

Outlook 2023

EU Competition Law Briefing

Agenda



HBER

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Foreign Subsidies Control

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Market Definition

Björn Herbers



The new VBER and VGL in practice

Kai Neuhaus



1/2003

Siobhan Kahmann



The Digital Markets Act (DMA)

Björn Herbers



ECJ

Edmon Oude Elferink



FDI

Jacqueline Vallat

HBER

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HBER

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)

- **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

Comment and Next Steps

- 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?

- 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:
 - **Update** the Notice to reflect changes in the economy
 - implement **case law** and practice by competition authorities

Current state of play



The New Market Definition Notice

Major changes

- **General concepts** remain unchanged
- Clarifications and updates
- Clearer structure
- **Novel issues**
 - In particular: **digital markets**
- Volume: From 9 pages to 40
 - Added Guidance → More explanations
 - Examples
 - Reflection of case law, decisional practice

Overview

- **Principles & Methodology**
 - Non-price elements
 - Forward looking
 - What to do with potential competition
- **Market definition process**
 - Quantitative techniques
 - Evidence
- **Market definition in specific circumstances**
 - 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

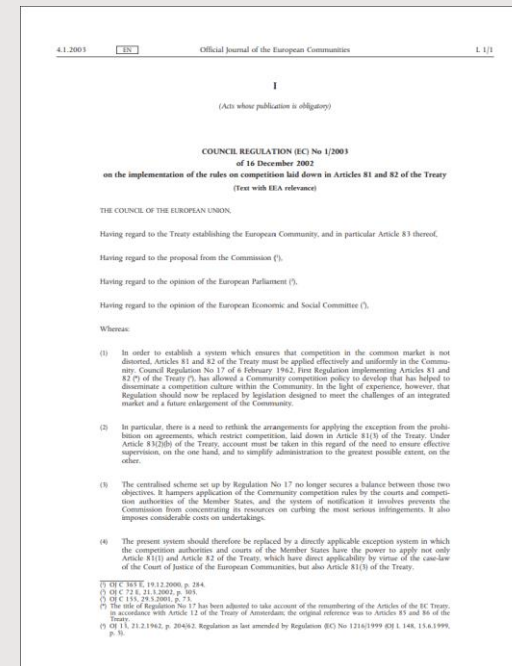
Review of Reg 1/2003

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)

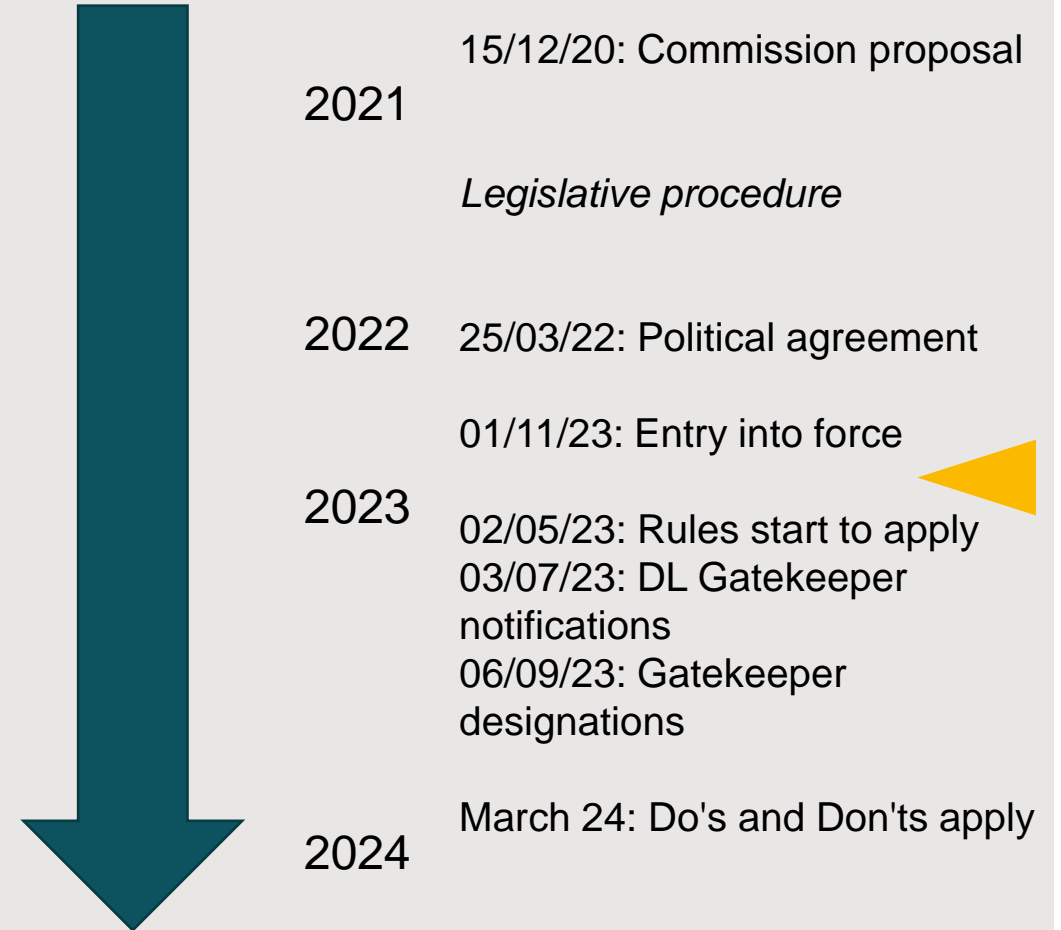
Björn Herbers

The Digital Markets Act (DMA)

What is it about?

- **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

Current state of play



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	▪ Operating systems
▪ Search engines	▪ Cloud computing
▪ Social networks	▪ Advertising services
▪ Video-sharing	▪ Web browsers
▪ Messenger	▪ 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”

Potential Outcome 2023

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

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

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;

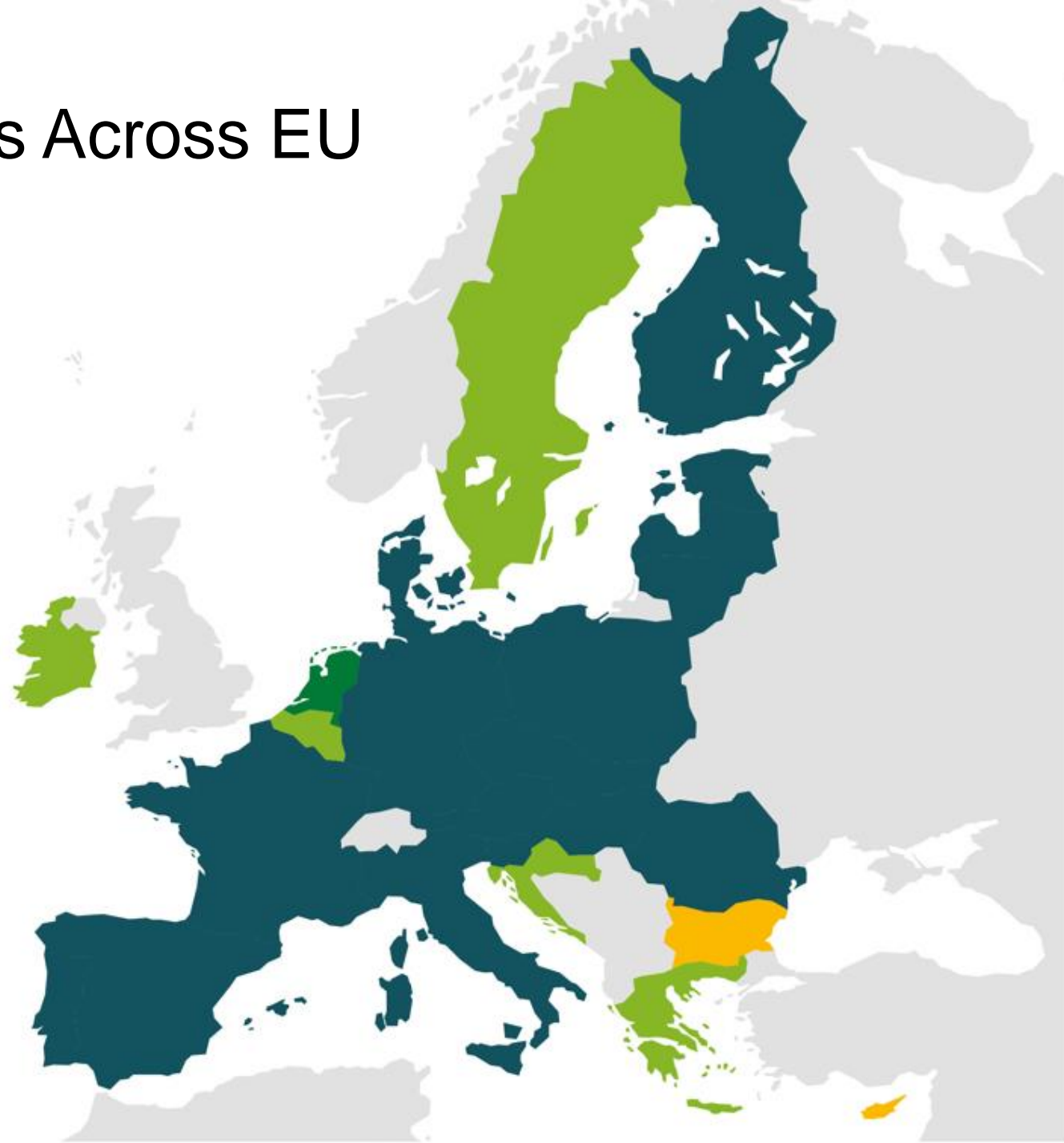
The Netherlands

- 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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