BRUSSELS À JOUR

Rockin‘ Around the Christmas Tree

Markus Röhrig, Christian Dankerl, Philipp Heuser and Christoph Sielmann report on the latest developments from the European capital of competition law.

Christmas is the season of warm wishes, mince pies, Glühwein at the Christmas Market… and a final review of the most significant competition law developments of the year that was. In our annual Christmas issue, we look at what has shaped the year in the key fields of competition law – antitrust, merger control, FSR, and State aid – and what the takeaways are for 2025.

Antitrust

It’s the most wonderful time of the year to reflect on key events in antitrust enforcement. So what was going on in 2024?

- It seems – or is it only our gut feeling? – that these days, **dawn raids** are (again) **on the rise**. While we still have not seen official figures concerning these unwanted visits, which are not only inconvenient during the holiday season, it seems that this classical form of competition law enforcement is back on the agenda of the European Commission and National enforcers. BTW – 24th December is a Tuesday this year… so fingers crossed that everyone sees only wanted visitors on that day…
- This year, the **pharmaceutical sector** had some hard antitrust pills to swallow (see our November issue for a deep dive): The Commission investigated a first pharma cartel, “pay-for-delay agreements”, (new!) patent-game playing, and disparagement cases under antitrust law. Only recently in October, Teva was sanctioned under Article 102 TFEU for the misuse of divisional patents and the implementation of a systematic disparagement campaign. According to the Commission, Teva’s continuous strategy of filing and withdrawing divisional patents to artificially extend the protection of a pharmaceutical ingredient, and only withdrawing its application at the EU Patent Office (EPO) right before the EPO was able to decide on the validity of the patent, negatively impacted other competitors’ market entry.
- Furthermore, Teva became the first company to be sanctioned for what the Commission considered a systematic **disparagement campaign** against a competing product’s safety, efficacy, and therapeutic equivalence. Yet, the Commission also provided an emergency

stop for the runaway-disparagement-train to Article 102 TFEU land: In the *Vifor* case, the Commission ultimately did not establish an infringement following Vifor's commitments to launch a communication campaign to restore the reputation of the competitor's product. While the publication of the full decision will hopefully bring more guidance on the lawfulness of patent strategies, pharmaceutical companies must expect their communication about other competitors' products to be increasingly scrutinized under Article 102 TFEU. And only Santa knows which strategy from the "toolbox" is next on the Commission's list…

- Earlier this year, in September, our newsletter reported on another sector that has come under close antitrust scrutiny. In *Delivery Hero / Glovo*, the Commission took on **"No-Poach Agreements"** as hardcore by-object infringements. While a decision has not yet been published, the employment policies of these companies have been and are expected to continue to be, the subject of national investigations. In Spain, this resulted in Delivery Hero announcing that they would be hiring freelance riders as full-time employees in order "to avoid further legal uncertainties". It remains to be seen if such steps can convince the EU authorities to reduce or drop the expected €400 million fine.
- In September, the ECJ brought the fifteen-year ***Google Shopping* saga** to an end (C-48/22 P). The court upheld the GC's earlier judgment according to which Google had abused its market dominance as a search engine by favoring Google Shopping in its general search results. While this ruling is definitive, a lot of questions still remain unanswered, such as where to draw the (fine) line between lawful and abusive self-preferencing, the exact circumstances in which the AEC test and the Bronner test apply, and whether the *Google Shopping* judgment can be applied beyond digital platforms.
- At the end of November, the Commission fined **Pierre Cardin** – a French fashion house that licenses its trademark to permit third parties to manufacture and distribute Pierre Cardin branded clothing – and its largest licensee Ahlers a total of EUR 5.7 Mio. The fashion house breached Article 101 TFEU by restricting cross-border sales of Cardin-branded clothing in addition to the sale of such products to customers. Traders and retailers' interest is to produce products at lower costs in the internal market and subsequently trade them to market with higher costs and ultimately lead to lower prices on the market. As a result, given the potential for markets to be isolated, it can be posited that manufacturer and supplier pricing strategies may be perceived as one of the gravest forms of anti-competitive conduct. The overarching goal of the collaboration between Pierre Cardin and Ahlers was to guarantee Ahlers' comprehensive territorial protection across the countries included in its licensing agreements with Pierre Cardin within the EEA. Some in the fashion industry might reconsider their strategies in the New Year…
- If you are considering some last-minute hotel booking for a holiday getaway, it is likely that **Booking.com** will pop up on your screen rather early on in the process. The company used its price parity clauses – a particular type of "Most Favored Nation" (MFN) vertical restraints – that ensured that hotels and accommodation providers do not offer lower prices on other platforms. In September, the ECJ issued a preliminary ruling following a dispute between Booking.com and several German accommodation providers over these MFN clauses. The ECJ found that price parity clauses did not qualify as ancillary restraints and that potential procompetitive benefits could only be taken into account in the application of Article 101(3) TFEU.

- To end the section on a (New Year's) high, we'll take a quick look at upcoming policy changes. It is more than a year now since the Commission started its **revision** of the **Article 102 Guidelines** on exclusionary abuses of dominance. The public consultation has been concluded and the replies have been published, but there is no clear schedule as to when the Commission will present the revised proposals (although it aims for an adoption in 2025).
- Given Commissioner Teresa Ribera's recent commitment to improving the speed of enforcement (particularly in abuse of dominance cases) during the annual CRA Brussels Conference and her wish to simplify competition rules, one might assume that a **modernization of Regulation 1/2003** is likely a project high on her list of New Year's resolutions... We'll see what other amendments that might entail. The Federal Government of Germany just set out its thoughts on the project. In a paper called ***Modernising EU competition law – German proposal for the 2024-2029*** term of the European Commission it puts forward a Wishlist of measures to be implemented during the review process. This list contains a proposal to align the Commission's competencies with recent legislative developments such as the ECN+ directive, to lower the requirements for ordering interim measures on an EU level, to anchor mechanisms to simplify and speed up procedures without the threat of sanctions and fines in order to allow for the application of a different standard of proof and on evidence. However, it also speaks out in favor of keeping Article 3 which allows national regulators to apply stricter rules in the area of abuse control. We'll see how much space Santa has in his bag and which boxes he is going to tick.

Digital Markets Act

The DMA also had its momentum in 2024 and will certainly continue to do so in 2025. A rather prominent case of the year that was involved Apple, which is the subject of two specification proceedings that were launched in September to assist Apple in complying with its interoperability obligations under Article 6(7) of the DMA. Furthermore, in July, the Commission sent preliminary findings to Meta over its "pay or consent" model, with a view to a potential breach of Article 5(2) of the DMA. The DMA was also discussed in the Draghi Report as well as in Teresa Ribera's Mission Letter. Both documents underline the need for a swift enforcement of the DMA.

Merger Control

2024 brought some game-changing developments in the field of merger control.

- The seemingly never-ending **Illumina/Grail** case has come to an end. The story behind the saga is well known. In September, the ECJ overturned the earlier GC, stating that Article 22 EUMR does not permit the Commission to review cases referred by member states that were not themselves competent to assess the merger under national law. As a result, the Commission has abandoned its previous Article 22 EUMR approach and is currently reviewing its options to assess cases that involve high-potential targets with (currently) low revenues. In the meantime, eight member states have adopted call-in rights to review (or refer) cases that do not meet national thresholds (and more are likely

to come – looking at you, France). Already in October, Italy used its call-in power for a referral. Given this flood of national call-in powers, *Illumina/Grail* might have actually led to less legal certainty – at least so far. Long-term options currently discussed in Brussels and across national capitals are a revision of the EUMR's thresholds (though this opening of Pandora's box currently seems unlikely), the adoption of an EU call-in right, or including a clarification in Article 22 EUMR that it indeed covers "any" transaction, whether or not it meets the thresholds. The *Towercast* approach has also been the subject of recent discussions but is certainly not a panacea. Since Commissioner Ribera has been explicitly tasked with addressing the enforcement gap that the Commission sees here, it seems safe to say that it will also be one of the key topics in 2025. Watch this space…

- Once upon a time, two brave former Italian prime ministers were entrusted with nothing less than finding the magic potion to save the future of EU competition policy. While this might not push Cinderella from the top of Germany's favorite Christmas tales list, Commission President Ursula von der Leyen was certainly relieved to see these two men return triumphantly from their missions, presenting the **Letta Report** and the **Draghi Report**. The reports (especially the latter) contain some far-reaching proposals to revamp EU competition policy (for further details, see our June and Rentrée issues). With the new Commission and Parliament in place, it will be interesting to see if they find, and apply, the recipe for the magic potion in these reports… and what role geopolitics and the notion of European Champions may play in merger control.
- On 4 October, the ECJ handed down its judgment in **thyssenkrupp** (C-581/22 P), one of the few cases concerning substantive merger control issues. There, the ECJ sided with the European Commission which vetoed the creation of a joint venture with Tata Steel intended to establish Europe's second-largest steelmaker five years ago. The ECJ has dismissed Thyssenkrupp's appeal, largely confirming its earlier judgment in CK Telecoms (C- C-376/20 P).
- Ecosystem theories of harm remain the talk of the town when it comes to substantive merger control. On 25 September 2023, the Commission prohibited **Booking.com**'s proposed acquisition of **eTraveli**, arguing that the intended acquisition would have allowed Booking to strengthen its dominant position on the market for hotel online travel agencies ('OTAs') in the EEA. The deal is now pending in Luxembourg (T-1139/23) giving the GC and potentially the ECJ the chance to weigh in on one of the most hotly debated issues on mergers these days.
- The year began with the publication of the new **Commission's Market Definition Notice**. Among the most interesting updates were the "small but significant non-transitory decrease in quality" (SSNDQ) - test for free services in digital markets, some general principles on measuring damage in digital ecosystems, and non-price parameters for determining digital platform markets. The Commission also highlighted their focus on 'innovation competition', which is characterized by frequent and significant research and development (R&D). Given the uncertain outcome of innovation efforts in terms of final product, the Commission may factor various outcomes of R&D processes in its assessment, which particularly affects the pharmaceutical industry. Companies may

compete in 'innovation areas' at an early stage. In *Booking* and *Google AdSense*, we got a first impression of how these principles might be applied by the judiciary, though major changes to the current approach are not expected.

In the Meantime, On the Other Side of the Atlantic…

- If you are looking for some light fireside reading over the New Year, we recommend the new **HSR Merger Notification Form**. Effective as of mid-January 2025, the FTC's revised HSR notification rules will increase the burden and cost of merger filings in the U.S. For instance, the new competition analysis section requires narrative details on potential horizontal overlaps and notifying parties will have to disclose top customer contact lists as well as more comprehensive transaction details. That is, if the new rules remain in place under the incoming administration…
- As we put up our new calendars, the U.S. electoral college will put a new government in place that is presumably going to pursue a much more pro-business-oriented merger policy. Amongst the changes to be expected are a more liberal approach to vertical deals, a return of "fixable deals", an abandonment of the 2023 merger guidelines and an early termination of the HSR waiting period for non-problematic deals, as well as a return to a traditional antitrust analysis that focuses on a transaction's impact on prices and innovation rather than labor effects.

Foreign Subsidies Regulation

The first full year of mandatory reporting under the Foreign Subsidies Regulation has been more eventful than initially expected and provided some clarity on the new tool. Here are the key highlights to unpack from 2024:

- The Commission already had a lot on its plate at the start of the year as more cases were notified than expected. The Commission initiated its **first in-depth investigation** in relation to a Bulgarian public procurement procedure in which Chinese state-owned train manufacturer CRRC participated. The Commission found that the notification that CRRC had initially submitted did not include all foreign financial contributions and that the submitted price was considerably lower than the competing offers. In the end, the Commission did not have to adopt a final decision since CRRC withdrew its bid and the Bulgarian Transport Ministry cancelled the entire procedure.
- In the summer, the **Nuctech** decision (T-284/24) made headlines as the first case that the GC was able to decide on. In this case, the GC had to decide whether the Commission's request for access to the contents of certain employees' mailboxes, which were not stored on EU but Chinese servers, breached international law, and whether Nuctech had presented sufficient evidence to demonstrate that, prima facie, complying with the Commission's order would violate Chinese law. The president of the GC refused to grant an interim relief, paving the way for an extraterritorial application of the FSR in so far as the Commission can apply its investigative powers to obtain information stored outside the EU. However, the last word hasn't been spoken yet: It is now up to the ECJ to decide whether the Commission actually has this power. To be continued in 2025…

- Like children eagerly awaiting the arrival of Santa Claus, FSR lawyers were waiting for the Commission's **first phase II clearance**. And they were not disappointed. The conditionally approved acquisition of PFF Telecom Group by Emirates Telecommunications Group Company (E&) yielded valuable insights. Following concerns raised by the Commission about state-supported foreign subsidies to E&, the acquirer proposed a comprehensive 10-year remedies package, which was ultimately accepted. In fact, if a company is the only potential purchaser with already sufficient resources to carry out the acquisition, foreign subsidies are compatible with the new regulation. A key point is that the Commission's assessment extends beyond the acquisition process, encompassing the post-transaction impact. If it is certain that foreign subsidies cannot be used for unfair market behavior post-transaction, long-term behavioral remedies can be accepted. This was a rather unexpected turn as the remedies related to potential future market conduct, but may be used as a blueprint for obtaining FSR clearance in other cases. As the non-confidential version of the decision has not been published yet, a more detailed insight can be given in the new year.
- While it is still too early to call, it seems that the Commission is not throwing its new FSR rod on every Chinese-backed investment that comes within its reach. In October, it **cleared the merger** of Haier Smart Home's acquisition of Carrier's Commercial Refrigeration business in a Phase I investigation. (See also our October issue which discussed the potential new trade tensions with China due to the vigorous enforcement of the FSR.)
- In July, the Commission published a **Staff Working Document** on the FSR to provide more clarity on the assessment process. Over the coming year, the application will be further developed by the Commission's and Court's decisions.

State Aid

Compared to the fields of merger control and FSR, 2024 may seem like a rather uneventful year for State aid. But the ambitious plans of Commissioner Teresa Ribera will require significant investment to drive change at the scale that her mission letter envisions.

- The EU's State aid policy under Commissioner Teresa Ribera is expected to specifically focus on the green transition and to support Europe's cleantech industry. In her parliamentary confirmation hearing in November 2024, Ribera reiterated the need to support industrial decarbonization. Ribera also underlined her commitment to simplify State aid rules. Just a few days later, in her first speech as Commissioner-elect in front of the assembled Brussels competition community, she reiterated her ambition to introduce a **new State aid framework under the Clean Industrial Deal** that creates the right incentives for companies to invest in strategic sectors such as hydrogen production facilities. The combination of public and private funding is expected to be another cornerstone of her State aid policy, notably by creating more Important Projects of Common European interest (IPCEIs) for key areas such as semiconductors, battery supply chains, and hydrogen.
- On 10 September, the ECJ sided with the Commission and ruled that two Irish subsidiaries of **Apple** had received unlawful State aid from Ireland in the form of a tax advantage (C-465/20 P) amounting to €14.1 billion. The new year will show if the (new)

Commission will further use State aid rules to challenge tax rulings – or if the approach will leave the Commission with its most outspoken supporter Margrethe Vestager. The fact that the Commission announced, at the end of November, the closing of several tax investigations (see below) might indicate that the Commission's State aid resources will be used to fight battles elsewhere (FSR, anyone?).

- An early Christmas gift has been given to **Fiat, Amazon, and Starbucks**, as a Commission press communication from 28 November announced the conclusion of three in-depth State aid investigations into transfer pricing tax rulings granted by Luxemburg to Fiat and Amazon, and by the Netherlands to Starbucks. The decision came after the EU Courts annulled the Commission's initial decisions dating back to 2015 and 2017. Taking into account the guidance from the EU Courts, the Commission has now closed its in-depth investigations and confirmed that no selective tax advantages could be found. Is this the end of the 10-year-long battle against tax rulings? Well, just wait for it.

…and a Happy New Year

At Christmas, all roads lead home…but afterwards, right on to the ECJ? As we head into 2025, we can expect a first judgment from the ECJ on the FSR rather early in the year; decisions on the appeals in *Qualcomm v Commission* (C-819/24 O), *Commission v Google and Alphabet* (C-826/24 P), and *Condor v Ryanair* (C-505/24 P) are also expected rather soon.

It's been a busy year, with lots of fascinating developments, including the Commission's new ambition to tackle – for instance – disparagement cases in the pharmaceutical industry, the fall-out from *Illumina/Grail*, and the enforcement of the FSR. The list is long, and 2025 promises to be no less exciting. We will have you covered.

Until next time, Happy Holidays, and don't forget to follow #brusselsajour on LinkedIn for your favorite EU Competition Law topics!

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