

**Recent Developments in EU Competition Law**

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**ARTICLE 101 TFEU**

1. *Horizontal agreements*

**PENDING ARTICLE 101 HORIZONTAL CASES BEFORE THE COMMISSION**

Current investigations of horizontal agreements:

- *Atlantic farmed salmon*: unannounced inspections, 19 February 2019; statement of objections sent to six undertakings 25 January 2024
- *Wood pulp*: unannounced inspections, 12 October 2021; case closed 15 June 2023
- *Recycling of cars*: unannounced inspections, 15 March 2022; CMA also investigating
- *Fashion industry*: unannounced inspections, 17 May 2022; case closed 5 April 2024
- *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
- *Online food delivery*: unannounced inspections, 6 July 2022; further inspections 21 November 2023, including no-poach agreements
- *Fragrance industry*: unannounced inspections, 7 March 2023 (in conjunction with the US, UK and Switzerland); inspection decision on appeal, Cases T-263/23 (*Symrise v Commission*) and T-306/23
- *Fashion industry*: unannounced inspections, 18 April 2023
- *Synthetic turf sector*: unannounced inspections, 7 June 2023
- *Medical devices for cardiovascular applications*: unannounced inspections, 19 September 2023
- *Construction chemicals*: unannounced inspections, 17 October 2023 (in conjunction with the UK and Turkish authorities; the Commission has also been in contact with the DoJ)
- *Car starter batteries*: statements of objections sent to five producers and a trade association and its service provider for collusion on prices, 30 November 2023
- *New replacements tyres*: unannounced inspections, 30 January 2024. Possible price coordination, 'including via public communications'

## Cartel decisions

- ***Military hand grenades***

Commission decision of 21 September 2023 imposing a fine of €1.2 million for operating a cartel in the hand grenade market. Note the following:

- Diehl and RUAG found to have geographically shared markets for 14 years
- RUAG the whistleblower; Diehl granted 50% leniency
- This was a settlement case, the 41<sup>st</sup> to date
- Fine raised to achieve sufficient deterrence: the Commission used its discretion under paragraph 37 of the fining guidelines

- ***SNBB***

Commission decision of 19 October 2023 imposing fines of €13.4 million for price fixing, quota allocation and information exchange. Note the following:

- C2 the whistleblower
- Alkaloids of Australia, Alkaloids Corporation, Boehringer, Linnea and Transo-Pharm fined
- Transo-Pharm's and Linnea's fines reduced for leniency
- Single and continuous infringement from 2005 to 2019
- First Commission decision imposing a fine for a cartel in relation to an active pharmaceutical ingredient
- Cooperation between the Commission and the Swiss and Australian authorities
- 42<sup>nd</sup> settlement decision
- Alchem did not settle and the standard, non-settlement procedure continues against it

- ***Euro-denominated bonds***

Commission decision of 22 November 2023 imposing imposing fine of €26.6 million on Rabobank for exchanging commercially sensitive information and coordinating trading and pricing strategies in bonds markets. Note the following:

- Deutsche Bank the whistleblower
  - Deutsche Bank would have been fined €156 million but for the leniency application
  - On appeal, Case T-57/24 *Coöperatieve Rabobank v Commission*, not yet decided
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- ***Ethanol***

Commission decision of 7 December 2023 imposing a fine of €47.7 million on Lantmännen for manipulation of the wholesale benchmark for ethanol. Note the following:

- Abengoa had already settled this case with the Commission
- the Commission had closed the case against Alcogroup with no adverse finding
- the agreement involved the coordination of trading conduct; a limitation of the supply of physical ethanol in the Rotterdam area that could end up in the 'Market on Close' window; and the exchange of commercially sensitive information
- On appeal Case T-94/94 *Lantmännen v Commission*, not yet decided

## **GENERAL COURT**

- ***Ethylene***
  - Case T-590/20 *Clariant AG v Commission*, judgment of 18 October 2023, EU:T:2023:650

Judgment dismissing Clariant's appeal contesting the level of the fine imposed upon it in a settlement case

- ***Modafinil***

- Case T-74/21 *Teva Pharmaceutical Industries Ltd v Commission*, judgment of 18 October 2023, EU:T:2023:651

Judgment dismissing Teva's appeal against the Commission's decision *Cephalon*; on appeal Case C-2/24 P *Teva Pharmaceutical Industries Ltd v Commission*, not yet decided

- ***EIRD***

- Case T-106/17 *JP Morgan Chase v Commission*, judgment of 20 December 2023, EU:T:2023:832

Judgment upholding the Commission's decision in *EIRD*, except that the reasoning in the statement of objections was inadequate in relation to the level of the fine; the General Court assessed the level of the fine at the same amount as in the Commission's decision. On appeal Case C-160/24 P *JP Morgan v Commission*, not yet decided

- Case T-113/17 *Crédit Agricole v Commission*, judgment of 20 December 2023, EU:T:2023:83

Judgment substantially upholding the Commission's decision in *EIRD* except, apart from the inadequacy as in JP Morgan, as regards CA's contribution to the SCI; the General Court reduced the level of the fine by €4 million from the amount in the Commission's decision. On appeal Case C-191/24 P *Crédit Agricole v Commission*, not yet decided

## **COURT OF JUSTICE**

- ***Electrolytic capacitors***

- Cases C-757/21 P and C-757/21 P *Nippon Chemi-Con Corporation v Commission*, judgments of 13 July 2023, EU:C:2023:577 and EU:C:2023:575

Judgments rejecting appeals against the General Court's upholding of the Commission's decision

- ***Portuguese energy***

- Case C-331/21 *Energias de Portugal v ADC*, judgment of 26 October 2023, EU:C:2023:812

Judgment on whether a non-compete clause violated Article 101 when entered into between a supplier of energy and a food retailer. Fines of €34.4 million upheld by the Lisbon Court of Appeal, 22 February 2024

- ***European Super League***

- Case C-333/21 *European Super League v FIFA and UEFA*, judgment of 21 December 2023, EU:C:2023:1011

Judgment on the application of Articles 101 and 102 to the rules of FIFA and UEFA

- ***Belgian Football League***

- Case C-680/21 *Royal Antwerp FC v Royal Belgian FA*, judgment of 21 December 2023, EU:C:2023:1010

Judgment on the application of Article 101 to the 'home player' rule of the URBSFA

- ***International Ice Skating***

- Case C-124/21 P *International Skating Union v Commission*, judgment of 21 December 2023, EU:C:2023:1012

Judgment confirming the Commission's finding that the rules of the ISU infringed Article 101, and reversing the judgment of the General Court on the submission of disputes to arbitration in Switzerland

- *Notaries*
  - Case C-128/21 *Lietuvos notaru rūmai v Lithuanian Competition Authority* EU:C:2024: 49, judgment of 18 January 2024

Judgment on the application of Article 101 to decisions of the chamber of notaries in Lithuania fixing the methods of calculation fees

- *Trucks*
  - Case C-251/22 P *Scania AB v Commission* EU:C:2024:103, judgment of 1 February 2024

Judgment rejecting Scania's appeal against the General Court's upholding of the Commission's decision

## 2. *Vertical agreements*

### **COMMISSION INVESTIGATIONS**

#### **PENDING ARTICLE 101 VERTICAL CASES BEFORE THE COMMISSION**

- *Pierre Cardin*

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

- Statement of objections sent 31 July 2023

## **COMMISSION DECISION**

- *Chocolate, biscuits and coffee*

Fine of €337.7 million imposed on Mondelēz for infringements of both Article 101 and 102 involving the restriction of cross-border trade, 23 May 2024

## **GENERAL COURT**

- *PC video games*
  - Case T-172/21 *Valve Corporation v Commission*, judgment of 27 September 2023, EU:T:2023:587

Judgment dismissing Valve's appeal against the Commission's decision against Valve in the *Videogames* case

## **COURT OF JUSTICE**

- *Portuguese drinks market*
  - Case C-211/22 *Super Bock Bebidas*, judgment of 29 June 2023, EU:C:2023:529

Judgment arising from an Article 267 reference about whether resale price maintenance is restrictive of competition by object and how to determine what constitutes an agreement for the purpose of Article 101. Note: the Portuguese Court of Appeal subsequently upheld the AdC's fine of €24 million, AdC press release of 21 September 2023



**ARTICLE 102**

**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; commitments being market tested, 19 January 2024
- *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
- *Vifor* – formal investigation of possible disparagement of a drug, Monofer, but Vifor
  - Commitments being market tested, 19 April 2024
- *Public Power Corporation of Greece* – formal investigation of Greek wholesale electricity market launched 16 March 2021; statement of objections sent 7 February 2024
- *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; on appeal Cases C-496/23 P and C-497/23 P, not yet decided
  - Statement of objections sent 19 December 2022
- *Google* – formal investigation of Google's behaviour in online advertising technology services opened 22 June 2021
  - Statement of objections sent 14 June 2023
- *Animal health sector* – the Commission carried out unannounced inspections at a pharmaceutical company in Belgium, Zoetis, which is a global animal health company, because of possible abuse of a dominant position
  - Statement of objections sent 26 March 2024: acquisition of a late-stage pipeline product followed by termination of the development programme

- *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
- *Microsoft* – formal investigation of whether Microsoft is guilty of tying or bundling Teams with Office 365 and Microsoft 365

## **COMMISSION DECISION**

- ***X86 central processing units (computer chips)***
  - *Intel*, Commission decision of 22 September 2023

Re-imposition of fine (of €376.36 million) on Intel for the ‘naked restrictions’ of competition found in the 2009 decision and confirmed by the General Court’s judgment. On appeal Case T-1129/23 *Intel v Commission*, not yet decided

- ***Music streaming***
  - *Apple*, Commission decision of 4 March 2024

Commission decision imposing a fine of €1.8 billion for unfair trading conditions in the form of anti-steering obligations imposed on music streaming services. On appeal Case T-260/24 *Apple v Commission*, not yet decided

## **GENERAL COURT**

- ***Bulgarian gas***
  - Case T-136/19 *Bulgarian Energy Holding v Commission*, judgment of 25 October 2023, EU:C:2023:669

Judgment annulling Commission decision imposing a fine of €77 million on BEH for abusing a dominant position in the market for the supply of gas in Bulgaria; on appeal Case C-14/24 P *Commission v BEH*, not yet decided

## **COURT OF JUSTICE**

- ***Meta's use of personal data***

- Case C-252/21 *Facebook v Bundeskartellamt*, judgment of 4 July 2023, EU:C:2023:537

Judgment on the relationship between the GDPR and (German) competition law

- ***Natural mineral water***

- Case C-510/22 *Romaqua Group SA v Societa Națională a Apelor Minerale SA*, judgment of 21 September 2023, EU:C:2023:694

Judgment on the application of Article 102 and 106 to the extension of an exclusive concession for the exploitation of natural mineral water

- ***European Super League***

- Case C-333/21 *European Super League v FIFA and UEFA*, judgment of 21 December 2023, EU:C:2023:1011

Judgment on the application of Articles 101 and 102 to the rules of FIFA and UEFA

## **COMMISSION INITIATIVE ON GUIDELINES AND GUIDANCE ON EXCLUSIONARY ABUSES**

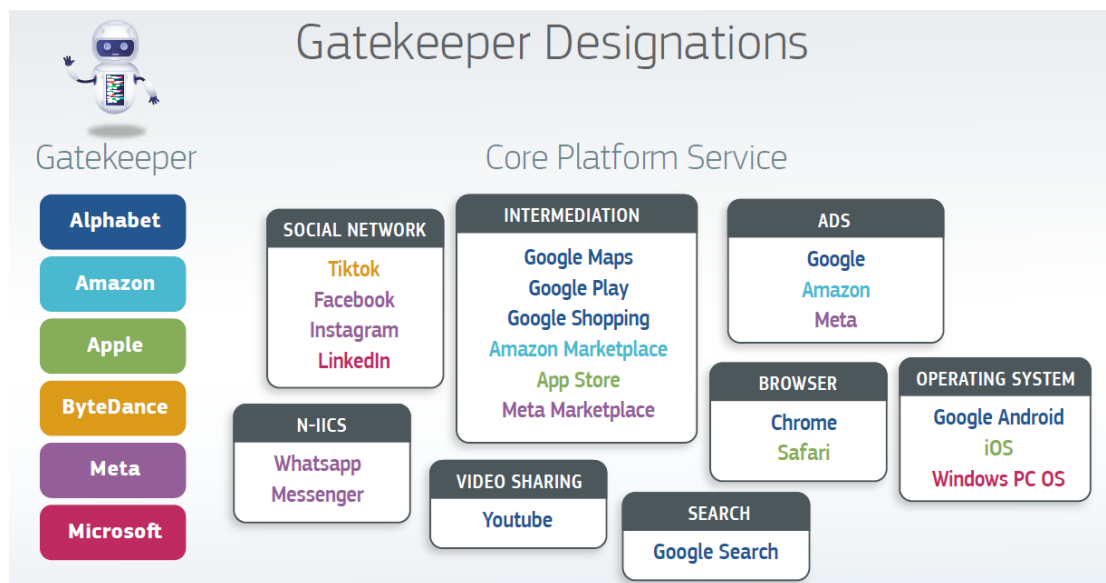
The Commission has amended its Guidance on Article 102 Enforcement Priorities and has launched a Call for Evidence in relation to Guidelines on the same topic, 27 March 2023

## DIGITAL MARKETS ACT

### COMMISSION

#### Gatekeeper designations

- **6 September 2023:** the Commission designated six gatekeepers in relation to 22 core platform services:



- Note that there are various appeals against designation:
  - Case T-1077/23 *Bytedance v Commission*, not yet decided
    - Application for interim relief to suspend designation dismissed for lack of urgency 9 February 2024, EU:T:2024:94
  - Case T-1080/23 *Apple v Commission*, not yet decided
  - Case T-1078/23 *Meta Platforms Ireland v Commission*, not yet decided

#### Market investigations

- **5 September 2023:** the Commission opened four market investigations as to whether Microsoft and Apple should not be designated in relation to certain core platform services, despite meeting the thresholds in the DMA
  - 13 February 2024: the Commission adopted four decisions deciding that the following will **not** be designated:
    - Apple's **iMessage** (messaging service)
    - Microsoft's **Bing** (online search), **Edge** (web browser) and **Microsoft advertiser** (online advertising)
  
- **6 September 2023:** the Commission opened a market investigation on as to whether Apple should be designated as a gatekeeper in relation to iPadOS, despite not meeting the thresholds in the DMA should not be designated in relation to certain core platform services, despite meeting the thresholds in the DMA
  - 29 April 2024: the Commission adopted a decision that designates Apple with respect to iPadOS
  
- **1 March 2024:** the Commission opened three market investigations as to whether Booking.com, Bytedance and X should be designated as gatekeepers
  - 14 May 2024: Booking.com designated in relation to its online intermediation service Booking.com
  - X Ads and TikTok Ads not designated
  - Market investigation launched of online social networking service X

### **Gatekeeper non-designations**

- **6 September 2023:** the Commission decided not to designate Alphabet/Gmail, Microsoft/Outlook.com and Samsung/Samsung Internet Browser, despite meeting the thresholds in the DMA

### **Templates**

- **9 October 2023:** the Commission published a template for compliance reports as required by Article 11 DMA
- **12 December 2023:** the Commission published a template for reporting on consumer profiling techniques as required by Article 15 DMA
- **6 March 2024:** Commission Annual Report on the DMA, COM(2024) 106 final
- **25 March 2024:** non-compliance investigations opened against Alphabet, Apple and Meta
- **30 April 2024:** whistleblower tool launched by Commission

**PRACTICE AND PROCEDURE AT EU LEVEL**

**COURT OF JUSTICE**

- *Google search*
  - *Heureka Group s.a. v Google LLC*, judgment of 18 April 2024, EU:C:2024:324

Judgment on limitation periods under Article 10 of the Damages Directive

**COMMITMENT DECISIONS**

- *Renfe*

The Commission has accepted commitments from Renfe to supply content and real-time data to rival ticketing platforms (and related matters), 17 January 2024



## **EU COMPETITION POLICY**

### **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; on 10 October 2023 it announced that it would not extend it beyond 25 April 2024 when it will expire

### **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. The guidelines were adopted on 7 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: Regulation 2023/1066 (R&D agreements) and Regulation 2023/1067 (specialisation agreements)
- New Horizontal Guidelines, entry into force following their publication in the Official Journal, 21 July 2023

### **EU-UK COOPERATION AGREEMENT**

- Directives adopted for the Commission to negotiate an agreement on cooperation and the exchange of information in competition matters, 1 June 2023

### **REFORM OF THE MOTOR VEHICLE BLOCK EXEMPTION**

- Regulation 461/2010 has been extended in force until 31 May 2028 by Regulation 2023/822, OJ [2023] L 102 1/1

### **PHARMACEUTICAL SECTOR**

- On 26 January 2024 the Commission published a report on enforcement of the antitrust and merger rules by the Commission and NCAs in the period 2018-2022

### **NOTICE ON MARKET DEFINITION**

- The Commission has adopted its new *Notice on Market Definition Notice*, 8 February 2024, OJ [2024] C/2024/1645

**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-298/22 *Banco BPN v BIC Português and Others*: a reference from Portugal on the exchange of information under Article 101. Opinion of AG Rantos 5 October 2023, EU:C:2023:738
- 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
- Case C-650/22 *Federation Internationale de Football Associations v BZ*: a reference from Belgium concerning FIFA's rules on the transfer of footballers. Opinion of AG Szpunar 30 April 2024, EU:C:2024:375
- 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
- Case C-253/23 *ASG 2 v North Rhine-Westphalia*: a reference from Germany asking whether a German rule restricting collective claims undermines the *effet utile* of competition law
- Case C-393/23 *Macedonian Thrace Brewery v Athenian Breweries*: a reference from the Netherlands in relation to jurisdiction arising out of a decision of the Greek Competition Authority
- Case C-209/23 *FT and RRC GmbH v FIFA*: a reference from Germany on the remuneration of footballers' agents
- Case C-264/23 *Booking.com v 25hours Hotel Company Berlin*: a reference from the Netherlands on wide and narrow parity clauses, Article 101 and the VBER
- Case C-428/23 *ROGON GmbH v Deutscher Fussballbund*: a reference from Germany on the application of *Wouters* and *Meca-Medina* to the rules in Germany on footballers' agents

- Case C-569/23 *Toplofikatsia*: a reference from Bulgaria on legal fees established by regulation there

**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>  <b>NB: Article 22 request from France, Belgium, Greece, Iceland, the Netherlands and Norway</b></p> <p>NB further:</p> <p>Case T-227/21 <i>Illumina v Commission</i>, EU:T:2022:447, on appeal to the Court of Justice Case C-611/22 P <i>Illumina v Commission</i> and Case C-625/22 P <i>Grail v Commission</i>: was it possible for the Commission to take jurisdiction under Article 22 EUMR? AG Emiliou's Opinion handed down 21 March 2024</p> <p>Case No M. 10493: interim measures, decision of 29 October 2021, to restore and maintain competition (Article 8((5)(a)): on appeal Case T-755/21, not yet decided</p>			<p>Yes (6.9.22)</p> <p>On appeal Case T-709/22, not yet decided</p>

<p>Case M. 10938: more interim measures, decision of 28 October 2022 (Article 8(5)(c)): on appeal Case T-5/23, not yet decided</p> <p>Case M. 10483: fine of €432 million for gun-jumping, decision of 12 July 2023, including a symbolic fine on Grail: on appeal Case T-591/23, not yet decided</p> <p>Case M.10939: restorative measures decision 12 October 2023 (transitional and divestment)</p> <p>Commission approval of Illumina's unwinding plan, 12 April 2024</p>			
<p>Case No M. 10615 <i>Booking Holdings/Flugo Group Holdings (eTraveli)</i></p>			<p>Yes (25.9.23)</p> <p>On appeal Case T-1139/23 <i>Booking Holdings v Commission</i>, not yet decided</p>
<p>Case No M.10433 <i>Vivendi/Lagardère</i></p>		Yes (6.6.23)	
<p>Case No M. 10806 <i>Broadcom/VMware</i></p>		Yes (12.7.23)	
<p>Case No M. 10807 <i>Viasat/Inmarsat</i></p>	Yes (25.5.23)		
<p>Case No M. 10149</p>		Yes (13.2.24)	

<i>Korean Air/Asiana</i>			
Case No M. 10896 <i>Orange/MásMóvil</i>		Yes (20.2.24)	
Case No M. 10920 <i>Amazon/iRobot</i> <b>NB: transaction abandoned</b> <b>January 2024</b>			
Case No M.11033 <i>Adobe/Figma</i> <b>NB: transaction abandoned</b> <b>December 2023</b>			
Case No M.11071 <i>Lufthansa/ITA Airways</i>			
Case No M.11109 <i>IAG/Air Europa</i>			

## GENERAL COURT

- Case T-585/20 *Polwax v Commission*, judgment of 14 June 2023, EU:T:2023:332

Judgment rejecting an appeal against the Commission's clearance of the *Orlen/Lotos* merger in 2020

## COURT OF JUSTICE

- Case C-376/20 P *Commission v CK Telecoms UK Investments Ltd*, judgment of 13 July 2023, EU:C:2023:561

Judgment setting aside the General Court's annulment of the Commission's decision in *Hutchison 3G UK/Telefónica UK* and referring the case back to the General Court

- Case C-746/21 P *Altice Group Lux Sàrl v Commission*, judgment of 9 November 2023, EU:C:2023

Judgment upholding the Commission's findings of infringement but a small reduction in the fine for infringing Article 4(1) EUMR from €56 million to €52.9 million

- Case C-297/22 P *UPS Inc v Commission*, judgment of 21 December 2023, EU:C:2023:1027

Judgment dismissing UPS's appeal against the ruling of the General Court that the Commission was not liable in damages to UPS for prohibiting the *UPS/TNT* merger

## **OTHER ISSUES**

Note also:

- Investigation opened by the Commission against Vivendi (a) for possible gun-jumping and (b) possible breach of the commitment not to complete its acquisition of Lagardère until the Commission had approved the buyer, 25 July 2023
- The Commission has sent a statement of objections to Kingspan for providing incorrect, incomplete and misleading information during a merger investigation, 19 March 2024
- See DG COMP's *Competition Policy Brief*, April 2024, on non-price competition in EU merger control