

EU competition regulatory update

Commission notice on informal guidance On 3 October 2022, the Commission published the informal guidance notice relating to new or unresolved questions concerning Articles 101 and 102 of the TFEU that arise in individual cases ("**Notice**").

In the Notice, the Commission recalls that, in principle, undertakings are well placed to decide whether a practice is conforms to Articles 101 and 102 of the TFEU. Nevertheless, if a new or unclarified question arises, undertakings may request informal guidance by the Commission in the form of a guidance letter that is not legally binding. However, according to the Commission: "(...) a request for guidance will not entitle an applicant to receive any such guidance, as this Notice cannot re-introduce a system that would be inconsistent with the self-assessment framework of Regulation 1/2003". In addition to raising a new or unclarified question, the issue must be serious enough for the Commission to have an interest in providing guidance. In assessing that interest, the Commission will consider, for example, the actual or potential economic importance of the goods or services concerned, whether the objectives of the agreement or unilateral practice are relevant for the achievement of the Commission's priorities or Union interest, the investments made or to be made by the undertakings concerned.

No fines will be imposed on undertakings relying in good faith on a guidance letter. However, the Commission can modify or revoke a guidance letter where the public interest so requires.

Entry into force of the Digital Markets Act On 14 September 2022, the EU adopted Regulation 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) ("**DMA**"). The DMA entered into force on 1 November 2022. It is a landmark legislation which, together with the related Digital Services Act (DSA), aims to ensure fair competition and user choice with respect to large online platforms.

Only large tech companies offering so-called "core platform services" and which are defined as "gatekeepers" according to defined criteria, are within scope of the DMA. The DMA will apply from 2 May 2023, at which point undertakings meeting the DMA thresholds for the definition of a gatekeeper have two months to notify the Commission. Once they are designated as gatekeepers by the Commission, they will have to comply with dos and don'ts set out in the DMA after a period of six months. The Commission is currently consulting on a draft implementation regulation. Concerning the definition and obligations of gatekeepers as well as enforcement by the Commission, please read [here](#).

Review of the Market Definition Notice From 8 November 2022 to 12 January 2023, the Commission is holding a public consultation on the draft revised Market Definition Notice ("**Draft Notice**", see press release [here](#)).

The Draft Notice puts greater emphasis on non-price elements, such as the level of innovation and quality. Also, as this is the first revision since 1997, the Draft Notice considers digitalisation in particular and, for instance, provides a definition of the market for multi-sided platforms. In the same vein, after markets and the competitive constraints they have on connected markets are considered in the market definition exercise.

The Draft Notice provides more clarity and guidance on practical matters, such as on the type of evidence that could be used and its sources. It also gives further clarifications on the assessment of imports regarding the determination of the geographic market. Concerning market shares, it specifies how metrics other than sales or purchase, e.g., capacity or the number of suppliers, could be useful.

Significant merger control cases In the first case, applying the Commission's new guidance on the application of the referral mechanism set out in Article 22 of the EU Merger Regulation described [here](#) concerning the acquisition of GRAIL by Illumina in the area of cancer detection, the Commission prohibited the merger on 6 September 2022 following an in-depth investigation (see press release [here](#)). The Commission argued that "Illumina is currently the only credible supplier of a technology allowing to develop and process these tests. With this transaction, Illumina would have an incentive to cut off GRAIL's rivals from accessing its technology, or otherwise disadvantage them". On 18 November 2022, Illumina lodged an appeal against that decision before the General Court.

It should also be noted that the parties had already completed the transaction before the Commission's prohibition decision. Hence, on 5 December 2022, the Commission issued a statement of objections in which it affirms that the parties must unwind the transaction to restore the situation that existed before the transaction. If the parties do not comply with the proposed measures, the Commission may oblige them to do so and the Commission may impose periodic penalty payments.

In addition, an interesting case currently under review by the Commission concerns Microsoft's proposed acquisition of Activision. On 8 November 2022, the Commission announced that it would conduct an in-depth investigation into the proposed \$69 billion acquisition of Activision Blizzard by Microsoft (see press release [here](#)). Microsoft runs the Xbox gaming platform and Activision Blizzard owns highly successful game titles such as Call of Duty. The main competition concern is that Microsoft could become too dominant a platform operator and prevent competing platforms to access Activision's games. The Commission has until 23 March 2023 to take a decision, which is expected to have a significant impact in view of the creation of a metaverse and because it will likely deliver clarifications concerning competition in the cloud gaming market.

For any further information please contact us or visit our website at www.elvingerhoss.lu.

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We undertake no responsibility to notify any change in law or practice after the date of this newsletter.