KOUTALIDIS LAW FIRM

KLF Competition Brief: A Retrospective

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INTRODUCTION

The 2023 KLF Competition Brief: A Retrospective has been prepared by the Competition Team of Koutalidis Law Firm. The aim is to concisely present the main developments in EU and Greek competition law both at policy as well as enforcement level before the EU Commission ("**Commission**"), the Hellenic Competition Commission ("**HCC**") and the EU courts in 2023. Businesses should take stock of such developments in their strategic planning since they will have an impact on the future direction of competition law and policy and the competition authorities' case prioritisation and examination of future cases.

2023 has been a very active year for both the Commission and the HCC, with a high number of dawn raids by both authorities. At EU level, we see the publication of several important legislations and policy documents spanning from the revised rules on horizontal agreements to amending the Guidance on Article 102 TFEU on exclusionary abuses – and from the revised market definition notice and the simplified merger notification rules to the Foreign Subsidies Regulation and the DMA. A notable trend at EU level is the focus of EC enforcement in the digital economy with a number of ongoing cases.

At national level, a key trend was the high number of settlement decisions coupled with the relative low number of hearings before the HCC. The HCC did not shy away from imposing high fines for the infringement of Article 1 Law 3959/2011, as amended and in force ("**Greek Competition Law**") and Article 101 TFEU in cartel cases, notably in the banking sector as well as for the infringement of Article 2 Greek Competition Law and 102 TFEU in the gaming sector. 2023 marked another year with the HCC being very extrovert both internationally forging links with other competition authorities as well as within the Greek market reaching out to several stakeholders and civil society.

EU

EU Main Trends

Revival of Dawn Raids

Year 2023 continued to mark the revival of dawn raids as cartel enforcement has become, in the post-pandemic era, again, a top priority for the Commission. The Commission publicized more inspections than in 2022 (seven in total against four dawn raids conducted in 2022 and 2021 respectively) for possible violations of Article 101 TFEU at the premises of companies active in a variety of sectors: fragrance, energy drinks, fashion, synthetic turf, medical devices, construction chemicals and online ordering and food delivery. What is noteworthy is that the cross-border enforcement was enhanced as two coordinated dawn raids were carried out in total, the first in March 2023 against fragrances manufacturers, which was coordinated along with the UK, US and Swiss competition authorities and the second in October against construction chemical companies in cooperation with the UK, US and Turkish competition authorities.

Compared to 2022, the number of dawn raids in consumer industries was also increased, evidencing that the EC tried to deliver on its promise to show "*increased focus on cases that are relevant for the cost-of-living crisis*". It is interesting to notice that the slight decrease in leniency applications has been counterbalanced by an increase in ex-officio investigations, which have become prevalent as a result of the use of more advanced resources and tools. Another emerging trend is the challenging of ex-officio investigations. Following the annulment by the Court of Justice ("**CJEU**") of the Commission's inspections decisions in the French Supermarkets case (analyzed below), two similar appeals have been lodged before the General Court ("**GC**") (regarding the dawn raids in the fragrance sector and in the energy drinks sector) challenging the existence of sufficient grounds to order an ex-officio inspection.

Vertical Restraints

In the field of vertical restraints, the Commission continues its effort to tackle the widely used within the EEA restrictions on cross-border sales (especially passive and unauthorized parallel sales) that seek to protect price differences between Member States and thereby deprive consumers of the full benefits of the single market. On 31 July 2023 Pierre Cardin and its licensee Ahlers received the statement of objections (analyzed in detail below), while the formal investigation into Mondelēz that started in 2021 is still ongoing and pertains, inter alia, to parallel trade restrictions.

EU Regulatory Developments

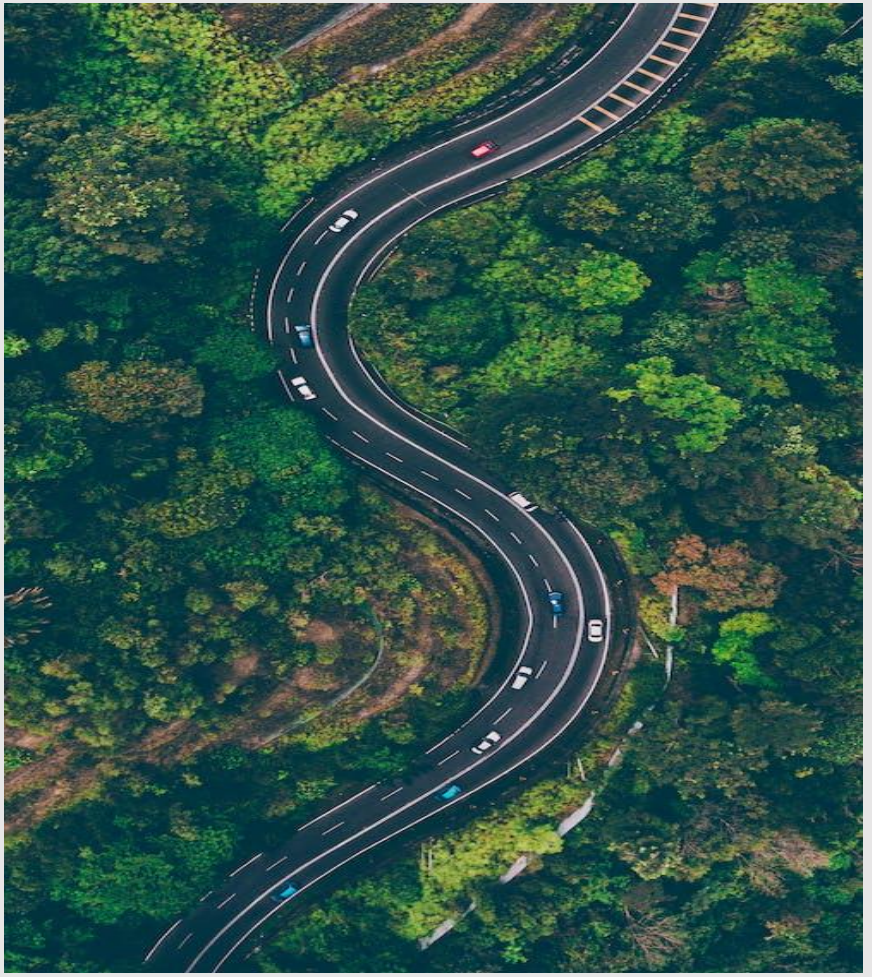
New Rules on Horizontal Cooperation Agreements

Following a lengthy period of review and consultation, on 1 June 2023, the EC published its revised Horizontal Cooperation Guidelines and adopted new R&D (Commission Regulation (EU) 2023/1066) and Specialisation (Commission Regulation (EU) 2023/1067) Block Exemption Regulations ("**HBERs**"). This revised set of rules provides useful guidance to competitors wishing to cooperate in areas such as R&D and production, but also in sustainability initiatives, reflects the latest case law and decisional practice and provides extensive guidance on how Article 101 TFEU should be interpreted in a new innovative and digitalized economy, including the use of algorithms and data processing. The new set of rules will remain in force for twelve (12) years. Undertakings that have already entered into agreements benefiting from the HBERs have a period of two (2) years to adapt to the new provisions. Main amendments to the horizontal guidelines include a completely new chapter (Chapter 9) on sustainability agreements, new sections on mobile infrastructure sharing agreements (NSAs) and bidding consortia and revised chapters on information exchange and on standardization, joint purchasing and commercialization agreements.

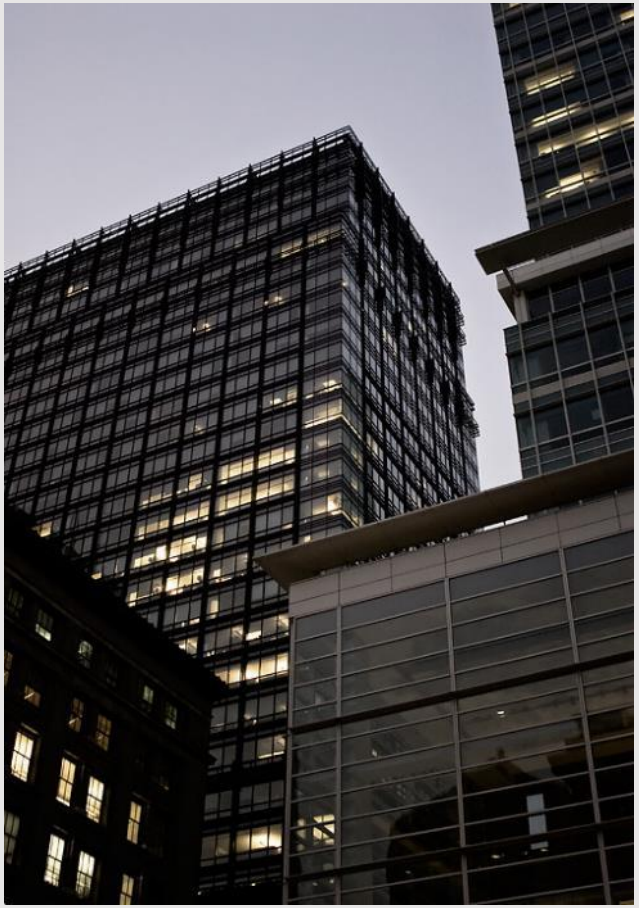
The revised horizontal guidelines provide more comprehensive guidance so as to reflect the recent case law of the European courts, inter alia, on the notion of 'commercially sensitive information', what sort of information exchange may fall under the category of 'by object' restriction, the potential pro-competitive effects of data-sharing agreements and precautionary measures that undertakings can implement to ensure compliance. The revised HBERs include simplified grace periods if market shares increase above the exemption threshold and provide flexibility with respect to the calculation of market shares. The R&D Block Exemption Regulation emphasizes the protection of innovation competition, while the Specialisation Block Exemption Regulation covers a larger variety of production agreements concluded by more than two parties, which will be beneficial for SMEs.

By providing updated and comprehensive guidance, the revised rules aim at striking a balance between fostering innovation, promoting sustainable practices and ensuring fair competition. On the new rules see dedicated KLF Newsletter.

Finally, using a novel exclusion from EU competition rules introduced by the recently reformed Common Agricultural Policy (CAP), the Commission adopted guidelines on how to design sustainability agreements in the field of agriculture.



EU Regulatory Developments



New Article 102 TFEU Guidelines

On 27 March 2023, the Commission published a Communication amending its 2008 Guidance on enforcement priorities concerning exclusionary conduct by dominant undertakings ("Amending Communication"). At the same time, it launched a consultation process for the adoption of Guidelines on exclusionary abuse of dominance ("Guidelines") and released a policy paper explaining the background of these initiatives. These developments were expected, considering the time elapsed since 2008 Guidance was adopted as well as the fact that there are no official guidelines clarifying the application of Article 102 TFEU. The Amending Communication is a short-term fix, until the adoption of the Guidelines by 2025.

As the Commission's objective is to codify the case-law, key changes of the Amending Communication reflecting the case-law developments include:

- The concept of "anti-competitive foreclosure" is dissociated from the dominant company's profitability resulting from the abusive conduct. Instead, it describes a scenario where such behaviour adversely affects the effective competitive structure, impacting aspects such as price, production, capacity, variety or quality of products and services.

- The use of the as-efficient competitor (AEC) test is based on the discretion of the Commission and is not a legally mandatory requirement for establishing the abusive conduct, noting that the test might not even be suitable in some cases. According to the case-law, the AEC test is essential in assessing predatory pricing and margin squeeze cases, while, in rebates cases it depends on the type of rebate.

- The clarification that margin squeeze is not a type of refusal to supply, but an independent form of abuse, with its own assessment criteria.

EU Regulatory Developments

Revised Market Definition Notice

On 8 November 2022, the Commission published its draft revision of the Market Definition Notice ("***Draft/Revised Notice***"), inviting all interested parties to submit their feedback. This is the first time the Market Definition Notice was revised since its adoption in 1997 ("***1997 Notice***"). The Draft/Revised Notice is almost twice the size of the 1997 Notice as it incorporates 25 years of Commission's decisional practice, EU courts' case law, guidance and clarifications on gaps identified in the Staff Working Document published in July 2021 and the public consultation responses on its roadmap. The Commission adopted the revised Market Definition Notice on 8 February 2024. The Commission's continuous efforts to stay abreast of market changes are reflected in the approach proposed in the Draft/Revised Notice. This approach aims to enhance the definition of relevant product and geographic markets, particularly considering the evolving landscape of digital markets.

The most notable issues addressed in the Draft/Revised Notice are the following:

- The market definition is only concerned with "immediate" competitive constraints, i.e., the competitive constraints from "within" the market while, the competitive constraints from "outside" the market, such as potential competition, are taken into account at the stage of the competitive assessment.

- Market definition is not "*a mandatory step in all assessments under Union competition law*" and the Commission "*does not need to reach a definitive conclusion on the precise scope of the market where the outcome of the Commission's assessment would change under different plausible market definitions*". Also, the Draft/Revised Notice grants the Commission the flexibility to delineate the relevant (product and geographic) market(s) on a case-by-case basis.

- Acknowledgement that separate markets may exist where there is significant product differentiation, price discrimination, significant investments in R&D, or when it comes to products offered in/by multi-sided platforms and/or digital ecosystems

- The definition of the geographic market in the context of globalization.

- Acknowledgment that there are specific products or industries, where other metrics (than sales and purchases) can be proven more useful when calculating market shares (e.g., the number of visits or the number of downloads in digital markets, the level of R&D expenditure in markets where investments in R&D are significant, the capacity for transport markets etc.).

EU Regulatory Developments

Simplified Merger Regulation Package

On 1 September 2023, the Commission adopted a new legislative package of simplified merger control procedures with clearer rules and guidance to reduce the administrative burden both on the notifying parties and on itself, when it comes to transactions with no substantive concerns.

This package includes: (i) a new Implementing Regulation, (ii) a new Notice on Simplified Procedure, and (iii) a Communication on the transmission of documents ("***Simplification Package***").

Amongst the main changes, the most notable ones are:

- The introduction of new categories of simplified cases (super simplified cases, simplified cases, simplified cases under the flexibility clause and simplified cases under the normal procedure) and a "light" version of the normal procedure, allowing some markets to be treated in a simplified manner within the normal procedure.
- A codification of the super-simplified treatment for joint ventures that are not active in the EEA and for transactions whether there are neither horizontal not vertical relationships between the parties.
- The introduction of new filing forms (Form CO, Short Form CO, Form RS and Form RM, with the most significant changes appearing in the simplified Short Form CO, which is now a "tick-the-box" form).

- The official establishment of the electronic submission as the default, a practice accepted since the start of the Covid-19 pandemic back in 2020.

The Simplification Package brings several positive changes to the merger control procedure, noting however, that the Implementing Regulation itself does not provide many changes regarding the Commission's substantive assessment of mergers. The Commission anticipates that approximately 10% of normal procedure cases would be eligible for simplified treatment under the new flexibility rules. Whether the Simplification Package will achieve its intended goal will largely depend on how the Commission will approach the new rules in practice.

EU Regulatory Developments

Foreign Subsidies Regulation

The long-awaited Foreign Subsidies Regulation ("***FSR***") entered into force on 12 July 2023, with the notification obligations provided therein commencing from 12 October 2023. The FSR creates a new regime aimed at ensuring a level playing field by addressing distortions of competition on the EU internal market caused by foreign subsidies granted by non-EU countries to companies operating within EU.

To achieve this, the FSR introduces three (3) new tools:

- A mandatory notification for concentrations where (i) the target undertakings, (in case of acquisitions), the JV or one of the merging parties (in case of mergers) generates aggregate EU turnover of at least EUR 500 million; and (ii) the aggregate amount of the foreign contributions received by the undertakings concerned is at least EUR 50 million over the three years prior to signing.

- A mandatory notification for tenders where the estimated value of the procurement at issues is at least EUR 250 million, and the bidder has received foreign financial contributions amounting to at least EUR 4 million from a non EU-country.

- The authority of the Commission to initiate ex officio investigations in all other market situations (including M&A and public tenders falling below the specified thresholds) which may involve financial contributions from non-EU countries, noting that this power covers any foreign subsidy granted during a prior five-year period.

The FSR will affect both EU and non-EU based companies that have received financial contributions from non-EU countries, noting that the concept of "financial contribution" is broad and can include capital injections, grants, loans, guarantees, tax exemptions etc. If the Commission ultimately finds that a foreign subsidy distorts the EU internal market under the FSR, it will have the power to impose redressive measures or accept commitments to remedy the distortion, including the repayment of subsidies, the imposition of behaviour remedies (such as governance modifications) or, in cases of substantial concerns, potentially the unwinding of a transaction. Finally, although the Commission has published a Q&A including clarifications on important points, there are still various substantive and practical issues that remain vague (e.g., the concept of "possible positive effects"). Further guidance is expected, as the Commission is obliged to publish guidelines by 12 January 2026.

EU Regulatory Developments

DMA

On 2 May 2023, the EU's landmark Digital Markets Act ("**DMA**") entered into force setting the regulatory boundaries for large digital platforms in the EU. After the expiry of the deadline for potential gatekeepers to submit their core platform services, on 6 September 2023, the EC adopted its first 'designation' decision under the DMA. To that effect, six (6) tech companies that provide core platform services and meet the relevant thresholds have been designated as gatekeepers with respect to their various core platform services - Alphabet, Amazon, Apple, ByteDance (Tik Tok), Meta and Microsoft. Ushering into the effective compliance stage, the six gatekeepers have until 6 March 2024 to ensure compliance with the DMA obligations. Inter alia, gatekeepers must observe obligations on interoperability, data access, advertising and customer contracts, while refraining from self-preferencing, preventing consumers from linking to businesses outside their ecosystem, preventing users from uninstalling software or apps and tracking end users' activities without effective consent. Gatekeepers are bound by the DMA obligations with respect to their European business model, however, they remain free to maintain their existing business models outside the EU which might result to what some have dubbed "splinternet". It remains to be seen whether the DMA will become the baseline for compliance or just a piece in a fragmented image.

It is worth noting that the appeals lodged against the Commission's designation decision before the General Court in November 2023 from Bytedance (TikTok), Meta and Apple bring forth fundamental questions with respect to the cross application of DMA and competition law, such as whether the qualitative criteria of the DMA are similar to the criteria of dominance.

The EC is feverishly preparing for the implementation stage. The Directorate for DMA enforcement 'Markets and Cases IV: Digital Platforms' sprung from an internal reshuffling within DG COMP and comprises three units, while throughout the year several workshops (on data, app stores, interoperability) and consultations (on implementation, self-preferencing, compliance reporting) and a DMA high-level group took place between the watchdog and stakeholders.

Commission – Article 101 TFEU

It appears that the Commission's enforcement in the realm of cartels was relatively subdued in 2023. The Commission has adopted only three (3) infringement decisions and issued one Statement of Objections in the fashion sector. Despite the limited number of decisions, it was the first time that a fine for a cartel infringement was imposed on undertakings active in the defence sector, namely in the market for military hand grenades, while it was the first time that a cartel has been sanctioned in relation to an active pharmaceutical ingredient. Furthermore, two of the decisions adopted in 2023 followed the settlement procedure and leniency applications were made in all three of them. In more detail:

- In September 2023, the Commission levied a fine of EUR 1.2 million against Diehl, a German weapons supplier, for its involvement in a cartel with RUAG, its Swiss rival (Case AT.40760). The two companies were found to divide national markets by mutually agreeing not to sell into the territory assigned to the other without the others' explicit consent from November 2007. The investigation began in 2021, when RUAG submitted a leniency application, securing full immunity from fines under the 2006 Leniency Notice and avoiding a potential fine of EUR 2.5 million. Diehl, cooperating extensively, received a 50% fine reduction in fines and an additional 10% reduction for acknowledging its participation under the 2008 Settlement Notice. Notably, the Commission deviated from the standard fining methodology, as it believed that the standard methodology would not have had a sufficient deterrent effect.

- In October 2023, the Commission imposed fines totalling EUR 13.4 million on five pharmaceutical companies (Case AT.40636) – Alkaloids (Australia), Alkaloids Corporation, Boehringer, Linnea and Transo-Pharm, that were found to engage in Resale Price Maintenance ("**RPM**") by fixing the minimum sales price of an active pharmaceutical ingredient, charged to distributors and generic drug manufacturers and to allocate quotas. The decision was adopted under the Commission's cartel settlement procedure, where the companies admitted their participation in a single and continuous infringement over various periods between 1 November 2005 and 17 September 2019. C2 Pharma, the whistleblower in this case, was granted immunity from fine under the Leniency Note, while all settling companies received a 10% fine reduction under the Settlement Notice. Two of the infringing undertakings, Transo-Pharm and Linnea, were also granted an additional reduction (50% and 30% respectively) for their cooperation under the Leniency Notice. The Commission will continue its investigation under the standard infringement procedure for Alchem, a company which was also under investigation but chose not to settle.

- In November 2023, the Commission imposed a EUR 26.6 million fine on Rabobank (Case AT.40512), a Dutch banking and financial services multinational company, for participating in a cartel concerning the trading of certain Euro-denominated bonds between 2006 and 2016, with Deutsche Bank, which however avoided a fine of EUR 156 million by reporting the infringement to the Commission through the Leniency Programme. The Commission investigation revealed that the two banks through some of their traders, used online chatrooms, emails and messages in order to exchange commercially sensitive information concerning (i) prices, volumes as well as current and future trading strategies and positions; (ii) the counterparties' identities; and (iii) their requirements for buying or selling bonds and coordinated their trading and pricing strategies.

- In July 2023, the Commission informed to the French fashion designer Pierre Cardin and its licensee Ashlers by means of a Statement of Objections of its preliminary view that they have breached EU antitrust rules by entering into anticompetitive agreements and coordinated their behaviour in order to restrict the ability of other Pierre Cardin licensees and their customers to sell Pierre Cardin-licensed clothing, both offline and online: (a) into Ahlers' EEA licensed territories; and/or (b) to low-price retailers (such as discounters) offering lower prices to consumers in such territories, with the aim to ensure Ahlers' absolute territorial protection in the countries covered by its licensing agreements with Pierre Cardin in the EEA.

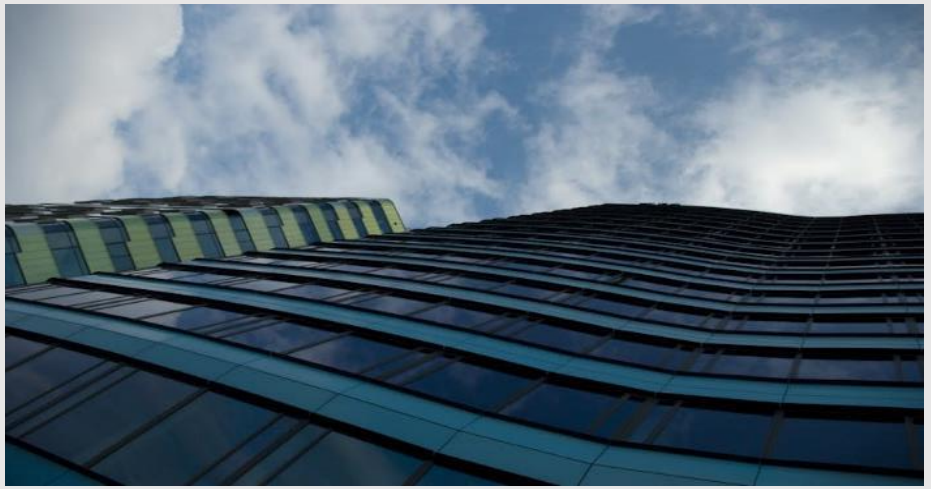
Commission – Article 102 TFEU

In the realm of Article 102 TFEU, the Commission, in addition to the DMA entering into force, continued to focus its attention on the battle against big tech companies. It (re-) adopted its infringement decision against Intel (Case AT.37990); it opened a formal investigation (Case AT. 40721), following a complaint lodged by Slack Technologies in 2020, to assess whether Microsoft may have breached EU competition rules by tying or bundling its communication and collaboration product Teams to its popular suites for businesses Office 365 and Microsoft 365; and, it sent a statement of objections to Google over abusive practices in online advertising (Case. AT. 40670) taking the initial view that Google is favouring its own online display advertising technology services to the detriment of competing providers of advertising technology services, advertisers and online publishers.

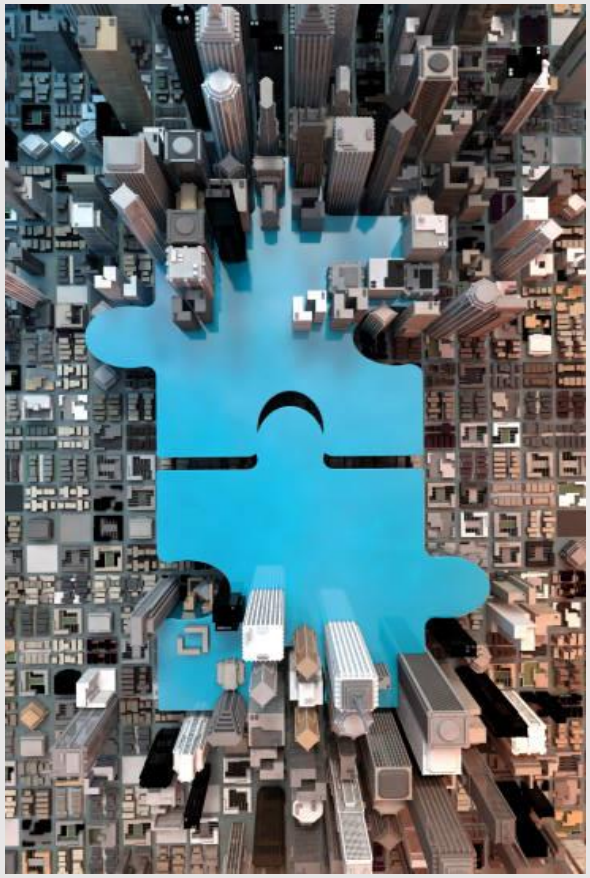
On the Intel saga: on 22 September 2023, the Commission re-imposed a fine of around EUR 376,36 million on Intel for a previously established abuse of dominant position in the market for computer chips called x86 central processing units ("CPUs"). As short recap, it should be recalled that in 2009, the Commission imposed on Intel a fine of EUR 1,06 billion for abusing its dominant position in the market for CPUs by deploying exclusionary practices constituting in a) the offering of conditional rebates to computer manufacturers, and b) direct payments to computer manufacturers to impede the launch of products containing competitors' CPUs and to limit the sale channels available to these products (the so called "naked restrictions"). This decision was partially annulled by the GC in 2022, following the referral from the CJEU, which in its seminal decision clarified the conditions for establishing when conditional rebates may infringe the EU competition rules. The GC annulled the 2009 decision with respect to its conditional rebate practice limb, confirming however the unlawfulness of Intel's naked restrictions. To that effect, the GC also annulled the fine in its entirety and the Commission re-imposed the relevant fine considering the seriousness of the infringement, as well as its lower scope. The GC decision has been appealed before the CJEU and thus the saga continues…

It should be noted that several important antitrust investigations are still ongoing – progress has been made on a handful of cases, where the oral hearings were completed (AT.40437 Apple App Store (music streaming), AT.40452 Apple Mobile Payments, AT.40684 Meta Advertising and AT.40588 Teva Copaxone), as well as in AT.40735 Online rail ticket distribution, where the Commission invited comments on commitments offered by Renfe, the state-owned rail incumbent operator, to address competition concerns over its alleged refusal to supply full content and real-time data to rival ticketing platforms operating in the Spanish online passenger rail ticket distribution market, in what according to the Commission's preliminary investigation amounted to a potential abuse of its dominant position.

Finally, the Commission closed two (2) investigations, without finding a violation of Article 102 TFEU; the first one against The Coca-Cola Company and its bottlers in the market for carbonated soft drinks and the second one was the rejection of Swenter's complaint regarding Sibelco's allegedly anticompetitive practices in the market for the extraction and supply of quartz sand, the latter having been appealed before the General Court by the complainant Ivo Swenters.



Commission – Mergers



In 2023, three hundred and thirty-five (335) transactions were notified to the Commission with the majority of them being cleared unconditionally under the Commission's simplified procedure. The Commission cleared only four (4) transactions with remedies at the end of its Phase I review, while three (3) of these transactions had been withdrawn and re-notified. The Commission approved seven (7) transactions after in-depth Phase II investigations, two (2) of these were approved without conditions, while three (3) were subject to behavioural remedies and two (2) to divestment commitments.

In 2023, a noteworthy shift occurred in the European Union merger control landscape. In only one year, the Commission took an unprecedent step by imposing the so far largest fine for jumping the gun on Illumina (EUR 432 million) and the first (symbolic) gun jumping fine on Grail, the target company, and then mandating the reversal of the Illumina/GRAIL already completed acquisition, blocked the Booking/eTraveli transaction introducing a groundbreaking theory of harm centred around "ecosystem concerns", and introduced legislative measures in order to simplify its merger review procedures.

While previously transactions were subject to referral under Article 22 EURM only if they fell within national thresholds, the Commission had adopted a proactive approach, actively monitoring transactions for potential review under Article 22 EUMR.

The focus now centres on assessing the value of the deal in relation to the target's revenue as a key determinant for invoking Article 22 EUMR. This change is evident in the Commission's recent practice, where in cases EEX/Nasdaq Power and Qualcomm/Autotalks the Commission acknowledged that despite these acquisitions not meeting EU merger control thresholds and lacking notification in any Member State, they still satisfied the criteria for referral under Article 22 EUMR.

General Court – Article 101 TFEU

On 27 September 2023, the GC issued its judgment in case T-171/21, Valve v. Commission, an important decision for the interplay between competition rules and intellectual property rights (IPRs), where it rejected Valve's request to annul the Commission's decision of 2021 finding that its geo-blocking practices with respect to certain PC games on its video-game marketplace and on its gaming platform Steam constituted a by-object infringement of Article 101 (1) TFEU resulting in the imposition of a fine of approximately EUR 1,6 million. The gist of the decision was the assessment of whether the use of technical measures designed to protect publishers' copyright, such as Technical Protection Measures (TPMs), when result at making any sale or use of the video games outside certain EEA countries practically impossible, which is a typical 'by-object' restriction of competition, could be justified under the rationale of granting territorial IP licences and of protecting an IPR that has not been exhausted. The General Court ruled that whether an IPR is exhausted or not is irrelevant when it comes to compliance with the antitrust rules, while the territoriality of copyright protection cannot be used to justify a 'disguised restriction on trade' such as the elimination of parallel imports in order to protect high royalty amounts in certain EEA countries.

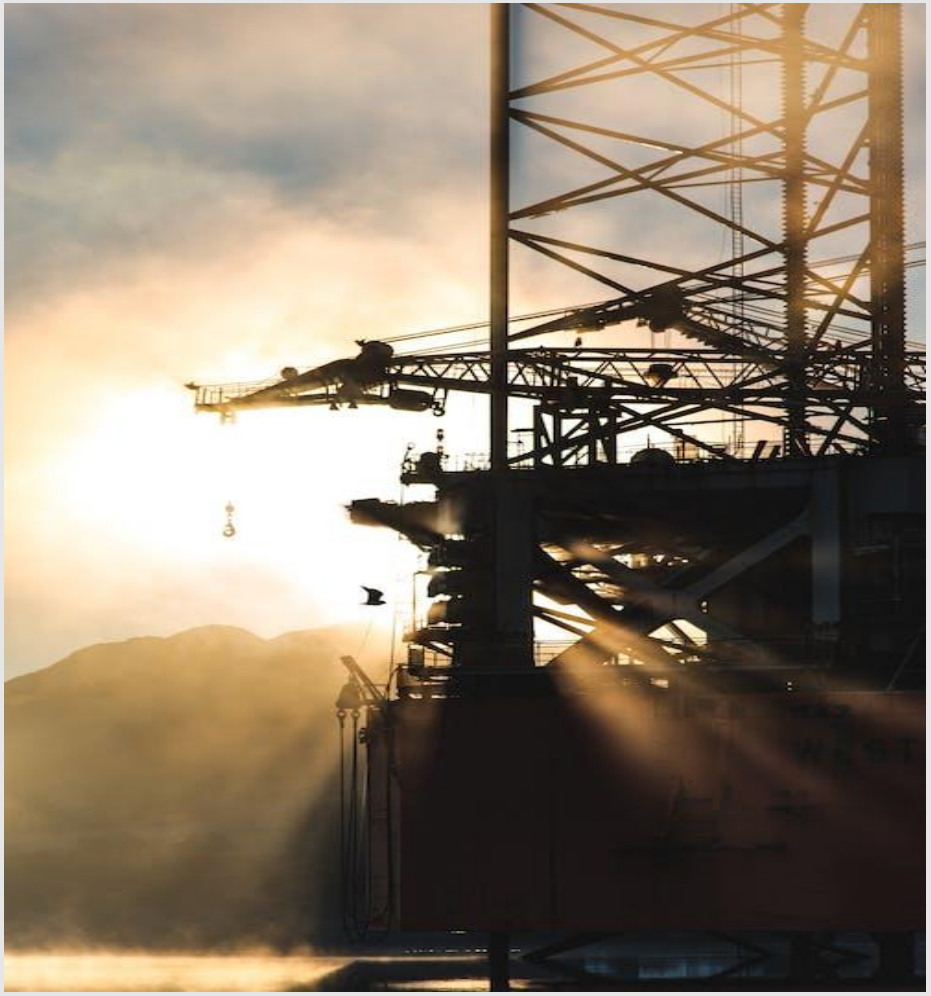
On 18 October 2023, in T-590/20, Clariant and Clariant International v. Commission, the GC dismissed the appeal of Clariant AG against the respective Commission's decision under the settlement procedure in connection with the ethylene purchasing cartel case. The arguments of the appellant concerned the calculation of the fine, with respect to which the General Court highlighted that the Commission enjoys particularly broad discretion when establishing a repeat offence. On a more important note, following a counterclaim of the Commission to remove the 10% fine reduction granted to Clariant under the Settlement Notice, the General Court clarified in para. 227 that "*the fact of having accepted a maximum amount of the fine in their settlement submission is not the same as accepting the exact final amount of the fine, the method of its calculation and the reasoning on which the Commission based itself in order to arrive at that final amount*". This decision is important as it recognises that issues discussed during the settlement process are not automatically regarded as accepted and can become the subject of further judicial review before the European courts.

In its ruling in T-74/21, Teva Pharmaceutical Industries and Cephalon v. Commission issued on 18 October 2023, the GC upheld the Commission's decision, in what constitutes another pay-for-delay case, that the patent settlement between Teva and Cephalon constituted a restriction of competition by object, assessed against the relevant legal test fleshed out by the CJEU in Case C-307/18 Generics (UK) and Others (Generics (UK)).

On 20 December 2023, the GC delivered two judgments following appeals lodged by JP Morgan Chase and Crédit agricole against the European Commission's decision in the Euro Interest Rate Derivatives ("EIRDs") cartel case (Case T-106/17, JP Morgan Chase and Others v Commission; Case T- 113/17, Crédit agricole and Crédit agricole Corporate and Investment Bank v Commission). Most of the pleas brought by JP Morgan and Crédit agricole were dismissed, including the arguments put forward by Crédit Agricole that the Commission had failed to establish a single and continuous infringement, had not established a restriction of competition by object and JP Morgan Chase's claim that the Commission did not demonstrate that its conduct had the objective of restricting competition and that the Commission breached its rights of defence. However, the General Court upheld JP Morgan Chase's claim that the Commission had made errors in relation to the calculation of the fine. On that basis, the GC ruled that the Commission's decision on fines was inadequately reasoned as regards the reduction factor and, as a result, the fine imposed had to be annulled. Moreover, the GC upheld Crédit agricole's plea that the body of evidence on which the Commission relied did not constitute sufficient, precise and consistent evidence that Crédit agricole was aware that the exchanges it had with another bank (Barclays) concerning pricing intentions and strategies went beyond the bilateral framework and formed part of an overall plan that also involved other banks. According to the General Court, the fine imposed on Crédit agricole did not reflect its actual participation in the single and continuous infringement, which led to a respective reduction of the fine from EUR114,654,000 to EUR 110,000,000.

General Court – Article 102 TFEU

With respect to decisions regarding Article 102 TFEU, 2023 was a year of "firsts" also for the General Court, as this was the first time that the General Court has annulled in full a Commission abuse of dominance decision. In T-136/19, Bulgarian Energy Holding and Others v Commission, the General Court annulled a 2018 Commission decision finding that the State-owned Bulgarian Energy Holding Group had infringed Article 102 TFEU by foreclosing competing gas suppliers on gas supply markets in Bulgaria and imposing a fine of approx. EUR 77 million in this respect. Notably, the decision also confirmed that the effects test plays a key role in the assessment of Article 102 case and has two necessary elements: it must be applied both in order to demonstrate that a conduct is capable of having an impact on market structure and that such conduct is not consistent with the competition on the merits.



Court of Justice – Article 101 TFEU

In January, the CJEU published its long-awaited judgement in C-883/19 P HSBC v. Commission, dismissing HSBC's appeal in the Euro interest derivatives cartel case. The CJEU provided guidance on cases where information exchange in the financial services sector might constitute a restriction by object under Article 101 TFEU. It concluded that this occurs when such practices create informational asymmetry among market participants, reducing market uncertainty to the detriment of competition. However, the CJEU emphasized that arguments regarding the pro-competitive effects of information exchanges should be thoroughly evaluated by EU courts.

With respect to the anti-competitive exchange of information, special reference should be made to Advocate General Rantos' opinion in case C-298/22, Banco BNP v. BIC Portugues in the context of a preliminary ruling request from Portuguese courts, according to which the exchange of information between competitors can constitute a restriction of competition "by object" in breach of Article 101 TFEU, noting that this is the first case where the exchange of information is considered as an independent violation of Article 101 TFEU, in the sense that no other form of collusion or concerted practice has been established.

Cases C-757/21 P, Nichicon Corporation v. European Commission and C-759/21 P, Nippon Chemi-Con Corporation v. European Commission present the CJEU approach to the single and continuous infringement, noting that a company may be found to have infringed Article 101 TFEU without having participated in all the individual meetings.

In decision C-331/21, EDP – Energias de Portugal SA, the CJEU determined that a non-compete clause within a commercial partnership agreement, which prohibits one party from entering the electricity market during its liberalization, particularly when the other party is a major player, constitutes an agreement which has as its object the prevention, restriction or distortion of competition, even if consumers derive certain benefits from that agreement and that the non-compete clause is limited in time, in so far as it is apparent from an analysis of the content of that clause and its economic and legal context that that clause displays a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess its effects.

In C-211/22, Super Bock, the CJEU issued a preliminary (rare) ruling to clarify the status of RPM under EU competition law. The CJEU took a distinct stance on vertical price fixing, asserting that classifying RPM as a hardcore restriction under the Vertical Block Exemption Regulation, does not automatically render it a violation of Article 101(1) TEFU as a "by object" restriction. Instead, the CJEU ruled that the imposition of an RPM restriction qualifies as a by object infringement, only if it can be proven that the agreement significantly harms competition considering the economic and legal context in which it operates (without, however, needing to assess whether it has appreciable restrictive effects). The Super Bock judgment marks a departure from the CJEU earlier, more formalistic approach, noting that the judgement should in no way be interpreted as a signal that it is now possible to impose a minimum resale price policy under EU competition law.

Court of Justice – Article 102 TFEU

In 2023, the CJEU handed down a handful of decisions on Article 102 TFEU that will set substantive precedent for cases to come.

On 12 January 2023, in case C-42/21P, Lietuvos geležinkeliai v. Commission the CJEU upheld the GC's judgement in finding that the Lithuanian national railway company had abused its dominant position in the Lithuanian freight market by dismantling 19 kilometres of rail tracks connecting Lithuania and Latvia in order to impede the provision of competing services from the Latvian national railway company. The CJEU specified that the Bronner criteria (Case C-7/97), that are routinely applied when examining whether a refusal to supply constitutes an abuse of dominance, were not the applicable test for the case at hand, as the allegedly abusive practices constituted an independent form of abuse. This could be seen as an endorsement from the Court of the Commission's eagerness to go beyond the specific categories of abusive conduct and engage in a more case-by-case identification.

Following a row of important Court rulings establishing a broader effects-based analysis of Article 102 TFEU alleged infringements (from Post Danmark II to Intel to Servizio Elettrico Nazionale), the Court delivered on 19 January 2023 its judgement in Case C-680/20, Unilever Italia, following the request for a preliminary ruling of the Italian supreme administrative court on the Italian Unilever case. The main takeaways revolve around the imputability of the inclusion of exclusivity clauses in contracts to which the dominant undertaking is not a party and the implementation of the effects analysis in exclusivity clauses. First, the actions of distributors forming part of the distribution network of a dominant undertaking may be imputed to the dominant undertaking, provided that those actions were not adopted independently but form part of a policy that is decided unilaterally by the dominant undertaking and implemented through those distributors, and, second, in assessing the capability of an exclusivity clause to restrict competition on the merits, the competition authorities and the Commission should examine, in the sense that it cannot exclude its relevance without any reasoning, any economic evidence proving the inability of the conduct to produce anticompetitive effects submitted by the dominant company, which could rely on the AEC test or any other pertinent methodology. It is thus clear that the CJEU calls for a more rigorous scrutiny of the exclusionary effects of allegedly abusive conduct for both pricing and non-pricing practices.

On 4 July 2023 the Court delivered its much-awaited preliminary ruling in C-252/21, Meta Platforms Inc. and Ors v. Bundeskartllamt clarifying that national competition authorities, when examining an alleged infringement of Article 102 TFEU through data processing activities, may assess whether the General Data Protection Regulation ("**GDPR**") rules have been breached, provided that they cooperate with the competent data protection authorities and observe previous decisions in relation to the allegedly infringing conduct. This is a seminal case with respect to the competence of national competition authorities, confirming that they can examine compliance with non-competition rules, as departing from such rules could indicate that the dominant firm is not behaving in a way that constitutes 'normal competition'. As regards the 'duty of sincere cooperation' that the national competition authorities should demonstrate vis-à-vis the relevant specialised supervisory authority, much of ambiguity remains on how it will play out in practice.

Competition Law and Sports

The curtain fell on the year with two (2) rulings delivered by the CJEU on 21 December 2023 pertaining to the application of competition rules to sports federations and their discretionary power to prevent alternative competitions from taking place, in Cases C-333/21, European Superleague Company (ESL) and C-124/21 P, International Skating Union (ISU).

With respect to the ESL judgement, in 2021 a coalition comprising 12 leading European football clubs established the European Super League (ESL), aiming to operate concurrently with FIFA and UEFA tournaments. However, the ESL's organizers failed to obtain prior authorisation from FIFA and UEFA, as mandated by the associations' regulations, sparking a dispute.

In response, FIFA and UEFA threatened sanctions against clubs and players involved in the ESL, prompting the ESL's organizers to contest this before the Madrid Commercial Court, alleging anti-competitive conduct. The Spanish Court in its request for a preliminary ruling sought guidance from Luxembourg on whether said authorisation/sanctioning regime was afoul of competition rules. Advocate General Rantos, in December 2022, advised that the regulations are compatible with EU law and essential for preserving the sport's integrity and competitive framework. He underscored the European Sport Model's principles, including its pyramid structure, open competitions, and financial solidarity.

However, the CJEU did not follow the Advocate's General Opinion. First, the Court recalled that the organisation of competitions, along with the relevant authorisation/sanctioning regimes, constitutes an economic activity and as such is subject to competition rules. Concerning the regulations at hand, both Articles 101 and 102 TFEU are relevant. This stems from the fact that sports associations are not only considered an "association of undertakings" under Article 101 TFEU but can also be deemed dominant entities due to the unique characteristics of sports organization within the European Sport Model. As the structural framework of European sports, with associations at its apex, these bodies possess fundamental statutory autonomy to govern their sport according to their rules. However, economically speaking, they function as de facto monopolists. In an increasingly commercialized sports landscape, many of their regulations inevitably impact the commercial interests of members and third parties.

Competition Law and Sports

The CJEU outlined the applicable test for determining whether such approval and sanctions regimes fall afoul of competition rules and clarified in para 178 that "*where there is no framework providing for substantive criteria and detailed procedural rules suitable for ensuring that they are transparent, objective, precise, non-discriminatory and proportionate, rules on prior approval, participation and sanctions, such as those at issue in the main proceedings reveal, by their very nature, a sufficient degree of harm to competition and thus have as their object the prevention thereof*".

The Court implemented the aforementioned test and went further in finding that the FIFA/UEFA authorisation system constituted a restriction by object under Article 101 TFEU and - by its very nature - violated Article 102 TFEU by arbitrarily prohibiting football clubs from establishing a new league. Finally, the Court contemplated the arguments that have been developed in terms of efficiency gains from the FIFA/UEFA authorisation system and the impact on the solidarity mechanism which could provide some grounds for justification under Article 101 (3) TFEU, these, however, being issues to be decided upon by the referring court.

The ISU judgement concerns a Commission decision (upheld by the GC) finding that ISU infringed Article 101 TFEU by implementing its eligibility rules in speed skating, which, albeit aiming to safeguard that common standards were observed by third-party organisers, restricted competition by object and effect as they exceeded what was necessary to achieve this legitimate objective. The CJEU upheld the GC's ruling, considering that the mere fact that the eligibility rules were not "*transparent, objective, non-discriminatory and proportionate*" sufficed to be regarded as restricting competition by object. Again, in this case the Court's decision was contrary to the Opinion of Advocate General Rantos that the infringement decision should be annulled, inter alia, on the grounds that such prior authorization rules must be examined vis-à-vis their effects on a practical basis and not in abstracto. Finally, in its judgement the CJEU held that compulsory exclusive jurisdiction granted to the Court of Arbitration for Sport is not compatible with EU competition law.

Other Cases

Procedure

The judgement T-452/20, Meta Platforms Ireland v. Commission marked a pivotal moment as the EU Courts addressed the lawfulness of a request for information ("**RFI**)" using digital search terms and explored the boundaries of the Commission's investigatory powers concerning protection of sensitive personal data. The GC mandated the disclosure of documents containing specific search terms. Despite Meta's contention that such search would yield thousands of irrelevant documents, some including highly private or personal information, the Court rejected the argument, asserting that Meta failed to convincingly demonstrate that the relevant RFI exceeded what was necessary. The GC recalled that the necessity requirement was met, as the Commission reasonably believed, at the time of its request, that the information could aid in determining whether a violation of competition rules had occurred. While acknowledging that some of the Commission's search terms might be too vague, the GC deemed others precise enough to satisfy the necessity requirement. Regarding documents containing personal data, the GC referred to the GDPR and the Data Protection Regulation applicable to EU institutions, affirming that EU institutions can lawfully process personal data when necessary for the enforcement of competition law and noting that the assessment of such documents within the environment of a virtual data room would be a satisfactory solution.

The CJEU decision C-883/19 P HSBC v Commission provides clarity on the procedural safeguards that the Commission must uphold to ensure the presumption of innocence of the parties in hybrid settlement cases that opt out of the settlement procedure. The bottom line is that the presumption of innocence applies even in hybrid procedures where a prior settlement decision has already been adopted. Any lapse in this regard on behalf of the Commission or the EU Courts might vitiate the entire procedure. Thus, the Commission need to be cautious when mentioning non-settling parties in such decisions, and the EU Courts must carefully scrutinize these decisions on appeal to ensure that the abomination principles were observed, and that a company's liability was not prejudged.

Furthermore, in C-815/21 P, Amazon.com and Other v Commission, the CJEU confirmed that the Commission has the authority to exclude a member state from the scope of an investigation, allowing the National Competition Authority to independently investigate the same conduct, without violating the protection against parallel antitrust proceedings. The CJEU clarified that Article 11(6) of Regulation 1/2003 does not confer an absolute right for an investigated undertaking to have its case exclusively handled by the Commission. Therefore, the Commission is entitled to carve a member state out of the investigation without being obliged to strip the NCA of its competence to apply the antitrust rules. Additionally, the CJEU explained that the safeguards provided by Article 11(6) of Regulation 1/2003 are applicable only when the Commission and one or more NCA(s) investigate the same alleged anticompetitive practices during the same timeframe. In cases where the Commission excludes a national market from its investigation, there are no parallel proceedings to protect an undertaking from.

In its judgements, C-693/20 P, *Intermarché Casino Achats v Commission*, C-690/20 P, *Casino, Guichard-Perrachon and Achats Marchandises Casino v Commission* and C-682/20 P, *Les Mousquetaires και ITM Entreprises v Commission*, the CJEU set aside in part the judgements of the GC and consequently annulled the Commission decision ordering inspections at the premises of a number of French undertakings in the distribution sector. By its judgements, the CJEU observed that the Commission has an obligation to record any interview conducted to collect information relating to the subject matter of an investigation, regardless of when such interviews take place (i.e., before the formal opening of an investigation, in order to collect indicia, or afterwards, in order to collect evidence of the infringement). The CJEU concluded that since the information obtained in disregard of the obligation to record constituted the essential elements of the indicia on which the Commission decisions were based, they were not substantiated by sufficiently serious indicia, thus, they were inadmissible.

Other Cases

Mergers

In May the GC issued two rulings dismissing third parties' action for annulment of two Commission decisions approving concentrations, in Case T-321/20, enercity v. Commission ("enercity)"and Case T-312/20, EVH v. Commission.

In enercity the GC's ruling provided clarity on the circumstances allowing a third party to challenge a Commission decision approving a concentration under the EU's merger control regime. According to Article 263 TFEU, individuals or entities can challenge a decision addressed to another person, provided that the decision is of direct and individual concern to them. The GC determined that the applicant was directly concerned by the decision in question, as it had the potential to bring an immediate change to the market in which the applicant operated.

Regarding the individual concern criterion, the GC emphasized that this depends on the effects of the decision on the third party's market position, and on its active participation in the administrative procedure. The GC ruled that merely responding to a questionnaire in the context of a market investigation or being recognised by the Hearing Officer as an interested third party constituted only minimal participation in the procedure and was not enough to establish the "active participation" and subsequently the standing to bring an application for annulment against a Commission merger decision.

In EVH, the GC clarified the concept of a "single concentration" and confirmed that asset swaps do not fall in this category, as in order for various operations to be classified as a "single concentration", they must ultimately result in control being acquired by the same undertaking(s). The judgement, following the position taken in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentration between undertakings, clarified that only those operations that actually contribute to achieving one and the same concentration can be considered part of a single concentration, noting that if the transactions at issue each aim to confer control of different targets to different undertakings, then they cannot be considered as parts of a single concentration, even if the operations are linked.

On its side, the CJEU delivered some important judgments as well: it addressed the standard of proof, closeness of competition and significant competitive force in C-376/20 P, *Commission v. CK Telecoms UK Investments*, affirmed the application of Article 102 TFEU to a concentration not covered by EU or national merger control in case C-449/21, *Towercast SASU v. Autorite de la concurrence and others* and endorsed the EC's authority to impose separate fines for the failure to notify a transaction and the violation of the standstill obligation in C-746-21 P, *Altice Group Lux v Commission*. In March, the CJEU issued a preliminary ruling in Towercast confirming that national competition authorities can apply abuse of dominance rules to concentrations that do not meet the EU or national merger control thresholds. However, the CJEU clarified that merely strengthening a dominant position through an acquisition does not automatically constitute an abuse. In line with its earlier judgment in the Continental Can case, the CJEU specified that the national competition authorities would have to demonstrate that the level of dominance achieved through the acquisition would significantly hinder competition. This implies a substantial impact on the competitive landscape, where, effectively, the market would be left with only undertakings whose behavior depends on the dominant undertaking.

This ruling is noteworthy as it confirms yet another avenue through which competition authorities can assess transactions falling outside merger control process (in addition to the new interpretation of Article 22 EUMR).

Other Cases

Mergers

In November 2023, in Altice, the CJEU upheld the Commission's imposition of a gun jumping fine on Altice in connection with its acquisition of PT Portugal. Although the CJEU reduced the amount of the fine, the decision confirms the Commission's strict approach to procedural enforcement in merger control. In line with its previous judgements, the CJEU confirmed that the Commission was right to impose two separate fines on Altice for both failing to notify the transaction and for breaching the standstill obligation, as these are different infringements of different provisions with different objectives. Also, the judgement provided further clarifications on the notion of the (partial) implementation of a concentration by stating that the implementation of a concentration arises as soon as the parties implement measures that contribute to a lasting change of control over the target, noting that it is the change of control that must be lasting and not each individual measure.

Finally, in the landmark judgement in CK Telecoms, the CJEU introduced a significant shift in the standard required for the Commission to intervene in mergers. The CJEU ruled that the Commission now only needs to demonstrate that a transaction is "*more likely than not*" to result in a significant impediment to effective competition, as opposed to the previously stringent standard of "*strong probability*" to either block a merger or impose remedies. The CJEU also provided clarity on the interpretation of key terms such as "*closeness of competition*" and "*important competitive force*". According to the judgment, the Commission can utilize the relative closeness of the merging parties to their competitors as evidence against the transactions. However, the Commission is not required to establish that the parties are "*particularly close*". Additionally, a merging party may be deemed an "*important competitive force*" even without standing out from its competitors, such as through more aggressive pricing conduct. The crucial factor lies in its capacity to exert "*more influence on the competitive process than its market share or similar measures would suggest*".

Private Enforcement

On 12 January 2023, the CJEU delivered a judgment in Case C-57/21, RegioJet, in which it clarified the provisions governing the disclosure of evidence contained in Directive 2014/104/EU of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union ("**Damages Directive**"). The CJEU held that a national court may order the disclosure of evidence in damages proceedings linked to an alleged infringement of competition law, even if these proceedings were stayed pending an investigation by the Commission concerning the same alleged infringement, provided the disclosure of evidence is necessary and proportionate for the purpose of the damages action.

On 6 March 2023, the Court issued an order in Joined Cases C-198/22 and C-199/22, QJ and IP v. Deutsche Bank AG, finding that the publication of the Commission's summary decision in the EU official journal (OJ) is an objective, precise, transparent and predictable starting point for limitation periods applicable to private damages.

On 20 April 2023 the Court delivered its preliminary ruling in C-25/21, Repsol Comercial de Productos Petroliferos clarifying that, when the Damages Directive is not applicable, a final infringement decision of a national competition authority must be regarded by the national courts adjudicating on follow-on actions for damages and declarations of nullity as establishing the existence of the infringement until proof of the contrary provided that the nature of the alleged infringement, and its material, personal, temporal and territorial scope coincide with those of the infringement found by the NCA decision. Such approach is in line with the direct effect of Article 101 TFEU.

Other Cases

Private Enforcement

On 16 February 2023 the Court handed down a preliminary ruling in C-312/21, Tráficos Manuel Ferrer shedding light on two important aspects of the Damages Directive; first, the circumstances under which the right to full compensation is rendered 'practically impossible or excessively difficult' and, second, the limitation of judicial estimation of damages when harm has been established, but it is 'practically impossible or excessively difficult' to quantify the harm. According to the Court's ruling, a national rule of civil procedure under which a claimant whose damages claim is partly granted must bear a portion of the procedural costs does not render 'practically impossible or excessively difficult' the exercise of the right to full compensation. Furthermore, if the claimant does not make the requisite effort to demonstrate and quantify the harm incurred, also by exhausting the possibilities offered under Article 5 (1) of the Damages Directive, national courts should not substitute the claimant and resort to judicial estimation.

In its ruling of 20 December 2023 the General Court in Case T-415/21, Banca Popolare di Bari v Commission dismissed the request of Banca Popolare di Bari (BPB) for compensation for the damage it allegedly suffered as a result of a Commission's decision that was ultimately annulled by the European Courts. In this ruling the GC confirmed that the European Union should make amends for any damage caused by its institutions provided that three conditions are cumulatively met. There must be a) a sufficiently serious breach of a rule of EU law conferring rights on individuals, b) the occurrence of damage, and c) a causal link between that breach and the damage sustained. Although, article 107 TFEU is a rule that confer rights on individuals, such as BPB as a beneficiary of the aid measures at issue which were wrongly classified as State aid and the amount of which was recovered following the annulled Commission Decision, the GC found the breach was not sufficiently serious, since the irregularity committed by the Commission is not unconnected with the customary, prudent and diligent conduct of an institution responsible for monitoring the application of competition rules in a particularly complex context.

GREECE

Greece - Main Trends

Overview

2023 has been a very active year for the HCC on a number of fronts. First, it continued to conduct a high number of dawn raids in different sectors of the Greek economy being one of the most active enforcers amongst its EU counterparts on that front. Second, it has undertaken a number of policy efforts having published guidelines and practical guides as well as memoranda of understanding. It has also organised a number of world leading conferences and secured its presence in leading fora at EU and international level. Further, it has strengthened its links with civil society and undertook initiatives to boost competition advocacy. Third, the HCC has also been active in employing its complementary enforcement tools, i.e. mapping (a new tool introduced in January 2022 by Law 4886/2022) and sector inquiries. It has also published the amended HCC Regulation on the Internal Operation and Management.

2023 has been less active in terms of the number of hearings, with a large number of infringement decisions having been adopted following the settlement procedure, which has been extended to apply also to vertical agreements, invitations to collude, price signaling and abuse of dominance cases. In particular, the HCC has only had hearings in four cases in 2023, all of which concerned alleged procedural infringements.

In 2023, the HCC has published 11 decisions for substantive infringements, 8 of which were adopted following the settlement procedure. It has also imposed a record fine of approx. 24,562 million for an abuse of dominance violation against a single company.

High Number of Dawn Raids

The HCC has conducted seven (7) dawn raids in the following sectors: Beer and alcoholic beverages, Pharmaceuticals, Agricultural sector (in particular in the market for currants), Poultry, Electricity, Baby products, Medical equipment.

HCC at the Forefront of Policy Efforts

Policy Efforts are important in fostering competition advocacy, building links with civil society and creating the image of a world leading authority. From a business perspective, it creates an opportunity to shape the relevant debates. In 2023 the HCC has published its Guidelines on the implementation of Article 1A of the Greek Competition Law. This provision deals with unilateral behavior by an undertaking. In particular it covers: (a) invitations to collude in order to restrict competition in the Greek territory, and (b) announcements relating primarily to future pricing intentions between competing undertakings ("price signaling").

The HCC has also published two guides in a bid to foster competition in both public policy making as well as the agricultural sector. The HCC "Guide on Promoting & Enhancing Public Policy Making" provides information to central governmental and other public bodies in order to help them ensure the protection of competition in public policy making, whereas its Guide on Competition in the Agricultural Sector covering both anticompetitive as well as unfair trading practices, aims at heightening awareness about the respective rules amongst market participants. It has also collaborated with one of the largest consumer organisations (EKPOIZO) in order to produce an educational video informing consumers on anticompetitive RPM agreements.

2023 has been a very active year for the HCC in terms of its international presence. First, it has organised a number of leading conferences and workshops, attracting a number of leading academics, practitioners, business representatives and regulators. The HCC workshops covered cutting edge topics in competition law and policy, from overlapping ownership and competition to greedflation and sustainability. The HCC has also organised a workshop on the "Digital investigative tools and Artificial Intelligence in competition law enforcement" for the countries of the Arab League and the African Competition Forum. Second, it has fostered and expanded its links with civil society. The HCC participated for the first time in the Thessaloniki International Fair in a bit to educate the public on competition law and policy. Third, it has organised the 7th European Competition Network (ECN) "Digital Investigation & Artificial Intelligence" Working Group in Athens. The meeting was attended by over 40 delegates of the ECN National Competition Authorities as well as the European Commission and by representatives of the European Union Agency for Cybersecurity (ENISA) and the Hellenic Police Forensic Science Division.

The HCC was also selected to lead the Agency Effectiveness Working Group of the International Competition Network, together with the Competition Authorities of Italy, Hungary and Mexico. 2023 has also marked the end of the twinning program of the HCC with its counterpart in Morocco. Finally, the HCC fostered its links with authorities of other EU Member States as well as the academic community. It has signed an MoU with the Law Faculty of the Aristotle University of Thessaloniki, as well as the Italian Competition Authority. It has also welcomed delegates of the German Competition Authority for a study visit at its premises.

Greece - Main Trends

Use of Complementary Enforcement Tools

The national watchdog continued to use extensively its investigatory powers to advance competition policy in vital sectors of the economy and utilize the 'arsenal' of Complementary Enforcement Tools encompassing sector inquiries, market investigations, and the novel tool (introduced with the 2022 amendment to the Greek Competition Law) of conducting 'mapping exercises'. On 8 February 2023, the HCC decided to conduct mapping exercises with respect to conditions of competition in five product markets: (a) laundry detergents, (b) fresh whole milk, (c) baby milk, (d) cheese and (e) cow yoghurt, as a further reaction to the significant price increases in certain products. Another bold initiative was the development of a tool for the interactive cartographic display of the state of competition in coastal ferry connections in Greece which will provide citizens, at first, only with a detailed display of the ferry routes, which, at a later stage, will be enriched with price data. On 13 July 2023, the HCC published the Interim Report on the ongoing sector inquiry into the Provision of Private Health Services and Related Insurance Services: the moderate degree of concentration, the extensive acquisitions by investment funds and the 'verticalization' emerged as key concerns.

Internal Operation

On 21 March 2023 the new HCC Regulation on the Internal Operation and Management entered into force, the new provisions focus on the participation of third parties, who can submit, following a reasoned request, their own pleadings and participate at the oral hearings, of experts, who may submit their observations in writing or orally during the hearing, they can be examined as witnesses or attend the discussion, ask questions to other experts (if any) and be cross examined with other experts/ and or parties' legal representatives. In case that the experts are not examined as witnesses, the HCC may – at its discretion, allow the participation of experts during the oral hearing and introduces the set-up of a preparatory meeting between the HCC President, the Rapporteur and the rest of the parties, seven (7) days prior to the oral hearing.

Low Number of Hearings

Although the HCC was very active in conducting dawn raids, in using the Complementary Enforcement Tools and issuing/publishing decisions, which led to a further reduction of the backlog of pending cases, the number of Oral Hearings was astonishingly low as a result of the significant rise in settlement decisions. The total number of Hearings was four (4), two (2) cases concerned the obstruction of dawn raids (Motor Oil and the Federation of Hellenic Food Industry) and (2) gun jumping allegations (Super Market Kritikos and an undisclosed undertaking in the financial services market).

HCC Antitrust Enforcement

Settlement Procedure: a High Number of Cases

Following the recent amendments to the Greek Competition Law and the enactment of HCC Decision 790/2022, in addition to horizontal cartel agreements, the Settlement Procedure applies to vertical agreements infringing Article 1 of the Greek Competition Law and/or Article 101 TFEU, Article 2 of the Greek Competition Law and/or Article 102 TFEU, as well as to infringements of Article 1A of the Greek competition law. In order to benefit from the Settlement Procedure, undertakings make a clear and unequivocal acknowledgement of their participation in the alleged infringement and accept their concomitant liability. As a result, they obtain up to 15% fine reduction.

In 2023 the HCC imposed a total of approx. EUR 43,323,293 fines following adoption of 7 settlement decisions. The highest fine (EUR41,756,180) was imposed in Decision 838/2023 against five banks and the Hellenic Banking Association for an infringement of Articles 1 of Law 3959/2011 and 101 TFEU. The other settlement decisions involved much lower fines and concerned anticompetitive vertical agreements, except for Decision 828/2023 which involved anticompetitive bid rigging practices. The HCC has now clearly set the tone for anticompetitive restrictions on advertising online and selling over the internet and suppliers and retailers should be very cautious and seek relevant legal advice when devising their distribution strategies.

In particular, in Decision 816/2023, the HCC imposed a fine of EUR 628,450 against the company under the name GIOCHI PREZIOSI HELLAS S.A. in the toy market for engaging in anticompetitive resale price maintenance practices. This was an ex officio investigation, which was triggered by random checks on specific popular product codes in higher demand, as recorded on the websites of toy retailers. The HCC has also conducted on-site inspections at the premises of undertakings active at all levels of the relevant toy market, including GIOCHI PREZIOSI HELLAS S.A. Similar to the above, following the relevant dawn raids, in 821/2023, the HCC imposed a fine of EUR 68,779 against the company KLINIKUM PLUS for engaging in anticompetitive resale price maintenance practices in the market for breast pumps. As with the previous two cases, in Decision 832/2023 the HCC imposed a fine of EUR 278,648 against Pyramis Metallourgia, a company active in the market of large/white domestic electric appliances, for imposing minimum advertised prices, which constitutes an indirect form of resale price maintenance since retail stores have to comply with advertised prices on online price-comparison channels. Decision 834/2023 also concerned vertical agreements which constitutes restrictions of competition by object, and in particular minimum advertised prices on internet sales in the context of a selective distribution network.

The HCC fined both the Chinese company YEALINK NETWORK TECHNOLOGY Co. Ltd and its Greek distributor Allwan since the latter actively supported the implementation of minimum advertised prices. This is a rare case of extraterritorial application of Greek and EU competition law by the HCC. It is also the first case in the context of a settlement procedure that fines were imposed to both suppliers and retailers taking part in a vertical restriction.

In Decision 824/2023 the HCC imposed a fine of EUR 111,521 against the company Caudalie. This case concerned vertical restraints as well, but this time the HCC sanctioned Caudalie for prohibiting retailers to promote its products via online price comparison platforms. Caudalie is active in the market for high quality cosmetic products distributed through selective distribution and primarily, in this case, through pharmacies. Interestingly, this case followed the HCC Sector Inquiry into e-commerce and a dedicated dawn raid at the company's premises. The HCC assessment aligns with the EU rules on vertical agreements prohibiting practices that entirely prevent the use of online advertising channels and, in particular, the use of price comparison services as such practices amount to a restriction on the effective use of the internet.

In Decision 828/2023 three companies ("VIOLAK INTERNATIONAL S.A.", "INEX MEDICAL S.A." and "BBD NIK. LAINIOTIS S.A.") active in the supply of diagnostic rapid tests for covid were fined a total of EUR 373,943 for bid rigging practices in the procurement of medical products (rapid tests).

HCC Antitrust Enforcement

Settlement in the Banking Sector

In Decision 838/2023, the HCC imposed fines totalling EUR 41,756,180 against Piraeus Bank, National Bank of Greece, Alpha Bank, Eurobank, Attica Bank, as well as the Hellenic Banking Association for horizontal collusion in breach of Article 1 of the Greek Competition Law and Article 101 TFEU. The HCC found first, a single and continuous infringement from the beginning of 2018 consisting of a concerted practice (with different levels of involvement between the different banks) with respect to a new pricing model (direct access fee – DAF) for ATM cash withdrawal transactions (with cards issued abroad and cards issued by domestic payment service providers (PSPs) not participating in the DIASATM network). It also found anticompetitive information exchange with respect to the level of DAF charges, with the Hellenic Banking Association acting as facilitator. The HCC found also a single and continuous infringement from the beginning of 2018 to the end of 2019, consisting of exchange of information (concerted practice) with the object of introducing new charges on certain banking products and services with the Hellenic Banking Association acting as facilitator. Second, it found an anticompetitive exchange of information (concerted practice) from August 2018 until the beginning of 2019 having as its object the pricing terms applied to VIVA for the execution of credit transfers and other trading terms. The HCC also imposed a behavioural remedy requiring banks to reduce DAF charges and accepted the associations proposal to introduce a compliance programme.

Commitments Decision

Apart from the settlement decisions covered above, the HCC has published its commitment Decision 778/2022, which concerned the commitments proposed by FREZYDERM aimed at addressing the HCC concerns with respect to certain contractual terms in its selective distribution network in the relevant market for the production and distribution of cosmetic products, personal and baby care products and other related products distributed through pharmacies, e-shops and pharmaceutical wholesalers. Such contractual terms could have resulted in the partitioning of national markets as well as the reduction of intra-brand competition.

Frezyderm offered to remove or amend the problematic contractual terms as well as implement a targeted compliance programme. The commitments have to be implemented within three (3) months from the notification of the HCC Decision and will be in force for a five (5) year period.

HCC Antitrust Enforcement

Infringement Decisions

2023 saw the adoption of the HCC decision on the Mytilineos complaint against Imerys (Decision 807/2023) imposing a EUR 1,372,369 fine. The complaint alleged that Imerys engaged in a series of abusive practices in violation of Article 2 Greek Competition Law and Article 102 TFEU, including a) an abusive strategy involving exploitative terms and abuse of its bargaining power, b) unjustified refusal to supply, c) excessive pricing, and d) structural abuse. Decision 807/2023 held, by majority, that Imerys infringed Article 2 of Greek Competition Law, by engaging in a total and/or partial refusal to supply and interrupting the relationship with a long-standing customer. In the same decision, the HCC ruled on the compliance of Imerys with HCC interim measures decision 690/2019 and found, by majority, that Imerys has not complied fully imposing on the company a EUR 560,000. Mytilineos has now acquired Imerys (Decision 837/2023).

In 2023, the HCC has also published Decision 763/2021 on its ex officio investigation for alleged infringements of Articles 1 and 2 Greek Competition Law and Articles 101 and 102 TFEU in the print press distribution market. According to the decision, Argos - the only print press distribution agency in the Greek market - infringed Articles 1 Greek Competition Law and 101 TFEU. It engaged in anti-competitive market and customer allocation within its selective distribution network practices vis-à-vis sub-distributors and sub-agents and in the imposition of "single branding"/non-compete obligations. Argos has also infringed Articles 2 Greek Competition Law and 102 TFEU through the adoption of exclusivity clauses both against the publishers as well as the sub-distributors/ sub-agents. The HCC has imposed a fine of EUR 750,656.

Decision 787/2022 on the complaints against OPAP for alleged infringements of Articles 1 and 2 Greek Competition Law and Articles 101 and 102 TFEU, imposing a fine EUR 24,562,249 was also published in 2023. According to the complaints, OPAP imposes on the agencies, a non-compete and exclusivity clause in relation to ancillary services in favour of OPAP which in essence amounts to abusive tying. The relevant product market was the gaming market via terrestrial means. The markets for ancillary services included the provision of bill payment services and money remittance services on a physical network, where agents act as intermediaries as well as the distribution of third-party products, pre-paid mobile and fixed phone cards and internet data through a physical network.

The HCC decision, by majority, held that OPAP engaged in non-compete and tying practices in breach of both Articles 1 and 2 Greek Competition Law and Articles 101 and 102 TFEU. The contractual arrangement between OPAP and the agents involving such terms (tying and non-compete) may result in anticompetitive foreclosure with respect to ancillary markets. OPAP enjoys a statutory monopoly in the gaming market via terrestrial means, and such practices not only protect its position in its main gambling market but also - and most importantly for the purposes of this case - depart from competition on the merits and affect competition in ancillary services concerning bill payments and distribution of telecom products (for which OPAP has no statutory monopoly), thus eliminating actual and potential competition. The abusive practices at issue affect primarily the agents. However, given OPAP's statutory monopoly in the territorial gaming market and OPAP's leveraging practices (with tied sales being such an example), the abusive practices at issue may also have at least potential effects on end consumers, by limiting effective competition in the affected ancillary markets, preventing the entry of new market players and affecting consumer choice in the form of new or improved products or services, service quality and innovation. HCC imposed, by majority, a very high fine of EUR 24,562,249.

Procedural Infringement: Obstruction of Dawn Raid

In 2023, the HCC has published its decision imposing the highest fine ever against a natural person for obstructing its investigation. According to Decision 745/2021, Alter Ego Media and a natural person obstructed the on-site inspection (dawn raid) conducted by the Directorate-General for Competition (DGC) at the premises of the company on May 8th, 2020, both during and after the completion of the dawn raid. The natural person, in particular, concealed certain documents, and therefore the DGC officials collected only part of the evidence. The HCC considered the gravity of the infringement and its impact on the dawn raid and imposed a fine of EUR 200,000 on Alter Ego Media and EUR 1,000,000.00 on the natural person.

HCC Merger Enforcement

On the merger front, 2023 has seen the approval of 17 transactions in Phase I and 2 transactions in Phase II, both unconditionally. The HCC has also decided to extent commitments in two merger cases.

Notable cases for Greek merger control include first the merger by absorption of ANEK by ATTICA GROUP, where the HCC unanimously cleared the transaction following an in depth Phase II investigation based on the acceptance of the failing firm defense (Decision 827/2023). This transaction concerned the markets for the provision of maritime transport services in the Greek territory and in pairs of ports based on Origin-Destination in Crete and the Adriatic as well as the market for the provision of maritime transport services through public service contracts. Despite the fact that the merger may significantly impede effective competition, particularly by creating or strengthening a dominant position, in certain pairs of ports the three conditions of the failing firm defense were met since:

a) given its financial situation, ANEK would be forced to exit the market in the near future,

b) apart from the notified transaction, there was no less harmful alternative, and

c) no other credible interest in acquiring ANEK's assets existed and therefore such assets would exit the market.

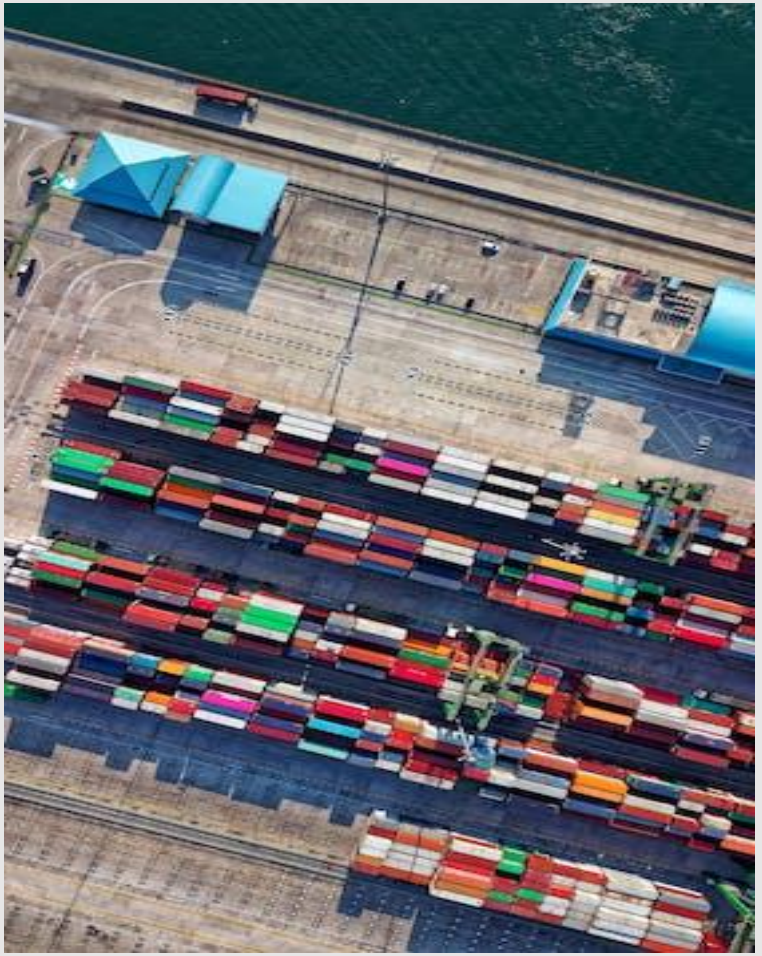
The second transaction that was cleared unconditionally following an in depth Phase II assessment is the acquisition of sole control over Aktor by Intrakat (Decision 830/2023). Intrakat is active in the construction, IT, waste management, real estate development and renewable energy sectors. Aktor - member of the Ellaktor Group - is active in the infrastructure, building and industrial construction and aggregates production sectors as well as in facility management services.

The HCC took into account the parties' and their competitors' market shares, the concentration levels, the number and frequency of tenders, the closeness of competition between the parties, the analysis of all tenders between 2018 and 2022 as well as the parties and their competitors' profiles and concluded that this transaction is not expected to significantly impede competition in any of the affected markets pertaining to the construction sector. In particular, with respect to any vertical and conglomerate effects, the HCC similarly concluded that the transaction will not result to a significant impediment to effective competition.

HCC Merger Enforcement

In Decision 822/2023, the HCC assessed the conditions of competition and the effectiveness of the commitments undertaken by ATTICA under Decision 658/2018 with respect to the ferry routes to the islands of Chios and Mytilini and extended the respective commitments for a period of three (3) years. The commitments include the obligation of ATTICA, not to increase its routes and enable the entry of a third-party competitor, should such interest be expressed as well as ATTICA's obligation not to reduce routes and to operate at least 7 routes per week in the June-August period and at least 6 routes per week in the period September - May.

In Decision 812/2023 the HCC reviewed the commitments offered by Mytilineos under Decision 682/2019 and decided to waive the majority of commitments, reformulate and extend the commitment under point C of Decision 682/2019. The HCC waived the commitments under A), B), D) and E) of Decision 682/2019, as the commitments under A), B), D) concern the cessation of abusive practices, which in any event are prohibited under Article 2 Greek Competition Law and 102 TFEU and, therefore, do not have an independent binding effect. With respect to commitment under E), no further assessment is necessary since the obligation to inform the clients of Mytilineos/EP.AL.ME. was observed. As regards commitment C), the HCC took into account: i) the absence of an entry of a new competitor-foundry into the market and the creation of an alternative solution for extruders, ii) the emerging future activity of one of EP.AL.ME.'s major customers, iii) the gradual switch of another EP.AL.ME.'s major customer to possible alternatives such as foreign companies/foundries and iv) the expressed intention of Mytilineos to expand the overall capacity of the specific aluminium foundry in order to meet the relevant objectives of reducing direct and indirect emission of pollutants in aluminium production for reasons of environmental protection. In light of the above, the maintenance of half of the production of the reference year in the relevant commitment under C) for a period of 2 years was considered proportionate and appropriate.



HCC Future Cases

Finally, as to what to expect from the HCC in the future, there are four (4) ongoing cases that were assigned to the relevant Commissioner-Rapporteur during 2023. In more detail, on 02.03.2023, the HCC decided to prioritise and assign to a Commissioner-Rapporteur the in-depth investigation of certain practices in the financial services sector that may infringe Articles 1 and 2 of the Greek Competition Law and/or Articles 101 and 102 of the Treaty for the Functioning of the European Union (TFEU). Furthermore, on 25.05.2023, the prioritization and assignment to a Commissioner-Rapporteur of the case concerning the obstruction of a dawn raid conducted by the Directorate-General for Competition in the sectors of supply and retail trade of supermarket products, in particular in the markets for cereals, milk, coffee, jam, beverages and cheese, regarding possible anticompetitive practices in the context of horizontal/vertical agreements was decided. On 25.07.2023, the HCC decided to prioritize and assign to a Commissioner-Rapporteur the ex officio investigation of possible anti-competitive bid-rigging practices in the market for the provision of cadastral survey services and support services for the creation of a national cadastre. Finally, on 03.08.2023, the HCC decided to prioritise and assign to a Commissioner-Rapporteur the in-depth investigation of certain practices in the markets for the production and supply of pharmaceutical products for the treatment of eye diseases.

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