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EU Competition Law Newsletter

Highlights

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Towercast: Advocate General Kokott Proposes To Add Article 102 TFEU To The Transactional Toolbox

On October 13, 2022, Advocate General Kokott delivered her opinion on a preliminary reference from the Paris Court of Appeal in the *Towercast* case, stating that transactions that escape EU and national merger control review are susceptible to review under Article 102 TFEU.[1]

Background

Article 102 TFEU prohibits undertakings from abusing their market dominance. In 1970s, the Court of Justice held in its landmark *Continental Can* judgment that an acquisition by a dominant company of a rival that strengthens that dominant position constitutes an abuse in violation of Article 102 TFFU.[2] The practical impact of *Continental Can* has, however, been reduced with the introduction of the EU Merger Regulation in 1989, designed to capture major transactions that could lead to strengthening of market dominance.[3]

In June 2016, a French television transmission service operator, TDF, acquired its rival, Itas, in a three-to-two deal, leaving Towercast as the only remaining competitor. The transaction fell below merger control thresholds in the EU and France and avoided any scrutiny. Towercast filed an abuse complaint with the French Competition Authority, which rejected it on the basis of a "clear dividing line between merger control and the control of anticompetitive practices".[4] Towercast appealed before the Paris Court of Appeal, which asked the Court of Justice whether Article 21(1) EU Merger Regulation[5] precludes national competition authorities from assessing under Article 102 TFEU

[1] *Towercast v Autorité de la concurrence* (Case C-449/21), opinion of Advocate General Kokott, ECLI:EU:C:2022:777.

[2] *Europemballage Corporation and Continental Can Company Inc. v Commission* (Case C-6/72), ECLI:EU:C:1975:50.

[3] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.

[4] Decision 20-D-01 of the French Competition Authority of January 16, 2020 regarding a practice implemented in the digital terrestrial television broadcasting sector; and *Towercast v Autorité de la concurrence* (Case C-449/21), opinion of Advocate General Kokott, ECLI:EU:C:2022:777, para. 21.

[5] "This Regulation alone shall apply to concentrations as defined in Article 3 [...]."

a concentration that did not meet the relevant EU or national merger thresholds.[6]

Advocate General's Opinion

The Opinion reiterates that Article 102 TFEU is a directly applicable provision of primary EU law and therefore prevails over secondary EU law, including the EU Merger Regulation. Article 102 TFEU is conceptually applicable in two situations.

First, when a transaction has been approved under EU or Member State merger control rules. In this scenario, the Article 102 tool seems futile because a transaction approved as compatible with the internal market should not violate Article 102 TFEU.[7]

Second, when a transaction escapes EU and Member State merger control scrutiny.[8] In this scenario, the Article 102 tool is appropriate to fill in a lacuna in the existing merger control mechanism, to capture "killer acquisitions" or potentially problematic transactions that fall below the merger control thresholds.[9] In her proposal to expand the transactional toolbox, Advocate General Kokott draws additional comfort from the General Court's judgment in *Illumina*, allowing the Commission to review transactions below the EU and national merger thresholds upon referral from national competition authorities.[10]

Conclusion

The Opinion is not binding, though recent statistics indicate that the Court of Justice follows Advocate General opinions in approximately 80% of cases.[11] If the Opinion is followed, merger control risk analysis would become even more complex – even if a transaction were to fall below EU and national merger control thresholds, transactional parties would still need to consider the degree of risk of: (i) a merger control review by the Commission following a referral in line with the *Illumina* precedent; and (ii) a potential abuse investigation by the Commission or national competition authorities in line with *Towercast*.

Any acquisition by a putatively dominant company might potentially be scrutinized years after closing, given that there is no deadline to initiate an abuse investigation.[12] The Opinion suggests that any abuse concerns would likely be resolved through the imposition of behavioural remedies and fines rather than divestment orders.[13] This is not obvious because Article 102 TFEU requires that the violation be put to an end. A violation would normally only cease upon divesting the acquired rival or other similar assets, if it stems from horizontal concerns related to the acquisition of a rival.

[6] Decision 20/04300 of the Court of Appeal of Paris of July 1st, 2021; and *Towercast v Autorité de la concurrence* (Case C-449/21), opinion of Advocate General Kokott, ECLI:EU:C:2022:777, paras. 22–23.

[7] *Towercast v Autorité de la concurrence* (Case C-449/21), opinion of Advocate General Kokott, ECLI:EU:C:2022:777, para. 60.

[8] *Towercast v Autorité de la concurrence* (Case C-449/21), opinion of Advocate General Kokott, ECLI:EU:C:2022:777, para. 57; Although there is a presumption that concentrations under the thresholds are not harmful and do not require an *ex ante* control, those thresholds do not introduce a presumption concerning *ex* post control.

[9] *Towercast v Autorité de la concurrence* (Case C-449/21), opinion of Advocate General Kokott, ECLI:EU:C:2022:777, para. 48.

[10] *Illumina v Commission* (Case T-227/21), ECLI:EU:T:2022:447, paras. 183–184; *See* our Alert Memo, *"European Commission Implements New Policy To Investigate Transactions That Would Otherwise Escape Merger Review"*, April 23, 2021, available here.

[11] Hunton Andrews Kurth, *Advocate General Upholds Validity of Standard Contractual Clauses in Schrems II Case*, available here (last visited October 8, 2022).

[12] The statute of limitations impacts the ability to impose fines.

[13] *Towercast v Autorité de la concurrence* (Case C-449/21), opinion of Advocate General Kokott, ECLI:EU:C:2022:777, para. 63.

CK Telecoms: Advocate General Kokott's (Re) balancing Of Probabilities Test

On October 20, 2022, Advocate General Kokott issued her opinion on the Commission's appeal of the General Court's landmark May 2020 judgment overturning the Commission's prohibition of the Three/O2 UK mobile telecommunications merger.[14] The Opinion advises the Court of Justice to uphold the Commission's appeal on all main grounds and refer the case back to the General Court for reconsideration.

The case represents the first opportunity for the Court of Justice to rule on the concept of "significant impediment to effective competition" ("SIEC") as it relates to non-coordinated (unilateral) effects in an oligopolistic market.[15]

Background

In 2016, the Commission prohibited the merger of the second and fourth largest mobile network operators in the UK, because it would have provided the merged entity with a "strong [market] position" even though it would not have created or strengthened a dominant position.[16] On May 28, 2020, the General Court annulled the Commission's decision in its entirety, essentially on the ground that the Commission did not provide "sufficient evidence to demonstrate with a strong probability" that the transaction would lead to a SIEC based on the loss of competition between the merging parties.[17] The Commission appealed this judgment to the Court of Justice.

Advocate General's Opinion

The Opinion is of particular interest in relation to the concepts of standard of proof, SIEC, closeness of competition, and important competitive force, indicating that the General Court may have erroneously put forward its own interpretation of these concepts, unsupported by case law or the Horizontal Merger Guidelines.

Standard of Proof

The Opinion refers to the Court of Justice's judgment in *Bertelsmann and Sony* establishing the relevant standard of proof in merger cases as a "balance of probabilities", requiring the Commission to predict the outcome that is "most likely to ensue,"[18] and not one that is "very probable" or "particularly likely" or established "beyond reasonable doubt".[19] By contrast, the Opinion notes, the General Court erroneously required the Commission to produce sufficient evidence to demonstrate a "strong probability" that a concentration will give rise to harm, recognizing that that standard lies between a balance of probabilities test and a requirement of proof beyond a reasonable doubt.

SIEC

The General Court held that, in the absence of a finding that a concentration will create or strengthen a dominant position, to prove a SIEC the Commission must establish that the concentration would involve: (i) the elimination of important competitive constraints that the merging parties had exerted upon each other; and (ii) a reduction of competitive pressure on the remaining competitors.

The Opinion notes that that approach is "too restrictive" and would prevent the Commission from taking account of all relevant circumstances affecting competition in an oligopolistic market.

[14] E*uropean Commission v. CK Telecoms UK Investments Ltd* (Case C-376/20 P), opinion of Advocate General Kokott, EU:C:2022:817.

[15] Christopher J. Cook, "Advocate General Sides with Commission in its Appeal of General Court's Overturning of Three/O2 Prohibition", *Cleary Antitrust Watch Blog,* October 24, 2022, available here.

[16] *Hutchinson 3G UK / Telefonica UK* (Case COMP/M.7612), Commission decision of September 29, 2016, para. 406.

[17] *CK Telecoms UK Investments Ltd v. Commission* (Case T-399/16) EU:T:2020:217.

[18] *Bertelsmann and Sony v. Impala* (Case C-413/06 P) EU:C:2008:392, para. 52.

[19] *European Commission v. CK Telecoms UK Investments Ltd* (Case C-376/20 P), opinion of Advocate General Kokott, EU:C:2022:817, para. 56.

The SIEC concept ought to be more flexible than established by the General Court.

Closeness of competition

The Commission had established that Three and O2 were close, but not "particularly close," competitors.[20] The General Court observed that in oligopolistic markets, all competitors are likely to be relatively close, and therefore the Commission must show that the merging parties are "particularly close" competitors.

However, the Opinion notes that closeness of competition is only one of the factors that the Commission considered in respect of its theory that the concentration would have eliminated an important competitive constraint. The Commission's Horizontal Merger Guidelines recognise that closeness of competition is a matter of degree, and neither the Guidelines nor the EU Merger Regulation require that the merging parties be particularly close competitors in order to establish the elimination of important competitive constraints, or a SIEC.

Important competitive force

The General Court found that the Commission had erred in finding that Three constituted an "important competitive force" because it did not stand out from its competitors.[21] The Opinion notes, however, that an important competitive force does not need to stand out from its competitors "in terms of its impact on competition or be 'competing particularly aggressively in terms of prices', forcing those competitors to align with its prices".[22]

Conclusion

The Advocate General's position on the standard of proof is unsurprising because the General Court arguably deviated from long-established Court of Justice case law. This is further evident from the subsequent judgment in *Thyssenkrupp*, where the General Court reverted back to the balance of probabilities test. Similarly, the interpretations of the concepts of SIEC and closeness of competition have little support in the Horizontal Merger Guidelines, which may persuade the Court of Justice to follow the Opinion.

News

Commission Updates

The Commission's Revised Informal Guidance Notice: In Search of A Win-Win?

On October 3, 2022, the Commission adopted a Revised Informal Guidance Notice on the application of Articles 101 and 102 TFEU to novel or unresolved competition law questions.[23] The Revised Informal Guidance Notice gives the Commission more flexibility in issuing informal advice compared to the 2004 guidance.[24]

Background

Prior to 2003, the Commission frequently issued "comfort letters" under Regulation 17[25] to applicants seeking clarity as to whether their agreements and conduct complied with EU competition rules. This placed a considerable burden on the Commission's resources and prompted a shift towards a system of "self-assessment" under Regulation 1/2003, which remains applicable to date.[26] The Commission

[20] *Hutchinson 3G UK/Telefonica UK* (Case COMP/M.7612), Commission decision of September 29, 2016, para. 444.

[21] *CK Telecoms UK Investments Ltd v. Commission* (Case T-399/16) EU:T:2020:217, paras. 173–175.

[22] *European Commission v. CK Telecoms UK Investments Ltd* (Case C-376/20 P), opinion of Advocate General Kokott, EU:C:2022:817, para. 108.

[23] Commission notice on informal guidance relating to novel or unresolved questions concerning Articles 101 and 102 of the Treaty on the Functioning of the European Union that arise in individual cases, OJ 2022 C 381/9 ("Revised Informal Guidance Notice").

[24] Commission notice on informal guidance relating to novel questions concerning Articles 81 and 82 of the EC Treaty that arise in individual cases, OJ 2004 C 101/78 ("2004 Informal Guidance Notice").

[25] Article 4-8 of Regulation No. 17 implementing Articles 65 and 86 of the Treaty OJ 1962 L 204/62 ("Regulation 17").

[26] Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty OJ 2004 L 1/1 ("Regulation 1/2003").

only retained limited powers to issue informal guidance with a view to ensuring legal certainty.[27]

The 2004 Guidance Notice

Under the 2004 Informal Guidance Notice, the Commission would only provide informal guidance if "no clarification [exists in the] EC legal framework" and that clarification would be "useful".[28] The rationale for setting a very high threshold was to prevent a reintroduction of the abolished notification system though the back door.[29] In practice, the Commission reportedly did not issue any guidance letters in the past two decades.[30]

The 2022 Guidance Notice

The Revised Informal Guidance Notice introduces increased flexibility for the Commission to engage in informal discussions. The starting point remains the same: the Commission should only provide informal guidance when: (i) a novel or unresolved competition law question is at issue; and (ii) there is "an interest" in providing guidance.[31] To ensure a more effective application of this tool, though, the Revised Informal Guidance Notice increases the Commission's discretion to act through three principal changes.

First, informal guidance can now be given in the absence of "sufficient clarity" on the underlying point of law,[32] compared to the previously required absence of any clarification.[33] The Commission can now issue guidance where there is a gap in existing precedent, and clarification would provide "added value with respect to legal certainty."[34] For example, this is arguably the case with respect to pricing algorithms. Second, the Commission can take into account the "Commission's priorities or Union interest" when deciding whether there is sufficient interest in providing guidance.[35] Third, a number of procedural changes open the door for increased communication with undertakings applying for guidance (*e.g.*, requirement that applicants submit their own preliminary assessment on the application of Articles 101 and 102 TFEU; informal pre-application discussion with the Commission).[36] In the same vein, the Commission ought to "use its best efforts to inform the applicant of the course of action that it intends to take [...] within a reasonable time,"[37] including if it decides not to issue any guidance.[38]

Practical implications

The Revised Informal Guidance Notice introduces much overdue flexibility for the Commission to give informal guidance on novel competition law questions. This sends a message that the Commission is determined to increase its informal engagement with undertakings and make effective use of its entire competition enforcement toolkit. However, the Commission's informal guidance process does not provide sufficient protection against self-incrimination and explicitly preserves the Commission's power to launch proceedings based on informal guidance applications.[39] This may end up disincentivizing most undertakings from directly engaging with the Commission on the very issues that are most in need of clarification.

[27] Rec. 38 of Regulation 1/2003.

[28] Para. 8 of the 2004 Informal Guidance Notice.

[29] European Commission, "Call for Evidence for an initiative on Anti-competitive agreements and abuse of a dominant market position – update of informal guidance notice for businesses," May 24, 2022, available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13448-Anti-competitive-agreements-and-abuse-of-a-dominant-market-position-update-of-informal-guidance-notice-for-businesses_en.

[30] *Ibid.*; Para. 8 of the 2004 Informal Guidance Notice.

[31] Para. 7 of the Revised Informal Guidance Notice.

[32] *Ibid.*, para. 7(a).

[33] Para. 8(a) of the 2004 Informal Guidance Notice.

[34] Para. 7(a) of the Revised Informal Guidance Notice.

[35] *Ibid.*, para. 7(b).

[36] *Ibid.*, paras. 12–13.

[37] *Ibid.*, para. 17.

[38] *Ibid.*

[39] *Ibid.*, para. 19.

Statement of Objections Sent To Teva – The Commission Doubles Down On Novel Theories of Harm

On October 10, 2022, the Commission sent a Statement of Objections ("SO") to Teva, maintaining that the company abused its alleged dominant position through patent misuse and disparagement practices.[40]

Background

In 2015, Teva's patent covering glatiramer acetate—the active ingredient used in Copaxone—expired, allowing generic versions of the medicine to enter the market. Various market players accused Teva of misuses of patent procedures and disparaging communication campaigns to illegally block or delay the market entry of follow-on products. This led to several dawn raids at Teva's premises in October 2019 and the subsequent launch of a formal probe in March 2021.[41]

Statement of Objections

On October 10, 2022, over a year and a half after the formal proceedings were initiated, the Commission sent the SO to Teva. The SO focuses on two novel concerns.

First, Teva allegedly engaged in so called "divisional patent games." Under the IP law principle of unity of invention, a patent application may only concern one invention, or several inventions linked together in such a way that they form a single general inventive concept. Divisional patent applications are those deriving from an earlier patent application known as the "parent", which the applicant splits into a sequence of applications each claiming a single element of the same claimed invention. Divisional applications can give rise to further multiple divisional applications without any limitation. Each divisional patent lasts until the expiry date of the "parent" patent, but is subject to new examination procedures and, if granted, new opposition periods independent of the outcome of the parent application.

Teva allegedly sought to artificially extend its patent protection by reportedly filing and subsequently withdrawing patent applications deriving from the "parent" patent, thereby forcing its competitors to file a new legal challenge each time. While divisional patents are commonly accepted by patent offices, a repetitive filing of divisional patents could be a way for a patentee to multiply the patent barriers that a generic competitor needs to overcome to enter the market.[42]

Relatedly, the Commission's focus on patent misuse practices is also evident from its involvement in a recent dawn raid at Novartis' premises in Switzerland.[43]

Second, Teva allegedly implemented a systematic "disparagement" campaign disseminating false or misleading information about the safety and efficacy of follow-on competing products. Disparagement as a theory of harm has long been the exclusive domain of the French Competition

[40] Commission Press Release IP/22/6062, "Commission sends Statement of Objections to Teva over misuse of the patent system and disparagement of rival multiple sclerosis medicine," October 10, 2022.

[41] Commission Press Release IP/21/1022, "Commission opens formal investigation into possible anticompetitive conduct of Teva in relation to a blockbuster multiple sclerosis medicine," March 4, 2021. *See* also French Competition Law Review of March 2021, "Pharma Still Under The Microscope: The Commission Investigates Potentially Abusive Patent Filing Strategies."

[42] The "divisional patent game" proceeds as follows: (i) filing cascades of divisional patent applications at different times, related to the same parent application; (ii) defending such divisional patents in European Patent Office ("EPO") opposition proceedings; (iii) enforcing such divisional patents in national courts; (iv) strategically withdrawing any earlier patent from the family, just before an EPO decision confirming it is invalid, thus avoiding the negative effects on the other divisional members of the family; (v) even when a parent patent is invalidated, there will still be a divisional patent application covering substantially the same subject matter, replicating the legal uncertainty and restarting the clock. An opposition proceeding to invalidate a divisional patent can take 3–6 years until final resolution by EPO Technical Board of Appeal.

[43] The dawn raid has been conducted by the Swiss Competition Authority, who cooperated with the Commission pursuant to the bilateral agreement between them on the application of the competition rules. *See* Swiss Competition Authority Press Release, "COMCO: Investigation on use of patents," September 15, 2022, available here. The company allegedly attempted to protect its drug for the treatment of skin diseases against competing products by using one of its patents to initiate litigation proceedings.

Authority ("FCA").[44] The SO is a clear signal that the Commission is eager to establish a novel EU precedent, and the Commission has doubled down on enforcement against disparagement by opening a formal probe into Vifor Pharma in June 2022.[45] This comes against the backdrop of Commissioner Vestager's encouragement that antitrust enforcers be "willing to explore the boundaries, and not to shy away from novel theories of harm, where these are relevant."[46]

There is, however, potentially a long battle ahead as Teva announced that it will "vigorously defend" itself, including by challenging the Commission's case before EU Courts.[47]

The Commission Encourages Immunity & Leniency Applications Through A "No-Name" Basis Engagement And "Hypothetical" Immunity/Leniency Applications

On October 25, 2022, the Commission published additional guidance on its Leniency Policy in the form of Frequently Asked Questions ("FAQs") to further encourage companies to seek immunity or leniency from cartel fines.[48]

Background

The Commission's Leniency Policy allows companies to confidentially disclose their participation in a cartel and subsequently cooperate with the Commission during an investigation to obtain full immunity or partial reduction from fines (up to 50%).[49]

Cartel enforcement remains one of the Commission's top priorities, with the Leniency Policy at the center of the Commission's efforts to uncover prohibited conduct. Even though the number of leniency applications has decreased in recent years, several dawn raids conducted this year signal an increasing cartel enforcement trend.[50]

FAQs

The FAQs guidance introduces two principal changes.

First, the Commission encourages companies to inquire on a "no-names basis" as to whether they may benefit from immunity or reductions under the Leniency Policy. This may be particularly useful for companies not involved in "hard-core" cartels, but in less obvious problematic conduct such as restraints on innovation, wage fixing, no-poach[51] or other labor market agreements. During the informal exchanges, a company's legal representative may obtain guidance without having to disclose the sector, the participants or other details identifying the potential cartel.

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[44] In 2013, following a complaint from Teva Santé, the FCA fined Sanofi-Aventis €40.6 million for implementing a disparaging campaign targeting pharmacists and doctors regarding the quality and safety of generic products competing with its own Plavix drug. In 2014, the FCA fined Schering-Plough €15.3 million for abusing its dominant position by disparaging Arrow's generic product before its launch on the market. In 2017, the FCA imposed a €25 million fine, subsequently reduced to €21 million by the Court of Appeal, on Janssen-Cilag and its parent company Johnson & Johnson, for delaying entry into the market of the generic version of Durogesic, and for hindering its development through a disparagement campaign. In 2020, the FCA also fined Genentech, Novartis, and Roche €444 million for having misled public authorities regarding the risks related to the use of Avastin. That decision is currently under appeal.

[45] *See* Commission Press Release IP/22/3882, "Commission opens investigation into possible anticompetitive disparagement by Vifor Pharma of iron medicine," June 20, 2022.

[46] EVP Vestager Keynote speech at the European Competition Day 2022 in Prague, "Fairness and Competition Policy."

[47] *See* Nicholas Hirst and Lewis Crofts, "Teva rejects EU antitrust claims over MS drug, threatens legal fightback, MLex, October 10, 2022, available here.

[48] *See* DG COMP, Frequently Asked Questions (FAQs) on Leniency, October 2022, available here.

[49] The first cartel participant to inform the Commission of a cartel and provide sufficient information for the Commission to commence an investigation receives full immunity from any eventual fine, if it complies with the conditions of the Leniency Notice. Any other cartel participants that apply for leniency after the investigation has started could receive a reduction of any potential fine if they provide sufficient evidence that represents "significant added value" and cooperate genuinely. Evidence is of a "significant added value" if it reinforces the Commission's ability to prove the infringement. The first company to meet these requirements is granted a fine reduction of between 30% to 50%, the second a reduction between 20% to 30%, and any subsequent company a fine reduction of up to 20%.

[50] Recently, the Commission carried unannounced inspections in a company active in gas production (*see* Commission Press Release IP/22/2202, "Commission confirms unannounced inspections in the natural gas sector in Germany," March 31, 2022); companies and associations active in the automotive sector (*see* Commission Press Release IP/22/1765, "Commission carries out unannounced inspections in the automotive sector," March 15, 2022); company active in the defence sector (*see* Commission Press Release IP/21/6241, "Commission carries out unannounced inspections in the defence sector," November 23, 2021); company suspected of abuse of dominance in the animal health sector (*see* Commission Press Release IP/21/5543, "Commission carries out unannounced inspections in the animal health sector in Belgium," October 25, 2021); companies active in the wood pulp sector (*see* Commission Press Release IP/21/5223, "Commission carries out unannounced inspections in the wood pulp sector," October 12, 2021); and a company active in the manufacture and distribution of garments June 22, 2021 (*see* Commission Press Release IP/21/3145, "Commission carries out unannounced inspections in the manufacturing and distribution of garments sector," June 22, 2021).

[51] Agreements not to solicit another company's employees.

In addition, a company can submit a "hypothetical" immunity application disclosing the sector, geographic scope, estimated duration of the cartel, and a descriptive list of evidence to be shared later, without having to reveal any of the participants' identities. Once the Commission informs the applicant that the provided information satisfies the immunity requirements, the applicant must disclose all evidence and information to benefit from immunity (subject to additional conditions mentioned in the Leniency Notice, such as preserving confidentiality and ongoing cooperation with the Commission).

Second, the Commission has established the role of a Leniency Officer as the primary point of contact to provide "informal advice" and information on the leniency process and engage with prospective applicants or their legal representatives.[52]

The practical benefit of a "no-name" consultation remains to be seen. There are no specific deadlines to obtain feedback – companies will therefore need to carefully assess how likely it is that, while they engage in informal consultations, others may go on the record and obtain immunity or a higher leniency rank.[53]

Digital Services Act Published in the EU Official Journal

On October 27, 2022, the Digital Services Act ("DSA") was published in the Official Journal of the EU, marking its formal adoption.[54] The DSA sets out new rules that apply to the distribution of user-generated online content. Unlike the DMA, which seeks to ensure the contestability of digital markets, the DSA seeks to improve user safety online and ensure accountability of platforms for the content that they transmit, host or publicly disseminate.

The DSA introduces a common base of obligations applicable to all intermediary services providers offering services to recipients in the EU, as well as additional obligations applicable to "very large online platforms" ("VLOPs") and "very large online search engines" ("VLOSEs").[55] The new set of rules concerns content moderation, due diligence, user information, and targeted advertising. The provisions on targeted advertising include the requirement to provide users of online platform services with a declaration as to whether the content they provide "is or contains commercial communications".[56] They also include a ban on targeted advertising based on users' sensitive personal data (*e.g.*, sexual orientation, religion and ethnicity) and targeted advertising for minors.[57] VLOPs and VLOSEs will be required to offer users the choice not to receive recommendations based on profiling.[58]

The enforcement of the common obligations is left to the EU Member States, which are to appoint a Digital Services Coordinator by February 17, 2024. The rules applicable to VLOPs and VLOSEs will be enforced by the Commission and will apply four months after the a provider is notified of its designation as a VLOP or a VLOSE.[59] The first designations of VLOPs and VLOSEs are expected in March or April 2023, as online platforms and search engines are required to publish their user numbers by February 17, 2023. The Commission and national Digital Services Coordinators can impose fines of up to 6% of the company's worldwide turnover in the preceding fiscal year. An implementing regulation is expected before the end of the year.

[52] This position already exists in France and in the Netherlands for more than a decade. Details on how to contact the Leniency Officers are available here.

[53] The FAQs does not indicate any timing regarding the informal exchanges with the Commission on a "no name" basis or with the Leniency Officer as it is very likely to vary from one case to another depending on its complexity, the information provided and the workload of the Commission at that time.

[54] *See* Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act). *See* also our April 2022 EU Competition Law Newsletter.

[55] VLOP and VLOSE are online platforms and search engines with above 45 million active users.

[56] Article 26 of the DSA.

[57] Article 28 of the DSA.

[58] Article 38 of the DSA.

[59] Articles 92 and 93 of the DSA.

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