

RECENT DEVELOPMENTS IN EU/EEA IN COMPETITION LAW

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RECENT DEVELOPMENTS IN EU AND EEA COMPETITION LAW

STRUCTURE OF PRESENTATION

- ⊙ **HORIZONTAL CASES UNDER ARTICLE 101**
 - RECENT DEVELOPMENTS, PP 2-4
- ⊙ **ABUSE OF DOMINANCE CASES**
 - RECENT DEVELOPMENTS, PP 5-7
- ⊙ **PENDING ARTICLE 267 REFERENCES**
 - RECENT DEVELOPMENTS, PP 15-16
- ⊙ **EU MERGER CONTROL**
 - RECENT DEVELOPMENTS, PP 17-19
- ⊙ **IMPORTANT POLICY DEVELOPMENTS**
 - RECENT DEVELOPMENTS, PP 12-14

COMPETITION LAW DEVELOPMENTS 2022-2023

ARTICLE 101 TFEU

- ONLY TWO COMMISSION DECISIONS IN THE LAST 12 MONTHS
 - *METAL PACKAGING*: FINE OF €31.5 MILLION
 - *STYRENE MONOMER PURCHASING MARKET*: FINE OF €157 MILLION FOR A PURCHASING CARTEL
- ONLY ONE JUDGMENT OF SIGNIFICANCE, CASE C-883/19 *HSBC V COMMISSION*. TWO LEGAL ISSUES:
 - THE LEGITIMACY OF ‘STAGGERED HYBRID SETTLEMENTS’
 - THE RELEVANCE OF PRO-COMPETITION ARGUMENTS AS PART OF THE CHARACTERISATION OF ‘OBJECT’ RESTRICTIONS

COMPETITION LAW DEVELOPMENTS 2022-2023

ARTICLE 101: UNANNOUNCED INSPECTIONS

- ◎ THE COMMISSION HAS CONDUCTED NUMEROUS DAWN RAIDS:
 - *WOOD PULP*: 12 OCTOBER 2021
 - *DEFENCE SECTOR*: 23 NOVEMBER 2021
 - *RECYCLING OF CARS*: 15 MARCH 2022; CMA ALSO INVESTIGATING
 - *FASHION INDUSTRY*: 17 MAY 2022; 18 APRIL 2023
 - *WATER INFRASTRUCTURE*: 14 JUNE 2022
 - *ONLINE FOOD DELIVERY*: 6 JULY 2022
 - *FRAGRANCE INDUSTRY*: 7 MARCH 2023 US, UK AND SWITZERLAND ALSO INVESTIGATING

COMPETITION LAW DEVELOPMENTS 2022-2023

ARTICLE 101: UNANNOUNCED INSPECTIONS

- IN THE EU THE COMMISSION MUST HAVE REASONABLE GROUNDS FOR SUSPECTING AN INFRINGEMENT
- IF THERE ARE NO REASONABLE GROUNDS, THE DECISION ITSELF CAN BE CHALLENGED:
 - *ČESKÉ DRÁHY AS V COMMISSION; LES MOUSQUETAIRES V COMMISSION*
 - IN *LES MOUSQUETAIRES* (MARCH 2023, RD P 10) THE COMMISSION'S DECISION WAS ANNULLED AS IT HAD NOT MADE A NOTE OF INTERVIEWS WITH COMPLAINANTS ON WHICH ITS DECISIONS WERE BASED (CF *INTEL, QUALCOMM, GOOGLE ANDROID*)

COMPETITION LAW DEVELOPMENTS 2022-2023

ARTICLE 101: UNANNOUNCED INSPECTIONS

- ◉ THE COMMISSION IS CONDUCTING A REVIEW OF REGULATION 1/2003, THE IMPLEMENTING REGULATION THAT GIVES THE COMMISSION THE POWER TO ENFORCE COMPETITION LAW
- ◉ TO WHAT EXTENT DO THE RULES ON DAWN RAIDS REQUIRE AMENDMENT?
 - DIGITAL SEARCHES
 - SEARCHES OF HOMES
 - CONSEQUENCES OF UNLAWFUL ACTS DURING DAWN RAIDS

COMPETITION LAW DEVELOPMENTS 2022-2023

ARTICLE 101: UNANNOUNCED INSPECTIONS

- ◉ IN THE MEANTIME THERE HAVE BEEN NUMEROUS CHALLENGES TO DAWN RAIDS AT MEMBER STATE LEVEL; FOR EXAMPLE IN RECENT TIMES:
 - PORTUGAL'S CONSTITUTIONAL TRIBUNAL, 16 MARCH 2023: INSPECTION OF E-MAILS WITHOUT JUDICIAL APPROVAL UNCONSTITUTIONAL
 - SPAIN'S SUPREME COURT, 28 FEBRUARY 2023: INSPECTION ANNULLED AS FIRM NOT INFORMED WHETHER THERE WAS A COURT ORDER
 - ECHR, 4 APRIL 2023: LITHUANIAN LEGAL SYSTEM VIOLATED ARTICLE 8 HUMAN RIGHTS CONVENTION AS NO EFFECTIVE LEGAL REMEDY

COMPETITION LAW DEVELOPMENTS 2022-2023

ARTICLE 102 TFEU

- ON 27 MARCH 2023 THE EUROPEAN COMMISSION ANNOUNCED A NEW INITIATIVE CONCERNING ARTICLE 102 TFEU
- IT AMENDED ITS EXISTING **GUIDANCE** ON ARTICLE 102 ENFORCEMENT PRIORITIES
- AND INITIATED A PROCEDURE THAT WILL (PROBABLY) LEAD TO THE ADOPTION OF **GUIDELINES** ON ARTICLE 102 IN 2025
- WHAT IS THE REASON FOR THIS INITIATIVE?

COMPETITION LAW DEVELOPMENTS 2022-2023

ARTICLE 102 TFEU

- IN RECENT YEARS THERE HAS BEEN AN UNPRECEDENTED NUMBER OF ARTICLE 102 CASES
- MANY WERE AGAINST THE GAFA COMPANIES
- BUT ALSO AGAINST PHARMACEUTICAL COMPANIES AND VARIOUS UTILITIES (FOR EXAMPLE RAIL, TELECOMMUNICATIONS, GAS, ELECTRICITY - PENDING CASES RD PP 5-6)
- SINCE THE COMMISSION'S *GUIDANCE ON ENFORCEMENT PRIORITIES* (2008) THERE HAVE BEEN 32 JUDGMENTS OF THE EU COURTS ON ARTICLE 102

COMPETITION LAW DEVELOPMENTS 2022-2023

ARTICLE 102 TFEU

- ◉ THERE HAVE BEEN NUMEROUS IMPORTANT DEVELOPMENTS OVER THIS PERIOD, BOTH IN TERMS OF JURISPRUDENCE AND IN POLITICAL AND ECONOMIC THINKING
- ◉ THE TIME IS RIPE FOR A REVIEW OF WHERE WE ARE AND WHERE WE SHOULD BE GOING
- ◉ THIS IS OCCURRING AGAINST THE BACKDROP OF THE ENTRY INTO FORCE OF THE DIGITAL MARKETS ACT
- ◉ AND OF AN INCREASING CONSENSUS INTERNATIONALLY IN FAVOUR OF ENFORCEMENT

COMPETITION LAW DEVELOPMENTS 2022-2023

ARTICLE 102 TFEU

PARTICULAR ISSUES

- HOW FORMALISTICALLY CAN ARTICLE 102 BE APPLIED?
 - ARE THERE ANY '*PER SE*' RULES?
 - IS EFFECTS ANALYSIS REQUIRED IN THE CASE, EG, OF REBATES TO REWARD LOYALTY/EXCLUSIVITY?: SEE *INTEL*, *QUALCOMM*, *GOOGLE ANDROID*
 - IS EFFECTS ANALYSIS REQUIRED IN THE CASE OF EXCLUSIVITY ITSELF?: SEE *UNILEVER*
- IF EFFECTS ANALYSIS IS REQUIRED IN ALL ABUSE CASES, WHAT DO WE MEAN BY EFFECTS?

COMPETITION LAW DEVELOPMENTS 2022-2023

ARTICLE 102 TFEU

PARTICULAR ISSUES

- ◉ IF EFFECTS ANALYSIS IS REQUIRED, DOES THIS NECESSITATE THE APPLICATION OF THE 'AS EFFICIENT COMPETITOR' TEST?
- ◉ NOTE THE COMMISSION'S AMENDMENT TO THE 2008 GUIDANCE: IN SOME CASES HARM TO A **LESS EFFICIENT** COMPETITOR CAN ALSO BE TAKEN INTO ACCOUNT: *POST DANMARK, UNILEVER*
- ◉ FURTHERMORE, IT IS NOT **MANDATORY** TO APPLY A PRICE-COST AS EFFICIENT COMPETITOR TEST TO PROVE FORECLOSURE: *INTEL, UNILEVER*

COMPETITION LAW DEVELOPMENTS 2022-2023

ARTICLE 102 TFEU

PARTICULAR ISSUES

- ◉ DOMINANT FIRMS HAVE OFTEN ARGUED (UNSUCCESSFULLY) THAT COMPETITION AUTHORITIES HAVE UNFAIRLY AVOIDED THE STRICT CRITERIA OF THE *OSCAR BRONNER*/ESSENTIAL FACILITIES CASE LAW
 - *TELIASONERA, SLOVAK TELEKOM, LG V COMMISSION*
- ◉ THE GUIDANCE IS AMENDED TO MAKE CLEAR THAT THE COMMISSION DOES NOT CONSIDER A CONSTRUCTIVE REFUSAL TO DEAL CASE REQUIRES THE APPLICATION OF *OSCAR BRONNER*

COMPETITION LAW DEVELOPMENTS 2022-2023

PENDING ARTICLE 267 REFERENCES

- NOTE SEVERAL IMPORTANT PENDING ARTICLE 267 REFERENCES ON ASPECTS OF ARTICLE 101 TFEU:
 - FOOTBALL GOVERNANCE:
 - CASE C-333/21 *EUROPEAN SUPER LEAGUE V FIFA AND UEFA*
 - CASE C-680/21 *ROYAL ANTWERP FC V ROYAL BELGIAN FA*
 - CASE C-650/22 *FEDERATION INTERNATIONALE DE FOOTBALL ASSOCIATIONS V BZ*
 - NON-COMPETE CLAUSES:
 - CASE C-331/21 *ENERGIAS DE PORTUGAL V ADC*
 - RPM/OBJECT RESTRICTIONS:
 - CASE C-211/22 *SUPER BOCK BEBIDAS*
 - EXCHANGE OF INFORMATION:
 - CASE C-298/22 *BANCO BPN V BIC PORTUGUÊS AND OTHERS*

COMPETITION LAW DEVELOPMENTS 2022-2023

MERGER CONTROL

- JURISDICTIONAL ISSUES PROMINENT:
 - ARTICLE 22 EUMR
 - COMMISSION'S REVISED GUIDANCE ON ARTICLE 22
 - ON ARTICLE 22 EUMR SEE *ILLUMINA/GRAIL*: CASE T-227/21, 13 JULY 2022, ON APPEAL CASE C-611/22, NOT YET DECIDED
 - ON SUBSTANCE SEE *ILLUMINA/GRAIL*: CASE T-709/22, NOT YET DECIDED
 - NOTE ALSO CASE T-755/21, APPEAL AGAINST THE INTERIM MEASURES DECISION
 - QUERY: WILL THERE BE A FINE FOR GUN-JUMPING?
 - CASE C-449/21 *TOWERCAST V AUTORITÉ DE LA CONCURRENCE*, JUDGMENT OF 16 MARCH 2023
 - ARTICLE 14 DIGITAL MARKETS ACT

COMPETITION LAW DEVELOPMENTS 2022-2023

POLICY DEVELOPMENTS: EU

- ◉ DRAFT NOTICE ON MARKET DEFINITION
- ◉ GUIDELINES ON EU COMPETITION LAW AND COLLECTIVE AGREEMENTS OF SELF-EMPLOYED PERSONS, 29 SEPTEMBER 2022
- ◉ REFORM OF THE REGIME FOR HORIZONTAL COOPERATION AGREEMENTS, 1 JUNE 2023
- ◉ CONSULTATION ON SUSTAINABILITY AGREEMENTS IN THE AGRICULTURAL SECTOR
- ◉ NEW VERTICALS BLOCK EXEMPTION

COMPETITION LAW DEVELOPMENTS 2022-2023

POLICY DEVELOPMENTS: EU

- ◉ REVIEWS OF MOTOR VEHICLE, LINER CONSORTIA AND TECHNOLOGY TRANSFER REGULATIONS
- ◉ REVIEW OF ARTICLE 102
- ◉ FOREIGN SUBSIDIES REGULATION
- ◉ NEW GUIDANCE ON SIMPLIFIED PROCEDURE FOR MERGERS, 20 APRIL 2023
- ◉ IMPLEMENTING RULES FOR THE DIGITAL MARKETS ACT

COMPETITION LAW DEVELOPMENTS 2022-2023

THANK YOU FOR YOUR ATTENTION!