

# Outlook 2022

EU Competition Law Briefing

# Agenda



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Szabolcs Szendro



## **Foreign subsidy control**

Helmer Krane



## **EU merger control reform**

Björn Herbers



## **Other developments of interest...**

Siobhan Kahmann



## **New rules for horizontal restraints (HBER/HGL)**

Michael Bauer



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Edmon Oude Elferink



## **New rules for vertical restraints (VBER/VGL)**

Amaury Le Bourdon

# Digital Markets Act

Szabolcs Szendro

# Digital Markets Act

## What is it about?

EU's digital package focusing on online platforms:

- **Digital Services Act (DSA):**
  - Consumer protection tool
  - Combatting illegal content and counterfeiting
- **Digital Markets Act (DMA):**
  - Competition tool
  - Regulation of core online platform service providers qualifying as gatekeepers
  - **Core platform services:** e.g. online intermediation services (E-Bay), search engines (Google), social networking (Facebook), video-sharing platforms (YouTube), cloud computing (Microsoft)
  - **Gatekeepers:** core platform service providers exceeding certain thresholds

## Current state of play

Amendments by the European Parliament on 15 December 2021, e.g.:

- **Extension of scope:** web browsers, virtual assistants and connected TV can also be gatekeepers
- **Higher thresholds:** €8 billion in annual EEA turnover or market capitalization €80 billion is required (instead of 6.5 and 65 respectively)
- **Additional obligations:** e.g. further requirements on the use of data for targeted or micro-targeted advertising
- **More restriction on “killer acquisitions”:** the Commission can temporarily restrict gatekeepers from making acquisitions in areas relevant to the DMA
- **Higher fines:** not less than 4% and not exceeding 20% of total annual worldwide turnover

# Digital Markets Act

## Potential Outcome 2022

- DMA potential gamechanger for gatekeepers:
- Mandatory notification if a core platform service provider qualifies as gatekeeper
  - Several obligations for gatekeepers, such as:
    - No self-preferencing
    - No bundling
    - More freedom for business users (e.g. in pricing, access to app stores)
    - Transparency obligations
  - Merger notification requirement (to prevent killer acquisitions)
  - Fines up to 20% of total annual turnover
  - Enforced by the European Commission

## Next Steps

- **EU co-decision procedure:** European Parliament and Council
  - On 25 November 2021, the Council adopted its general approach on the DMA
  - On 15 December 2021, the EP approved the DMA with significant amendments
  - Discussions between the Commission, the EP and the Council (“trilogue”) are ongoing, the latest session was held on 3 February 2022
  - Negotiations with Member State governments started in January 2022
  - The Commission aims to have reached consensus by the summer of 2022
- On 20 January 2022, the Commission published its report on the consumer Internet of Things (“IoT”) sector inquiry, the findings of which may contribute to the DMA’s legislative process

# EU merger control reform

Björn Herbers

# EU merger control reform

## What is it about?

- 2017 Evaluation of procedural and jurisdictional aspects of EU merger control
  - March 2021: Commission staff working document summarizing results
    - No substantive changes to EU Merger Regulation
- 1 Keep turnover-based jurisdictional thresholds
  - 2 New case referral policy (article 22 EUMR)
  - 2 Simplification of EU merger control process

## Current state of play

### 1 Referral policy

- March 2021: Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases
- Illumina/Grail case at the Court (T-227/21)

### 2 Simplification

- Public consultation March - June 2021

# EU merger control reform

## Potential Outcome 2022

### 1 Referral policy

- Will depend on the outcome of Case T-227/21
- Illumina argues that the Commission erred in its interpretation of Article 22 EUMR

### 2 Simplification

- (1) Scope of simplified procedure
  - Flexibility clause
  - New categories
- (2) Revised forms
  - Tick-the-box and opt out
- (3) Electronic filing

## Next Steps

### 1 Referral policy: Court decision (not on agenda yet)

### 2 Simplification package: First quarter 2022

- Draft revised Implementing regulation
- Draft revised Notice on Simplified Procedure



# Review market definition notice

## What is it about?

- Update of the 1997 Market Definition Notice
- Guidance for concepts of relevant product and geographic markets EU competition law

## Current state of play

- 2020 public consultation
- Support study and contributions of the NCAs, engagement with experts
- July 2021: Commission staff working document summarizing results

## Potential Outcome 2022

- Principles to stay
  - For example: Likely no "China" clause (potential competition)
- Update and addition of details
- Principles for digital contexts

## Next Steps

- Until 16.02.: Further call for evidence
- Draft revised notice
  - Q1/2023?
  - From notice to guidelines?

# New rules for horizontal restraints (HBER/HGL)

Michael Bauer

# Rules for Horizontal Restraints (HBER/guidelines)

## What is it about?

- Two **block exemption regulations** (HBER)
  - BER for R & D Agreements
  - BER for Specialisation and joint production
- **Guidelines for horizontal restraints** (HGL)
  - Details concerning BERs
  - Additional areas
    - Info exchange, joint purchasing, joint commercialisation, standardisation
- BERs expire 31/12/2022
- Need to adapt to new developments
  - Case law
  - Industry development

## Current state of play

- First general public/NCA consultation closed
- Topics raised mainly concerned HGL:
  - **Information exchange**: Signaling, dual distribution (interplay with VGL), benchmarking, data pooling / sharing, Hub & Spoke, algorithms
  - **Joint buying**: Joint buying v collective boycott/buyer cartel
  - **New areas**: Sustainability agreements, digital platforms
- Debate about "**Sustainability and Competition law**"
  - Policy Brief by DG COMP officials - Speech by VP Vestager - Various workshops by DG COMP - COM communication "A competition policy fit for new challenges"
  - NCA case law (e.g. GE), papers (NL/GR), new laws (AT)
- **Common Agricultural Policy (CAP)**
  - New exemption for sustainability agreements in the agricultural sector
- COM guidance letters
  - **AdBlue case** (collusion on technical developments/innovation)
  - **GAIA-X** (industry-wide alliance, data ecosystem)

# Rules for Horizontal Restraints (HBER/guidelines)

## Potential Outcome 2022

### – Sustainability agreements

- Definition of not anti-competitive agreement (standardisation, joint development, joint production)
- General guidance concerning exemption
  - Sustainability goals count as efficiency - transparency for consumers needed – Unclear: whether consumers need to be prepared to pay higher prices
  - Affected consumers need to receive a fair share of the benefits
  - Proof of market failure? (indispensability of the restraint)
  - No price fixing
- Additional tools: guidance letters ("Comfort letter 2.0") and Art. 10 decisions (Finding inapplicability)

### – Joint buying

- Clearer distinction between a buyer cartel and a legitimate joint-purchasing agreement
- More prominence to potential anticompetitive effects on suppliers
- More guidance and more examples, e.g. no-poach agreements (not to solicit another company's employees)

### – Infrastructure (network) sharing?

### – Data sharing

### – Information exchange??

## Next Steps

- Draft HBER/HGL (upcoming months)
- Adoption (Q4/22)

# New rules for vertical restraints (VBER/VGL)

Amaury Le Bourdon

# New rules for vertical restraints (VBER/VGL)

## What is it about?

- Review of the 2010 VBER to expire on 31 May 2022
- Draft VBER and VGL proposed by the EC and put out to consultation (summer 2021)
- Waiting for the final versions

## Current state of play

### Evaluation:

- Evaluation launched (3 Oct 2018)
- Open public consultation (4 Feb - 27 May 2019)
- Summary of contributions received (30 July 2019)
- Stakeholder workshop in Brussels (14-15 Nov 2019)
- External evaluation study published (25 May 2020)
- Staff working document published (8 Sept 2020)

### Impact assessment:

- Inception Impact Assessment published (23 Oct 2020)
- Public consultation (18 Dec 2020 – 26 March 2021)
- Working Paper DG Comp (5 Feb 2021)
- Public consultation on draft revised rules (9 July 2021 – 17 Sept 2021)
- [Additional public consultation](#) on proposed guidance on **information exchange in dual distribution** (4 Feb 2022 - 18 Feb 2022)



# New rules for vertical restraints (VBER/VGL)

## Potential Outcome 2022

### Revisions/clarifications mainly in the following areas:

- dual distribution
- restrictions of active sales
- online sales
- parity obligations (MFNs)

**And now**, more clarification on **information exchange in dual distribution**

## Next Steps

- Public consultation on additional guidance still ongoing for one week
- **31 May 2022**: VBER 2010 expires
- **1 June 2022**: New VBER 2022 effective

# Foreign subsidy control

Helmer Krane



# Foreign subsidy control

## What is it about?

- Planned instrument to remedy the impact of **subsidies** granted **by non-EU states** to companies operating in the EU
- Content:
  - Commission may **on its own initiative** examine information from any source regarding alleged distortive foreign subsidies
  - Additional **notification obligation** for **concentrations** (mergers and acquisitions) and **public procurement procedures** above certain thresholds
- The effects can be **procedural delays** but also **obligations** such as **divestment**, **access to infrastructure**, **repayment** of the subsidy or **prohibition of the transaction** (merger, contract award)
- **Important:** Does not only concern companies from outside the EU, but also **European companies that receive aid from non-EU states**

## Current state of play

- Proposal for the regulation **published in May 2021**
  - Before that, there was a comprehensive process, including **public consultation** and a structured **dialogue with Member States**
- Draft for Parliament's report was first discussed in the responsible **trade committee (INTA)** on **24 January 2022**
- **General support** of the proposal by the rapporteur and also by both opinions submitted by other committees
- Therefore, the question is **less one of whether** the instrument will be adopted, **but rather how** the proposal will be modified

# Foreign subsidy control

## Potential Outcome 2022

- **Main** amendments to the proposal being discussed:
  - **Privileged access rights to foreign markets** as a form of potentially distortive foreign subsidy
  - **Lowering** of thresholds
  - **Exemptions from the notification obligation** in the case of mergers
  - **Exclusion of financial contributions** from foreign countries with "**equivalent**" subsidy control systems
  - **Reversal of the burden of proof** for **state-owned** companies
  - **Earlier** review

## Next Steps

- Currently, the amendments are being **discussed in the parliamentary groups**
- A **decision by the EU Parliament on the report could be taken in April or May 2022**. After that, it is the turn of the EU Commission and the Council
- It is possible that the foreign subsidy control instrument will **enter into force in 2022**. According to the proposal, it would be **applicable from 6 months after entry into force**

# Other developments of interest...

Siobhan Kahmann

# Collective Bargaining and EU Competition Law

## What is it about?

- Significant self-employment in EU and rise of platform economy
- Greater flexibility but difficult working conditions for some people

## Current state of play

Policy package from the Commission Dec 2021:

- Proposed Guidelines on applying competition law to collective agreements of solo self-employed persons
- Proposal for a Directive on improving working conditions in platform work with Impact Assessment

## Potential Outcome 2022

- Adoption of the Guidelines
- Further development of proposed Directive to be discussed by EP and Council

## Next Steps

- Public consultation on text of draft Guidelines open until 24 February 2022
- Q2 2022 planned adoption of Guidelines and publication of Impact Assessment Report and Support Study
- Legislative procedure for proposed Directive

# Standardisation Strategy

## What is it about?

- EU has outlined a new Standardisation Strategy, aimed at taking a greater role in setting standards
- Expected to support the competitiveness of EU firms and help achieve goals on resilience, climate change and digital economy

## Potential Outcome 2022

- Five main strategic elements:
- Act imminently on standardisation urgencies
- Reform and review standardisation process
- Info sharing and co-ordination mechanism
- EU Excellence hub on standards
- Set annual priorities

## Current state of play

Just announced on 2 February!

Communication from the Commission to the EP, Council and EESC and CotR

## Next Steps

2022 Action Points:

- Priorities/standardisation urgencies
- High Level Forum
- Propose amends to Regulation on EU Standardisation 1025/2012, evaluation in Q2 2022
- Code of Practice and Standardisation Booster

# Net Neutrality and Zero Rating

## What is it about?

- Concept reviewed by DG Competition via externally commissioned report in 2017
- Net Neutrality rules closely linked to competition law
- No issues were identified at the time

## Potential Outcome 2022

- Reviewed Draft BEREC Net Neutrality Guidelines expected for public consultation, following 50th BEREC plenary meeting in March 2022

## Current state of play

Joint Telco Regulator BEREC confirmed that ZR acceptable under certain conditions since 2016

CJEU preliminary rulings in 2021 revisited the matter and prompted BEREC to review policy and launch open consultation

## Next Steps

- To be continued...

# EU courts decisions on the 2022 agenda

Edmon Oude Elferink

# Court decisions to look out for!

## Article 101 TFEU – cartels and follow on damages

- **Scania** – rights of defence in hybrid cartel cases – judgment of 2 February 2022 (Case T-799/17)
- **Servier** – pay for delay restriction by object – definition of relevant market (ATC-level) (Cases C-176/19P and C-201/19)
- **Daimler** – follow on damages claims in Trucks – scope of cartel infringement (Case C-588/20)
- **ISU** – ban on participation in non-ISU speedskating events (Case C-124/21)
- **European Super League** – exclusive rights to organise professional football competitions (Case C-333/21)

## Article 102 TFEU – abuse of dominance

- **Intel** – exclusivity rebates – judgment of 26 January 2022 (Case T-286/09 RENV)
- **Google** – unlawful conditions use of Android (Case T-604/18)
- **Qualcomm** – predation – selling below cost price (Case T-671/19)
- **Servizio Elettrico Nazionale** – discriminatory use of customer data (Case C-377/20)
- **Unilever Italia** – single economic entity and loyalty rebate scheme (Case C-680/20)
- **DB Station & Service** – user-rights of railway stations abusive (Case C-721/20)
- **Baltic Rail** – removal of rail track abusive (Case C-42/21P)



# Court decisions to look out for!

## European Union Merger Regulation – mergers

- **Illumina** – lawfulness referral under Article 22 EUMR from a number of Member States (Case T-227/21)
- **Groupe AA** – fundamental questions on the application of merger rules, Article 101 TFEU and state aid rules (C-344/21)
- **Illumina** – interim measures for gun jumping in relation to Grail acquisition (Case T-755/21)

## Regulation EC 1/2003 (a.o.) – procedural questions

- **Sped-Pro** – rejection of complaint due to systemic deficiencies in the rule of law in a Member State – judgment of 9 February 2022 (Case T-791/19)
- **French supermarkets** – lawfulness inspection decisions (Cases C-682/20P, Cases C-690/20P and C-693/20P)
- **Facebook** – interplay between competition law enforcement and GDPR – jurisdiction competition authorities GDPR (Case C-252/21)



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