

Recent Developments in EU and EEA Competition Law

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ARTICLE 101 TFEU: ENFORCEMENT AT EU LEVEL

1. *Horizontal agreements*

PENDING ARTICLE 101 HORIZONTAL CASES BEFORE THE COMMISSION

Current investigations of horizontal agreements:

- *Atlantic farmed salmon*: unannounced inspections, 19 February 2019
- *Oil and fuels – benchmarking*: statements of objections sent 7 July 2022 (note that Abengoa has already settled this case with the Commission and that the Commission has closed the case against Alcogroup with no adverse finding)
- *Rail passenger transport in several Member States*
- *Wood pulp*: unannounced inspections, 12 October 2021
- *Defence sector*: unannounced inspections, 23 November 2021
- *Recycling of cars*: unannounced inspections, 15 March 2022; CMA also investigating
- *Fashion industry*: unannounced inspections, 17 May 2022
- *Collusion in relation to used railway wagons*: the Commission has sent SOs to the Austrian and Czech rail incumbents into a possible collective boycott of RegioJet, an entrant into long-distance rail passenger transport in the Czech Republic, 10 June 2022
- *Water infrastructure*: unannounced inspections, 14 June 2022
- *Online food delivery*: unannounced inspections, 6 July 2022
- *Euro-denominated bonds trading*: statements of objections sent 6 December 2022
- *Fragrance industry*: unannounced inspections, 7 March 2023 (in conjunction with the US, UK and Switzerland)
- *Energy drinks*: unannounced inspections, 21 March 2023
- *Fashion industry*: unannounced inspections, 18 April 2023

Cartel decisions

- *Metal packaging*

Commission decision of 12 July 2022 imposing fines of €31.5 million for participating in a cartel in the metal packaging sector. Note the following:

- The cartel practices were the exchange of information and coordination in relation to the imposition of surcharges and technical standards
 - The practices were from March 2011 to September 2014
 - The case was transferred to the Commission by the BKA which lacked power to fine the subsidiaries of Crown and Silgan
 - The 39th settlement decision
 - On appeal Case T-589/22 (Silgan) and Case T-587/22 (Crown)
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- ***Styrene monomer merchant market***

Commission decision of 29 November 2022 imposing fines of €157 million for operating a cartel in the buying market for styrene monomer. Note the following:

- Six buyers exchanged sensitive commercial information and coordinated their negotiating strategy on the industry reference price of styrene (the ‘Styrene Monthly Contract Price’)
- The collusion was to **reduce** an element of the price of styrene
- INEOS was the whistleblower
- Four of the other five buyers received reductions in their fines
- This was a settlement case, the 40th to date

GENERAL COURT

- ***Heat stabilisers***
 - Case T-640/16 RENV *GEA Group AG v Commission*, judgment of 25 January 2023, EU:T:2023:18

Judgment dismissing GEA's appeal in its entirety following the remittal of the case by the Court of Justice

COURT OF JUSTICE

- *Euro interest rate derivatives sector*
 - Case C-883/19 P *HSBC Holdings plc and Others*, judgment of 12 January 2023, EU:C:2023:11

Judgment partly setting aside the General Court's rejection of HSBC's appeal but dismissing the remainder of the appeal

2. *Vertical agreements*

COMMISSION INVESTIGATIONS

PENDING ARTICLE 101 VERTICAL CASES BEFORE THE COMMISSION

- *Chocolate, biscuits and coffee*

The Commission opened an investigation into possible cross-border restrictions of trade in chocolate, biscuits and coffee by Mondelēz, 28 January 2021 (the Commission is looking into possible infringements of both Article 101 and 102)

- *Pierre Cardin*

The Commission opened an investigation into possible cross-border restrictions of trade in Pierre Cardin products, 31 January 2022

ARTICLE 102: ENFORCEMENT AT EU LEVEL

PENDING ARTICLE 102 CASES BEFORE THE COMMISSION

- *Apple* – formal investigation in relation to Apple Pay launched 16 June 2020
 - Statement of objections sent 2 May 2022
- *Apple* – formal investigation in relation to Apple's App Store rules launched 16 June 2020
 - Statement of objections sent 30 April 2021
 - Fresh statement of objections sent 28 February 2023 limiting the scope of the case to Apple's anti-steering obligations
- *Teva* – formal investigation in relation to possible abuses of patent procedures and exclusionary disparagement of competing products in the pharmaceutical sector launched 4 March 2021
 - Statement of objections sent 10 October 2022
- *Public Power Corporation of Greece* – formal investigation of Greek wholesale electricity market launched 16 March 2021
- *EPEX Spot* – formal investigation of possible foreclosure of the market for intraday trading of electricity launched 30 March 2021
- *Facebook* – formal investigation of Facebook's use of advertising data opened 4 June 2021
 - Facebook's partially successful challenge of the Commission's RFI: Case T-451/20 R, 29 October 2020; however its appeal requesting the Court to annul the RFI was rejected, 24 May 2023, EU:T:2023:276
 - Statement of objections sent 19 December 2022
- *Google* – formal investigation of Google's behaviour in online advertising technology services opened 22 June 2021
- *Animal health sector* – the Commission carried out unannounced inspections at a pharmaceutical company in Belgium because of possible abuse of a dominant position
- *Natural gas in Germany* – the Commission carried out unannounced inspections at the premises of several companies in Germany active in the supply, transmission and storage of natural gas, 31 March 2022
- *Energy drinks*: unannounced inspections, 21 March 2023

- *Renfe* – formal investigation of Renfe's alleged refusal to supply content and real-time data to rival ticketing platforms, 28 April 2023

GENERAL COURT

- ***LTE chipsets***
 - Case T-235/18 *Qualcomm Inc v Commission*, judgment of 15 June 2022, EU:T:2022:358

Judgment annulling the Commission's finding that Qualcomm's exclusivity payments infringed Article 102 TFEU

- ***Google Android***
 - Case T-604/18 *Google LLC v Commission*, judgment of 14 September 2022, EU:T:2022:541

Judgment substantially upholding the Commission's decision in *Google Android*, but reducing the fine from €4.342 billion to €4.125 billion as the Commission's assessment of the 'revenue sharing' agreements was defective. On appeal to the Court of Justice Case C-738/22 P *Google and Alphabet v Commission*, not yet decided

COURT OF JUSTICE

- ***Charges for use of German rail infrastructure***
 - Case C-721/20 *DB Station & Service AG v ODEG Ostdeutsche Eisenbahn GmbH*, judgment of 27 October 2022, EU:C:2022:832

Article 267 reference dealing with the application of Article 102 to prices that might be excessive in circumstances where there is a regulatory system in place: a national court applying

competition law must, as a matter of sincere cooperation, take into account the decision of the relevant regulatory authority

- ***Packaged ice cream***

- Case C-680/20 *Unilever Italia Mkt. Operations Srl v AGCM*, judgment of 19 January 2023, EU:C:2023:33

Article 267 reference on the single economic entity doctrine and on the use of the as-efficient competitor test in Article 102 cases concerning exclusivity clauses

- ***Lithuanian rail services***

- Case C-42/21 P *Lietuvos gelezinkeliai v Commission*, judgment of 12 January 2023, EU:C:2023:12

Judgment dismissing an appeal against the General Court's rejection of LG's appeal

- ***Digital terrestrial television***

- Case C-449/21 *Towercast v Autorité de la Concurrence*, judgment of 16 March 2023, EU:C:2023:207

Judgment confirming that Article 102 TFEU can apply to a merger below the EUMR turnover thresholds that has not been referred to the European Commission under Article 22 EUMR

COMMISSION INITIATIVE ON GUIDELINES AND GUIDANCE ON EXCLUSIONARY ABUSES

The Commission has amended its Guidance on Article 102 Enforcement Priorities and has launched a Call for Evidence in relation to Guidelines on the same topic, 27 March 2023

PRACTICE AND PROCEDURE AT EU LEVEL

GENERAL COURT

- ***LED luminaries***
 - Case T-886/19 *Design Light & Led Made in Europe v Commission*, judgment of 13 July 2022 EU:T:2022:442

Unsuccessful challenge to the Commission's rejection of a complaint that Philips had infringed Articles 101 and 102

COURT OF JUSTICE

- ***Trucks***
 - Case C-267/20 *Volvo and DAF Trucks*, judgment of 22 June 2022, EU:C:2022:494

Judgment concerning limitation periods and other aspects of the Damages Directive in the Spanish *Trucks* litigation; the Audiencia Provincial de León awarded damages of €10906.00 on 19 September 2022 (PaRR, 23 September 2022)

- Case C-588/20 *Landkreis Northeim v Daimler AG*, judgment of 1 August 2022, EU:C:2022:607

Judgment on the scope of the Commission's decision in *Trucks*: specialised trucks, including refuse collections trucks, were covered by the decision

- Case C-163/21 *AD and others v PACCAR and others*, judgment of 10 November 2022, EU:C:2022:863

Judgment on the Damages Directive, and specifically about the rules on disclosure of evidence

- Case C-312/21 *Tráficos Manuel Ferrer v Daimler AG*, judgment of 16 February 2023, EU:C:2023:99

Judgment on costs and the quantification of damages arising from the *Trucks* decision

- Case C-285/21 *Dalarjo v Renault*, order of 2 March 2023

Order confirming that the Commission's decision in *Trucks* extends to dumper trucks

- ***Velux windows***

- Case C-149/21 *Fakro sp. z oo v Commission*, judgment of 30 June 2022, EU:T:2022:517

Judgment dismissing an appeal against the rejection of Fakro's complaint to the Commission about the behaviour of Velux

- ***Avastin and Lucentis***

- Case C-261/21 *Hoffmann-La Roche*: judgment of 7 July 2022, EU:C:2022:534

Judgment dismissing an argument that the Italian Council of State should revoke a judgment in which, according to Roche and Novartis, failed to comply with the ECJ's judgment in Case C-179/16

- ***Advertising networks***

- Case C-385/21 *Zenith Media Communications SRL v Consiliul Concurentei*: judgment of 10 November 2022, EU:C:2022:866

Article 267 judgment on how to calculate fines under national competition law in the light of EU principles

- ***Czech rail services***

- Case C-57/21 *RegioJet a.s.*, judgment of 12 January 2023, EU:C:2023:6

Article 267 judgment on various aspects of the Damages Directive

- ***French supermarkets***

- Cases C-682/20 P etc. *Les Mousquetaires and ITM Enterprises v Commission*, judgments of 9 March 2023 EU:C:2023:170 etc.

Successful appeals against a General Court judgment on Commission in section decisions; decisions annulled

- ***Spanish petrol stations***

- Case C-25/21 *ZA etc v Repsol*, judgment of 20 April 2023, EU:C:2023:298

Judgment on the burden of proof and voidness of a vertical agreement following a decision of the Spanish competition authority, pre-dating the Damages Directive

COMMITMENT DECISIONS

- *T-Mobile CZ, CETIN and O2 CZ*: commitments accepted by the Commission on 11 July 2022 in the case of network sharing arrangements in the Czech Republic between mobile operators. Summary of decision published 29 November 2022
- *Motor car insurance in Ireland*: commitments accepted by the Commission on 30 June 2022 in relation to data held by Insurance Ireland

- *Amazon*: commitments accepted by the Commission on 20 December 2022 relating to Marketplace data, Amazon Prime and the Buy Box. The decision has been published

EU COMPETITION POLICY

CONSULTATION ON MARKET DEFINITION

The Commission announced on 26 June 2020 that it has published a public consultation on its Market Definition Notice; the consultation was open until 9 October 2020

- A 'Support study' was published by DG COMP in June 2021
- Staff Working Document published 12 July 2021, SWD(2021) 199 Final
- The Commission sought feedback from 19 January 2022 to 16 February 2022
- Consultation on draft revised Market Definition Notice launched 8 November 2022

COLLECTIVE BARGAINING FOR SELF-EMPLOYED WORKERS

The Commission launched a process on 30 June 2020 into collective bargaining by self-employed workers: is this prevented by Article 101?

- Inception Impact Assessment launched 6 January 2021
- Public consultation initiated 5 March 2021
- *Guidelines on the application of Union competition law to collective agreements regarding the working conditions of solo self-employed persons* published 29 September 2022

REFORM OF THE MOTOR VEHICLE BLOCK EXEMPTION

The Commission has prolonged the MVBBER and updated the guidelines, 17 April 2023

REVIEW OF REGULATION 1/2003

Call for evidence on proposed change to the Notice on Informal Guidance, 23 May 2022; consultation launched 30 June 2022

REFORM OF THE EXEMPTION FOR LINER SHIPPING CONSORTIA

The Commission launched a call for evidence on the block exemption for liner shipping consortia on 9 August 2022

E-LENIENCY

Improvements to DG COMP's e-Leniency tool announced 30 September 2022

SUSTAINABILITY AGREEMENTS IN AGRICULTURE

The Commission launched a public consultation on a draft proposal for guidelines on sustainability agreements in the agriculture sector on 10 January 2023 pursuant to Article 210a of Regulation 1308/2013 as amended by Regulation 2021/2117. It is intended that the guidelines will be in place by 8 December 2023

GUIDELINES AND GUIDANCE ON EXCLUSIONARY ABUSES

The Commission has amended its Guidance on Article 102 Enforcement Priorities and has launched a Call for Evidence in relation to Guidelines on the same topic, 27 March 2023 (see Article 102 above)

REFORM OF THE EXEMPTION FOR TECHNOLOGY TRANSFER

The Commission launched a consultation on the block exemption for technology transfer on 17 April 2023

REFORM OF THE HORIZONTAL REGIME

The Commission has reformed the horizontal cooperation agreement regime, 1 June 2023

- New block exemptions for R&D and Specialisation agreements, entry into force 1 July 2023

- New Horizontal Guidelines, entry into force following their publication in the Official Journal

PENDING ARTICLE 267 REFERENCES

- Case C-142/20 *Analisi G. Caraccioco s.r.l. v Regione Siciliana*: does Regulation 765/2008 create a monopoly contrary to Article 102? (Article 4(1) of the Regulation provides that each MS will appoint only one national accreditation body)
- Case C-128/21 *Lietuvos notaru rūmai v Lithuanian Competition Authority*: Article 267 reference on whether notaries are undertakings; AG Pittruzella Opinion, 12 January 2023, EU:C:2023:16
- Case C-252/21 *Facebook v Bundeskartellamt*: Article 267 reference on the relationship between the GDPR and (German) competition law; AG Rantos Opinion 20 September 2022, EU:C:2022:704
- Case C-333/21 *European Super League v FIFA and UEFA*: did the latter infringe competition law in their reaction to the proposed formation of a European Super League? Opinion of Advocate General Rantos 15 December 2022, EU:C:2022:993
- Case C-331/21 *Energias de Portugal v ADC*: can a non-compete clause violate Article 101 when entered into between non-competing undertakings? Opinion of Advocate General Rantos, 2 March 2023, EU:C:2023:153
- Case C-680/21 *Royal Antwerp FC v Royal Belgian FA*: a reference on the compatibility with Article 101 of the 'home player' rule of the RBFA. Opinion of AG Szpunar 9 March 2023, EU:C:2023:188
- Case C-605/21 *Mestsky v Praze, Huereka and Google*: a reference on limitation periods under the Damages Directive
- Case C-211/22 *Super Bock Bebidas*: a reference about resale price maintenance and whether it is restrictive of competition by object
- Case C-298/22 *Banco BPN v BIC Portugêses and Others*: a reference from Portugal on the exchange of information under Article 101
- Case C-425/22 *MOL Magyar Olaj- és Gázipari Nyrt v Mercedes-Benz Group AG*: a reference from Hungary on where the parent of a subsidiary can bring an action for damages where the harm was suffered by the subsidiary
- Case C-632/22 *AB Volvo v Transsaqui S.L.*: a reference from Spain concerning jurisdiction over a parent of a subsidiary in the *Trucks* case

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Norwegian Competition Authority, June 2023
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- Case C-650/22 *Federation Internationale de Football Associations v BZ*: a reference from Belgium concerning FIFA's rules on the transfer of footballers
- Case C-2/23 *FL and KM Baugesellschaft m.b.H. & Co KG*: a reference from Austria concerning access to leniency documents
- Case C-233/23 *Alphabet v AGCM*: a reference from Italy on aspects of the refusal to deal doctrine in the context of the development of applications software

EUROPEAN UNION MERGER REGULATION

RECENT AND CURRENT PHASE II INVESTIGATIONS

Name of case	Cleared?	Cleared with commitments?	Prohibited?
<p>Case No M. 10188 <i>Illumina/Grail</i></p> <p>NB: Article 22 request from France, Belgium, Greece, Iceland, the Netherlands and Norway</p> <p>NB: interim measures adopted 29 October 2021 to restore and maintain competition following Illumina's breach of the standstill Obligation</p> <p>NB: two appeals, Case T-227/21 (assumption of jurisdiction) and Case T-755/21 (appeal against interim measures decision); appeal in Case T-227/21 rejected (below)</p>			<p>Yes (6.9.22)</p> <p>On appeal Case T-709/22, not yet decided</p>
<p>Case No M. 10438 <i>MOL/OMV Slovenija</i></p>		Yes (17.5.23)	
<p>Case No M. 10663 <i>Orange/VOO and Brutélé</i></p>		Yes (20.3.23)	
<p>Case No M. 10658 <i>Norsk Hydro/Alumetal</i></p>	Yes (4.5.23)		
<p>Case No M. 10646</p>		Yes (15.5.23)	

<i>Microsoft/Activision Blizzard</i>			
Case No M. 10615 <i>Booking Holdings/Flugo Group Holdings (eTraveli)</i>			
Case No M.10433 <i>Vivendi/Lagardère</i>			
Case No M. 10806 <i>Broadcom/VMware</i>			
Case No M. 10807 <i>Viasat/Inmarsat</i>	Yes (25.5.23)		
Case No M. 10149 <i>Korean Air/Asiana</i>			
Case No M. 10896 <i>Orange/MasMovil</i>			

GENERAL COURT

- Case T-584/19 *Thyssenkrupp v Commission*, judgment of 22 June 2022 EU:T:2022:386

Judgment dismissing an appeal the prohibition of the proposed thyssengrup/Tata Steel merger

- Case T-227/21 *Illumina Inc v Commission*, judgment of 13 July 2022 EU:T:2022:447

Judgment dismissing Illumina's appeal that the Commission had no jurisdiction under Article 22 EUMR to investigate the *Illumina/Grail* merger; on appeal Case C-611/22 P, not yet decided

OTHER ISSUES

Note also:

- The Commission has adopted a package of simplification measures for EU merger control, 20 April 2023
 - Commission Implementation Regulation 2023/914
 - Commission Notice on a simplified treatment for certain concentrations
 - Commission Communication pursuant to Regulation 2023/914
- See Case M. 10494 *VIG/AEGON CEE*, decision of 21 February 2023: Hungary had violated Article 21(4) EUMR by vetoing the acquisition of the Hungarian subsidiaries of the AEGON Group by Vienna Insurance Group