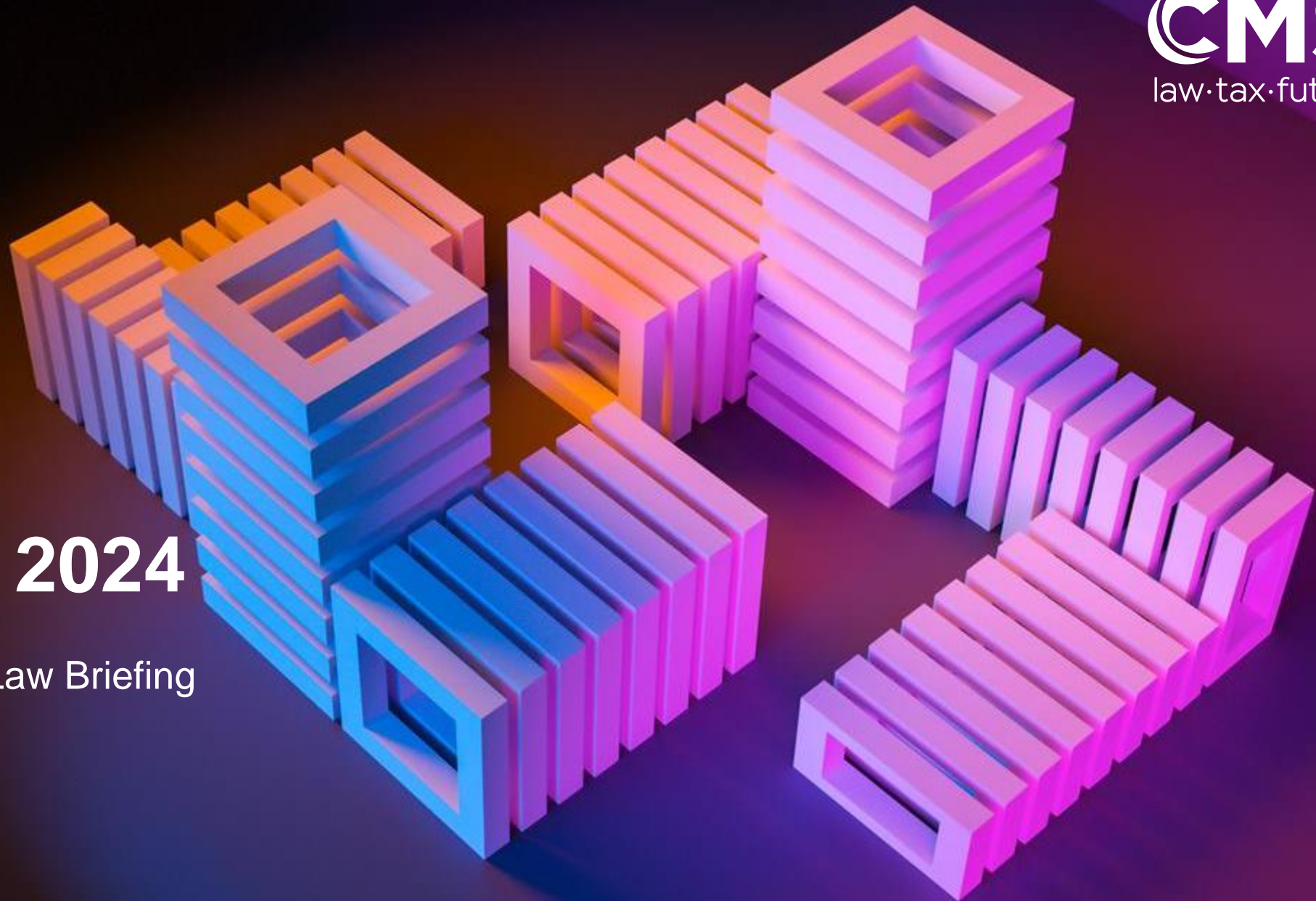


Outlook 2024

EU Competition Law Briefing



Agenda



Revised market definition notice

Brian Sher



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Technology-Transfer: Review of the TTBER and Guidelines

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Revised market definition notice

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Revised market definition notice

What is it about?

- New notice, 8 February 2024
 - Complete overhaul of 1997 notice
 - Consolidation – 27 years' case law
- Refresher on role of market definition
 - Merger control
 - Abuse of dominance (Art 102)
 - Role in Art 101
- Notice is not a panacea

What is new (1)

1. Greater focus on **dynamism of markets**
 - Forward-looking where structural change expected
 - Role of innovation, R&D, pipeline products, potential competition
 - Can broaden (*GE/Alstom*), narrow (*GSK – Generics v Cmn*) or define (*Abbvie/Allergan*) a market
2. **Digital markets and bundles**
 - Multi-sided platforms – overall platform market (*Microsoft/LinkedIn*) or separate markets (*Mastercard*)
 - After-markets – system vs multiple vs dual
 - Digital ecosystems

Revised market definition notice, contd.

What is new (2)

- **Geographic market definition**
 - Methodological points
 - E.g. homogeneity, supplier location, customer location
 - Evidence
 - E.g. pricing levels, customer factors, barriers
- **Market shares**
 - Multiplicity of alternative approaches
 - Capacity/production, contracts,
 - Usage – active users, streams, downloads
 - Dealing with zero price markets

Practical points

- Greater weight on contemporaneous evidence
- Facts, facts, facts
- Merger control vs abuse of dominance
 - Different functions of market def
 - Greater focus in notice on mergers - market def in abuse cases less developed
- Market def is complex and technical – importance of conveying that to business stakeholders. Allow time for it



New rules in digital: DMA, DSA and AI

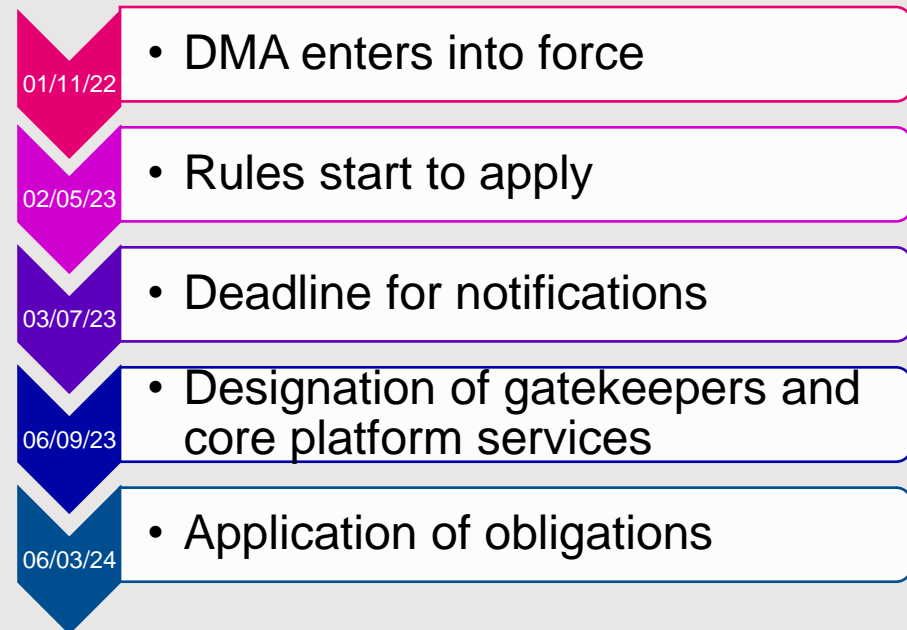
Bjoern Herbers

Digital Markets Act (DMA)

What is it about?

- Aim: To make markets in the digital sector **fairer** and more **contestable**
- Special rules for **gatekeepers** = large digital platforms providing **core platform services**,
 - online search engines, app stores, messenger services etc.
- Ex ante regulation: List of strict **dos and don'ts** ("inspired by competition law")
- The DMA is enforced by the **European Commission**
- Competition law **toolbox**
- **Fines**: of up to 10% of the company's total worldwide annual turnover, or up to 20% in the event of repeated infringements

Current State of Play



Digital Markets Act (DMA)

What is new?

- September 23: Gatekeeper **designation** decisions
 - Six gatekeepers
 - 22 core platform services
- Three companies are challenging gatekeeper decision in front of the General Court
 - Application for interim measures dismissed
- Market investigations
 - February 24: Commission closes **market investigations on rebuttals**
 - Two gatekeepers submitted ‘rebuttal’ arguments, explaining why despite meeting the quantitative thresholds certain of their services should not qualify as core platform services
 - Ongoing market investigation on **additional core platform service**

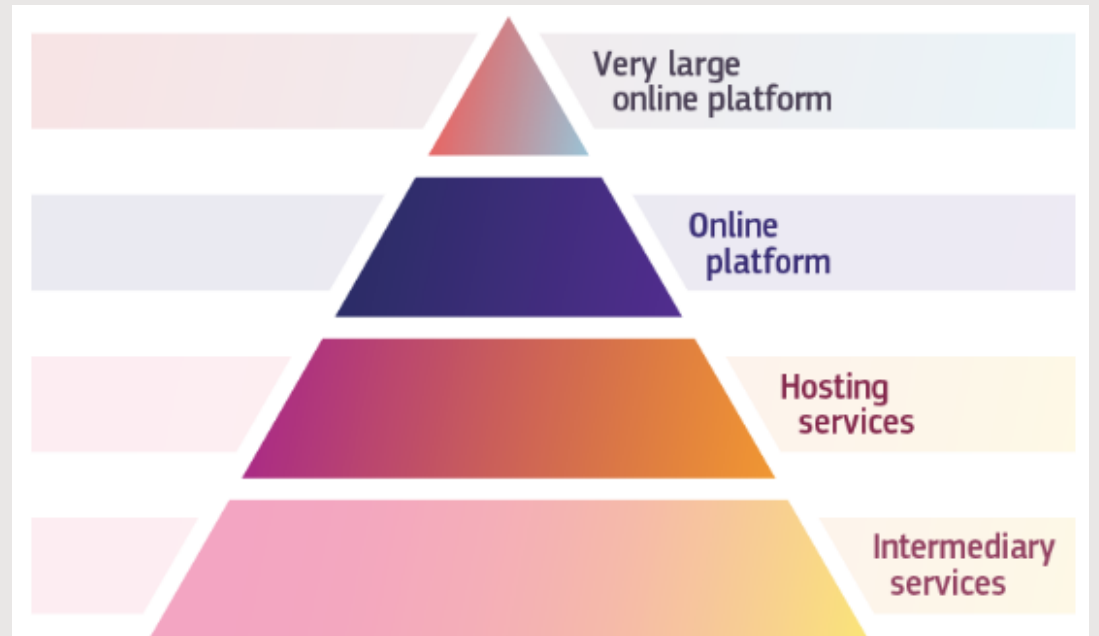
Comment and Next Steps

- **Compliance obligation** applies as of 6 March
- Gatekeepers have to submit **compliance reports**
- Mixed feedback on **compliance measures**
- Reports on gatekeeper M&A
- Start of **enforcement**
 - Public enforcement
 - Private enforcement

Digital Services Act (DSA)

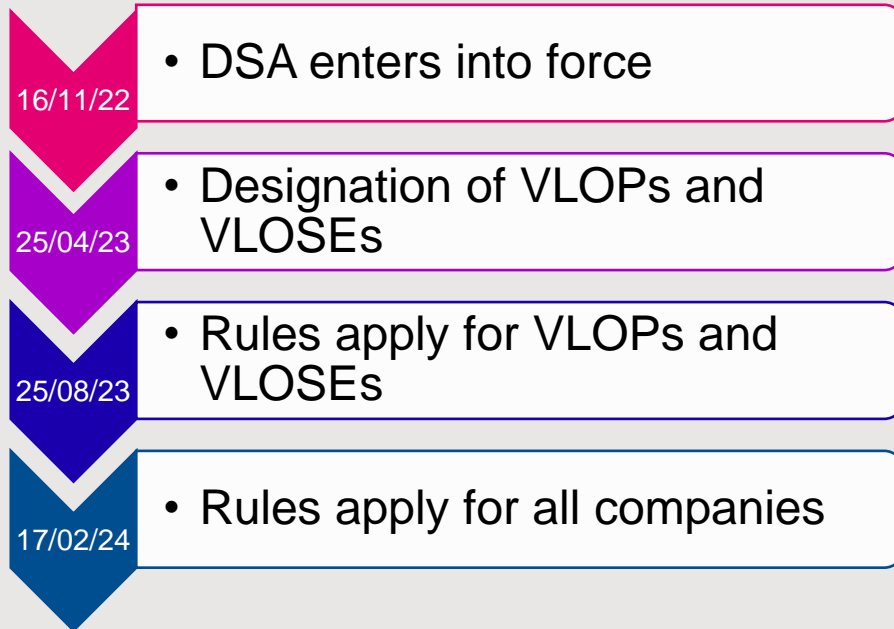
What is it about?

- Regulation of **online intermediaries and platforms**
 - Marketplaces, social networks, content-sharing platforms, app stores, and online travel agencies.
- Aim: Prevention of **illegal and harmful activities** online and the spread of disinformation
 - "Making the online world safer"
- Obligations under the DSA depending on **role, size and impact** in the online ecosystem
- **Fines**: of up to 6% of the company's total worldwide annual turnover
- **Enforcement** by European Commission and Member States



Digital Services Act (DSA)

Current State of Play



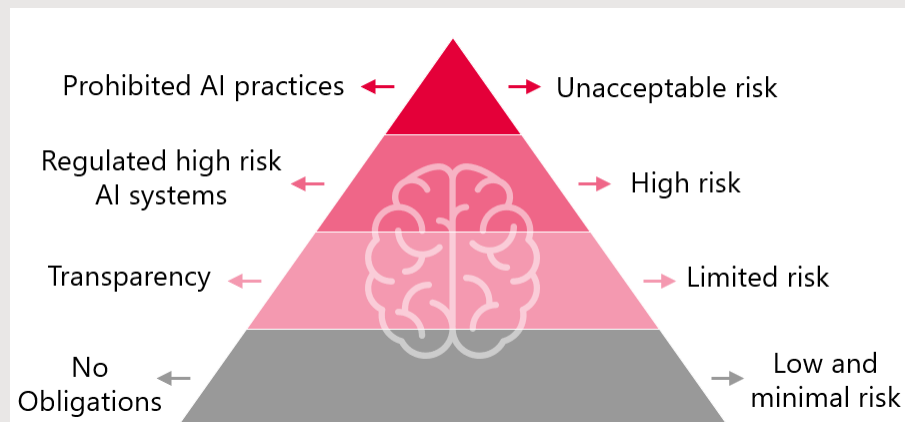
What is new?

- **Implementation**
 - Delegated Regulation on independent audits
 - Administrative Arrangements with Member State authorities
 - European Centre for Algorithmic Transparency
- **Enforcement**
 - 12/23: Commission opens proceedings against X (Twitter)
 - 02/24: Commission opens proceedings against TikTok

AI Act

What is it about?

- World's first **comprehensive regulatory framework for AI**
- Aim: Product safety, fundamental rights protection, general principles for AI
- Establishment of **compliance requirements** for AI developers, providers and users
- Level of regulation determined by the risk of the AI system (**risk-based approach**)

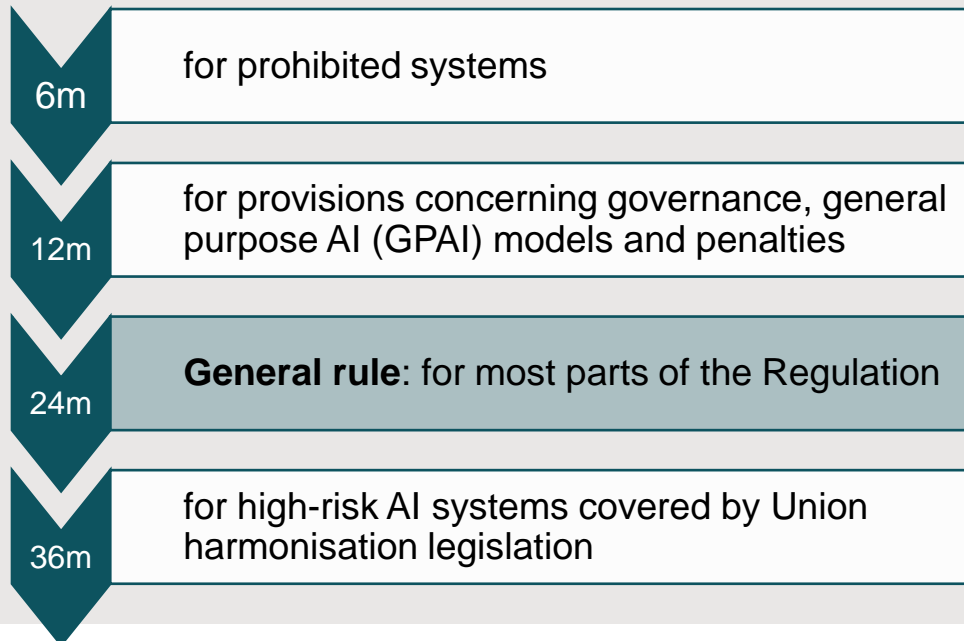


- Detailed catalogue of **prohibited systems**
- Strict compliance requirements for **high-risk AI systems** (e.g. remote biometric identification systems)
- Special rules for **general purpose AI (GPAI)**
- **Enforcement** by Member States and by European Commission (EU AI Office)
- **Fines:** of up to EUR 35m or 7% of the company's total worldwide annual turnover (whichever is higher)
- Protection of SMEs as an enforcement priority

AI Act

Current State of Play

- Formal **adoption** by Parliament and Council expected in April 2024
- **Entering into force**: 20 days after publication in OJ
- **Application:**



Comment and Next Steps

- **Final "clean" text**
 - **Implementing Acts**
 - Set-up of **national authorities**
 - Interplay with **sector specific legislation**
-
- **Product liability** will be regulated in the Civil liability regime for artificial intelligence (AILD)
 - Commission launched call for contributions on **competition in generative AI**



Article 102 – Abuse of Dominance Guidelines

Brian Sher

Abuse of dominance guidelines and outlook

What is it about?

- Commission launched Art 102 “package” end March 2023
 - “Minor” amends enforcement priorities
 - Staff working paper
 - Consultation on Art 102 guidelines
- Draft guidelines expected Summer 2024. Final guidelines expected 2025 following consultation
- Codification of case law (stated goal) vs policy choices
 - What is really going on?

What to watch out for / be aware of

1. Judgments
 - *Italian electricity case, Unilever Italia, Lithuanian railways*
 - *European Super League*
2. Waiting for *Intel* ECJ (AG Medina’s opinion)
 - And the *Google* cases
3. Outlook:
 - Exclusionary abuse
 - Role for presumptions? When? (Staff paper provides clue)
 - How the Commission will negotiate the cases it doesn’t like
 - New types of exploitative abuse



Technology-Transfer: Review of the TTBER and Guidelines

Rolf Hempel

TTBER

What is it about?

- Commission Regulation (EU) No 316/2014
 - Exempts certain categories of technology transfer agreements (e.g., patent, know-how and software license agreements) from the prohibition of anti-competitive agreements
- Further guidance: TT Guidelines

Current State of Play

- TTBER will expire 30 April 2026
- The Commission is currently conducting an evaluation to help it decide whether to let the TTBER and the TT Guidelines expire, prolong their duration, or revise them

TTBER

What is being discussed?

- Overall stakeholders are relatively satisfied with the clarity and comprehensibility of the TTBER and the TT Guidelines and confirmed the continuing relevance of the TTBER and TT Guidelines
- Only few points of criticism

Next Steps

- The adoption by the Commission is planned for the third quarter of 2024



Reg. 1 / 2003: Evaluation of the framework for antitrust enforcement

Siobhan Kahmann

Review of Reg 1/2003

What is it about?

- **Reg 1/2003** is the result of the most comprehensive reform of procedures for the enforcement of Articles 101 and 102 TFEU since 1962 – **NOW ~21 years old**
 - Abolished AT notifications
 - Empowered NCAs
 - Level playing field across MS
 - Close co-operation between EC and NCAs
 - Enhanced enforcement tools
- **Call for evidence and public consultation** on the antitrust rules Q3 2022 on regs 1/2003 and 773/2003

Current State of Play

- **EC enforcement action has adapted** to evolving markets (i.e. digital markets) and changing ways of doing business
- **Procedural framework largely unchanged**
- **Consultation - Better Regulation Rules**
 - Effectiveness - how well objectives are met?
 - Efficiency - costs vs benefit?
 - Relevance - EU action necessary?
 - Coherence - Complement/contradict?
 - EU added value - clear?
- **Two questionnaires:** general and expert

Review of Reg 1/2003

What is new?

- **Factual results** of public consultation published Dec 2022
- **Evaluation support study** awarded Dec 2022
- **Stakeholder workshop** in Brussels October 2023
 - Evidence gathering toolbox
 - Complaints and third-party participation
 - Remedies and fines
 - ECN cooperation

Next Steps

- **Staff Working Document** – Q2 2024
- Will include a summary of all consultation results
- Will consider position and changes



- Watch this space...

ECJ decisions: Important judgments from Luxembourg

Edmon Oude Elferink

2024 – what you may have missed

Article 101 and 102 TFEU

- ECJ 21 December 2023, Case C-333/21, **European Superleague**
 - Intersection competition rules and sports – Restriction by object
- ECJ 21 December 2023, Case C-124/21P, **ISU/Commission**
 - Intersection competition rules and sports
- ECJ 25 January 2024, Case C-438/22, **Em akaunt BG EOOD**
 - Wouters-doctrine – Minimum fee amounts lawyers
- ECJ 1 February 2024, Case-251/22P, **Scania/Commission**
 - Hybrid case – Objective impartiality – Tabula rasa

Digital Markets Act

- President General Court 9 February 2024, Case T-1077/2023, **Bytedance/Commission**
 - Interim measures – Designation gatekeeper – No urgency

2024 – what to look out for

Article 101 and 102 TFEU

- ECJ, Case C-240/22P, **Commission/Intel**
 - Microprocessors market – Loyalty rebates
- ECJ, Case C-48/22P, **Google/Commission**
 - Google Search – Self preferencing
- ECJ, Case C-298/22, **Banco BPN/BIC**
 - Information exchange – Stand-alone
- ECJ, Case C-221/22P, **Commission/Deutsche Telekom**
 - Obligation Commission to pay default interest
- ECJ, Case C-70/23P, **Westfälische Drahtindustrie/Commission**
 - Prestressing steel cartel – Due date of fine
- ECJ, Case C-201/19P, **Servier/Commission**
 - Pay for delay

EUMR and EFTA

- ECJ, Cases C-625/22P and C-611/22P, **Illumina/Commission** and **Grail/Commission**
 - Referral mechanism Article 22 EUMR – Dutch clause
- General Court, Case T-709/22, **Illumina/Commission**
 - Prohibition Illumina/Grail
- EFTA-Court, Case E-11/23, **Lassenteret/Assa Abloy**
 - Trade secrets – Confidentiality ring – Abuse of dominance – Damages

National competition laws: Overview on new tools and amendments

Henrik Nordling

Overview of new development and trends

– **Increased Enforcement and Legislative Amendments**

- Changes often include expanding the scope of competition authorities' powers, introducing stricter penalties.
- E.g. Germany and Norway investigative powers

– **Focus on Digital Markets and Emerging Technologies**

- Particular attention to competition issues in digital markets, tech and AI.
- E.g. Portugal AI guidelines, Chile Crypto judgment

– **Sector specific investigations**

- Sectors include healthcare, agriculture, energy, financial services, and retail, among others.
- E.g Belgium and agriculture

– **Focus on Sustainability and Environmental Issues**

- Growing emphasis on incorporating sustainability and environmental considerations into competition law enforcement
- E.g. France guidelines

– **Increased FDI screening**

- Updated, implemented and expanding FDI regimes
- E.g. Netherlands, Sweden

– **Competition in Labour markets**

- Growing trend to look at issues in labour markets, including wage fixing, non-competes and non-poaching
- E.g. UK

– **Plenty more to consider...**

- Tackling inflation
- Verticals enforcement
- Merger control modifications

Thank you for joining us!

Don't forget to scan the QR code to [register for our next webinar](#) **State Aid Outlook 2024** on 22 March





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