



Outlook 2023

EU Competition Law Briefing

Agenda



HBER

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Foreign Subsidies Control

Michael Bauer



Market Definition

Björn Herbers



The new VBER and VGL in practice

Kai Neuhaus



1/2003

Siobhan Kahmann



The Digital Markets Act (DMA)

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ECJ

Edmon Oude Elferink



FDI

Jacqueline Vallat

HBER

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What is it about?

- **Update of the Horizontal Package 2022/2023:**
 - R&D BER No. 1217/2010
 - Specialisation BER No. 1218/2010
 - Horizontal Guidelines 2010

Current State of Play

- Previous HBERs to expire end of 2022
- Drafts of March 2022
- Extension of "old" regulations until mid-2023
- Legislative process ongoing, further changes to the 2022 drafts?

R&D BER and Specialisation BER

What is new?

- **R&D BER**
 - Limitation of the exemption if only few R&D poles
 - Clarifications and simplifications
- **Specialisation BER**
 - Clarifications and simplifications

Comment and Next Steps

- **R&D BER**
 - Missed chance to carve out or include separate provisions for vertical R&D agreements
- **Specialisation BER**
 - Welcome clarifications, but no real innovation
 - adaption of existing agreements to the new rules within the transitional period (2024/2025?)

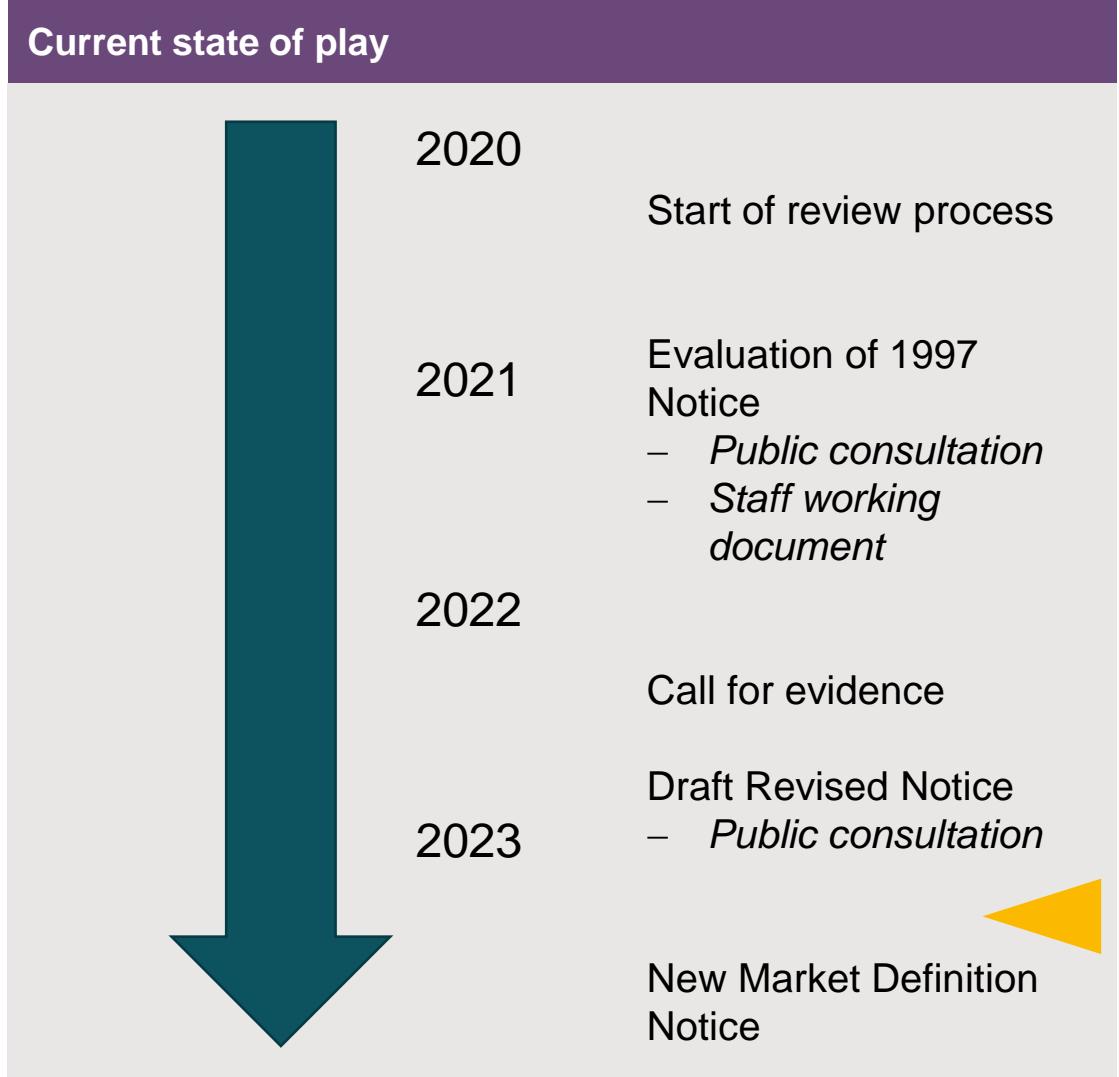
Horizontal Guidelines

What is new? (key issues)	Comment and Next Steps
<ul style="list-style-type: none">– Joint purchasing: Distinction between joint purchasing and buyer cartels– Commercialisation: additional guidance, e.g. for bidding consortia– Information Exchange: update digitalization and additional guidance– Standardisation: more flexibility for more limited participation in standard-setting– Sustainability: guidance for sustainability agreements	<ul style="list-style-type: none">– Significant extension of guidance on horizontal agreements– Adaption of existing agreements to the new rules (immediately after publication)– Use of the new safe harbours

The New Market Definition Notice

Björn Herbers

The New Market Definition Notice

What is it about?	Current state of play
<ul style="list-style-type: none">– Competition takes place on markets– Definition of the "relevant market" (usually) first step in competition law assessment– EU Market Definition Notice provides guidance on principles and best practices of Commission– Current Market Definition Notice dates from 1997– March 2020: COM started review process– Aim:<ul style="list-style-type: none">– Update the Notice to reflect changes in the economy– implement case law and practice by competition authorities	 <p>2020 Start of review process</p> <p>2021 Evaluation of 1997 Notice<ul style="list-style-type: none">– <i>Public consultation</i>– <i>Staff working document</i></p> <p>2022 Call for evidence</p> <p>2023 Draft Revised Notice<ul style="list-style-type: none">– <i>Public consultation</i></p> <p>New Market Definition Notice</p>

The New Market Definition Notice

Major changes	Overview
<ul style="list-style-type: none">– General concepts remain unchanged– Clarifications and updates– Clearer structure– Novel issues<ul style="list-style-type: none">– In particular: digital markets– Volume: From 9 pages to 40<ul style="list-style-type: none">– Added Guidance → More explanations– Examples– Reflection of case law, decisional practice	<ul style="list-style-type: none">– Principles & Methodology<ul style="list-style-type: none">– Non-price elements– Forward looking– What to do with potential competition– Market definition process<ul style="list-style-type: none">– Quantitative techniques– Evidence– Market definition in specific circumstances<ul style="list-style-type: none">– Market definition in digital markets– Market definition in innovation-driven markets– Market shares

Regulation 1/2003

Siobhan Kahmann

Review of Reg 1/2003

What is it about?

- **Reg 1/2003**
 - the result of the most comprehensive reform of procedures for the enforcement of Articles 101 and 102 TFEU since 1962
 - **NOW 20 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, new tech and changing ways of doing business
- **Procedural framework largely unchanged**
- **Consultation - Better Regulation Rules**
 - Effectiveness - objectives met?
 - Efficiency - costs vs benefit?
 - Relevance - EU action necessary?
 - Coherence - Complement/contradict?
 - EU added value - clear?
- **Two questionnaires:** general and expert

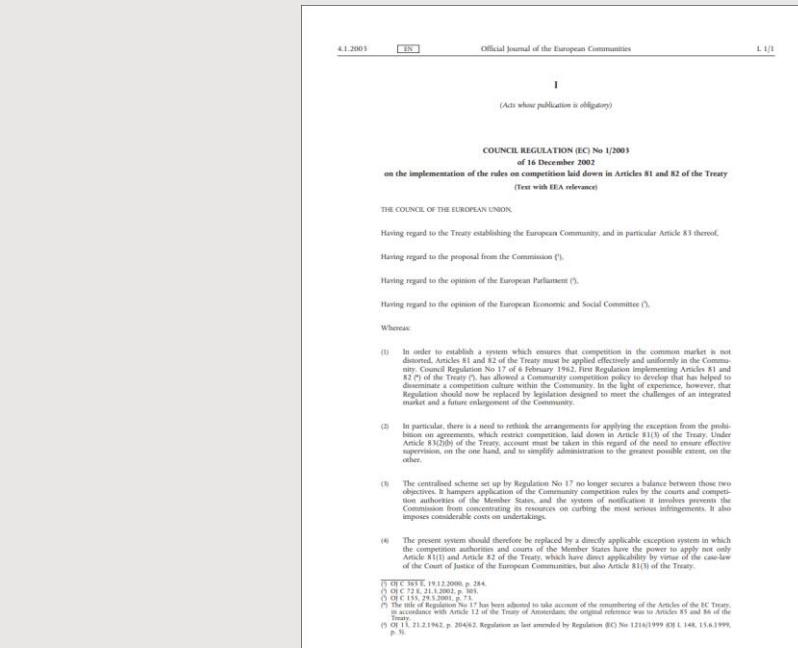
Review of Reg 1/2003

Potential Outcome 2023

- **Factual results** of public consultation published Dec 2022
- **Evaluation support study** awarded Dec 2022
- **Stakeholder workshop** in Brussels June 2023
 - Achievements
 - Needs
 - Challenges

Next Steps

- **Staff Working Document** to summarise results of evaluation exercise Q2 2024
- Will consider position and changes...



European Court of Justice

Edmon Oude Elferink

2023 – what you may have missed

Article 101 and 102 TFEU

- ECJ 12 January 2023, Case C-42/21, *Baltic Railways/Commission*
 - **Abuse of dominance**: on-applicability essential facility doctrine
- ECJ 19 January 2023, Case C-680/20, *Unilever Italia/AGCM*
 - **Abuse of dominance**: attribution of conduct independent distributors
 - Application of AEC-test to exclusivity agreements
- ECJ 16 March 2023, Case C-449/21, *Towercast*
 - Interplay between **abuse of dominance** and **merger control**
 - No “Sperrwirkung”

Other

- ECJ 16 February 2023, Case C-312/21, *Tráficos Manuel Ferrer/Daimler*
 - **Cartel damages**: liberty for a national judge to estimate damages
- ECJ 9 March 2023, Case C-682/20P, *Les Mousquetaires/Commission*, Case C-690/20P, *Casino/Commission*, and Case C-693/20P, *ICA/Commission*
 - **Investigations**: insufficient indicia for the Commission to have adopted inspection decisions due to absence of recordings

2023 – what to look out for

Article 101 and 102 TFEU

- Case C-124/21P, *International Skating Union/Commission*, and Case C-333/21, *European Superleague*
 - Application of Article 101 TFEU and 102 TFEU in the context of **sports**
- Case C-331/21, *Autoridade da Concorrência and EDP*
 - Non-competition clauses
 - Notion of potential competition
 - Ancillary restraints
- Case T-671/19, *Qualcomm/Commission*
 - Lack of **jurisdiction** Commission
 - **Abuse of dominance**: Predatory pricing

EU Merger Regulation

- Case C-376/20P, *Commission/CK Telecoms*
 - Gap-case (no dominance)
 - Legal test merger control
 - Standard of proof
- Case C-611/22P, *Illumina/Commission*
 - Article 22 EUMR referral policy

Foreign Subsidies Control

Michael Bauer

Foreign subsidies regulation (FSR)

What is it about?

Main idea:

- Control of subsidies granted by Non-EU countries
- Main focus: concentrations and public procurement

Problem:

- FSR creates a burdensome additional merger control regime
 - stand-still obligation - gun-jumping may result in high fines
- Enables third parties to delay transactions
- Many additional notifications are to be expected, but prohibition decisions are unlikely

Caution:

- M&A transactions potentially covered if agreement is signed after **12 July 2023**
- Notification obligations apply as from **12 October 2023**
- Preparation of data is complicated

What are the details?

- Notification requirement concerning **larger M&A transactions** if e.g.
 - Acquisition of control or creation of joint venture
 - If acquisition: target had **sales >EUR 500m** in the EU
 - undertakings (buyer and target) received **financial contributions** from foreign states **> EUR 50m** in the **three** preceding years
- Concept of '**financial contribution**' is very broad
 - Not to be mixed up with 'subsidies'
 - Includes all financial transactions with state or private entities (if transaction is attributable to the state)
 - (usually) calculation based on gross value
 - E.g. for each purchase agreement sales price could count

Foreign subsidies regulation (FSR)

How to prepare the company?

- Will I be possibly involved in M&A transaction that will exceed the turnover thresholds (EUR 500m EU)?
- If so, **mark in accounting system** all
 - business transactions with state/state-owned entities
 - grants
- In case of relevant M&A transaction:
 - Collect and list all such contributions
 - **last three years** if exceeding **EUR 200k**
- Pragmatic approach:
 - If total (incl. all finance. contr.) likely >EUR 50m: notify
- If notified:
 - For all **countries** where **total per year >EUR 4m**: Add for each entry (>200k) additional information, e.g.:
 - Possible link with the planned concentration?
 - Was the recipient a firm in difficulty? etc
 - Try to get waiver

Next Steps

- COM published **draft implementation regulation** plus draft notification forms for public consultation
- Deadline expired two weeks ago
- Many critical statements
- **Limited changes** still to be expected
- **Further guidelines** not to be expected soon
- All deals potentially covered where agreement is signed **after 12 July**

The new VBER and VGL in practice

Kai Neuhaus

The new VBER and VGL in practice

What is it about?

- New VBER
 - **in force** since 1 June 2022
Commission Regulation (EU) 2022/720
 - **replaced** Commission Regulation (EU) 330/2010
- New VGL **published** on 30 June 2022

First practical experience – all sales channels

- **Resale price maintenance** – more leeway?
- **Dual distribution** – limited information flow between manufacturer and reseller
- **Exclusive customers / territories / selective distribution** – more flexible and better protection
- **Hardcore restrictions re territory or customers** – more guidance, more confusion?

The new VBER and VGL in practice

First practical experience – online sales channel

- **Prevention of effective use of internet** – same understanding EU-wide?
- **Hybrid platform contracts no longer exempted** – did anybody notice?

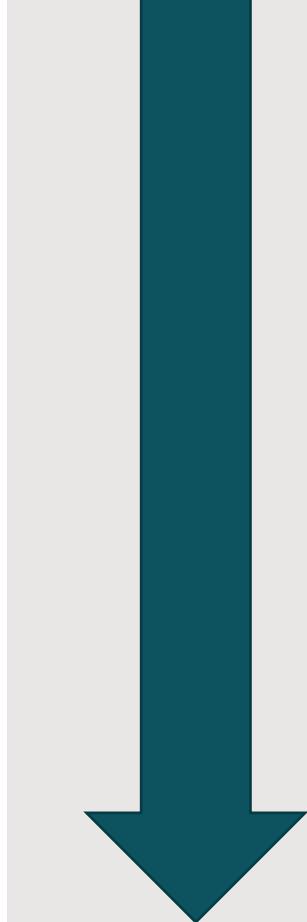
Next Steps

- **Grace period** to update existing vertical agreements to new VBER ends 31 May 2023
- **Interplay with HBER / HGL** can change the picture
- New VBER will expire **31 May 2034**

The Digital Markets Act (DMA)

Björn Herbers

The Digital Markets Act (DMA)

What is it about?	Current state of play
<ul style="list-style-type: none">– Landmark piece of regulation and flagship of EU digital agenda– Aim: Fairness and contestability on digital markets– DMA gives the European Commission far-reaching powers over (very) large digital platforms– Strict rules addressed to digital gatekeepers operating core platform services and significant economic impact– Gatekeepers are designated by the Commission– Not competition law – but inspired by competition law cases	 <p>15/12/20: Commission proposal</p> <p>2021</p> <p><i>Legislative procedure</i></p> <p>2022</p> <p>25/03/22: Political agreement</p> <p>01/11/23: Entry into force</p> <p>2023</p> <p>02/05/23: Rules start to apply</p> <p>03/07/23: DL Gatekeeper notifications</p> <p>06/09/23: Gatekeeper designations</p> <p>2024</p> <p>March 24: Do's and Don'ts apply</p>

The Digital Markets Act (DMA)

Gatekeepers & Core Platform Services

- **Gatekeepers** = particularly important role in the market because of their size and their importance as gateways for business users to reach their customers
- **Three cumulative criteria**
 - ✓ Size that impacts the internal market
 - ✓ The control of an important gateway
 - ✓ An entrenched and durable position
- **Core platform services**
 - Online intermediation services
 - Search engines
 - Social networks
 - Video-sharing
 - Messenger
 - Operating systems
 - Cloud computing
 - Advertising services
 - Web browsers
 - Virtual assistants

Do's and Don'ts

- **Designated gatekeepers** must comply with the obligations (dos and don'ts) in Articles 5, 6 and 7 DMA with regard to their core platform services
- Not a clear system but list of problematic conduct, in many cases reflecting competition law experience
- **Special obligation:** interoperability of messenger services
- Gatekeepers have to **ensure compliance**
- **Enforcement** by the Commission
 - Fines of 10% / 20% of the worldwide annual turnover
- Possibility of **private enforcement**

FDI

Jacqueline Vallat

FDI – Outlook 2023

What is it about?

- Foreign investment controls
 - Rules requiring approval of certain investments
- But:
 - Not always “foreign”
 - Nor “direct”

Current state of play

- Geopolitical context
- Trend of introducing new or tightening existing regimes
 - Key part of M&A transactions
 - Specific features of regimes:
 - Less predictability / transparency / certainty of timelines or outcomes

Potential Outcome 2023

- Continuing trend of new / tighter regimes
 - Especially EU – see next
- Geopolitical context – again

Next Steps

- Think carefully in M&A
 - Multi-jurisdictional analysis and risk assessment
 - Global strategy
- Increasing complexity

FDI – Screening Mechanisms Across EU

- EU Member State with a national FDI screening mechanism;

Austria, Czechia, Denmark, Estonia, Finland, France, Germany, Hungary, Italy, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovakia, Slovenia and Spain

- EU Member State with a national FDI screening mechanism - in the process of updating;

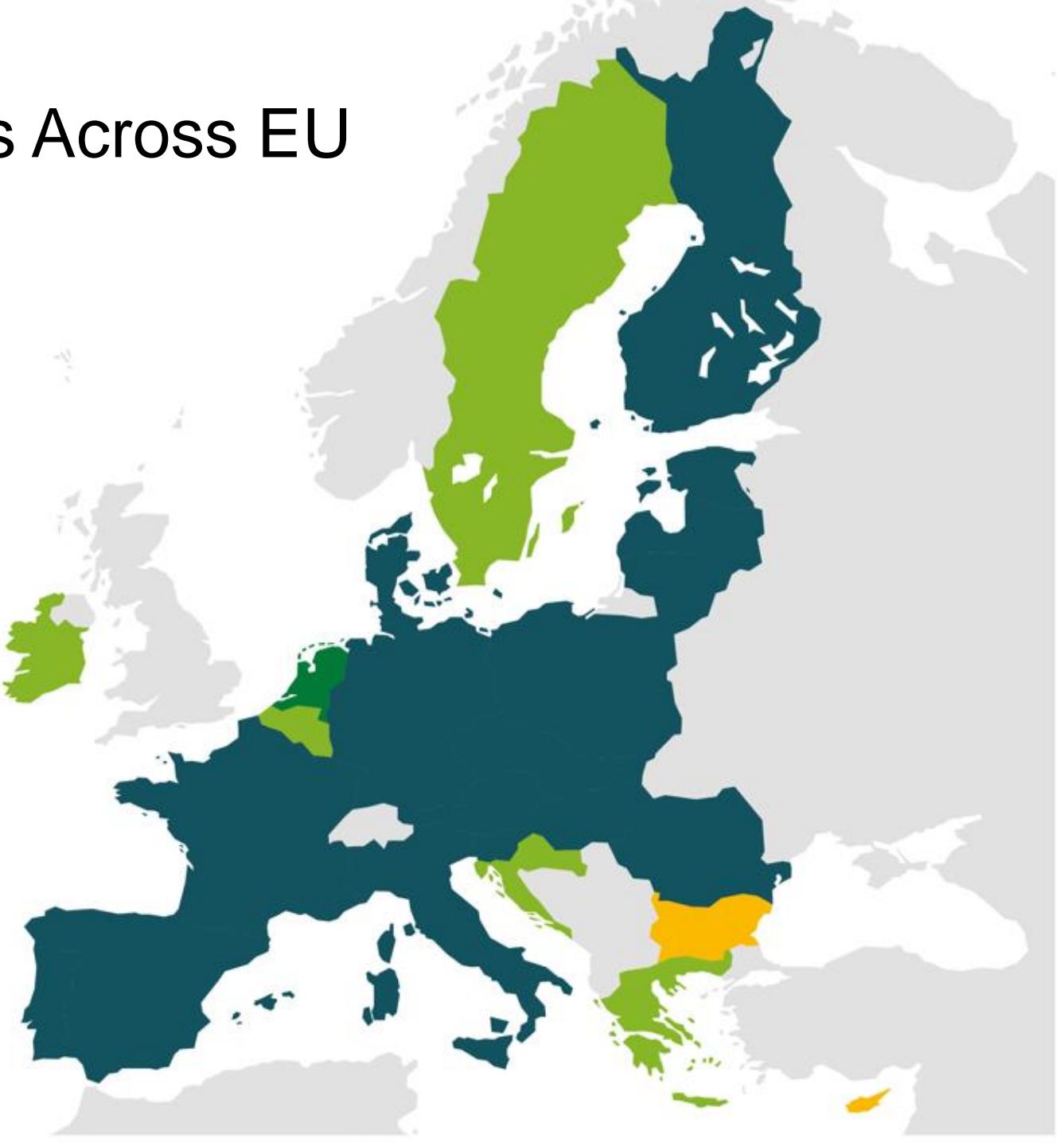
The Netherlands

- EU Member State without a national FDI screening mechanism – considering, planning or in the process of adopting; and

Belgium, Croatia, Greece, Ireland, Luxembourg, and Sweden

- EU Member State without a national FDI screening mechanism – no publicly reported initiative towards adoption underway.

Bulgaria and Cyprus



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