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Competition Legal Quarters

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As you will see, the start of 2023 was packed with exciting news from the competition law world. The Dentons team has cracked them for you and supplemented useful context. We are testing a new format: instead of grouping all news by jurisdiction (EU, CZ, SK), we group issues by topic (procedure, compliance, merger control…).

Top news in brief:

- The Czech Office for the Protection of Competition (ÚOHS) has had a busy start of the year with its "*expedited*" sector inquiry into prices of basic food commodities. It ultimately found no major issues. ÚOHS is further pushing through the implementation of the ECN+ directive, which could also extend its powers to obtain police wiretaps for ease of investigating secret cartels. This year will also likely see a new ÚOHS guidance on how it intends to provide discounts if firms have implemented compliance programs.
- The Slovak Antimonopoly Office (PMÚ) has a new Chairman, Mr. Juraj Beňa, who transitioned from private sector. Similarly to Czechia, high food prices spark concerns and PMÚ has been pushed to react on the Slovak government's initiative to cap prices of certain products. Slovakia has adopted a new Act on Foreign Direct Investments fitting in the EU framework.
- The European Commission and EU courts continue their hyper-active mode from last year: the Commission released two major reforms: amendment to guidance on Article 102 TFEU enforcement priorities, and a new simplified merger control package. EU courts have looked at a variety of novel issues, such as whether anticompetitive conduct of independent distributors can be attributed to the supplier (it can, in certain circumstances) or how the Commission applies its State Aid temporary crisis frameworks in practice (not very diligently, it seems).

There is so much more, though - be tempted to browse through.

How to use: This newsletter also includes references to articles or client briefs where Dentons' lawyers took a deep dive into the selected topics. Links are also provided to primary legal source or press releases.

Some abbreviations used: CJEU = Court of Justice of the EU, the top EU court; GC = General Court, EU's first instance court; ÚOHS = Czech competition authority; PMÚ = Slovak competition authority; TFEU = Treaty on functioning of the European Union

Antitrust procedure & compliance

Member states

Czech Republic: Setting up compliance programs in time can earn higher discount on fines

Speaking at the 6th Annual Antitrust and Competition Compliance in Prague, in March 2023, ÚOHS Vice chairman Kamil Nejezchleb expanded on the authority's new(ish) approach to discounts for firms that implement a competition compliance program (more in earlier Dentons' alert). For instance, ÚOHS can grant a higher discount (up to 15 percent) to firms that implemented a program before being investigated as opposed implementing it during the authority's investigation (where discounts of 10 percent or less are granted). In any event, firms should submit compliance programs for ÚOHS's consideration early in the investigation process: The authority may refuse to accept the program if submitted only after receipt of ÚHOS's Statement of Objections. The authority has yet to issue a more detailed guidance on compliance programs but Mr. Nejezchleb stated that the policy will emphasize a "*no-one-size-fits-all*" approach, meaning that each firm should tailor the compliance program to its size and business model.

Czech Republic: ÚOHS may gain access to police wiretaps after all. Strasbourg Court not opposed to the idea

At the same conference, Mr. Nejezchleb said his preference was that ÚOHS is granted the power to access wire-tape recordings collected by the police. Initially dropped from the government bill to implement the ECN+ Directive due to mixed feedback, this proposal was re-introduced during parliamentary reading and ended up passed by the lower chamber. The current bill therefore seeks to allow ÚOHS to rely on telecommunications traffic information, content recordings and recordings made during the surveillance of persons and affairs. The new power should only apply to recordings made after the law coming into effect, but due to Czechia's delay in implementing the EU directive, the law may come into force as soon as within 15 days of its publication. Meanwhile, two Dutch companies, Burando Holding B.V. and Port Invest B.V., challenged the transfer and use of police wire-tapped data by the Dutch competition authority before the European Court of Human Rights in Strasbourg, but failed to obtain a relief. The Court held that where such data were collected lawfully during criminal investigation and the national law provides clear rules on the possibility to transfer them to the competition authority, there is no violation of fundamental rights (judgment of 16 May 2023 in *Burando Holding B.V. And Port Invest B.V. V. The Netherlands, no. 3124/16 and 3205/16*, available here)

Slovakia: New chairman of PMÚ takes office

On 1 March 2023, Juraj Beňa took over as chairman of the PMÚ for the next five years. He stated that he will strive to improve the PMÚ's visibility before the general public. Beňa comes from the competition and regulatory department of mobile network operator Orange Slovensko and has experience as a competition enforcer, having worked for the PMÚ's Division of Cartels and as a national expert in the EC's Directorate-General for Competition.

Slovakia: PMÚ annuls €8 million fine on construction cartelists

The appeal council of the PMÚ annulled a first-instance decision imposing a fine of €8 million for bid rigging in a construction works procurement. The appeal council identified incompleteness of evidence, which impacted on the assessment of the companies' leniency applications as well as the PMÚ's factual conclusions. The appeal

council thus concluded that the first-instance decision was non-reviewable and had to be quashed. PMÚ will now reconsider the case again.

Czech Republic: ÚOHS releases annual report for 2022

In ÚOHS's annual report for 2022, the competition authority noted that it sees as a priority for 2023 the transposition of the ECN+ Directive (2019/1). The transposition deadline for this directive expired in February 2021, and as a result the European Commission initiated a "*procedure infringement*." As part of this effort, the authority also intends to revise its soft-law documents, particularly those concerning the imposition of fines, leniency and settlements.

As regards enforcement policy, ÚOHS continues to focus on suppressing hardcore cartels. In the area of vertical agreements, particularly on resale price maintenance (RPM) and restrictions on internet sales, it intends to focus primarily on major players with significant market power. ÚOHS also intends to begin focusing on "*no-poaching agreements*" regarding maximum wages or the non-hiring of employees among competitors – it has released its first policy brief on the issue available here. Regarding merger control, ÚOHS is following the European trend concerning Article 22 of the EUMR and intends to actively consider its use. Regarding environmental criteria and sustainability policy, the authority has already signaled a rather conservative stance.

European Union

Legal challenge forces EC to drop investigations due to faulty dawn raid; watchdog reports more on-site inspections

The European Commission had to drop proceedings against Intermarche Casino Achats, after the EU General Court found that the Commission did not have sufficiently serious indicia to launch a dawn raid in February 2017. In a judgment of 9 March 2023, (C-693/20 P), on further appeal the CJEU clarified that irrespective of whether the Commission collects "*indicia*" or "*evidence*" and whether before or after the initiation of formal investigation, it has an obligation to record interviews whenever these involve collecting information on the subject matter of the (possible) investigation. Otherwise – the Court opined – some interviews with third parties could end up excluded from the obligation's scope and hence unavailable for the investigated company's later defence.

Meanwhile, the Commission announced that it had carried out a number of dawn raids on various companies in the energy drink sector, in particular Red Bull, over suspicions of anticompetitive agreements and abuse of dominant position. In Slovakia, the PMÚ raided premises of a company active in the IT sector.

CJEU releases judicial statistics 2022, wants General Court to take over more preliminary rulings

Over the past five years, new cases before the Court of Justice and the General Court consistently oscillate just below 2,000, which roughly corresponds to the number of completed cases. These cases have dealt mainly with issues such as the rule of law, protection of the environment, data and consumer protection and competition enforcement. Notably, cases related to the war in Ukraine accounted for a significant share (11.4 percent) in 2022. The caseload before the CJEU has risen a bit, prompting it to request legislators to transfer jurisdiction over preliminary rulings to the General Court. The aim is to help preserve the CJEU's capacity to deliver high-quality decisions. Currently, it takes around 16 to 20 months to complete one instance of a case, on average.

Sector inquiries

Czech Republic

ÚOHS closed its "*expedited*" inquiry into prices of five basic food items

On 23 May 2023, ÚOHS published its findings of inquiry into whether there may be foul play behind steep price increase in basic food items (milk, butter, eggs, wheat flour and chicken meat). Despite much spotlight and political pressure, ÚOHS kept composure and produced a detailed report (117 pages, available here) concluding that there are no indications of abuse of dominance or collusion between various supply chain players. Margins are -according to the authority- evenly distributed along the supply chain, even if slightly favoring retailers. No single part of the supply chain seems to be directly responsible for the sharp price increases over the past few years. The ÚOHS also reiterated its finding from last year's inquiry that if retailers pursue the global / average margin strategy, it may be difficult to delineate relevant antitrust markets along specific commodities, and in any event the authority has not identified any player that would be currently dominating these markets. The authority concludes on a hopeful note that the external price pressures are winding down and retail prices could react accordingly.

ÚOHS closes inquiry in pharmaceuticals distribution sector

ÚOHS completed its sector inquiry into the distribution of pharmaceuticals that took place from 2021 to 2022. The Office focused on the impact and effects of distribution models on competition in the wholesale and retail pharmaceutical markets. Special attention was paid to *direct-to-pharmacy* and *direct-to-hospital* models, which are typically used in the distribution of special, more expensive drugs. However, the inquiry did not reveal any significant indications that would lead to the initiation of administrative proceedings for violating competition law. In connection with its findings, the authority at least issued several recommendations addressed to regulators, distributors and consumers which, in general, appeal to comply with block exemption regulations.

Slovakia

Capping food prices by retailers: PMÚ warns that any agreement on price might be anticompetitive

The PMÚ has issued a press release in response to public statements about food retailers capping prices. The authority warns that any agreement between competitors to fix prices or exchange pricing information may restrict competition and breach the Competition Act. However, the authority emphasized that the retail market is transparent, and participants are well-informed about prices and product characteristics offered by their competitors. Market participants regularly monitor prices and adjust their own pricing policies accordingly, which is not prohibited by competition law. It is interesting to note that in its sectoral report issued on 23 May 2023, the Czech ÚOHS specifically warned against regulation capping prices of food, as this could deform the market and lead to scarcity on shelfs.

Horizontal and vertical agreements

European Union

Imputability of dominant distributor's conduct to producer

In the case of Unilever's abuse of dominance, which resulted in the Italian competition authority imposing a fine of €60 million, the CJEU clarified that if a distributor's actions are part of a commercial policy decided unilaterally by the producer (in this case, Unilever) and the distributor acts as an "*instrument of territorial implementation*," then the producer can be held responsible for the distributor's conduct.

In addition, CJEU ruled on exclusivity clauses in distribution agreements, stating that competition authorities need to establish that the clauses are capable of restricting competition on the basis of tangible evidence. However, in doing so, the authorities may derogate from the "*as efficient competitor*" test but must consider evidence presented for consideration by the dominant undertaking.

CJEU partly upholds General Court decision against HSBC in EIRD cartels case—hybrid settlements

The CJEU confirmed that that HSBC had engaged in anticompetitive conduct, but it partially overturned the judgment of the GC on procedural grounds. From substantive point of view, the CJEU held that "*creating anticompetitive informational asymmetry between market participants suffices to find a by object infringement, even if there is no effect on prices for consumers*." However, the CJEU agreed that the GC had erred in law by holding that, except for ancillary restraints, procompetitive effects can only be taken into account in the context of an assessment of Article 101(3) TFEU.

Procedurally, the case is interesting because the other participant of the cartel reached a settlement with the Commission, which means they pleaded guilty to the anticompetitive conduct. HSBC, on the other hand, decided to push back against the Commission. The CJEU emphasized that "*the presumption of innocence applies even in hybrid procedures where a prior settlement decision has already been adopted*." Therefore, the GC should have assessed in detail whether in the settlement decision the Commission had prejudged HSBC's liability.

European Commission prolongs motor vehicle block exemption regulation

The European Commission has extended the Motor Vehicle Block Exemption Regulation (MVBER) for five years, until May 31, 2028, and updated the Supplementary Guidelines for the sector. The revised guidelines aim to help automotive companies assess the compatibility of their vertical agreements with EU competition rules, while ensuring that aftermarket operators, including garages, continue to have access to vehicle-generated data necessary for repair and maintenance. The updated guidelines clarify that vehicle sensor–generated data is an essential input for repair and maintenance services, and independent auto mechanics should have equal access to such data to comply with EU competition rules. The MVBER extension allows the Commission to react to possible market changes resulting from vehicle digitalization, electrification and new mobility patterns. The updated guidelines reflect the increased importance of access to vehicle-generated data.

Member states

Czech Republic: For the first time ÚOHS imposes fine for restricting online sales

ÚOHS imposed a fine of CZK 12 million on an undertaking active in the wholesale market with detergents for resale price maintenance. The authority found that the undertaking was also restricting online sales of its customers, which may constitute a restriction by object. ÚOHS emphasized that sales via the internet must be available to all customers outside special distribution networks, such as selective or exclusive ones.

The undertaking's eager cooperation with ÚOHS, despite being found in violation, resulted in a 50 percent reduction of the fine. Additionally, another 20 percent reduction was granted for using the settlement procedure. Simple math reveals that ÚOHS had initially contemplated a relatively high fine of CZK 30 million—in line with its controversial and criticized statements that RPM practices continue to be a priority for the authority.

Czech Republic: Another fine for bid rigging

ÚOHS recently imposed fines totaling CZK 3.2 million on a bid rigging cartel, which included one self-employed business person. This fact led ÚOHS to significantly reduce the fine for that person to observe an established case law that a financial penalty must not have prohibitive character. The cartel agreement was concluded in connection to a private call for tenders to revitalize a panel apartment building, issued by the building's owners association. According to ÚOHS' findings, the firms colluded to submit a one advantageous bid, which would guarantee the win of contract for one of the cartellists.

Power cable cartels in Europe

In January 2022, the German competition authority dawn-raided several power cable manufacturers on suspicion that they aligned on surcharges for the industry-standard metal, an important input to produce these cables. In March 2023, the Slovak PMÚ released a press statement that it had also commenced proceedings against certain power cable manufacturers, stating similar concerns. In a separate case in Portugal, cable manufacturers have already been fined €2 million for price fixing and market sharing in public procurement procedures launched by the national electricity infrastructure manager for the supply of cables for electricity transmission.

Abuse of dominance

European Union

European Commission amends guidance on enforcement priorities in applying Article 102 TFEU

On March 27, the European Commission released a Communication and Annex announcing an amendment to its 2008 Guidance. The Commission also launched a consultation to gather feedback and announced its intention to adopt new Guidelines on exclusionary abuses of dominance by 2025. The new Guidelines will follow the CJEU's established "*effects-based*" approach to Article 102 and will represent a shift towards a more economic approach to enforcing Article 102. At the same time, the Commission wants to expand the meaning of "*anti-competitive foreclosure*" to cover also less clear-cut cases that may harm markets' competitive structure. This could, in theory, increase the risk that a conduct is found restrictive of competition even though it is found to merely weaken the competition as opposed to one that fully excludes or marginalizes competitors. A first draft of the new Guidelines is expected to be published in 2024.

Apple's App Store: European Commission reduces scope of abuse of dominance investigation

The Commission began investigating Apple in 2018 after Spotify filed a complaint against Apple's App Store commission charges and restrictions on linking out to alternative ways how to subscribe. In 2021, the Commission issued its first Statement of Objections, citing concerns about the anticompetitive nature of the App Store's rules. However, after a long silence following Apple's reply, on 28 February 2023 the Commission released a new Statement of Objections, which now focuses solely on the rules preventing the signposting of alternative payment options. The Commission believes that these rules violate Article 102 TFEU. This marks the first time that the Commission has "*restated*" its earlier Statement of Objections.

Killer acquisitions: CJEU rules on ex-post review of mergers under Art 102 TFEU

On March 16, 2023, the CJEU ruled that a merger between undertakings that was not subject to notification under either EU or national merger control could still be reviewed ex-post in the context of abuse of dominance rules (Article 102 TFEU) (case *Towercast*, C-449/21). This decision comes in the wake of the *Illumina case* (C-625/22 P), which concerned the application of Article 22 EUMR, allowing the European Commission to review mergers that slip under the radar of both EU and national merger control rules.

The Towercast ruling adds another layer of uncertainty to EU merger control procedures. According to the CJEU, a transaction that does not meet European or national merger control thresholds may still be subject to an ex-post review by competition authorities and courts, which can assess whether a purchaser who holds a dominant position on a given market and has acquired control over another undertaking on that market has, through that conduct, substantially impeded competition within the internal market or a substantial part of it. The Belgian competition authority quickly adopted this approach and opened an investigation into the takeover of edpnet by Proximus one week after the ruling. For more context, see a Dentons article on implications of the Towercast ruling here.

Antitrust challenges to FIFA and UEFA's monopoly over international football competitions

Advocate General Rantos has opined that the FIFA-UEFA rules requiring prior approval for any new football competition are compatible with EU competition law. The CJEU's final judgment on the matter is expected to be announced this year, and Rantos' opinion could be determinative. The proposed European Super League aimed to create a closed competition with guaranteed participation for founding clubs, but FIFA and UEFA refused to recognize it, threatening to expel any participant. The Super League founders argued in the Commercial Court of Madrid that FIFA and UEFA's conduct was anticompetitive and incompatible with Articles 101 and 102 TFEU, leading to the case being referred to the CJEU for a preliminary ruling. FIFA along the US Soccer Federation faces a similar complaint in the United States where an antitrust lawsuit claiming unlawful prohibition on foreign clubs and leagues from organizing official matches in the US was filed and reinstated by the Court of Appeal.

Amazon kills two birds with one stone: Commitments settling three EU antitrust cases and implementing DMA requirements

Amazon faced a prolonged investigation by the European Commission over concerns that it is using data from third-party sellers on its marketplace to promote its own-label products and giving them preferential treatment in its Buy Box (the white box on the right side of its product detail page, where customers can add items for purchase). In response, Amazon has made a commitment not to use non-public data related to independent sellers for its own retail business and to give equal treatment to all sellers in the Buy Box. These commitments replicate the prohibitions set out in Articles 6(2) and 6(5) of the Digital Markets Act (Regulation (EU) 2022/1925), which seeks to regulate digital gatekeepers in the EU. It seems therefore that Amazon sought to tailor its remedy to get rid of the Commission antitrust case and at the same time to adjust its business to be DMA compliant. For a look at how Articles 6(2) and 6(5) address the DMA click here.

Facebook found itself in a similar position, having received a Statement of Objection claiming that parent company Meta uses ad-related data derived from competitors for the benefit of Facebook Marketplace and ties the Facebook marketplace ads service with its social network, thereby locking out Facebook's competitors. It remains to be seen if Meta will take similar actions to resolve these concerns, considering it will likely be labelled as a Gatekeeper under the DMA.

Complaints against Microsoft's cloud computing practices

According to reports, Microsoft made an offer to modify its cloud computing practices in order to settle antitrust complaints from smaller rivals and avoid an investigation by the European Union. Three companies, including OVHcloud, Aruba, and a Danish association of cloud service providers, had previously lodged complaints with the European Commission about Microsoft's cloud practices and licensing deals. These complaints focused on the higher costs of buying and running Microsoft software in clouds other than Azure, and the technical adjustments needed to run some programs on competitors' clouds. The Commission will monitor the settlement, and Microsoft said it introduced changes to its licensing practices in October last year, in response to feedback from European cloud providers.

Member states

Czech Republic: ÚOHS accepts Honeywell's commitments not to tie issuance of certificates to purchase of goods

According to ÚOHS' preliminary findings, Honeywell's policy conditioning sales of its alarm and evacuation radio equipment products on a participation by customers in Honeywell's training programs could be excluding competitors, who are only active in offering maintenance and repair services. To avoid a fine for abuse of dominance, Honeywell agreed to abandon the practice by way of binding commitments.

Slovakia: Appeal instance confirms €1 million fine for tying and bundling practices

The PMÚ fined an industrial park operator €1 million for anticompetitive behavior. The park operator was found to have forced undertakings operating within the park to purchase exclusively from it compressed air, refrigeration, nitrogen, gas and electricity, while simultaneously prohibiting them from producing these goods themselves. The PMÚ found this the practice in breach of Article 102(a) TFEU, stating that not only did it make it difficult for the undertakings to move to another industrial park, but it also impeded competition on the market for the supply of these essential supplies.

Merger control

European Union

Commission adopted the 2023 Merger Simplification Package

On 20 April 2023, the Commission adopted a new legislative package including a revised Implementing Regulation, new notice on simplified procedure and a communication on the transmission of documents (available here). This is intended to make EU merger control more focused and effective. The simplified procedure will be henceforth available for: (i) joint ventures that have no current or expected turnover in EEA or annual turnover in EEA less then EUR 100 million and total value of asset transfer in the EEA is less than EUR 100 million, (ii) no party to the transaction is active in the same product and geographic market or markets that are upstream or downstream, or (iii)(a) horizontal overlaps are lower than 20% of market share or lower than 50% and the increment in the Herfindahl Hirschman index (reflecting how highly market is concentrated) is below 150, and (b) vertical overlaps are lower than 30 % of market share in the linked markets or lower than 50%, and (iv) changes from joint to sole control. As regards procedure, the simplified transactions may be notified directly without pre-notification contacts (but after submission of case team allocation request) and where conditions from the simplified process are satisfied, the Commission will issue a short-form decision within 25 working days. The Commission warns, however, not to submit cases for simplified procedure if parties wish the Commission to approve any ancillary restraints, such as post-transaction non-competes.

Commission clears Agrofert's acquisition of Borealis

Czech group Agrofert received approval to acquire the nitrogen business of Borealis, a subsidiary of OMV. The deal, with an enterprise value of €810 million, includes fertilizer, AdBlue, melamine and technical nitrogen, and was announced last year. The deal was cleared in Phase I proceedings without any remedies, despite apparently high market shares of the merging firms in the nitrogen space.

Commission cleared the Microsoft-Activision Blizzard merger while UK's CMA has blocked it – marking a first serious post-Brexit divergence between the watchdogs

The European Commission has accepted Microsoft's commitment to license Activision Blizzard's successful video games, such as Call of Duty, World of Warcraft or Diablo, post merger and approved the transaction on 15 May 2023. The remedy was prompted by concerns that by taking these games exclusive, Microsoft could stymie competition in the nascent cloud gaming market. Only a fortnight earlier, however, the UK Competition and Markets authority has rejected the same commitment package as insufficient and blocked the deal, which may mean a global show-stopper preventing Microsoft to complete the acquisition (FTC's attempt to block the deal in the US is pending). Whilst Microsoft announced that it will appeal CMA's decision to courts, the divergence of approach between once hierarchized regulators has sparked heated comments.

Shift in exercise of referrals under Article 22 EUMR and implications for M&As in practice

The recent Illumnia/Grail case marks only the second time in history that the European Commission has exercised a referral under Article 22 EUMR. Article 22 allows the Commission to have jurisdiction over concentrations that do

not meet thresholds criteria, either under the EUMR or member states law, but only when national competition agencies request the review. The activation of Article 22 also triggers an obligation to suspend implementation of the transaction. However, Illumina and Grail did not suspend the implementation of their deal and are now being investigated for gun jumping. As a result, the Commission imposed very rare interim measures, requiring Illumina to keep Grail separated, with all commercial activities of these two companies to be done on an arm's length basis. Grail will be temporarily run by an independent Hold Separate Manager. For gun jumping, the Commission may impose a fine of up to 10 percent of the undertaking's turnover, and Illumina has set aside US$450 million for the fine.

The Figma/Adobe acquisition is another case of an Article 22 referral, which occurred shortly after the Illumina/Grail case. Historically, the Commission discouraged member states from making referral requests, believing that these transactions were unlikely to have a significant impact on the EU internal market. However, there has been a noticeable change in trend in the Commission's decision-making practice. In its Staff Working Paper, the Commission presented referrals under Article 22 EUMR as complementary to turnover-based jurisdictional thresholds and intends to use Article 22 to catch so-called killer acquisitions—high-priced transactions for targets with low turnover in the digital, pharma and other sectors.

This change in trend brings legal uncertainty to mergers and acquisitions in the EU. Companies will have to be more careful and consider the implications of their acquisitions, especially if they involve targets with low turnover. The Commission will continue to use Article 22 to catch such acquisitions, and companies must be aware of the potential risks of noncompliance.

State aid and foreign subsidies

European Union

In a major win for Ryanair, the EU General Court overturns Commission's approval of recapitalization aids to Lufthansa and SAS-Scandinavian airlines

On 10 May 2023, The EU General Court annulled the Commission's decisions approving grant of EUR 6 billion of recapitalization aid to Lufthansa (joint cases T-34/21 and T-87/21) and EUR 1 billion to SAS-Scandinavian airlines (case T-238/21). The Commission approved these aids under the Covid 19 Temporary Crisis Framework earlier in 2020. The crisis framework essentially means a much-simplified process for approving State Aid in justified cases. On action from Ryanair, a rival airliner, challenging the Commission's decisions, the General Court found several errors in how the Commission applied the temporary crisis framework. This included the crucial points of whether the firms were really unable to obtain standard financing on the market for all their needs and whether the impact of the aid on the markets was mitigated by the proposed commitments and envisaged exit of the States from the airlines' structures. The Commission, aware of possible impact on the aviation sector at large, has already announced that it may appeal the to the CJEU.

Green Deal reflected in EU state aid law

The EU is making progress towards its goal of achieving a net-zero economy through the implementation of the Green Deal Industrial Plan. It has adopted a new Temporary Crisis and Transition Framework to support key sectors in their transition to a sustainable and net-zero economy. The framework includes measures that will simplify the granting of state aid to small projects, expand the possibilities of support for the deployment of renewable energy and introduce new measures to support key sectors for the transition towards a net-zero economy.

In addition, the EU has endorsed an amendment to the General Block Exemption Regulation (GBER) that will simplify and speed up public support for the EU's green and digital transitions. The revised rules increase and streamline possibilities for aid in environmental protection and energy, aid for research and development, and will facilitate certain projects involving beneficiaries in multiple member states.

These measures are significant steps towards achieving the EU's ambitious climate goals. The new framework and amendment to the GBER will allow member states to design and implement support measures in key sectors to accelerate the transition to climate neutrality and net-zero industry.

The European Commission has also launched a Green Deal Industrial Plan aimed at supporting the transition to climate neutrality and increasing the competitiveness of Europe's net-zero industry. The plan is based on four pillars: a simplified and predictable regulatory environment, faster access to financing, enhanced skills, and open trade for resilient supply chains. The Commission proposes a Net-Zero Industry Act to provide a regulatory framework suited for its quick deployment, as well as a Critical Raw Materials Act to ensure sufficient access to vital materials. These initiatives build on previous efforts and will complement ongoing efforts under the European Green Deal and REPowerEU.

Standard of proof in state aid cases—General Court's ruling on Carpatair Air appeal

On 8 February 2023, the General Court annulled European Commission Decision SA.31662 in the Carpatair case. The Carpatair decision had given permission to four measures implemented by Romanian authorities at Timisoara International Airport in favor of Wizz Air. The General Court ruled that the public financing given to the airport operator between 2007–2009 constituted compatible state aid but the discounts, rebates on airport charges and non-collection of airport charges between October 2009 and February 2010 did not constitute state aid within the meaning of Article 107(1) TFEU. The decision sets out several principles that the European Commission must observe to prove that a measure is not selective.

According to the General Court, the Commission has to conduct an extensive and in-depth analysis even in cases where it decides that a member state has not conferred state aid to the undertaking concerned. To establish the absence of de jure and de facto selectivity, the Commission will conduct the relevant selectivity analysis. Ultimately, the General Court has confirmed that the burden to prove the absence of a selective advantage when rejecting the state aid character of national measures is arguably as high as the burden required for the Commission to prove the existence of state aid.

Foreign Subsidies Regulation faces tough criticism from EU business

The European Commission's draft implementation act for the EU Foreign Subsidy Regulation (FSR) has sparked concern among EU businesses. The FSR aims to protect the internal market by prohibiting non-EU players from benefitting from distortive foreign subsidies. However, the proposed draft implementing regulation, which includes a mix of state aid and merger control instruments, has been criticized by stakeholders. Companies argue the FSR system will impose "*excessive red tape*," is "*unworkable in practice*" and "*extremely burdensome*," while the thresholds for reportable transactions would be too low. Critics argue that the notion of "*third-party financial contributions*" that triggers the notification obligation is too broad and covers hundreds, if not thousands, of transactions that may not be subsidies at all. While the general objective of the FSR may be reasonable, the proposed draft implementing regulation is widely considered as too onerous. You can read more about the FSR's impact on M&A in our earlier article (*in Czech*).

Slovakia: PMÚ issues binding guidelines on state aid scheme for support of renewable energy from waste

The PMÚ issued a binding statement on compliance with European Union rules on the state aid scheme for the promotion of energy from renewable energy sources. The scheme aims to provide state aid on investments in the construction of new facilities—or reconstruction of existing ones—that produce biogas usable for combined heat and power generation or can be upgraded to biomethane. The aid aims to increase capacity for utilizing biodegradable waste, including kitchen waste and biodegradable components of mixed municipal waste, for biogas production. The Ministry of Environment of the Slovak Republic is the provider of the aid and also the issuer of the scheme, while the Slovak Environmental Agency is the executor.

Foreign direct investment

Slovakia introduces Act on Screening of Foreign Investments

On 1 March 2023, a new Act on the Screening of Foreign Investments entered into effect, introducing a comprehensive mechanism for screening foreign investments in the Slovak Republic. The new regime includes more international standards and fits within the framework of EU regulation. The aim of the law should only be to introduce the possibility of assessing foreign investments for the purpose of protecting the security and public order of the Slovak Republic, and subsequently the EU. Investments that qualify for screening are those originating from outside the EU, or from EU citizens controlled by such persons, that exceed a 10 percent stake in a target entity active in listed sectors, such as media services, biotechnology or defense industry products. The acquirer is obliged to submit a request for screening of the investment only in the case of critical foreign investments. Screening will have an impact on transaction deadlines, taking up to 130+ days. For more details see our alert on this topic.

Significant market power

Amendment to Czech Act on Significant Market Power dramatically expands its scope—all businesses purchasing food and agriculture products should beware

On 1 January 2023, an amendment to the Act on Significant Market Power in the Sale of Agricultural and Food Products came into effect, significantly expanding the Act's scope. Previously, only retailers with an annual turnover of food and agriculture products exceeding CZK 5 billion in the Czech Republic were subject to the Act. However, the Act now applies to all purchasers of food and agriculture products whose total turnover exceeds €2 million and at the same time exceeds the turnover of their supplier, or if they have a total turnover in the Czech Republic in excess of CZK 5 billion (approx. €210 million).

In conclusion, the amended Act applies to all entrepreneurs with turnover of more than €2 million who purchase food or agriculture products as part of their business, such as online retailers, restaurant chains, and service providers. These entities must comply with obligations imposed by the Act, such as having agreements of specific parameters with suppliers in writing and refraining from trading practices qualified by the Act as unfair. For noncompliance, the purchaser may be fined up to 10 percent of its turnover, and ÚOHS may impose remedial measures, such as an obligation to return to the harmed suppliers the benefits obtained through the use of the unfair trade practice. In this context, ÚOHS's chairman, Petr Mlsna, publicly declared the intent of the office to immediately focus on entities that are newly subject to the Act. For more details, see our alert on this change.

Private damages

CJEU's preliminary ruling in CD/Regiojet case: Documents pre-existing the investigation should be disclosed

The CJEU has ruled that national courts can order disclosure of evidence held by competition authorities for use in damages actions for competition law infringements, even if proceedings concerning the same matter are ongoing before the European Commission (C-57/21). The ruling came after the Czech Supreme Court asked for a preliminary ruling on the interpretation of Directive 2014/104 (Damages Directive) in a case involving RegioJet and state-owned railway company, České dráhy. The CJEU held that only documents that were not pre-existing to the investigation but were prepared specifically in the context of that public investigation can be covered by the so-called grey list (documents whose disclosure must be limited to what is relevant, proportionate and necessary). Otherwise, access to documents during ongoing public enforcement would be nearly impossible because any

relevant document would most likely also be part of the authority's file. The CJEU's ruling is in line with the PACCAR decision (C-163/21), and thus the court maintains the trend.

We are happy to share our know-how. We will continue to prepare a selection of competition news on a quarterly basis, but you can keep track of exciting developments on our LinkedIn profiles (below).

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