

Competition Outlook 2025

EU Competition Law Briefing

Agenda



Court of Justice of the European Union

Edmon Oude Elferink



Digital Competition & Regulation

Björn Herbers



Merger control: “Killer acquisitions” - what next in the wake of Illumina/Grail

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Draft Article 102 TFEU Guidelines on Exclusionary Abuses

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Foreign Subsidies Control

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National Competition Laws: Update & Outlook

Dieter Zandler

Court of Justice of the European Union

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Pending competition cases

Preliminary references

- Case C-2/23 (FL und KM Baugesellschaft) – cartel damage directive – ECN+ directive – (non) disclosure leniency request and settlement submission in criminal proceedings
- Case C-209/23 (RRC Sports) – football players' agents – FIFA rules
- Case C-233/23 (Alphabet/Google) – abuse of dominance – refusal of access to platform or digital infrastructure – Bronner
- Case C-428/23 (ROGON) – football players' agents – restrictions DFB – Meca-Medina doctrine
- Cases C-510/23 (Trenitalia) and C-511/23 (Caronte & Tourist) – abuse of dominance – ECN+ directive – pre-investigation stage

Preliminary references

- Case C-581/23 (Beevers Kaas) – vertical restraints – prohibition of active sales in exclusively allocated territory – parallel imposition requirement
- Case C-161/24 (OSA) – collective management company of copyrighted works – license fees for hotels
- Case C-133/24 (CD Tondela) – Portuguese football leagues – Covid19 – No poach-agreements – Meca-Medina doctrine
- Case C-245/24 (Lukoil Bulgaria) – abuse of dominance – single continuous infringement – essential facility doctrine

Pending competition cases

Direct actions

- Joined cases C-367/22P a.o. (Air Canada a.o./Commission) – air cargo cartel – extraterritorial jurisdiction Commission – inbound routes – qualified effects – single and continuous infringement
- Case C-464/23P (EVH/Commission) – RWE/E.ON assets – cartel prohibition and merger control – single concentration – market definition
- Case C-14/24P (Commission/Bulgarian Energy Holding a.o.) – abuse of dominance – Romanian Transit Pipeline 1 – refusal to grant access – exclusionary effects not hypothetical (pay for delay)
- Case C-160/24P (JP Morgan Chase/Commission) – Euro Interest Rates Derivatives – standard of proof
- Case C-191/24P (Crédit Agricole/Commission) – Euro Interest Rates Derivatives – lack of impartiality Commission – information exchange

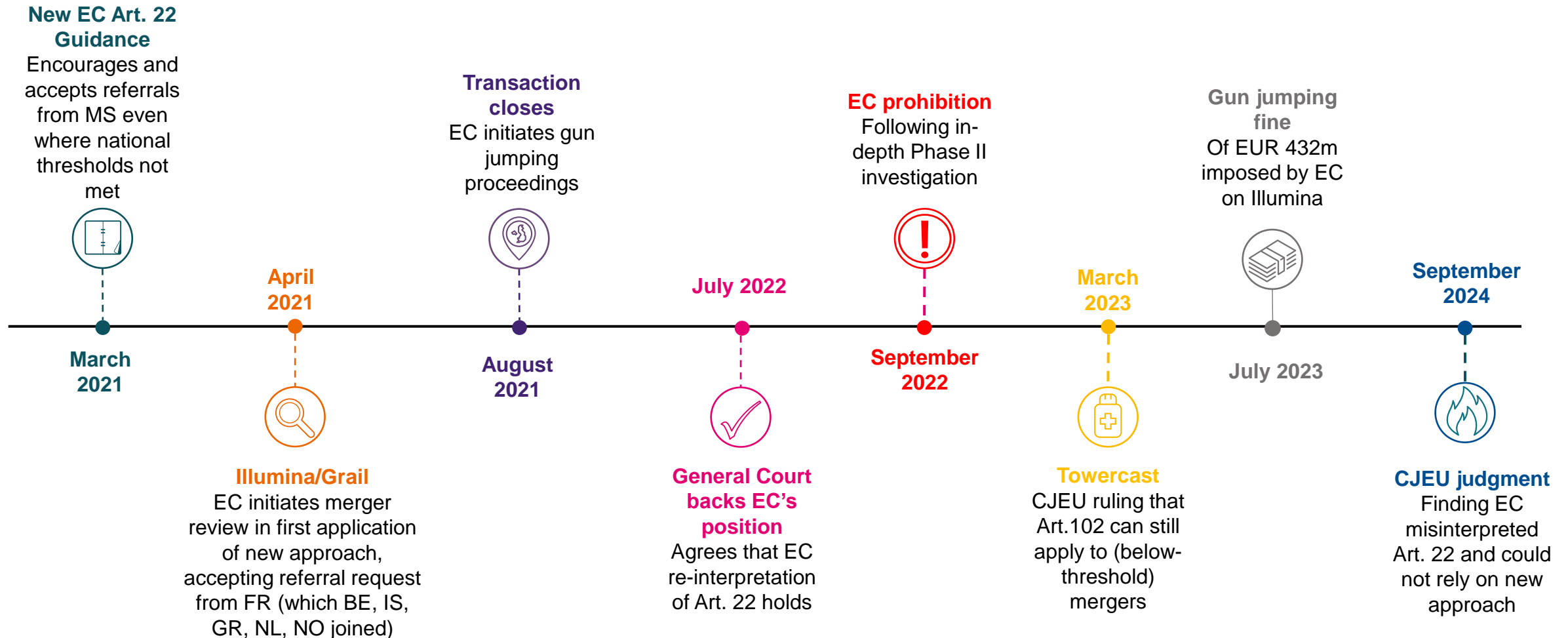
Infringement procedures

- Case C-577/23 (Commission/Estonia) – transposition ECN+ directive – (lack of) independence competition authority (judgment out on 23 January 2025!)

Merger control “Killer acquisitions” - what next in the wake of *Illumina/Grail*

Jacqueline Vallat

A recap of the timeline



“Killer acquisitions” – what next ?

Illumina / Grail key points

- Art. 22 referral mechanism for two purposes:
 - MS that do not have merger control rules (LU); or
 - Extension of ‘one stop shop’ principle, to allow EC to examine concentration notified/notifiable in several MS
- Repeated emphasis on predictability and legal certainty: thresholds are ‘of cardinal importance’
- Envisages two solutions:
 - EU legislator to review EU thresholds
 - MS to revise downwards their thresholds
- BUT does not preclude Art. 102 (*Towercast*)

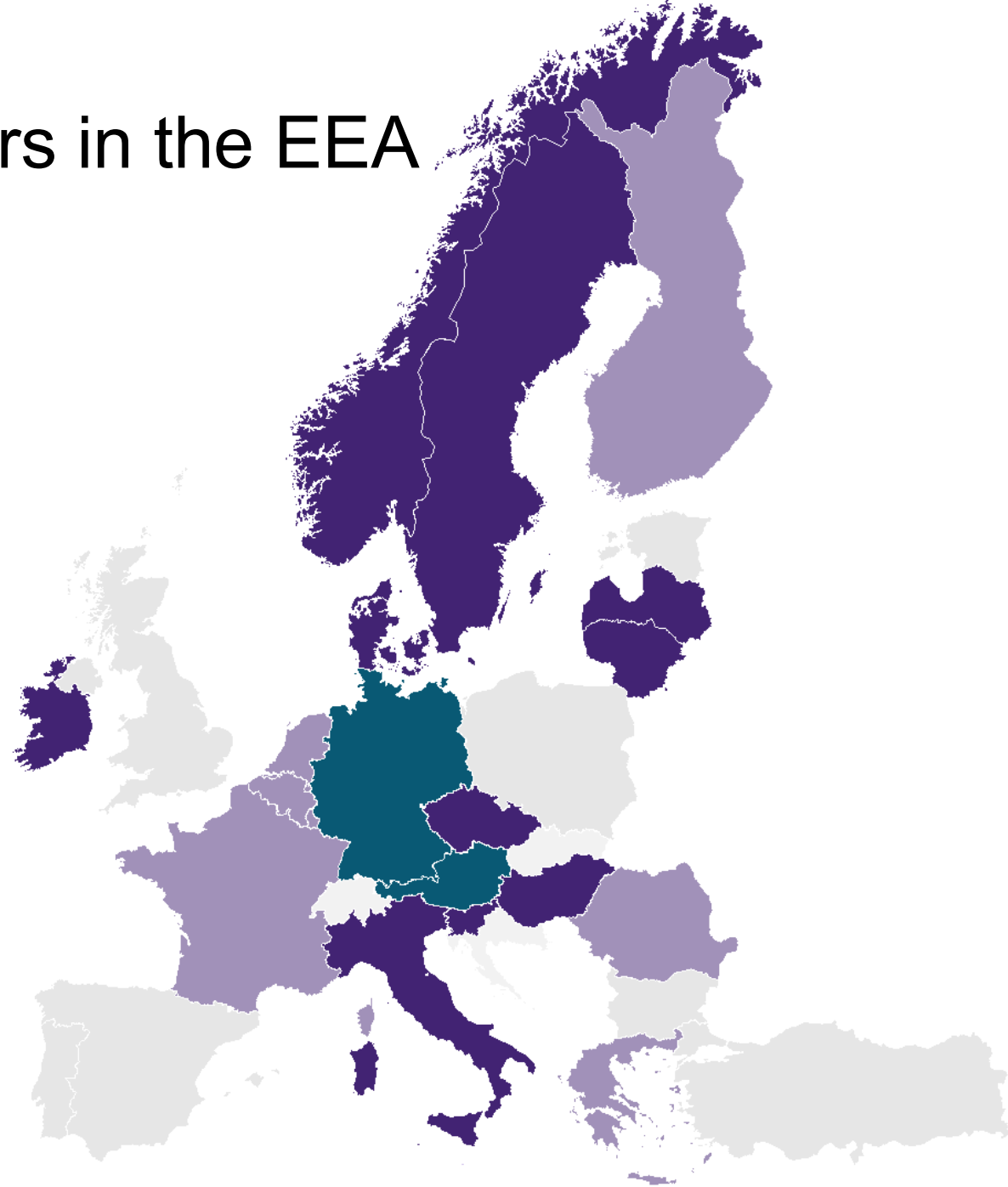
What are the options?

- Review of EUMR
 - Draghi report (Sep 2024): suggests deal value-based thresholds
 - Mission letter to Ribera (Sep 2024): focus on ‘risks of killer acquisitions’
 - ‘Nothing has yet been decided’ (Oct 2024)
- Art. 102 (and 101): *Towercast*
 - EUMR does not preclude ex-post control by MS of below-threshold concentrations
 - BE and FR very active
 - ...and legal certainty?
- Revision of national thresholds

The introduction of 'call-in' powers in the EEA

- Current status:

- Powers to 'call-in' below-threshold mergers in place
- 'Considering' introduction of call-in powers (e.g. lobbying/consultation, draft legislation)
- Deal value-based thresholds



Note: Cyprus and Iceland both also have below-threshold call-in powers.

“Killer acquisitions” – what next ?

National call-in powers

- Different shapes and sizes
 - Any threshold?
 - Turnover or market-share based?
 - Nexus?
 - Time limit?
 - Long standing or recent?
- Proliferation in recent years
- *Nvidia/Run:ai*: first Art. 22 referral post *Illumina/Grail* using call-in powers (IT)
 - Currently being appealed

Outlook

- An ever-diminishing legacy of *Illumina/Grail*?
 - And what of predictability and legal certainty in international transactions?
 - Risk of fragmentation?
 - Legality of referrals based on highly discretionary call-in rights?
- And the next big debate...
 - ‘Acqui-hires’ or AI ‘partnerships’?

Foreign Subsidies Regulation

Szabolcs Szendrő

Foreign Subsidies Regulation I.

What is it about?

- **Objectives:**
 1. **Addressing distortions** caused by foreign (non-EU) subsidies in the context of:
 - **Acquisition or merger** of undertakings active in the EU
 - Participation in **public procurement and concession** procedures
 - **Other** market situations
 2. Legal **gap** to be filled (state aid regime did not cover these actions, but restricted EU governments)
 3. Respect of **international obligations**
- **Focus on China** but not limited to – non-discrimination principle
- The Commission has **extensive toolbox**
 - Investigate powers (e.g., RFIs, market investigations, dawn raid)
 - Sanctions (e.g., fines of up to 10% of total turnover)

Current state of play

- **Investigate foreign financial contributions** (e.g., subsidies, interest-free loans, unlimited guarantees)
- **Three types of procedure**
 - **Ex-ante notification above certain thresholds**
 - Concentration
 - Public procurement / concession
 - **Ad hoc notification below notification thresholds**
 - **Ex officio investigation** (to any market situation)
- **Assessment of distortion**
 - Potential damage to competition in the EU
 - Indicators of a distortion: amount, form and purpose of the subsidy, markets concerned, etc.
- **Balancing test**
- **Remedy the distortion**
 - Structural or non-structural redressive measures
 - Prohibition of concentration or award of public procurement / concession

Foreign Subsidies Regulation II.

What is new?

1. **Public procurement cases** (100+ submissions in the first 100 days)
 - In-depth investigation into **electric trains** in Bulgaria
 - In-depth investigation into the **solar photovoltaic** sector in Romania
2. **Merger cases** (85 M&A notifications and 130 prenotification discussions in the first year)
 - First in-depth investigation and conditional approval in the **telecommunication** sector (e& / PPF)
 - Unconditional approval regarding **refrigeration** business (Haier / Carrier)
 - **Numerous cases in the pipeline** from various industries (e.g., bank, paper distribution, investment)
3. **Ex officio cases**
 - In-depth investigation into **wind turbines** targeted Chinese suppliers
 - In-depth investigation into **security equipment** sector included dawn raids in several EU states

Comment and next steps

- FSR enforcement is expected to remain a **key priority**
- Understaffing of the Commission is likely only temporary – substantial **boost in resources** is expected
- Expected **primary targets**:
 - “Greatest scale” issues
 - Investment-heavy markets
 - Greenfield investments, developing markets
 - Killer acquisitions
- **FSR is integrated into the EU policy framework**:
 - Formal antitrust instrument
 - EU competitiveness
 - EU green transition, sustainability
- As the **Draghi-report** indicates:
 - *“It is of **paramount importance for the EU** that these new rules [FSR] are applied **effectively** and result in the intended **benefits for EU consumers and businesses.**”*

Foreign Investment Control (FDI)

Claire Vannini

Highlights and trends at national level

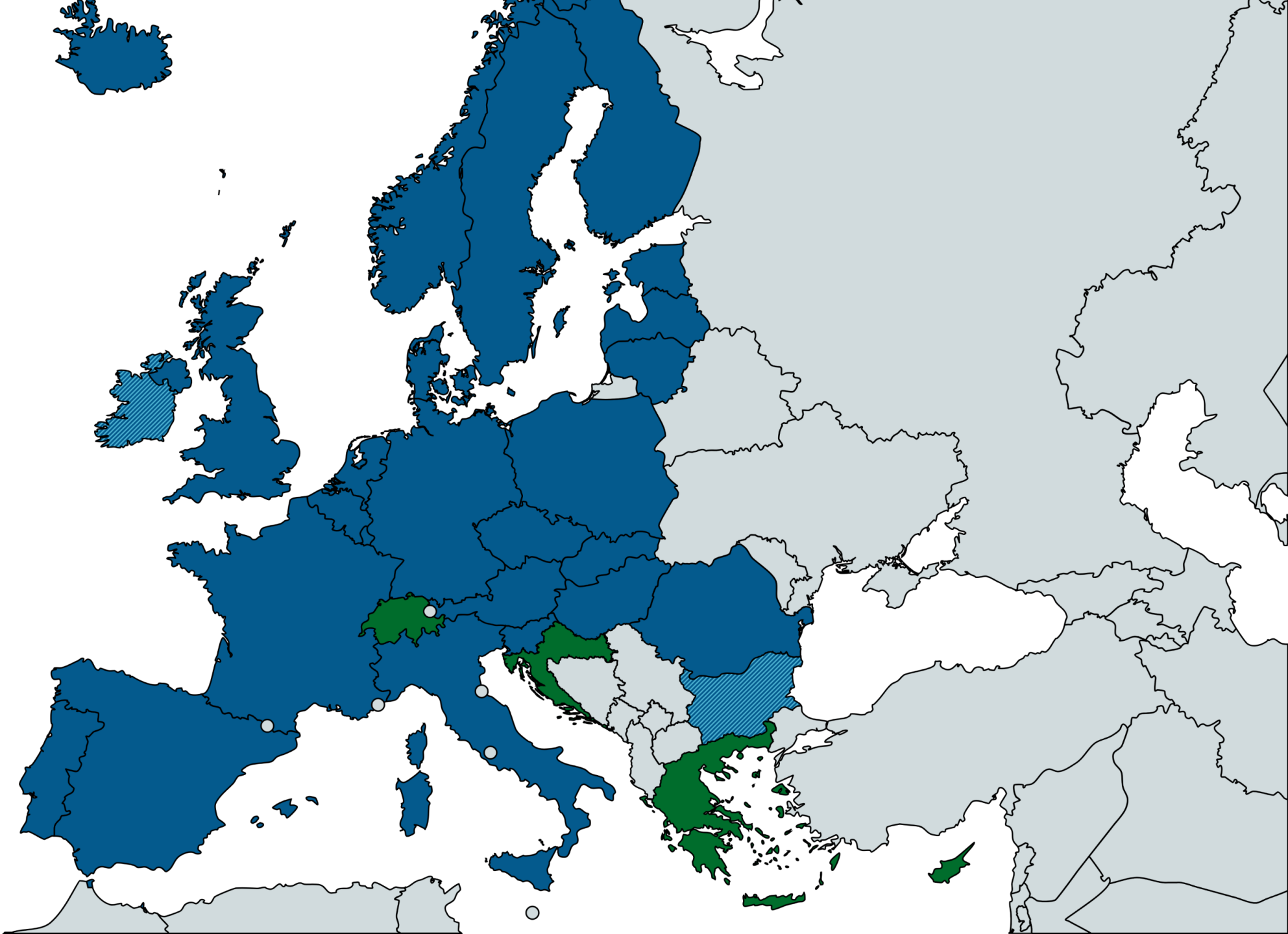
What is new?

- A growing number of European countries now have an **FDI regime**:
 - Netherlands
 - Belgium
 - Luxembourg
 - Sweden
 - Bulgaria
 - Ireland
- Many long-established regimes have continued to **expand their scope** and **tighten their controls**:
 - France
 - Spain

Next steps

- **New FDI regimes** may come into force in 2025:
 - Switzerland
 - Croatia
 - Greece
- National authorities expected to focus on **technology and AI sectors**, as well as activities related to **critical raw materials**:
 - Germany
 - France
 - Netherlands

- In force
- Recently in force
- Steps initiated



Outlook for initiatives at EU level

What is new?

- The European Commission pursues its initiative to revise the **EU FDI Regulation**
 - National FDI regime would become compulsory in all Member States
 - Greater harmonisation across the EU
- Potential future adoption of a new EU control mechanism for **outbound investment** related to key technologies:
 - Semiconductors
 - AI
 - Quantum computing

Next steps

- Revision of the EU FDI Regulation:
 - Mid-2025: new Commission's discussions
 - Adoption not before 2026
 - Implementation not before 2028
- Outbound investments
 - Assessment of outbound investments by Member States until June 2026

Digital Competition & Regulation

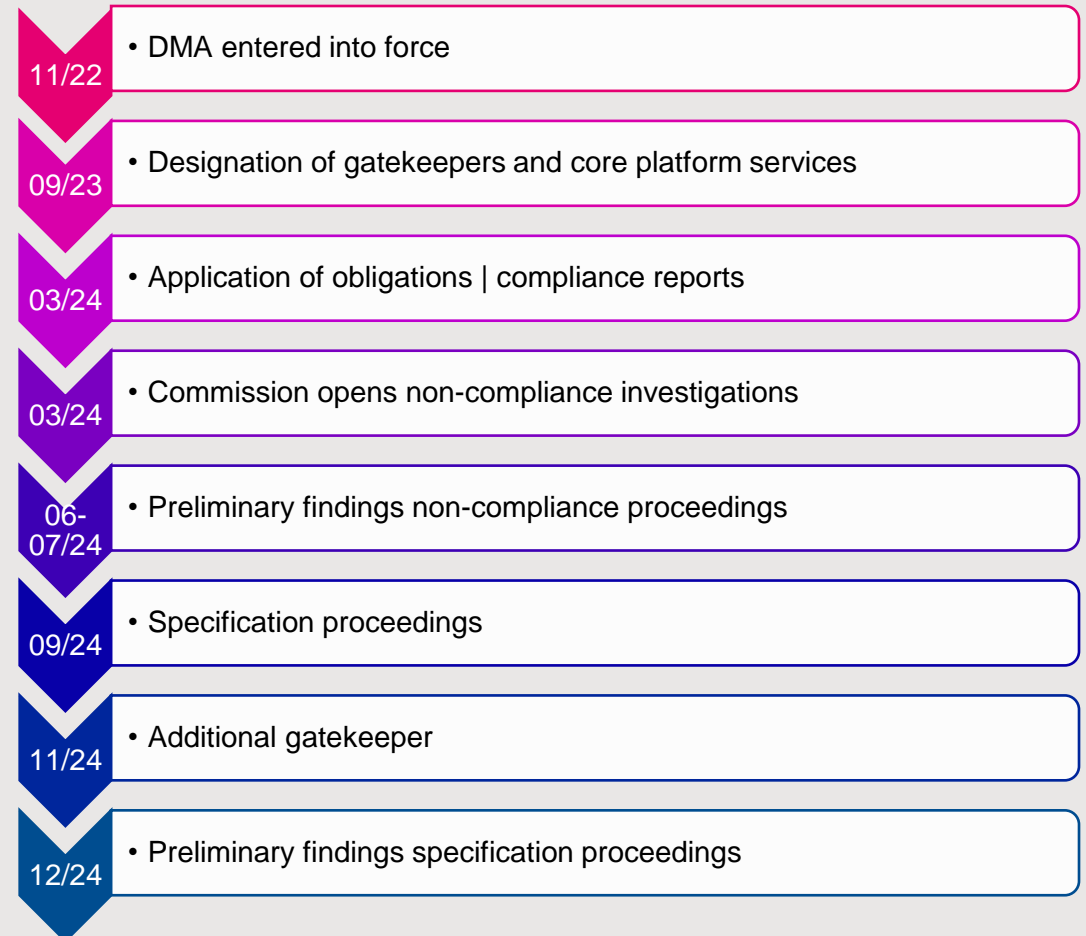
Bjoern Herbers

Digital Markets Act (DMA)

What is it about?

- 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")
- Competition law **toolbox**
- **Reporting obligation** for acquisitions
 - Impact of Illumina/Grail judgement

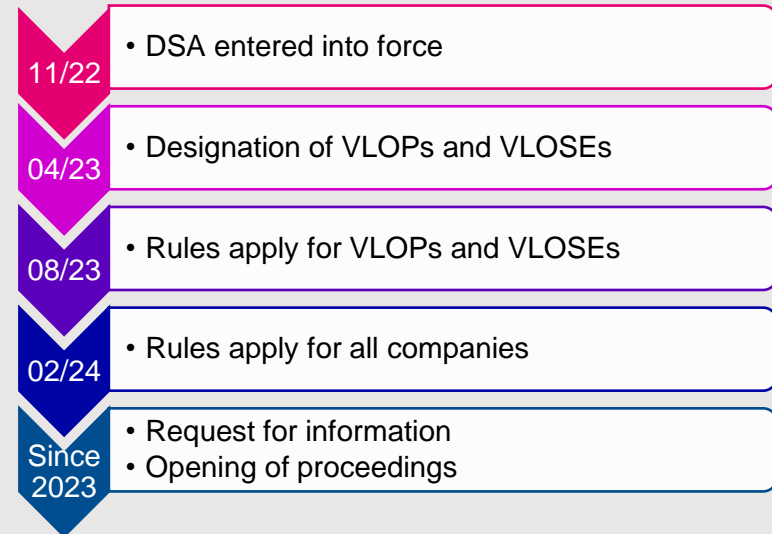
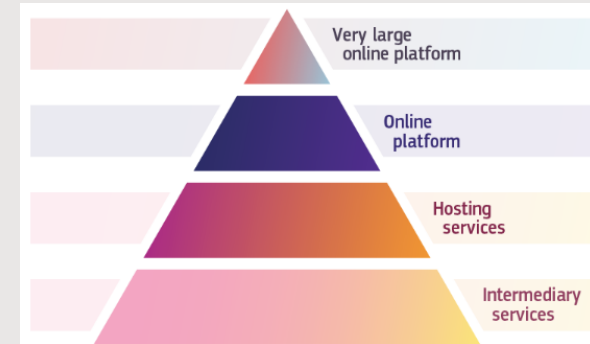
Current state of play



Digital Services Act (DSA)

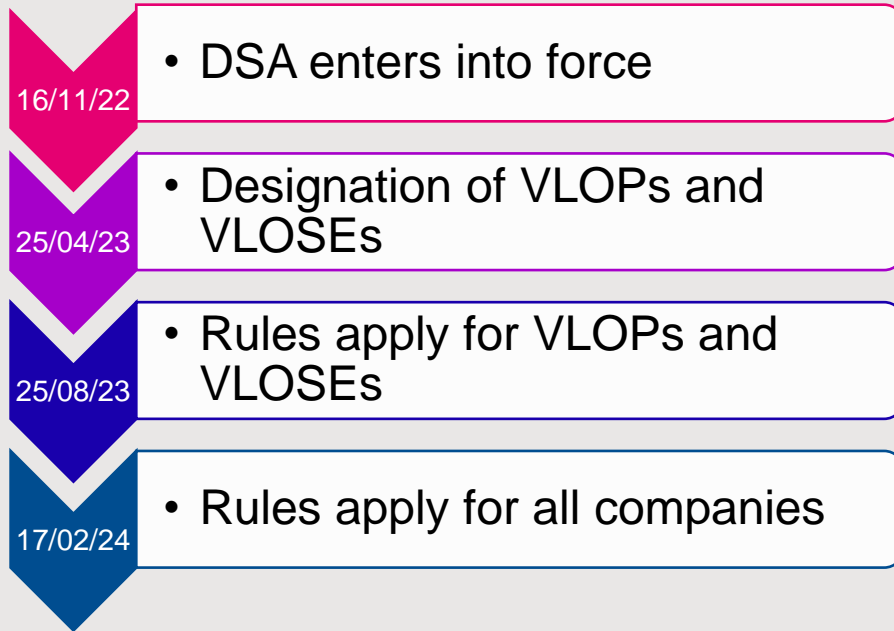
What is it about?

- 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 depend on the **role, size and impact** in the online ecosystem
- **Enforcement** by European Commission and Member States (Digital Services Coordinator)



Digital Services Act (DSA)

Current state of play



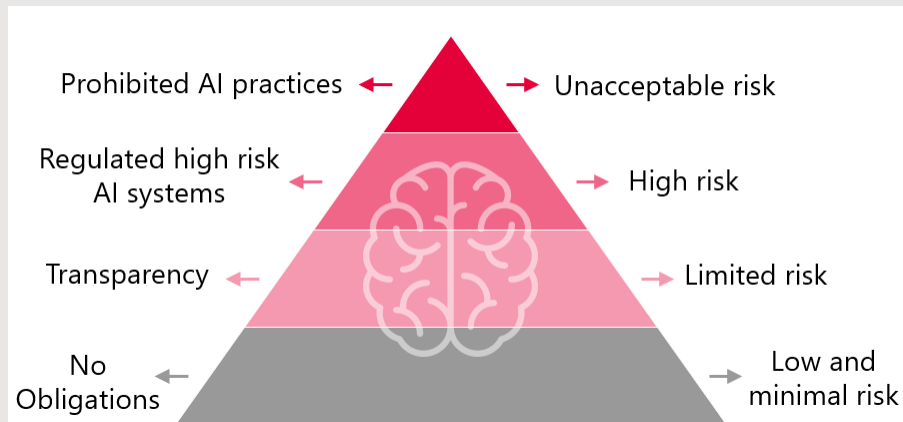
What is new?

- **Implementation**
 - Delegated Regulation on independent audits
 - Administrative Arrangements with Member State authorities
 - European Centre for Algorithmic Transparency
- **Enforcement**
 - Commission has opened proceedings against different VLOPs

AI Act

What is it about?

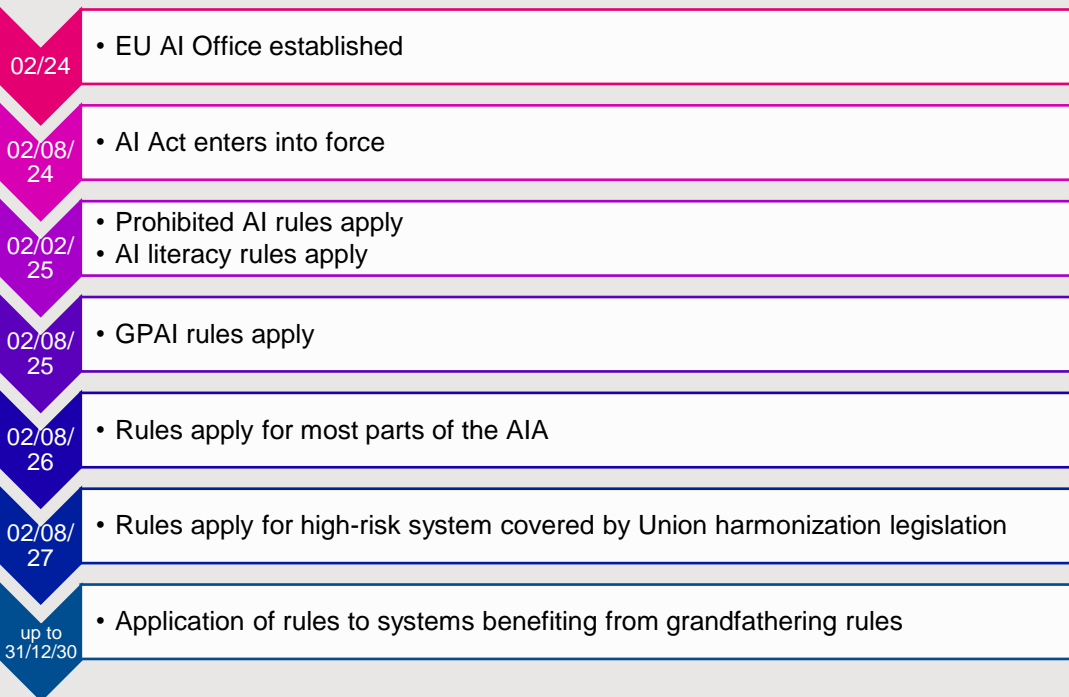
- World's first **comprehensive regulatory framework for AI**
- Aim: Product safety, fundamental rights protection, general principles for AI
- Establishment of **compliance requirements** for AI developers, providers and users
- Level of regulation determined by the risk of the AI system (**risk-based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

AI Act & Competition and AI

Current state of play



Comment and next steps

- Set-up of **national authorities**
 - Interplay with **sector specific legislation**
 - **AI pact**
 - **Product liability** will be regulated in the Civil liability regime for artificial intelligence (AILD)
-
- Competition & AI
 - AI partnerships
 - DG Comp: Policy brief on **competition in generative AI** (and virtual worlds)
 - DMA & AI

Draft Article 102 TFEU Guidelines on Exclusionary Abuses

Brian Sher

Draft Article 102 TFEU Guidelines on Exclusionary Abuses

What is new?

- New draft guidelines on exclusionary abuses, issued in August 2024
- **Two-fold test** for abuse
 - “not on the merits”
 - capable of exclusion
- Use of **presumptions for exclusionary effects**

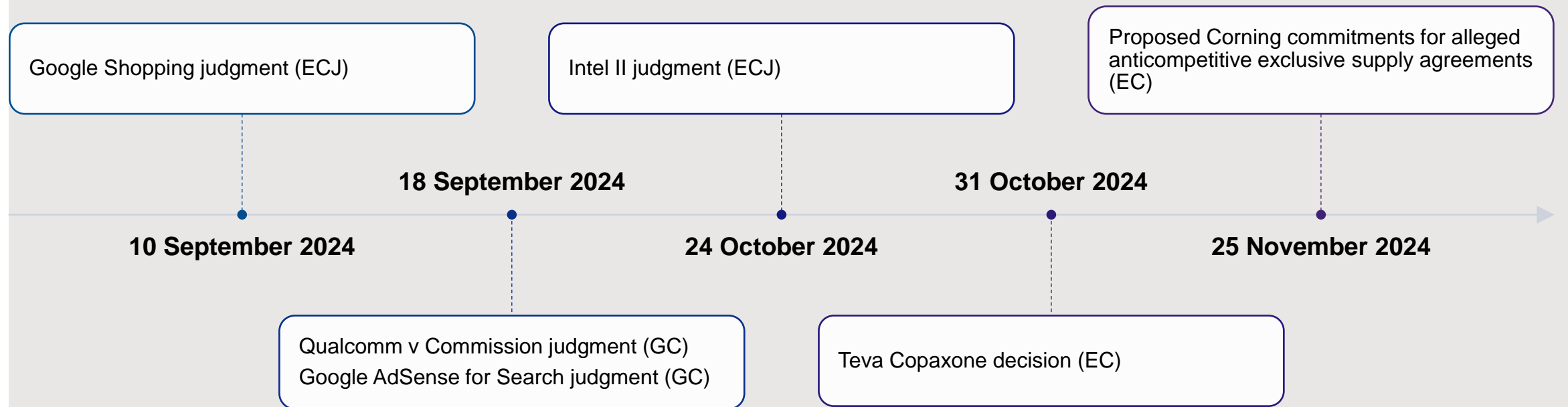
Comment and next steps

- Over **100 responses to public consultation** from various stakeholders (Autumn 2024). Some recurring themes:
 - Regrettable exclusion of exploitative abuses
 - Insufficient guidance, clarity and legal certainty for companies
 - E.g. lack of a positive definition of “competition on the merits”
 - Reduced use of economic based approach
 - E.g. need for clarification of when to use and to depart from AEC principle
 - Lack of guidance on interplay with DMA
- European Commission to hold **stakeholder workshop** on 13 February 2025 to gather views on the draft guidelines
- European Commission aims to adopt the guidelines in 2025

Draft Article 102 TFEU Guidelines on Exclusionary Abuses, contd.

Continued abuse of a dominant position case law

- Since the draft guidelines (August 2024), competition authorities and courts have issued several Article 102 TFEU decisions, including some landmark decisions.



Private enforcement

Edmon Oude Elferink

Legislation and pending competition cases

What is (not) new?

- Cartel damage directive (2014/104): 10 year anniversary!
 - Impact cannot be overstated
 - Claimant friendly case law
 - Benefits consumers?
- Directive on representative actions for the protection of collective interests of consumers (collective redress directive) (2020/1828)
 - Transposition period ended on 30 June 2023
 - 7 EU Member States still to transpose, including Spain and France
 - No preliminary references to CJEU in relation to directive in competition cases yet

Preliminary references

- Case C-253/23 (ASG2) – group collection of claims for damages – validity of assignments to provider of legal services – inapplicability of national law
- Case C-393/23 (Athenian Brewery) – Brussels I-bis Regulation – close connection – concept of an undertaking – follow on action for damages – abuse of dominance
- Case C-672/23 (Electricity & Water Authority of the government of Bahrain) – Brussels I-bis Regulation – close connection – concept of an undertaking – anchor defendant
- Case C-673/23 (Smurfit Kappa) – Brussels 1-bis Regulation – close connection – anchor defendant

Pending competition cases

Preliminary references

- Case C-21/24 (Nissan Iberia) – limitation period
- Case C-34/24 (Stichting Right to Consumer Justice)
 - abuse of dominance – stand alone action – online platform – Handlungsort – Erfolgsort
- Case C-286/24 (Meliá Hotels International) – *Holiday pricing* case 2020 – disclosure of evidence – action for access to documents prior to action for damages
 - impact on residents Portugal

CMS European Class Action Report

- For more information about developments in class action in the EU:
- [CMS European Class Action Report 2024](#)
- [Class Actions LinkedIn](#)

National competition laws: Update and outlook

Dieter Zandler

National competition laws

Outlook – expected enforcement activities of national competition authorities

- Focus on consumer facing industries
- Signaling and (algorithmic) collusion continue to remain in the spotlight of NCAs although number of cases so far limited
- Sustainability and ESG are “overhyped” for justification/exemption of restrictive practices
- NCAs may become subject to increased political pressure to achieve results for consumers (in particular in CEE/SEE)
- Merger control – NCAs requesting new tools/amended thresholds to close perceived gaps (NCAs FOMO on certain transactions not covered yet by existing merger control rules)

Germany

Potential legislative developments

- **12th amendment** to the German Act against Restraints of Competition (*12. GWB-Novelle*) is planned; possible changes:
- **Merger control:**
 - **Increase of turnover based merger control thresholds** to reduce number of overall cases
 - **Transaction value threshold:** Reduction from EUR 400 million to e.g. EUR 300 million and amendment of target's "significant domestic activities" test (removing requirement to current activities)
- **Increasing attractiveness of private enforcement:** Greater flexibility for plaintiff when choosing court (increasing specialization of regional courts dealing with PADC)

Current state of play and outlook

- First draft was initially planned for Q1 2025
- The early elections may **postpone** the publication of the draft law and may lead to changes

France

Potential legislative developments

- In 2024 the French government has introduced a draft aiming to **increase** the merger control **turnover thresholds**
- If adopted, a concentration would be subject to ex-ante merger control if it **meets the following turnover thresholds**:
 - The aggregate worldwide turnover of all the undertakings concerned exceeds **EUR 250 million** (currently EUR 150 million); and
 - The turnover in France of at least two of the undertakings concerned exceeds **EUR 80 million** (currently EUR 50 million)
- Special turnover thresholds for concentrations involving undertakings active in the **retail trade** would also be **increased**

Current state of play and outlook

- Discussion of draft in French parliament **has been delayed** following the dissolution of the National Assembly by the French President

Switzerland

Potential legislative developments

- A **revision of the Swiss Cartel Act** is currently under consideration, with potential major amendments including:
 - Introduction of the **SIEC test**;
 - Amendment of Article 5 Swiss Cartel Act (equivalent to Art 101 TFEU), mainly related to the **delineation of by object and by effect restrictions**;
 - **Strengthening private antitrust law enforcement** including by extending consumer rights to sue, suspending limitation periods during investigations and reducing administrative fines in case of damage payments

Current state of play and outlook

- The Council of States (one of the two chambers of the Swiss parliament) **approved** most of the [Federal Council's proposal](#) on 11 June 2024, including the introduction of the **SIEC test**
- However, the proposed amendment of Article 5 Cartel Act was restricted; further, the introduction of a compliance defense was proposed by the Council of States
- A **discussion** in the [National Council](#) (second chamber of the Swiss parliament) is **currently ongoing**
- It is expected that the potential amendments will enter into force **in 2026 at the earliest**

United Kingdom

Recent legislative developments

- The new Digital Markets, Competition and Consumers Act (**DMCCA**) significantly changes the UK's competition and consumer landscape (staggered implementation from May 2024 to Spring 2026):
- **Part 1** establishes a new regime for digital markets (similar to the EU Digital Markets Act)
- **Part 2** gives the CMA greater powers in tackling illegal, anti-competitive behaviours and introduces significant changes to merger control, including:
 - Increasing **threshold in UK merger control** from GBP 70 million to **GBP 100 million**
 - Introduces a new “hybrid” test met: (i) where one party has 33%+ share of supply and £350m+ UK turnover; and (ii) the other has a UK nexus
- **Part 3 and 4** strengthens the enforcement of consumer law, introducing an administrative procedure aligning it with enforcement of competition law
- **Part 5** among others includes provisions which deal with investigative assistance to overseas regulators

Current State of Play and outlook

- Part I **entered into force on 1 January 2025** and targets Big Tech and gives the CMA broad powers to promote competition in fast-moving digital markets.
- CMA [guidance](#) published
- **First two designation investigation** launched by CMA
 - On Google's activities in search and search advertising on 14 January 2025
 - On Apple and Google's activities in mobile ecosystems on 23 January 2025
- Third designation investigations expected in first half of 2025
- **Jurisdictional provisions** of DMCC (e.g. **transactions** covered by **UK merger control regime**) apply as of **1 January 2025**

Austria

Recent legislative developments

- Federal Act to **Mitigate the Consequences of the Crisis and Improve Market Conditions** in the case of **Market-Dominating Energy Suppliers** entered into force on 6 July 2024
- Exclusively targets practices of **electricity, district heating, and natural gas** (via pipelines) **suppliers** holding a dominant market position
- Prohibition of requesting prices or terms that are unfavorable compared to those offered by other energy/utility suppliers on comparable markets, unless objectively justified
- **Temporary scope of application** until 31 December 2027

Current state of play and outlook

- New rules on dominant energy suppliers: Difficult tool for NCA with little improvement compared to existing rules on abuse of dominance
- Generally, **level of fines** (relative) will likely increase further (cartels, abuse of dominance, gun-jumping; focus on 0-10% worldwide group turnover)
- Number of pending private (follow-on) antitrust damages actions will increase



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