145] Meta is now advancing the same arguments on appeal. If successful, Meta's Facebook Messenger and Facebook Marketplace would thus not be subject to the DMA's obligations for CPSs. Meta's appeal is currently pending before the General Court.

Apple

As noted above, Apple has appealed the Commission's decisions both to open and to close its market investigation into iMessage, insofar as the Commission found that iMessage is a NI-ICS. Apple has also appealed its designation as a gatekeeper with respect to its online intermediation service App Store and its OS iOS. As part of this appeal, Apple has also contested the legal basis for Article 6(7)of the DMA, relating to interoperability, as inconsistent with the European Charter of Fundamental Rights and the principle of proportionality.[146] All of Apple's appeals are currently pending before the General Court.

DMA/DSA Whistleblower Tools

To offer individuals a secure way to report violations, the Commission launched its Whistleblower Tools for the DMA and the DSA on April 30, 2024.[147] Both tools allow for identified and anonymous reporting of information, in any of the EU official languages, and in any format (*e.g.*, reports, emails exchanges, data metrics, internal research, and decisions).

— The DMA Whistleblower Tool aims to identify gatekeeper practices that violate the DMA and lists some examples, such as self-preferencing, the use of parity clauses or non-publicly available data of business users of gatekeepers, and the combination and cross-use of personal data without user consent.[148]

— The DSA Whistleblower Tool targets practices of Very Large Online Platforms and Very Large Online Search Engines that infringe the obligations established in the DSA, including on content moderation, advertising practices, and the protection of children's rights.[149]

[141] ByteDance Judgment, para. 316.

[142] *Ibid*., paras. 36–72.

[143] *ByteDance Ltd v. Commission* (C-627/24 P), action brought on September 26, 2024, available here.

[144] *Meta Platforms v. Commission* (Case T-1078/23), action brought on November 15, 2023, available here.

[145] Commission Decision C (2023) 6105 of September 5, 2023 designating Meta as a gatekeeper pursuant to Article 3 of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, paras. 157–163 and 234–245.

[146] *Apple v. Commission* (Case T-1080/23), action brought on November 16, 2023, available here.

[147] Commission Press Release, "Commission launches Whistleblower Tools for Digital Services Act and Digital Markets Act," April 30, 2024, available here.

[148] *See* Commission DMA Whistleblower Tool, available here.

[149] *See* Commission DSA Whistleblower Tool, available here.

While it remains to be seen how widely used the DMA Whistleblower Tool will be, it is not the only available option. Under Article 27 of the DMA, instances of non-compliance with the DMA can also be reported by any third party to the Commission or to the national competition authority of the Member State where that complainant is based. Similarly, under Article 53 of the DSA, recipients of services and their representatives have the right to lodge a complaint against providers of intermediary services about an alleged infringement of the DSA with the Digital Services Coordinator of the Member State where the recipient is located or established.

DMA non-compliance investigations and specification proceedings

On March 25, 2024, the Commission launched its first non-compliance investigations against three gatekeepers: (i) Meta (one investigation); (ii) Alphabet (two investigations); and (iii) Apple (two investigations). On June 24, 2024, the Commission opened a third non-compliance investigation against Apple. On September 19, 2024, the Commission also opened two specification proceedings into Apple's compliance with DMA interoperability obligations.

Meta

In November 2023, Meta introduced a "pay or consent" model whereby EU users of Facebook and Instagram were offered the choice between, (i) paying a monthly subscription for advertisement-free versions of the services, or (ii) continuing to use the free version with personalized advertisements. On March 25, 2024, the Commission issued preliminary findings to Meta stating that its "pay or consent" model did not comply with Article 5(2) of the DMA because it curtails the end user's right to consent and exercise free choice. The Commission took issue that end users were not offered a "less personalized but equivalent" alternative in line with the DMA's requirements.[150] Shortly after, the European Data Protection Board issued a formal opinion on valid consent in the context of pay or consent models, calling for the implementation of an alternative that specifically does not use behavioral advertising.[151]

On November 11, 2024, Meta announced amendments to its "pay or consent" model by both, (i) substantially reducing the price for the advertisement-free version, and (ii) introducing a new, additional free option where users are shown "less-personalized" advertisements, including ones which are non-skippable.[152] The Commission has until March 25, 2025 to adopt a final decision in its non-compliance investigation.

Alphabet

On March 25, 2024, the Commission opened two non-compliance investigations to assess Alphabet's compliance with the DMA rules applicable to its, (i) online intermediation service Google Play, and (ii) online search engine Google Search.[153]

In the first investigation, the Commission is examining, (i) whether charging an initial acquisition fee (and a fee for ongoing services provided by Google Play) over a period of two years is compatible with Article 5(4) of the DMA,[154] and (ii) whether Alphabet complies with the requirement that business users must be "free to promote and choose the distribution channel that they consider most appropriate" in view of the restrictions it imposes on developer ability to link out to offers existing outside of their app.

In the second investigation, the Commission is examining whether Alphabet's display of Google

[150] Commission Decision C (2024) 2052 of March 25, 2024 opening proceedings pursuant to Article 20(1) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

[151] European Data Protection Board Opinion 08/2024 on Valid Consent in the Context of Consent or Pay Models Implemented by Large Online Platforms, available here.

[152] *See* Meta, "Facebook and Instagram to Offer Subscription for No Ads in Europe," November 12, 2024, available here.

[153] Commission Decision C (2024) 2055 of March 25, 2024 opening a proceeding pursuant to Article 20(1) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector; and Commission Decision C (2024) 2053 of March 25, 2024 opening a proceeding pursuant to Article 20(1) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

[154] Article 5(4) of the DMA requires gatekeepers to allow app developers to "steer" consumers to offers outside the gatekeepers' app stores, free of charge.

search results may lead to self-preferencing in relation to Google's vertical search services (*e.g.*, Google Shopping; Google Flights; and Google Hotels) over similar rival services, in breach of Article 6(5) of the DMA.[155]

Apple

On the same day, the Commission opened two non-compliance investigations to assess Apple's compliance with the DMA rules applicable to its, (i) online intermediation service App Store, and (ii) its operating system iOS.

— In the first investigation, the Commission is examining whether Apple's pre-existing business terms and new compliance measures comply with Article 5(4) of the DMA, which requires Apple to allow business users to communicate and promote offers to end users, and to conclude contracts with those end users, free of charge. In particular, the Commission is looking at: (i) Apple's decision to charge a recurrent fee to certain users after such a contract with a third-party is concluded; (ii) Apple's choice to maintain two parallel sets of business terms and forcing business users to choose between the ability to link out and the ability to use Apple's in-app payment mechanism; and (iii) Apple's lack of transparency and predictability for developers on the process to terminate their enrolment in the Apple Developer Program.[156]

— The second investigation focuses on Apple's compliance with Article 6(3) of the DMA. The Commission is examining whether Apple allows end users to uninstall software applications on iOS, to easily change default settings on iOS and to choose their default iOS web browser through a choice screen.[157]

On June 24, 2024, the Commission issued its preliminary findings that Apple's App Store rules violate Article 5(4) of the DMA,[158] and opened a third non-compliance investigation against Apple to determine whether: (i) both sets of Apple's business terms comply with the obligation to enable the effective use of alternative channels of distribution by app developers and end users (under Article 6(4) of the DMA); (ii) the fee structure of Apple's new business terms, including its new Core Technology Fee, could deter business users from exercising the rights afforded by Articles 5(4), 5(7), and 6(4) of the DMA; (iii) subjecting the distribution of third-party app stores and sideloaded apps to Apple's approval, and the criteria for such approval, comply with Article 6(4) of the DMA; (iv) the user journeys to install third-party app stores and sideload apps complies with Article 6(4); and (v) Apple's Core Technology Fee complies with the free interoperability obligation of Article 6(7) of the DMA.[159]

Finally, on September 19, 2024, the Commission opened two specification proceedings to assess Apple's measures for compliance with the interoperability obligations set out in Article 6(7) of the DMA.[160] Under Article 8(2) of the DMA, the Commission can specify the measures a gatekeeper must take to comply with the DMA. This is the first time that the Commission has used this tool. The first specification proceedings focus on Apple's process for handling interoperability requests from app developers, while the second proceedings focus on how Apple should provide effective interoperability with certain iOS connectivity features and functionalities used

[155] Article 6(5) of the DMA prohibits gatekeepers from treating more favorably, in ranking and related indexing and crawling, its first-party services and products compared to similar third-party services or products.

[156] Commission Decision C (2024) 2056 of March 25, 2024 opening a proceeding pursuant to Article 20(1) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, paras. 9–10.

[157] Commission Decision C (2024) 2060 of March 25, 2024 opening a proceeding pursuant to Article 20(1) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, para. 10.

[158] Commission Press Release IP/24/3433, "Commission sends preliminary findings to Apple and opens additional non-compliance investigation against Apple under the Digital Markets Act," June 24, 2024, available here.

[159] Commission Decision C (2024) 4509 of June 24, 2024 opening a proceeding pursuant to Article 20(1) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector, paras. 15–20.

[160] Commission Decision C (2024) 6663 of September 19, 2024 opening a proceeding pursuant to Article 20(1) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector and Commission Decision C (2024) 6661 of September 19, 2024 opening proceedings pursuant to Article 20(1) of Regulation (EU) 2022/1925 of the European Parliament and of the Council on contestable and fair markets in the digital sector.

by connected devices, such as smartwatches, headphones, and VR headsets.

On December 18, 2024, the Commission adopted its preliminary findings in the two respective proceedings, setting out in both the proposed measures that Apple should implement. These proposed measures were open for public consultation until January 9, 2025. The Commission now has three months to conclude the specification proceedings (by adopting an implementing act which details the final measures Apple will need to implement to ensure compliance).[161] In the meantime, the Commission retains the power to adopt a non-compliance decision and to impose fines or periodic penalty payments on Apple.

What next for DMA enforcement?

Along with potential new gatekeeper decisions and the resolution of ongoing investigations and court cases, the future of the DMA will depend on how the new Commission approaches DMA enforcement, while navigating potential tensions with the new Trump administration.

In the Mission Letter to the new Executive Vice-President for Clean, Just, and Competitive Transition Teresa Ribera Rodríguez, President of the European Commission Ursula von der Leyen sets out her priorities for the new Commission and specifically calls on Ribera to "address the challenges and dynamics of digital markets, including platform economies and data-driven business models" and to "ensure the Commission takes rapid and effective enforcement actions under the Digital Markets Act."[162] The letter echoes the support for effective DMA enforcement expressed in Mario Draghi's September report on the future of European competitiveness,[163] and Ribera's commitment to "push for a vigorous enforcement of the DMA." The new Commissioner will reportedly focus on three priorities: (i) opening up "closed" ecosystems; (ii) giving consumers "choice"; and (iii) ensuring that data "belongs to those who generate it."[164]

NEWS

Court Updates

Article 101 TFEU and Cartels

i. FIFA vs. BZ: Court of Justice Declares No-Poach Agreements "By-Object" Infringements

On October 4, 2024, the Court of Justice delivered its preliminary ruling in a case involving Federation Internationale de Football Association ("FIFA") and a former professional football player.[165] The Court of Justice found that certain provisions within FIFA's transfer rules, specifically those related to the termination of player contracts, had the same effect as no-poach agreements and, therefore, constituted "by-object" infringements of EU competition law.

The FIFA player transfer market and the rules under scrutiny

The case centered around FIFA's *Regulations on the Status and Transfer of Players* ("RSTP"). Under the RSTP, a professional football player registered with one national football association can only register at a new association, once the latter receives an International Transfer Certificate ("ICT") from the previous relevant football association. The ICT is only issued if there is no

[161] Commission Press Release, "Commission seeks feedback on the measures Apple should take to ensure interoperability under the Digital Markets Act," December 19 2024, available here.

[162] European Commission, Mission Letter to Teresa Ribera Rodríguez, Executive Vice-President for a Clean, Just, and Competitive Transition, available here, p. 7.

[163] Mario Draghi, "The future of European competitiveness," September 2024, available here, Part B, pp. 302–303.

[164] European Commission, Mission Letter to Teresa Ribera Rodríguez, Executive Vice-President-designate for a Clean, Just, and Competitive Transition, available here, pp. 4, 11, and 13.

[165] *FIFA* (Case C-650/22) EU:C:2024:824.

unresolved dispute between the player and their former club over the termination of their contract.

The contested rules stipulate in essence that if the original football club considers that the player terminated their contract "without just cause" (i) the player is liable to compensate their former club; (ii) any new club that signs the player will be jointly and severally liable for the compensation; and, (iii) the new club is presumed to have induced the player to terminate their contract, and will face sanctions if they sign-up the player within the first three seasons or three years (whichever ends first) of the player's contract with their former club (defined as the "Protected Period").

The Court of Justice's judgment

The Court of Justice's ruling follows a preliminary reference by the Appeal Court of Mons (Belgium), which sought clarification on whether these RSTP provisions violated among other things Article 101 TFEU, prohibiting restrictive agreements between undertakings.

The Court of Justice concluded that the RSTP had an effect comparable to a no-poach agreement between all football clubs throughout the EU, resulting in a "generalised, drastic, and permanent" restriction of competition.[166] The Court of Justice considered several factors:

— ***Uncertainty in Compensation.*** The method for calculating the compensation owed by the player and potentially the new club for terminating the relevant contract before its term is discretionary, increasing the uncertainty and making the amount unpredictable.

— ***Barrier to Player Mobility.*** Players who terminate their contracts prematurely and are alleged by their former club to have terminated "without just cause," are effectively barred from moving to a new club in another EU Member State. The ICT cannot be issued if there is any ongoing dispute (which in turn could potentially jeopardize a player's career).

— ***Liability and Sanctions for New Clubs.*** Clubs signing players in these circumstances risk (i) being held jointly and severally liable to pay compensation; (ii) being presumed to have incited the player to terminate their previous contract; and, (iii) exposing themselves to severe sporting sanctions if they signed the player during the Protected Period, *i.e.*, being barred from playing at any FIFA competition.

Given that in professional football, the ability to recruit talent is an essential parameter of competition, the Court of Justice considered, in line with the Advocate General's opinion,[167] that the rules at issue were impeding clubs from different Member States from competing freely. By doing so, FIFA's transfer rules allowed football clubs to retain their players, with near certainty, for the entire duration of their contracts. The resulting allocation of key resources, and partitioning of the market, thus severely distorted competition between football clubs and, given the likely severe impact on competition, constituted a by-object infringement.

Ancillary restraint argument

The Court of Justice also assessed whether the rules could benefit from the so-called ancillary restraint exemption which allows restrictions that serve a legitimate non-economic objective in a proportionate manner to fall outside the scope of anticompetitive agreements under Article 101 TFEU (*e.g.*, rules protecting the health and safety of players, the stability of teams during a championship season, or a level playing field among teams). The Court of Justice reaffirmed its earlier stance in the *European Superleague Company* judgment, that the ancillary restraints exemption cannot apply to by-object infringements.[168] In the circumstances this meant the RSTP could not qualify as ancillary.

[166] *FIFA* (Case C-650/22) EU:C:2024:824, para. 145.

[167] *See* Cleary Antitrust Watch Blog, "Advocate General Szpunar finds FIFA rules on transfer of players contrary to Articles 101 and 45 TFEU," April 30, 2024, available here.

[168] *European Superleague Company* (Case C-333/21) EU:C:2023:1011, para. 183. *See also* Cleary Antitrust Watch Blog, "Revolution For Sport Gatekeepers? The Grand Chamber Of The Court Of Justice Rules On The European Super League And International Skating Union Cases," December 21, 2023, also published in the December 2023 EU Competition Law Newsletter, available here.

Exemption under Article 101(3) TFEU

Similarly, the Court of Justice assessed whether the objective economic benefits of the rules at stake could outweigh the negative effects on competition, *i.e.*, whether the rules could be exempted under Article 101(3) TFEU. This is the case when the anticompetitive agreement allows for efficiency gains that are at least partially passed on to customers. The competitive restrictions must also be indispensable, proportionate, and not eliminate all competition.

In the Court of Justice ruling, the court sets out in detail the conditions that need to be met in order for Article 101(3) TFEU to be applicable. While deferring to the relevant national court, the Court of Justice points out in particular that the FIFA rules do not seem proportionate or indispensable, resulting in a "generalised, drastic, and permanent" effect making international transfers of players almost impossible while under contract.

Implications

While the Court of Justice's judgment concerns the niche market of professional football players, it reflects broader trends in EU competition law enforcement.

— ***Increased Scrutiny.*** The Court of Justice's judgment aligns with the Commission's May 3, 2024, policy brief on antitrust in labor markets, which emphasized heightened enforcement against labor market restrictions.[169] The Commission underscored that it would treat no-poach agreements as "by-object" infringements.[170]

The Court of Justice's conclusion that FIFA's rules resulted in the allocation of a key competitive resource (*i.e.,* professional football players) among competitors mirrored the Commission's approach that no-poach agreements constitute supply-source sharing agreements expressly prohibited under Article 101(1)(c) TFEU.

— ***Agreements Restricting Demand.*** The Court of Justice reiterated that agreements between undertakings do not need to concern their supply of goods or services. Instead, they can relate to "resources of any kind which the undertakings need to produce those goods or services, and therefore demand."[171] In any event, the Court of Justice confirmed its previous judgment in *Royal Antwerp Football Club* that the recruitment of highly trained professionals (in this case professional football players) constitutes an essential resource for the supply of services downstream, *i.e.,* national or international football competitions.[172]

— ***Possible Exemptions.*** Interestingly, while the Court of Justice applies a very strict approach to the FIFA rules and the RSTP, it studiously left open the possibility that sporting rules, for example, are limited to ensuring the stability of football teams during a season or the "homogeneity" of competitions. Therefore, these may escape Article 101 TFEU altogether or at least benefit from an Article 101(3) TFEU exemption if these restrictions are strictly proportional and/or temporary.

— ***Applications to Other Sectors.*** Although the market for professional football players is highly specific, the Court of Justice's findings can in principle be applied to other sectors. The Court of Justice's reference to "highly trained professionals" suggests that the principles deduced from the FIFA rules may extend to other areas and professional rules such as in the engineering, IT, or medical sectors, where talent is similarly a critical resource.

— ***Free Movement of Workers.*** No-poach agreements that restrict workers from moving between Member States can also infringe upon one of the European Union's fundamental freedoms: the free movement of workers. In its judgment on the FIFA case, the Court of Justice confirmed that the contested rules could create an illegitimate barrier to this freedom. As a

[169] *See* Cleary Antitrust Watch Blog, "Turning up the Heat: the Commission's Interest in Labor Markets," May 3, 2024, available here.

[170] *Ibid.*

[171] *FIFA* (Case C-650/22) EU:C:2024:824, para. 129.

[172] *Royal Antwerp Football Club* (Case C-680/21) EU:C:2023:1010, paras. 107, 109, and 110.

result, no-poach agreements not only restrict competition but may also violate European Union fundamental freedoms, by limiting their ability to work across borders.

Conclusion

The Court of Justice's judgment has impacted FIFA directly. FIFA announced plans to revise its transfer rules by opening a dialogue with key stakeholders. Additionally, the ruling has exposed FIFA to potential damages claims from professional football players (and clubs) affected by these longstanding rules, which have been in effect since 2001.

This judgment aligns with the Commission's broader approach over the last year which encourages the investigation of anticompetitive agreements on the labor market.

ii. Some Are More Equal Than Others: The Court of Justice Reduces Ferriere Nord's Fine to Rectify The Commission's Breach of The Principle of Equal Treatment

On October 4, 2024, following two annulments,[173] the Court of Justice confirmed the Commission's second readoption of its decision to fine Italian manufacturers of reinforcing steel bars for a price-fixing cartel. While dismissing all other pleas, the Court of Justice found that the Commission had breached the principle of equal treatment by granting two manufacturers different fine discounts per year of their non-participation in the cartel.[174] To rectify the unequal treatment, the Court of Justice reduced Ferriere Nord's fine from €2,237,000 to €2,165,000.

Background

On December 17, 2002, the Commission fined eight Italian companies a total of €85 million for a price-fixing cartel, relating to the manufacture of reinforcing steel bars, between December 1989 and July 2000 (the "2002 Decision"). On October 25, 2007, the General Court annulled the 2002 Decision because its legal basis (Article 65 of the Treaty constituting the European Coal and Steel Community) was no longer in force when the decision was adopted.

The Commission readopted its decision on September 30, 2009 based on corresponding provisions of Regulation 1/2003.[175] The readopted decision confirmed the Commission's original findings and reimposed near-identical fines (the "2009 Decision"). All eight companies appealed to the General Court once more. On December 9, 2014, the General Court handed down a series of judgments that upheld the 2009 Decision. Five of the companies, including Ferriere Nord, appealed to the Court of Justice. On September 21, 2017, the Court of Justice set aside the General Court judgment and annulled the 2009 Decision on the ground that the Commission had infringed the appellants' respective rights of defense by not granting an oral hearing following the sending of the statement of objections preceding the 2009 Decision.[176]

On July 4, 2019, the Commission readopted its decision (following an oral hearing), citing the "public interest in pursuing an effective and deterrent enforcement against cartels."[177] In its latest decision, the Commission granted the five companies an exceptional 50% fine reduction (from €32 million to €16 million) due to the excessive length of proceedings caused by appeals to the EU courts against multiple procedural

[173] *See* Cleary Antitrust Watch Blog, "The Commission Grants An Exceptional 50% Fine Reduction To Compensate For Protracted Cartels Proceedings," July 4, 2019, available here.

[174] *Ferriere Nord v. Commission* ("Ferriere Nord v. Commission") (Case C-31/23 P) EU:C:2024:851.

[175] *See* Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1, Article 7(1), and Article 23(2).

[176] The Court of Justice annulled the 2009 Decision only to the extent that it concerned the five companies which had appealed to the Court of Justice, namely: (i) AlfaAcciai; (ii) Feralpi Holding; (iii) Ferriere Nord; (iv) Partecipazioni Industriali / Riva Fire ("Riva"); and (v) Valsabbia Investimenti / Ferriera Valsabbi. Conversely, the 2009 Decision became final for the remaining three cartel participants who did not appeal.

[177] Commission Press Release MEX/19/3709, "Antitrust: Commission re-adopts decision and fines five producers of reinforcing steel bars €16 million for price-fixing cartel," July 4, 2019, available here.

errors by the Commission.[178] On November 9, 2022, the General Court handed down a series of judgments that upheld the Commission's latest decision. Ferriere Nord and another participant then lodged a final appeal to the Court of Justice.

Equal treatment

On October 4, 2024, the Court of Justice delivered two judgments dismissing the final appeals against the Commission's 2019 Decision, except for Ferriere Nord's unequal treatment plea. Ferriere Nord successfully claimed that the Commission treated two similar situations differently when calculating its fine (discount), thus breaching the principle of equal treatment. The Court of Justice agreed, finding that the Commission failed to justify why it had applied a lower fine reduction rate to Ferriere Nord than to another cartel participant, Riva, for the same mitigating circumstance—namely a period of interrupted participation in the cartel.

Party	Duration of partici-pation	Period of non-partici-pation	Fine discount
Riva	10.5 years	1 year	3%
Ferriere Nord	7 years	3 years	6%

The Commission argued that since Riva had participated in the cartel for longer than Ferriere Nord, its participation was necessarily more serious, as was the effect of its temporary non-participation. According to the Commission, this justified granting Riva a higher fine reduction rate (3% per year of non-participation) than Ferriere Nord (only 2% per year of non-participation). The Court of Justice rejected this argument, holding that a period of non-participation by any cartelist in an ongoing cartel "has, in principle, the same effect on competition."[179] Further, the Court of Justice pointed out that the analysis of the two firms' periods of participation versus periods of non-participation militates *against* granting Riva a higher fine discount rate. Indeed, Riva was inactive less than one tenth of the time, while Ferriere Nord's period of inactivity (three years) is almost half as long as its period of participation in the cartel (seven years). To rectify the unequal treatment, the Court of Justice, in exercising its unlimited jurisdiction, increased Ferriere Nord's fine reduction to a total of 9% (*i.e.*, 3% per year of non-participation).

Conclusion

This judgment signals the Court of Justice's increased willingness to engage closely with the facts and scrutinize the Commission's approach in setting fine (discounts) in cartel cases. The judgment is also a reminder that the principle of equal treatment prohibits the Commission from *both* treating different situations in the same way *and* treating similar situations in a different way, without an objective justification. Until now, the few successful appeals on grounds of unequal treatment had all involved the Commission unjustifiably applying the same fine reduction rate to cartel participants, despite differences in their respective situations.[180] This judgment reveals the flipside of the principle of equal treatment, which raises the bar for the Commission to substantiate in sufficient detail each step of its assessment when setting cartel fines.

iii. General Court Cans Crown and Silgan Appeals Against The Commission's Metal Packaging Cartel Decision

On October 2, 2024, the General Court dismissed Crown's and Silgan's respective appeals[181] against a 2022 Commission decision imposing a total fine of €31.5 million for participating in a cartel

[178] *Reinforcing Steel Bars* (Case COMP/AT.37956), Commission decision of July 4, 2019, para. 521.

[179] *Ferriere Nord v. Commission*, para. 294.

[180] *See Pometon SpA v. Commission* (Case C-440/19 P) EU:C:2021:214, paras. 150–152.

[181] *Crown Holdings and Crown Cork & Seal Deutschland v. Commission* (Case T-587/22) EU:T:2024:661 ("*Crown Holdings*") and *Silgan Holdings and Others v. Commission* (Case T-589/22) EU:T:2024:662 ("*Silgan Holdings*").

concerning the sales of metal cans and closures in Germany between 2011 and 2014.[182] The judgments serve as a reminder of the General Court's tendency to defer to the Commission's cartel enforcement practice, including on the conditions for accepting case referrals from national competition authorities, particularly in cases that were initially settled by the applicants.

Background

In March 2015, the German Federal Cartel Office ("FCO") launched an investigation into Crown and Silgan, among other metal packaging manufacturers. Two years into its investigation, the FCO referred the proceedings to the Commission after finding that the anticompetitive conduct may have extended to national markets beyond Germany and that German law applicable at the time could allow the investigated companies to escape liability.[183] The Commission initiated proceedings in April 2018 and conducted dawn raids in several Member States.

On July 12, 2022, the Commission fined Crown and Silgan €31.5 million for breaching Article 101 TFEU by exchanging sensitive information and coordinating their commercial strategies for the sale of metal cans and closures in Germany over a three-year period.[184] Both companies opted for the settlement procedure: they agreed not to contest the Commission's legal and factual assessment in exchange for a 10% fine reduction. Crown also benefited from an additional 50% leniency reduction and was fined only €7.7 million compared to €23.9 million for Silgan.

The judgments

Crown and Silgan sought to annul the Commission's decision on the grounds of procedural irregularities. The Commission made a counterclaim, requesting the General Court to exercise its unlimited jurisdiction to withdraw the 10% settlement discount that it had granted to Crown and Silgan in the contested decision. The General Court dismissed Crown's and Silgan's respective appeals, as well as the Commission's counterclaim.

The framework for case re-allocation

Crown and Silgan argued that the Commission violated their legitimate expectations, and other fundamental principles of EU law[185] by unlawfully accepting the FCO's case re-allocation request three years after the opening of the initial investigation in Germany. The applicants argued that the Commission's Notice on cooperation within the Network of Competition Authorities ("Cooperation Notice") had given rise to "legitimate expectations" that case re-allocation would only take place within a period of two months.[186]

The General Court rejected the appeals in their entirety, concluding that the Cooperation Notice could not have created legitimate expectations because it did not provide a precise and unconditional time limit for case re-allocation. Under the Cooperation Notice, case re-allocation should "normally" occur "within a period of two months", but it can also take place after that "initial period" if the facts known about the case "change materially."[187] According to the General Court, the material change exception extends to

[182] *Metal Packaging* (Case AT.40522), Commission Decision of July 12, 2022. *See also* July 2022 EU Competition Law Newsletter for additional information on the contested decision, available here.

[183] *See* July 2022 EU Competition Law Newsletter for more information on the FCO's concerns about potential liability loopholes under the German law applicable at the time, available here.

[184] The Commission found that Crown and Silgan had engaged in a single and continuous infringement between 2011 and 2014, which consisted of two parts: (i) regular exchanges of detailed data on their most recent past annual sales volumes of metal lids to individual customers; (ii) coordination to impose a surcharge and apply shorter minimum durability recommendations for metal cans and lids coated with BPA-free lacquers.

[185] The applicants also argued that the Commission's actions breached the fundamental EU principles of, *inter alia*, subsidiarity, proportionality, and good administration.

[186] *See* Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/3, para. 18 ("Where case re-allocation issues arise, they should be resolved swiftly, normally within a period of two months, starting from the date of the first information sent to the network pursuant to Article 11 of the Council Regulation").

[187] *Ibid.*, paras. 18–19.

"any relevant fact that comes to light during the proceedings", including the FCO's concerns that the appellants might have escaped liability under the German law applicable at the time.[188] The General Court found that the timing of the FCO's referral request (and the Commission's acceptance thereof) was therefore justified in the present case.

The validity of settlement discounts

The General Court dismissed the Commission's counterclaim that Crown and Silgan should be stripped of the 10% settlement discount applied to their fines in the contested decision. According to the Commission, Crown's and Silgan's respective appeals undermined the procedural gains normally derived from the use of the settlement procedure and should therefore not benefit from the standard 10% settlement discount.

The General Court found that, notwithstanding the appeals, the Commission did derive procedural benefits from the settlement because Crown and Silgan had (i) recognized their liability for the infringement and (ii) relinquished their rights to request further access to the file or to be heard again in the oral hearing.[189] Further, the General Court found that the appeals did not seek to revisit any of the content of Crown's and Silgan's settlement submissions: the appellants merely dispute the competence of the Commission in place of the competence of the FCO.[190] The General Court found that the evidentiary burden lies with the Commission to prove that Crown and Silgan had accepted its jurisdiction during the settlement process. Absent such evidence, Crown's and Silgan's respective appeals cannot be held to undermine the validity of the settlement discount.

Conclusion and takeaways

The judgments confirm that settling parties may validly challenge the procedural validity of a Commission settlement decision without necessarily foregoing the benefit of undertaking settlement proceedings (namely receiving a 10% fine discount). At the same time, the judgments signal the General Court's unwillingness to annul late-stage case referrals from national competition authorities to the Commission. Accordingly, companies should remain vigilant that investigations may be re-allocated from national to European level at any point.

iv. KIA Auto: Court of Justice Eases the Road for Establishing Anticompetitive Effects in Vertical Agreements

On December 5, 2024, the Court of Justice delivered a preliminary ruling in a case involving KIA Auto and its parent company Tallinna Kaubamaja Grupp on the required standard of proof to demonstrate restrictions by effect under Article 101(1) TFEU.[191]

The Court of Justice found that, to characterize a practice as a restriction of competition by effect, national competition authorities do not necessarily have to demonstrate the existence of specific and actual effects on competition. In line with existing case law, including Article 102 TFEU, the Court of Justice confirmed that it is sufficient for competition authorities to demonstrate the existence of *potential* anticompetitive effects, provided that they are sufficiently appreciable.[192]

Background

The case concerned a vertical agreement between KIA Auto, the sole authorized importer of KIA cars in Latvia, and its authorized dealers and repairers (the "authorized representatives"). For the warranty to remain valid, KIA Auto and its authorized representatives imposed conditions that required KIA car owners to have (i) all routine maintenance planned by KIA; (ii) repairs not

[188] *See Crown Holdings*, paras. 51–63.

[189] *See Crown Holdings*, paras. 148–151. *See also Silgan Holdings*, paras. 147–150.

[190] *See Crown Holdings*, para. 150. *See also Silgan Holdings*, para. 149.

[191] *Tallinna Kaubamaja Grupp and KIA Auto* (Case C-606/23) EU:C:2024:1004 ("KIA Judgment"), available here.

[192] *Ibid.*, para. 37.

covered by the warranty performed by authorized representatives; and (iii) only original KIA spare parts used for any repairs and replacements.[193]

On August 7, 2014, the Latvian Competition Council found that this conduct constituted a restriction of competition by effect on the relevant markets[194] and imposed a fine of €134,514.43 on KIA Auto and its parent company Tallinna Kaubamaja Grupp (together the "KIA companies").[195]

The KIA companies contested the decision before the Regional Administrative Court of Latvia. They argued that KIA cars could be serviced at non-KIA service centers and would only later need to be inspected, free of charge, at an authorized representative to maintain the validity of the warranty. On March 10, 2017, the Regional Administrative Court dismissed the action, confirming the Latvian Competition Council's decision.[196]

The KIA companies appealed the judgment and on December 22, 2021, the Latvian Supreme Court found that the Regional Administrative Court erred in its assessment by relying on inaccurate criteria to determine whether the Latvian Competition Council had rightly concluded to the existence of a restriction of competition by effect. The Supreme Court remanded the case back to the Regional Administrative Court for reconsideration.[197]

On remand, the Regional Administrative Court deemed the Supreme Court's ruling to be inconsistent with the case law of the European courts. In particular, the Regional Administrative Court noted that in the *Google Shopping* case (which concerned an Article 102 TFEU infringement), the General Court found that the European Commission was only required to demonstrate potential adverse effects on competition, without having to show that these effects had actually materialized.[198] In light of this, the Regional Administrative Court decided to stay the proceedings and referred two questions to the Court of Justice for a preliminary ruling.

The Court of Justice's judgment

The questions referred to the Court of Justice sought clarification on (i) whether the Latvian Competition Authority must prove "actual and real restrictive effects on competition" to find that a practice infringes Article 101(1) TFEU, and (ii) whether the sole existence of potential restrictive effects on competition suffices for such a finding.[199]

The Court of Justice first referred back to the wording of Article 101 which distinguishes between anticompetitive "object" and "effect". The Court of Justice ruled that, in evaluating whether the agreement restricted competition "by effect," the Latvian Competition Council did not have to prove specific and actual anticompetitive effects, finding that it was sufficient to show the potential for such effects, provided that they are sufficiently appreciable.

The Court of Justice first reiterated that to conclude on the existence of anticompetitive effects, it is essential for competition authorities to conduct a counterfactual assessment. This counterfactual assessment requires competition authorities to adopt a "realistic and credible" approach, to take into account the legal and economic context in which the agreement is situated, and determine how the market and its players would operate, and be structured, in the absence of the agreement in question.[200]

[193] KIA Judgment, para. 6.

[194] The Latvian Competition Council found that this conduct impeded competition on two grounds: first, by limiting access to independent repair services in the Latvian market, and second, by limiting access to independent producers of spare parts.

[195] KIA Judgment, para. 5.

[196] *Ibid.*, para. 9.

[197] *Ibid.*, paras. 10 and 11.

[198] *Google and Alphabet v Commission* (Google Shopping) (Case T612/17) EU:T:2021:763, paras. 377 and 378 and also *Google Shopping* (Case C48/22) EU:C:2024:726, paras. 165 and 167.

[199] KIA Judgment, para. 14.

[200] *Ibid.*, paras. 29–31.

The Court of Justice then found, however, that conducting this counterfactual assessment does not prevent competition authorities from considering the *purely potential* effects of an agreement when determining whether it restricts competition by effect, as long as these effects are "sufficiently appreciable," in line with previous case law.[201]

The Court of Justice concluded that potential effects suffice to meet the standard of proof under Article 101(1) TFEU, highlighting that such an interpretation "corresponds to that of Article 102 TFEU" and is in line with other past cases.[202]

Key takeaways and implications

Interestingly, the Court of Justice's judgment did not examine the circumstances under which selective distribution agreements in aftermarkets, specifically related to warranty terms, can result in a "by effect" infringement of competition. In particular, it did not address the application of the Vertical Block Exemption Regulation ("VBER")[203] or the Motor Vehicle Block Exemption Regulation ("MVBER"),[204] nor did it assess their potential compatibility with Article 101 TFEU in specific circumstances.[205]

The Court of Justice focused its assessment on the legal principle by focusing on the required standard of proof, and in that regard provided important clarifications to the interpretation of what constitutes restrictions of competition by effect under Article 101(1) TFEU. Although the case concerned a vertical agreement between undertakings in relation to warranty conditions imposed on car owners, the same reasoning can be applied *mutatis mutandis* to any agreements or concerted practices between undertakings.

This conclusion is particularly important in two aspects:

— ***Timely intervention.*** In the event that the Court of Justice had required evidence of actual and real anticompetitive effects to find an infringement of Article 101(1) TFEU, competition authorities would be unable to intervene and conclude to the existence of anticompetitive practices until such effects were fully materialized (which in some cases, could be irreversible).

— ***Convergence with legal standard for Article 102 TFEU.*** The Court of Justice's ruling aligns the standard of proof under Articles 101 and 102 TFEU. For both types of infringements, while the standard of proof remains high since the regulator must conduct a realistic assessment of the factual background and the relevant market, it is sufficient to demonstrate potential anticompetitive effects, capable of potentially excluding equally efficient competitors.[206] This is a welcome clarification for the purposes of legal certainty, considering that Article 102 TFEU, contrary to Article 101 TFEU, does not contain the notion of "by object" or "by effect" restrictions; it is now clear that this notion is to be interpreted in the same way under both provisions.

Merger Control

v. The General Court Upholds Commission's Clearance of Vodafone's Acquisition of Liberty Global Assets

[201] KIA Judgment, para. 32. *See also Commission v Servier and Others* (Case C176/19 P) EU:C:2024:549, paras. 345–353.

[202] In particular, *Post Danmark v Danish Competition Authority* (Case C23/14) EU:C:2015:651, paras. 65–66. *See also* Cleary EU Competition Quarterly Report, October–December 2015, available here. *See* KIA Judgment, paras. 35 and 36.

[203] *See* Commission Regulation (EU) 2022/720 of May 10, 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, available here.

[204] *See* Commission Regulation (EU) No 461/2010 of May 27, 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector, available here.

[205] *See* Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles, available here, para. 69.

[206] *Post Danmark v Danish Competition Authority* (Case C23/14) EU:C:2015:651, paras. 65–66. *See also TeliaSonera Sverige* (Case C52/09) EU:C:2011:83, para. 64.

Introduction

On November 13, 2024, the General Court dismissed three appeals against the European Commission's decision conditionally approving Vodafone's acquisition of Liberty Global's cable business assets in four EU Member States.[207] Deutsche Telekom, NetCologne, and Tele Columbus brought actions before the General Court seeking the annulment of the Commission's clearance decision, arguing that the Commission should not have cleared Vodafone's acquisition subject to behavioral commitments.

The General Court rejected all grounds of appeal and fully upheld the Commission's conditional clearance decision. The General Court's judgment addresses a number of key concepts in EU merger control, including: (i) direct and indirect actual competition; (ii) potential competition; (iii) the relationship between market dominance and the "SIEC" test; and (iv) the adequacy of behavioral rather than structural remedies in merger control.

Background

Following an in-depth Phase II investigation, the Commission cleared Vodafone's acquisition of Liberty Global's cable business assets and telecommunications activities in Germany, Romania, Hungary, and the Czech Republic under Article 8(2) EU Merger Regulation ("EUMR"), subject to cable network access remedies.[208]

During its in-depth investigation, the Commission identified two major competition concerns in Germany:

— the acquisition would eliminate the important competitive constraints exerted by the merging parties on each other on the German market for the retail supply of fixed broadband services; and

— the acquisition would strengthen the merged entity's position on the German market for the wholesale supply of signal for the transmission of TV channels.

Vodafone's three German competitors—Deutsche Telekom AG, Tele Columbus AG, and NetCologne Gesellschaft für Telekommunikation AG brought appeals before the General Court, seeking to have the clearance decision annulled. The appellants argued that the Commission had committed manifest errors of assessment in examining the acquisition's effects on competition in Germany.

Direct competition

The General Court held that undertakings are direct competitors if they "compete for the same customers."[209] In this case, the cable networks of Vodafone and Liberty Global did not geographically overlap.[210] The Commission explained that the majority of retail TV households in Germany are located in so-called "multi-dwelling units" ("MDU"). MDUs are owned by housing associations or private landlords—these were referred to by the General Court and the Commission as the "MDU customers." Single-dwelling units ("SDU") customers are typically those who choose their own TV distributor and pay directly for their subscription.[211]

The General Court considered that a MDU customer could only choose either Vodafone or Liberty Global as a TV signal provider because Vodafone and Liberty Global were each limited to their own cable footprint and could not compete for customers outside their cable footprint. The General Court concluded that the Commission was correct in finding that Vodafone and Liberty Global were therefore not direct actual competitors.[212]

[207] *NetCologne v. Commission* (Case T-58/20) EU:T:2024:813; *Deutsche Telekom v. Commission* (Case T-64/20) EU:T:2024:815; and *Tele Columbus v. Commission* (Case T-69/20) EU:T:2024:816.

[208] *See Vodafone/Certain Liberty Global Assets* (Case COMP/M.8864), Commission decision of July 18, 2019.

[209] *Deutsche Telekom AG v. Commission* (Case T-64/20) EU:T:2024:815, para. 80.

[210] *Ibid*., para. 81. The General Court held that whether the MDU market was, prior to the transaction, national in scope or whether it was limited to the cable footprints of the merging parties, changed nothing since, in both cases, that observation holds true.

[211] *Ibid*., para. 18.

[212] *Ibid*., paras. 81–82.

Indirect competition and benchmarking

The General Court recalled that undertakings that do not directly compete can still be indirect competitors.[213] Undertakings are indirect competitors:

- if they are "subject to similar competitive pressures from other undertakings, which with each of them competes directly," or
- "where other factors, such as requirements imposed by customers, comparably limit their ability to set their prices and commercial conditions."[214]

Deutsche Telekom argued that Vodafone and Liberty Global monitored and compared their product offerings, which was an indication that they were indirect competitors.[215] The Commission disagreed and maintained that Vodafone and Liberty Global engaged in "simple commercial benchmarking aimed at monitoring and possibly imitating best practices in the industry."[216] The General Court found that the Commission was correct to conclude that this form of comparison, which consists of an analysis of market performance or best practices in the industry, cannot be classified as indirect competitive pressure.[217]

The Commission explained in response to a General Court question to be answered in writing that benchmarking can indicate an indirect competitive constraint if there is evidence that a party gathering information about the other party through benchmarking takes that information into account in making its commercial decisions so the information actually constrains that party by triggering a competitive reaction on its part.[218] That was not the case in the present scenario.

Potential competition

The General Court concluded that the Commission did not manifestly err in concluding that Vodafone and Liberty Global were not potential competitors.[219] The General Court explained that to determine whether an undertaking is a potential competitor, the Commission must determine if, in the absence of the transaction, there would have been "real concrete possibilities" for that undertaking to enter the market and compete with the established competitors.[220]

The Commission found that there was no potential competition between Vodafone and Liberty Global, because, among other things, neither: (i) had taken steps to enter the market of the other within a sufficiently short period of time (based on market characteristics); (ii) believed that it was economically rational or attractive to enter the market; or (iii) intended to pursue a significant market entry in the future.[221]

Prior tacit collusion

Deutsche Telekom claimed that tacit collusion and the resulting position of collective dominance was the reason why Vodafone and Liberty Global did not directly geographically overlap and compete prior to the acquisition.[222] In support of its allegation, Deutsche Telekom referred to a number of decisions of the Federal Cartel Office which found that the parties were in a collectively dominant position.[223]

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[213] *Deutsche Telekom AG v. Commission* (Case T-64/20) EU:T:2024:815, para. 102.

[214] *Ibid.*

[215] *Ibid.*, para. 91.

[216] *Ibid.*, para. 104.

[217] *Ibid.*, para. 106.

[218] *Ibid.*, para. 105.

[219] *Ibid.*, para. 156.

[220] *Ibid.*, para. 135.

[221] *Ibid.*, para. 137.

[222] *Ibid.*, para. 157.

[223] *Ibid.*, para. 158.

The General Court dismissed this ground of appeal, explaining that:

— Deutsche Telekom did not claim that the acquisition would have caused or strengthened a collective dominant position on the MDU market, but that the parties were before the transaction in a collective dominant position as a result of tacit collusion. These claims did not relate to the subject-matter of the contested merger clearance decision, but conduct potentially violating Article 101 TFEU (and/or Article 102 TFEU).[224]

— Even if the merging parties colluded prior to the acquisition, this would not alter the Commission's correct conclusion that there was no competition between Vodafone and Liberty Global on the MDU market resulting principally from the lack of overlap between their respective cable footprints.

— Third parties' allegations of tacit collusion between Vodafone and Liberty Global prior to the acquisition were not confirmed by the parties' internal documents. In addition, the Commission had found there was another more probable and plausible explanation for the merging parties' decision to not geographically expand their cable network and directly compete—*i.e.*, the lack of economic profitability.[225]

Relationship between dominance and SIEC test

Deutsche Telekom argued that the Commission failed to conclude that the creation of Vodafone's dominant position amounted to a merger-specific structural change in market conditions and gave rise to a SIEC. It considered that the creation of a dominant position is, in itself, the prime example of a SIEC.[226]

The General Court recalled that the essential legal test under Article 2(2) and Article 2(3) of the EUMR is whether a concentration creates a SIEC.[227] Finding that a planned concentration would result in anticompetitive effects is not sufficient in itself for that concentration to be regarded as incompatible with the internal market.[228] On this basis, the General Court clarifies the relationship between dominance and the SIEC test by saying that "the fact that a concentration would **create or strengthen a dominant position is not, in itself, sufficient** for that concentration to be regarded as **incompatible** with the internal market, provided that it would not significantly impede effective competition in the internal market or in a substantial part of it" (emphasis added).[229]

The General Court therefore concluded that Deutsche Telekom's argument that "if a dominant position is created or strengthened, that is sufficient for a finding of a SIEC – cannot succeed."[230]

Adequacy of behavioral remedies

Deutsche Telekom claimed that the Commission had manifestly erred in accepting the various behavioral commitments the merging parties had offered. The behavioral remedy package was "manifestly inappropriate and insufficient" to remedy the SIEC found on the market for wholesale TV transmission.[231] Deutsche Telekom also contended that behavioral remedies are never adequate to address horizontal competition concerns.[232]

The General Court rejected this argument and held that the Commission had not applied the

[224] *Deutsche Telekom AG v. Commission* (Case T-64/20) EU:T:2024:815, paras. 160-162.

[225] *Ibid.*, para. 163.

[226] *Ibid.*, para. 187.

[227] *Ibid.*, para. 191.

[228] *Ibid.*, para. 192.

[229] *Ibid.*, para. 193.

[230] *Ibid.*

[231] *Ibid.*, para. 361.

[232] *Ibid.*, para. 370.

wrong legal standard in assessing the suitability of behavioral remedies.

The General Court acknowledged that, in the Remedies Notice,[233] the Commission has a preference for structural remedies mainly because it is simple to implement them.[234] In paragraph 17 of its Remedies Notice, the Commission explains that behavioral commitments "may be acceptable only exceptionally in very specific circumstances."[235]

Paragraph 15 of the Commission's Remedies Notice, however, states that commitments other than structural commitments may also be capable of preventing the SIEC. So the suitability of behavioral remedies is not automatically ruled out by the Remedies Notice.[236] The Commission can accept behavioral remedies, if: (i) the commitments offered "are appropriate and sufficient to resolve the competition problem identified"[237] and (ii) if there is "certainty that those commitments will be able to be implemented."[238]

Key takeaways

The General Court judgment contains useful definitions and restatements of key concepts in merger control—including direct, indirect, and potential competition.

The General Court reaffirms and recalls that the SIEC test under the EUMR is an autonomous legal concept distinct from dominance. In particular, the General Court held that the creation or strengthening of a dominant position does not necessarily and automatically lead to a SIEC.[239]

It is therefore possible for the Commission to find that a planned transaction would create a dominant position, without simultaneously concluding that there would also be a SIEC.[240] It follows that the creation or strengthening of a dominant position is not *automatically* sufficient to prohibit a planned concentration under the EUMR.

The General Court's interpretation in *Deutsche Telekom* is not novel, but consistent with a long line of case law that defines the SIEC test as an autonomous legal concept distinct from dominance.[241]

The 2004 EUMR liberated EU merger control from the "legal corset" of the dominance test, and introduced the SIEC test as "the one and only substantive test applicable to all concentrations."[242] Articles 2(2) and 2(3) of the 2004 EUMR now exclusively refer to the SIEC test, making it the sole legal test for the substantive appraisal of concentrations. The creation or strengthening of dominance is now **neither necessary nor sufficient** to prohibit a concentration under Article 2 EUMR. The recitals of the 2004 EUMR make clear that the notion of a SIEC "should be interpreted as extending, **beyond the concept of dominance**"[243] (emphasis added). The recitals also leave no doubt that the SIEC test is the only decisive substantive test by which the compatibility of concentrations with the internal market is assessed: "in the interests of legal certainty, it should be made clear that [the EUMR] permits effective control of all such concentrations by providing that **any concentration which would significantly impede effective**

[233] Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, 2008/C 267/01 ("Remedies Notice").

[234] *Deutsche Telekom AG v. Commission* (Case T-64/20) EU:T:2024:815, para. 375.

[235] *Ibid.*, para. 370, referring to para. 17 of the Remedies Notice.

[236] *Ibid.*, para. 374.

[237] *Ibid.*, para. 375.

[238] *Ibid.*

[239] *Ibid.*, para. 192–193.

[240] *Ibid.*

[241] *Air France v. Commission* (Case T-2/93) ECLI:EU:T:1994:55, paras. 79–79; *EDP v. Commission* (Case T-87/05) ECLI:EU:T:2005:333, paras. 45–46 and 49; *Kaysersberg v. Commission* (Case T-290/94) ECLI:EU:T:1997:186, para. 184; *Airtours v. Commission* (Case T-342/99) ECLI:EU:T:2002:146, para. 58; *Tetra Laval v. Commission* (Case C-12/03 P) ECLI:EU:C:2005:87, para. 153; *Sony and Bertelsmann AG v. Impala* (Case C413/06 P) ECLI:EU:C:2007:790, para. 120; *Gencor v. Commission* (Case T-102/96) ECLI:EU:T:1999:65, paras. 94, 162, 170, 180, and 193; *French Republic and Société commerciale des potasses et de l'azote (SCPA) and Entreprise minière et chimique (EMC) v. Commission ("Kali und Salz")* (Joined Cases C-68/94 and C-30/95) ECLI:EU:C:1998:148, para. 221.

[242] Francisco Enrique González Díaz, The Reform of European Merger Control: *Quid Novi Sub Sole?*, [2004] 27(2) World Competition, 177–199.

[243] Recital 26, EUMR.

competition, in the common market or in a substantial part of it, should be declared **incompatible with the common market**"[244] (emphasis added).

However, the 2004 EUMR did retain a specific reference to dominance as one possible theory of harm under the SIEC test. This explicit reference to dominance was retained to "maintain the sizeable body of case law and case practice which has been built up over the years"[245] under the old EUMR's substantive test. The Council's intention was that the large majority of transactions should continue to be assessed by reference to the dominance standard and that "**most cases** of incompatibility of a concentration with the common market will continue to be based upon a finding of dominance"[246] (emphasis added). The 2004 EUMR states that "a significant impediment to effective competition [will] **generally** result from the creation or strengthening of a dominant position"[247] (emphasis added).

While it is clear from the text, history, and legislative intent (purpose underlying the 2004 EUMR), that the SIEC constitutes an independent legal test distinct from dominance, the General Court in *Deutsche Telekom* explicitly reaffirms the conceptual autonomy of the SIEC test. Even though the reference to "dominance" as one possible instance in which a SIEC may arise was maintained, *Deutsche Telekom* clarifies that this does not imply that the creation or strengthening of dominance is automatically sufficient to find a SIEC.

Finally, the General Court reaffirms that behavioral remedies are not inherently inferior or necessarily inadequate in addressing horizontal merger concerns. The judgment leaves the Commission with significant discretion in accepting behavioral—instead of structural—remedies as long as the Commission is satisfied that the behavioral commitments fully address the SIEC identified.

State Aid

vi. General Court finds Commission Failed to Act on Potentially Unlawful Dutch State Aid for Electric Pulse Fishing

On November 13, 2024, the General Court ruled in Case T-141/23 that the Commission failed to meet its obligations under Regulation 2015/1589 ("State aid Procedural Regulation" or "Regulation"),[248] which governs the application of Article 108 TFEU on State aid review in the EU.[249] The General Court held that the Commission's inaction regarding alleged illegal aid granted by the Kingdom of the Netherlands ("the Netherlands") to Dutch beam trawlers with pulsed electric currents—prior to the formal ban on electric fishing in the EU in July 2021—constituted a failure to act.

Background of the dispute

In March 2021, thirty six French, Dutch, and British fishermen, together with the European association of small fishermen, the Low Impact Fishers of Europe ("LIFE") (collectively, "the applicants"), filed complaints with the Commission. They claimed that Dutch authorities had unlawfully granted fishing authorizations to Dutch shipowners using beam trawls with pulsed electric currents, exceeding the 5% limit imposed on each Member State's beam trawler fleet for electrical pulse fishing. They also contended that funding provided to these trawlers under the European Fisheries Fund[250] ("EFF") and the European Maritime and Fisheries Fund[251] ("EMFF") was unlawful and incompatible with EU State aid rules.

[244] Recital 25, EUMR.

[245] *See* Explanatory Memorandum to Draft Merger Regulation, para. 56.

[246] *See* Horizontal Mergers Guidelines, para. 4, available here.

[247] Recital 26, EUMR.

[248] Regulation No. 2015/1589, laying down detailed rules for the application of Article 108 TFEU, OJ 2015 L 248/9.

[249] *Merlin and Others v. European Commission* (Case T-141/23) EU:T:2024:818.

[250] Regulation No. 1198/2006, concerning the EFF, OJ 2006 L 223/1.

[251] Regulation No. 508/2014, concerning the EMFF, OJ 2014 L 149/1.

In an April 2021 letter, the DG Competition stated that contested funding fell within the scope of either EFF or EMFF, so that the measures should be assessed under the rules governing the common fisheries policy, rather than State aid rules. DG Competition advised the applicants to direct their complaints to DG for Maritime Affairs and Fisheries (DG MARE). The applicants disagreed, emphasizing that funding granted in violation of EFF or EMFF regulations must still be assessed under State aid rules. They urged the Commission to identify the funding sources and determine whether they constituted unlawful aid.

In November 2021, the Commission wrote that it found no evidence of potentially unlawful State aid that would require the opening of a formal investigation. The applicants then submitted additional evidence in April 2022, including lists of Dutch beam trawlers benefiting from the fund and pointing to an investment aid program entirely funded by the Netherlands for equipping certain beam trawlers with electrical pulse fishing technology.

After examining the new information, in September 2022 the Commission reiterated that there was no evidence of breaches in EFF and EMFF rules or unlawful State aid requiring further examination. As the Commission had not, to this point, adopted any decision under the State aid Procedural Regulation, in November 2022 the applicants formally called upon the Commission to do so under Article 265 TFUE.

On February 14, 2023, the Commission sent a letter to the applicants informing them that it intended to close the case, stating that there was no basis to initiate proceedings against the Netherlands, nor to pursue further examination of the case. The Commission invited the applicants to provide any new relevant information within four weeks, after which the case would be closed. In the absence of any decision taken by the Commission in application of the State aid Procedural Regulation, the applicants lodged an action for failure to act before the General Court.

Findings of the General Court

The General Court referred to situations in which the Commission is required to act in respect of unlawful or incompatible State aid, as outline in Article 12(1) of the State aid Procedural Regulation which mandates the Commission to examine any complaint submitted by any interested party without undue delay. In addition, Article 24(2) of the Regulation provides that if a *prima facie* assessment of the facts and legal arguments do not offer sufficient grounds to establish unlawful State aid or misuse of aid, the Commission must issue a pre-closure letter notifying the interested party and invite them to submit comments within a specified period (which cannot normally exceed one month). If the party does not respond within the prescribed timeframe, the complaint is deemed withdrawn. Under the first sentence of Article 15(1) of the Regulation, the examination of potential unlawful aid must result in a formal decision under Article 4 of the Regulation.

On the admissibility of the action, the General Court referenced the principle under Article 265 TFEU which states that an "institution has not failed to act, not only when it adopts a measure vindicating the applicant, but also when it refuses to adopt such a measure but answers the request made to it with a statement of the reasons why it considers that that measure should not be adopted or that it does not have the power to do so."[252] The General Court further noted that when faced with an applicant's call to act, the Commission shall do so in a clear and definitive manner.[253] It is thus only outside these cases that an action for failure to act can be deemed admissible.

In light of these principles, the General Court examined the Commission's exchanges with the applicants (i) on the existence of funding granted in breach of the EEF and EMFF rules, and (ii) on the existence of national subsidies constituting State aid:

i. Regarding the contested EFF and EMFF funding, the General Court ruled that the

[252] *Merlin and Others v. European Commission* (Case T-141/23) EU:T:2024:818, para. 22.

[253] *Ibid.*, para. 24.

Commission's response included both a statement of reasons and argued a lack of competence to adopt a decision that had to be carried out in accordance with the specific procedures laid down in the EFF and EMFF regulations. Second, the General Court chose a contextual approach in assessing whether the Commission's position was clear and definitive in nature. It ruled that when read in context of (and in conjunction with) the exchanges it preceded, the Commission's February 14, 2023 letter constituted a clear and definitive position taken by the Commission. Following this approach, the General Court ruled that any action for failure to act regarding EFF and EMFF funding was inadmissible.[254]

ii. Regarding the contested national aid, the General Court found that the Commission failed to take a clear and definitive position as required under Article 265 TFEU. First, by interpreting the applicants' complaints as only concerning the EFF and EMFF funding, the Commission conducted an incomplete assessment by omitting to express its opinion on the Dutch aid scheme. The General Court further sided against the Commission by ruling that the February 14, 2023 letter could not qualify as a pre-closure letter under the second subparagraph of Article 24(2) of the State aid Procedural Regulation. This was because the Commission could not simultaneously argue that the letter served as such while previously asserting it lacked competence to adopt a decision under the same Regulation. The General Court ultimately held that the applicants' action was admissible insofar as it concerned the contested national aid. On substance, the General Court found that the Commission failed to take any action or adopt a formal decision, despite receiving complaints detailing alleged unlawful aid or misuse of aid. Consequently, at the end of the statutory two-month period following the call to act, the Commission's inaction confirmed the applicants' claim that the Commission did not fulfil its obligation under the Regulation, with respect to the contested national aid.

Key takeaways

The judgment, issued by the General Court in extended composition, is a rare instance where the EU judicature acknowledged the Commission's failure to act in the area of State aid. It offers valuable insight into the rules governing the admissibility of such actions, particularly when the institution has been explicitly required to adopt a clear and definitive stance on alleged unlawful State aid.

As for its direct consequences, the Commission is invited to take all necessary measures to comply with the ruling of the General Court, and thus seriously examine the complaints concerning the alleged national aid.

Other Updates

Divide and Conquer: Reform of The EU Judiciary Splits The Jurisdiction to Deliver Preliminary Rulings Between The Court of Justice and The General Court

On October 1, 2024, amendments to the Statute of the Court of Justice of the European Union entered into effect, ushering in a significant reform to the European judiciary.[255] As a result of the reform, the jurisdiction to issue preliminary rulings has been partially transferred from the Court of Justice to the General Court for cases falling exclusively within six well-established legal areas, including VAT, excise duties, and tariffs. Conversely, the Court of Justice retains jurisdiction to issue preliminary rulings in competition law and other areas which routinely raise complex questions of principle and consistency. The reform is designed to reduce the caseload of the Court of Justice, thereby allowing it to "focus to a greater extent on its role

[254] *Merlin and Others v. European Commission* (Case T-141/23) EU:T:2024:818, para. 38.

[255] Regulation (EU, Euratom) 2024/2019 of the European Parliament and of the Council of 11 April 2024 amending Protocol No 3 on the Statute of the Court of Justice of the European Union, OJ L/2024/2019.

as the supreme and constitutional court of the European Union."[256]

Background

The preliminary ruling procedure facilitates cooperation between the Court of Justice and Member States' national courts with the aim to ensure the uniform application of EU law in the territory of all EU Member States. Under Article 267 TFEU, upon a request from a national court, the Court of Justice has jurisdiction to issue preliminary rulings on (i) the interpretation of EU law and (ii) the validity of acts of EU institutions, bodies, offices, and agencies. Preliminary rulings are legally binding: the referring national court must abide by the Court of Justice's interpretation of EU law in rendering its own, final ruling in the national proceedings.

While the preliminary ruling procedure has proven an important tool for national courts, it has resulted in an ever-increasing caseload for the Court of Justice. In 2022 alone, the Court of Justice issued 564 preliminary rulings, representing 70% of all its judgments rendered in that year.[257] In the same year, the General Court—which is twice the size in terms of sitting judges—dealt with 904 proceedings. It is against this backdrop that the judicial reform was conceived as a means to shift a significant proportion of the Court of Justice's caseload to the General Court. This in turn is meant to speed up the timeline of proceedings before the Court of Justice.

Reform

As a result of the reform, the jurisdiction to issue preliminary rulings is now divided between the Court of Justice and the General Court. While the Court of Justice retains jurisdiction in the vast majority of cases (including in competition law), it can now transfer to the General Court preliminary ruling requests which raise questions in six well-established areas of EU law. To ensure consistent and timely rulings in these six areas, the General Court has a new specialized chamber with twelve designated judges,[258] two of whom are called upon to act as Advocate General.[259]

Six areas within the General Court's jurisdiction. The General Court now has jurisdiction to issue preliminary rulings pertaining to the following six areas, which together account for approximately 20% of all preliminary ruling references.[260] The six areas are the following: (i) the common system of value added tax; (ii) excise duties; (iii) the Customs Code; (iv) the tariff classification of goods under the EU combined nomenclature; (v) compensation and assistance to passengers in the event of denied boarding or of delay or cancellation of transport services; and (vi) the system for greenhouse gas emission allowance trading. Any other areas, including preliminary rulings on competition law, remain within the ambit of the Court of Justice.

Carve-outs from the General Court's partial jurisdiction. The General Court's jurisdiction to issue preliminary rulings in these six specific areas is subject to two important carve-outs:

— *First*, the General Court's jurisdiction is limited to preliminary rulings that *only* concern one or more of the six specific areas, to the exclusion of any other area. Conversely, the Court of Justice will handle all preliminary ruling references that raise questions *both* within *and* beyond the six areas designated to the General Court.

— *Second*, the General Court's jurisdiction in these six areas does *not* cover preliminary

[256] Court of Justice of the European Union Press Release 125/24, "Jurisdiction to hear and determine questions referred for a preliminary ruling is conferred on the General Court of the European Union in six specific areas," August 12, 2024, available here.

[257] European Parliament Briefing PE 754.559, "Amending the Statute of the Court of Justice of the EU Reform of the preliminary reference procedure," February, 2024, p. 3, available here.

[258] Court of Justice of the European Union Press Release 179/24, "Partial transfer of jurisdiction from the Court of Justice to the General Court: creation within the General Court of a Chamber specialising in preliminary ruling cases, and election of Advocates General," October 10, 2024, available here.

[259] The following ten judges sit in the General Court's new specialized chamber: Nina Półtorak, Tuula Riitta Pynnä, Johannes Christoph Laitenberger, Gerhard Hesse, Miguel Sampol Pucurull, Mirela Stancu, Gabriele Steinfatt, David Petrlík, Ioannis Dimitrakopoulos, and William Valasidis. In addition, the following two judges act as Advocate General: José Martín y Pérez de Nanclares and Maja Brkan.

[260] Court of Justice of the European Union, Press Release 125/24, "Jurisdiction to hear and determine questions referred for a preliminary ruling is conferred on the General Court of the European Union in six specific areas," August 12, 2024, available here.

ruling references which raise independent questions on the interpretation of: (i) primary EU law;[261] (ii) public international law; and/or (iii) general principles of EU law. Indeed, such proceedings remain within the jurisdiction of the Court of Justice.

In addition, the General Court will also be able to refer to the Court of Justice a case that falls within the General Court's jurisdiction but requires a decision of principle likely to affect the unity or consistency of EU law. This referral mechanism will likely be of limited use, given the extensive body of rulings by the Court of Justice in each of the six areas.

Procedural safeguards. All preliminary ruling references must be submitted to the Court of Justice, which will in turn determine whether to remit the request to the General Court. The early screening process is designed to ensure that the General Court handles only the cases which fall within the scope of its jurisdiction. This is consistent with the rationale behind the reform: to transfer to the General Court *only* repetitive questions in areas with well-established case law by the Court of Justice. Once a case is allocated, the competent court must clearly state in its ruling why it is competent to hear and determine the question(s) referred.

Conclusion

This is a rare instance of reform to the jurisdictional split within the two-tier EU judiciary. While the partial transfer of jurisdiction from the Court of Justice to the General Court does not cover preliminary ruling requests in the field of competition law, the reform will likely reduce the (average) length of appeal proceedings before the Court of Justice. It remains to be seen what the exact impact will be on the total duration of EU litigation, including in competition law cases. This reform might also serve as precedent for further jurisdictional transfers in the future, potentially also in the field of competition law and/or merger control. For now, companies and practitioners alike can take comfort from knowing that all preliminary ruling questions pertaining to competition law will be tackled by the Court of Justice.

[261] Primary EU law covers: (i) the Treaty on the European Union; (ii) the Treaty on the Functioning of the European Union; and (iii) the Charter of Fundamental Rights of the European Union.

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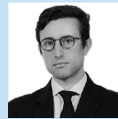
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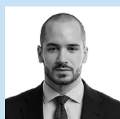
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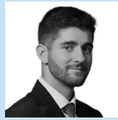

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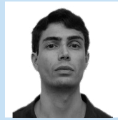

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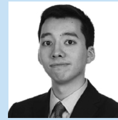

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