Konkurrenceretlig Nyhedsoversigt nr. 86 / dækkende 14. oktober 2023 – 14. november 2023

Indhold

1 | DANSK RET

Nyt fra Konkurrence- og Forbrugerstyrelsen

Godkendelse på baggrund af en forenklet sagsbehandling af The Warehouse Hotel A/S' erhvervelse af enekontrol over driften af Copenhagen Admiral Hotel.
Ved transaktionen overtager Warehouse Hotel driften af Admiral Hotel og opnår dermed enekontrol over den virksomhed, der omfatter de driftsmæssige aktiviteter, inklusive kunder, personale, varelager mv., der er tilknyttet hotellet. Transaktionen omfatter ikke de ejendomme, som indgår i driften af Admiral Hotel før transaktionens gennemførsel, og som Admiral Hotel fortsat vil blive drevet fra.
Læs mere
Dato: 2.11.2023

Godkendelse af Topdanmark Forsikring A/S' erhvervelse af enekontrol over Oona Health A/S.
Transaktionen indebærer, at Topdanmark erhverver enekontrol over Oona Group fra Daytona Holdings Limited og en række minoritetsaktionærer.
Læs mere
Dato: 27.10.2023

Godkendelse på baggrund af en forenklet sagsbehandling af Bain Capital Investors L.L.C.'s erhvervelse af enekontrol over F.I.S. Fabbrica Italiana Sintetici S.p.A. og dets datterselskaber.
Fusionen indebærer, at Bain Capital erhverver 100 pct. af aktieandelene i FIS og opnår dermed enekontrol.
Læs mere
Dato: 26.10.2023

Godkendelse på baggrund af en forenklet sagsbehandling af etableringen af det selvstændigt fungerende joint venture green.ai ApS.
Transaktionen udgør etableringen af et selvstændigt fungerende joint venture, jf. konkurrencelovens § 12 a, stk. 1, nr. 2, jf. stk. 2. Med transaktionen udvides kredsen af virksomheder med fælleskontrol, da Skovgaard Energy A/S indtræder som ny fælleskontrollerende ejer.
Læs mere
Dato: 18.10.2023

Godkendelse på baggrund af en forenklet sagsbehandling af Cube III Environment S.à r.l.'s erhvervelse af enekontrol over Urbaser Nordic AS.
Transaktionen omfatter, at Cube erhverver 100% af aktierne i Urbaser Nordic. Efter transaktionen vil Cube have enekontrol over Urbaser Nordic.
Læs mere
Dato: 17.10.2023

Godkendelse på baggrund af en forenklet sagsbehandling af BioCirc Group Holding ApS' erhvervelse af Naturbiogas Sode A/S.
Transaktionen indebærer, at BioCirc erhverver enekontrol over Naturbiogas Sode, jf. konkurrencelovens § 12 a, stk. 1, nr. 2. Kontrollen erhverves ved, at BioCirc erhverver 100 pct. af kapitalandelene i Naturbiogas Sode.
Læs mere
Dato: 16.10.2023

Nyt fra Konkurrencerådet

Ecit Account A/S' medansvar for markedsdeling.
Konkurrencerådet har afgjort, at rådgivningsvirksomheden Ecit Account A/S har overtrådt konkurrenceloven ved at deltage i en aftale om markedsdeling mellem en række selvstændige diskoteker og deres fælles indkøbsselskab. Ecit Account har været med i hele kartellets varighed på over 15 år.

Som rådgiver har Ecit Account været med til at etablere og opretholde den ulovlige aftale om, at diskotekerne ikke måtte åbne filialer i hinandens byer eller inden for en nærmere afstand af hinanden. Ecit Account har blandt andet:

- haft en ledende rolle i indkøbsselskabets bestyrelse,
- udformet markedsdelingsaftalen og indskærpet den over for diskotekerne, og
- deltaget aktivt på møder, hvor markedsdelingen blev drøftet.

Sagen om Ecit Account udspringer af et større sagskompleks om et diskotekskartel mellem 22 diskoteker og deres fælles indkøbsselskab. Diskotekerne og indkøbsselskabet har erkendt overtrædelsen og accepteret bøder i 2021.

Konkurrencerådet har besluttet at indbringe sagen mod Ecit Account for domstolene med henblik på en bøde.
Læs mere
Dato: 25.10.2023

Nyt fra Konkurrenceankenævnet

Boligtextilbranchens Indkøbsservice A.M.B.A. (Botex) mod Konkurrencerådet.
Konkurrenceankenævnet har hjemvist en afgørelse til fornyet behandling hos Konkurrencerådet. Sagen handler om, hvorvidt medlemmerne i den frivillige kæde, Botex, har begrænset konkurrencen ved at aftale ikke at husstandsomdele reklamer i hinandens områder.

I den frivillige kæde Boligtextilbranchens Indkøbsservice A.M.B.A. (Botex) har der været en aftale om, at medlemmer af kæden ikke måtte husstandsomdele reklamer i hinandens områder. Aftalen har eksisteret i perioden fra maj 2009 til august 2021.

Konkurrenceankenævnet har 11. oktober 2023 afgjort, at aftalen ikke havde til formål at begrænse konkurrencen, men at aftalen godt kan have haft den konsekvens, at konkurrencen blev begrænset. Konkurrencerådet skulle imidlertid have foretaget en grundigere analyse af aftalens mulige konkurrencebegrænsende virkninger.

Konkurrenceankenævnet har bl.a. skrevet i kendelsen, at: ”Sådanne fælles indkøbsordninger skal analyseres i deres retlige og økonomiske sammenhæng med hensyn til deres faktiske og sandsynlige virkninger for konkurrencen […]. Vurderingen skal omfatte de mulige begrænsende virkninger på både det eller de relevante indkøbsmarkeder, hvor den fælles indkøbsordning handler med leverandørerne, og det eller de relevante afsætningsmarkeder, hvor parterne i den fælles indkøbsordning kan konkurrere som sælgere.”

Konkurrencerådet afgjorde i juni 2022, at Botex’ adfærd var en overtrædelse af konkurrenceloven. Det er denne afgørelse, som Konkurrenceankenævnet nu har hjemvist til fornyet behandling.

Botex er en landsdækkende, frivillig kæde, som består af 24 selvstændige andelshavere, som hver ejer én eller flere Botex-butikker og/eller gardinbusser, som forhandler boligtekstiler.
Læs mere
Dato: 11.10.2023

Nyt fra domstolene

Civilretlige afgørelser

Intet nyt.

Afgørelser om bøder

Intet nyt.

Lovforslag i høring

Udkast til lovforslag om ændring af konkurrenceloven.
Høring over udkast til forslag til lov om ændring af konkurrenceloven (Krav om anmeldelse af visse fusioner under omsætningstærsklerne, indførelse af mulighed for markedsefterforskning og bødeudmåling m.v.).

Lovforslaget indeholder tre hovedelementer, som sigter mod at sikre en effektiv konkurrence. Det ene element giver Konkurrence- og Forbrugerstyrelsen mulighed for at kræve visse fusioner anmeldt, som i dag ikke er underlagt anmeldelsespligt. Således foreslås, at der i § 12 indsættes et nyt stykke efter stk. 5:

"Stk. 6. Selv om de deltagende virksomheders samlede omsætning er mindre end de omsætningstærskler, der er nævnt i stk. 1, kan Konkurrence- og Forbrugerstyrelsen kræve en fusion anmeldt, hvis de deltagende virksomheder tilsammen har en samlet årlig omsætning i Danmark på mindst 50 mio. kr., og Konkurrence- og Forbrugerstyrelsen vurderer, at der er risiko for, at fusionen hæmmer den effektive konkurrence betydeligt, navnlig som følge af skabelsen eller styrkelsen af en dominerende stilling. Konkurrence- og Forbrugerstyrelsen kan fastsætte en frist for at anmelde fusionen. Konkurrence- og Forbrugerstyrelsens afgørelse om, at en fusion omfattet af 1. pkt. skal anmeldes, skal træffes senest 15 hverdage efter, at Konkurrence- og Forbrugerstyrelsen er blevet gjort bekendt med fusionen."

I § 12 b, stk. 1, indsættes som 2. pkt.: *"En fusion, der er krævet anmeldt af Konkurrence- og Forbrugerstyrelsen i henhold til § 12, stk. 6, skal anmeldes, uanset at den allerede er gennemført."*

Det andet element giver mulighed for at iværksætte markedsefterforskninger, hvis der er tegn på forhold, der svækker den effektive konkurrence til skade for forbrugere eller virksomheder. Dette forslag er inspireret af bl.a. Tyskland, Storbritannien og Island. Der pågår aktuelt også overvejelser og drøftelser om at indføre et lignende værktøj i Norge. Storbritannien, der har haft værktøjet længst tid, har opgjort, at der er væsentlige forbrugergevinster ved værktøjet.

Som det tredje element indeholder lovforslaget et forslag om, at beregning af civile bøder til virksomheder m.v. for overtrædelser af konkurrencelovens forbudsbestemmelser skal ske med afsæt i principper, der afspejler Europa-Kommissionens gældende retningslinjer for beregning af bøder for overtrædelse af EU's forbudsbestemmelser.
Læs mere
Dato: 10.11.2023

Ny lovgivning

Intet nyt.

Nyt fra Ankestyrelsen

Intet nyt.

Andet

Intet nyt.

2 | EUROPÆISK OG INTERNATIONAL RET

Nyt fra Kommissionen

Antitrust & Cartels

Commission fines pharma companies €13,4 million in antitrust cartel settlement.
The European Commission has fined Alkaloids of Australia, Alkaloids Corporation, Boehringer, Linnea and Transo-Pharm a total of €13,4 million for participating in a cartel concerning an important pharmaceutical ingredient. C2 PHARMA was not fined as it revealed the cartel to the Commission under the leniency programme. All six companies admitted their involvement in the cartel and agreed to settle the case.
Læs mere
Dato: 19.10.2023

Commission carries out unannounced antitrust inspections in the construction chemicals sector.
The European Commission is carrying out unannounced antitrust inspections at the premises of companies active in the construction chemicals sector in several Member States.

The Commission has concerns that the inspected companies may have violated EU antitrust rules that prohibit cartels and restrictive business practices (Article 101 of the Treaty on the Functioning of the European Union).

The construction chemicals concerned by the inspection are chemical additives for cement and chemical admixtures for concrete and mortar. These are ingredients that are added to cement, concrete and mortar to modify and improve their properties and provide them with specific qualities.
Læs mere
Dato: 17.10.2023

Mergers

Commission approves Hitachi Rail's acquisition of Thales' ground transportation business, subject to conditions.
The European Commission has approved, under the EU Merger Regulation, the proposed acquisition of Thales' ground transportation business ('GTS') by Hitachi Rail. The approval is conditional on full compliance with commitments offered by Hitachi Rail.

Hitachi Rail and Thales GTS are leading suppliers of rail mainline signalling services in the European Economic Area ('EEA'). Both supply interlockings and automated train protection wayside systems (overlay and resignalling). Hitachi Rail also manufactures and supplies rolling stock for mainline and urban trains.

To address the Commission's preliminary competition concerns, Hitachi Rail offered to divest its mainline signalling platforms in France and Germany for interlockings, overlay and resignalling projects.

These commitments fully address the competition concerns identified by the Commission. They will preserve competition by removing the horizontal overlap between the parties in the French and German markets for interlockings and automated train protection wayside systems for mainline signalling platforms.
Læs mere
Dato: 30.10.2023

Commission approves acquisition of Seagen by Pfizer.
The European Commission has unconditionally approved the proposed acquisition of Seagen by Pfizer, under the EU Merger Regulation. The Commission concluded that the transaction would not raise competition concerns in the European Economic Area ('EEA').

Seagen and Pfizer are pharmaceutical companies. Seagen specialises in oncology therapies, primarily in antibody drug conjugates ('ADCs'). Pfizer's oncology portfolio largely consists of hormone therapies, immunotherapies, and targeted therapies.
Læs mere

Dato: 19.10.2023

State Aid

Commission approves €1.7 billion Italian State aid scheme under the Recovery and Resilience Facility to support agrivoltaic installations.
The European Commission has approved, under EU State aid rules, a €1.7 billion Italian scheme made available in part through the Recovery and Resilience Facility ('RRF') to support agrivoltaic installations. The measure is part of Italy's strategy to reduce greenhouse gas emissions and to increase its share of renewable energies, in line with the EU's strategic objectives relating to the EU Green Deal.
Læs mere
Dato: 10.11.2023

Commission consults Member States on a proposal for a partial adjustment of the phase-out schedule of the State aid Temporary Crisis and Transition Framework in view of the upcoming winter heating period.
The European Commission has sent to Member States for consultation a draft proposal to partially adjust the phase-out schedule of the provisions of the State aid Temporary Crisis and Transition Framework aimed at providing a crisis response following Russia's aggression against Ukraine and the unprecedented increase in energy prices.

Since the beginning of Russia's war against Ukraine and in the context of its direct and indirect effects on the EU economy, the State aid Temporary Crisis Framework, adopted on 23 March 2022, has enabled Member States to provide timely, targeted and proportionate support to businesses in need. The Framework has allowed Member States to act quickly and effectively to help companies affected by the significant economic uncertainties, disrupted trade flows and supply chains, and the exceptionally large and unexpected price increases, in particular of natural gas, electricity, numerous other input and raw materials, and primary goods. Those effects taken together had caused a serious disturbance in the economy of all Member States across a wide range of economic sectors.

On 9 March 2023, the Commission adopted the Temporary Crisis and Transition Framework, which amended and prolonged in part the Temporary Crisis Framework, and fosters support measures in sectors which are key for the transition to a net-zero economy, in line with the Green Deal Industrial Plan.

As Russia's war of aggression against Ukraine continues, the EU's economic situation is showing resilience in the face of the shocks it has endured. The Commission's Summer 2023 Economic Forecast notes that the EU economy continues to grow, albeit with reduced momentum. The situation in the energy markets and in particular gas and average electricity prices seem to have stabilised. In addition, the risks of energy supply shortages have receded, among other things due to the measures taken by Member States to diversify energy sources. At the same time, the Summer 2023 Economic Forecast notes that Russia's ongoing war against Ukraine and wider geopolitical tensions, in particular in the Middle East, continue to pose risks and remain a source of uncertainty.

Against this background, the Commission is proposing a limited prolongation of 3 months of the provisions enabling Member States to continue to grant limited amounts of aid (section 2.1 of the Framework) and aid to compensate for high energy prices (section 2.4 of the Framework), until 31 March 2024. This will allow Member States, where needed, to extend their support schemes and ensure that companies still affected by the crisis will not be cut off from necessary support in the upcoming winter heating period. Under section 2.4 of the Framework, Member States may continue to provide support by covering parts of additional energy costs only as far as the energy prices significantly exceed pre-crisis levels.
Læs mere
Dato: 6.11.2023

Commission approves €2.4 billion Czech scheme to support sustainable biomethane production.
The European Commission has approved, under EU State aid rules, a €2.4 billion Czech scheme to support the construction and operation of new or converted sustainable biomethane production plants. The measure will contribute to the implementation of Czechia's National Energy and Climate Plan and to the European Green Deal targets, while helping end dependence on Russian fossil fuels in line with the REPowerEU Plan.
Læs mere
Dato: 31.10.2023

Commission approves €659 million French State aid measure to support Verkor in researching and developing innovative batteries for electric vehicles.
The European Commission has approved, under EU State aid rules, a €659 million French measure to support Verkor in researching and developing new production processes of lithium-ion batteries for electric vehicles. The measure will contribute to the achievement of the strategic objectives of the European Green Deal and the EU battery strategy.
Læs mere
Dato: 30.10.2023

Commission opens in-depth State aid investigation into past co-operation between Slovak Post and SWAN.
The European Commission has opened an in-depth investigation to assess whether the initial co-operation and framework agreement between public postal services provider Slovak Post and mobile network operator SWAN was in line with EU State aid rules.

In 2015, Slovak Post, a state-owned company, and SWAN signed a co-operation and framework agreement. Under the agreement, Slovak Post (i) sold and promoted SWAN products and services in its offices and branches all over Slovakia; (ii) provided customer services to SWAN customers, including the operation of a call centre; and (iii) collected fees and payments from SWAN customers. SWAN remunerated Slovak Post for these services. This initial co-operation and framework agreement was in place from 2015 to 2021.
Læs mere
Dato: 30.10.2023

Commission approves €742 million Czech State aid scheme to support sustainable forest management.
The European Commission has approved, under EU State aid rules, a €742 million (CZK 17.4 billion) Czech scheme to support sustainable forest management. The measure will contribute to the achievement of the objectives of the Common agricultural policy by strengthening forest environmental protection.
Læs mere
Dato: 23.10.2023

Commission approves €24 million Romanian State aid scheme to support investments in sea and inland ports in the context of Russia's war against Ukraine.
The European Commission has approved an up to €24 million Romanian scheme (RON 118,6 million) to support investments in sea and inland ports in the context of Russia's war against Ukraine. The scheme was approved under the State aid Temporary Crisis and Transition Framework, adopted by the Commission on 9 March 2023 to support measures in sectors which are key to accelerate the green transition and reduce fuel dependencies. The new Framework amends and prolongs in part the Temporary Crisis Framework, adopted on 23 March 2022 to enable Member States to support the economy in the context of the current geopolitical crisis, already amended on 20 July 2022 and on 28 October 2022.
Læs mere
Dato: 13.10.2023

Andet

Report from the Commission to the European Parliament and the Council Third Annual Report on the screening of foreign direct investments into the Union.
This Report is the third Annual Report by the European Commission on the application of the EU Foreign Direct Investment (FDI) Screening Regulation1 (the “FDI Screening Regulation”, or the “Regulation”).

The Report covers the year 2022 and provides transparency around the operation of FDI screening in the EU, and developments in national screening mechanisms. It contributes to the accountability of the Union in an area where, given the security interests at stake, transparency regarding individual transactions is neither possible nor appropriate.

It is based on reports by the 27 Member States and other sources and consists of four chapters:

- Chapter 1 on trends and figures for FDI into the EU;
- Chapter 2 on legislative developments in Member States;
- Chapter 3 on FDI screening activities by Member States;
- Chapter 4 on the EU cooperation mechanism on FDI screening.

This Annual Report is an important tool for strategic trade and investment controls to ensure security and public order in the European Union.
Læs mere
Dato: 19.10.2023

EU foreign investment screening and export controls help underpin European security.
The European Commission analysed over 420 foreign direct investments (FDI) into the EU over the past year, according to the Annual Report on FDI Screening released today. In addition, EU Member States blocked 560 requests for exports of dual use goods over the same period. This level of activity demonstrates a clear commitment by the European Commission and Member States to safeguarding European security and public order in times of increased geopolitical tensions.

The number of EU Member States with a screening mechanism has grown from 11 to 21 since the EU's FDI screening regulation came into force, with more on the way.

As regards dual-use goods (goods which can be used for civil or military purposes), Member States reviewed 38,500 export applications in 2021 for goods worth €45.5 billion. Member States blocked exports on account of security risks in 560 cases, worth a total of €7 billion.
Læs mere
Dato: 19.10.2023

Nyt fra EU-domstolen

Domme

T-590/20 - Clariant og Clariant International mod Kommissionen.
Konkurrence – karteller – ethylenmarkedet – afgørelse, hvorved der fastslås en overtrædelse af artikel 101 TEUF – samordning af et element i købsprisen – forligsprocedure – bøde – regulering af bødens grundbeløb – punkt 37 i retningslinjerne for beregning af bøder – gentagelsestilfælde – punkt 28 i retningslinjerne for beregning af bøder – fuld prøvelsesret – modpåstand om forhøjelse af bøden.

Med deres søgsmål i henhold til artikel 263 TEUF har sagsøgerne, Clariant AG og Clariant International AG, nedlagt påstand principalt om delvis annullation af Kommissionens afgørelse C(2020) 4817 final af 14. juli 2020 om en procedure i henhold til artikel 101 TEUF (AT.40410 – Ethylen) (herefter »den anfægtede afgørelse«) og subsidiært nedsættelsen af den bøde, som de blev pålagt »solidarisk« i den pågældende afgørelse. Europa-Kommissionen har fremsat modpåstand om forhøjelse af den pågældende bøde.

Dom:
1. Europa-Kommissionen frifindes.
2. Clariant AG og Clariant International AG frifindes for Kommissionens modpåstand.
3. Clariant AG og Clariant International AG bærer hver deres egne omkostninger og betaler 90% af de af Kommissionen afholdte omkostninger.
4. Kommissionen bærer 10% af sine egne omkostninger.

Læs mere
Dato: 18.10.2023

T-74/21 - Teva Pharmaceutical Industries og Cephalon mod Kommissionen.
Konkurrence – karteller – markedet for modafinil – afgørelse, som fastslår en overtrædelse af artikel 101 TEUF – aftale om forlig i tvister vedrørende patenter – konkurrencebegrænsende formål – kvalificering – konkurrencebegrænsende virkning – betingelser for undtagelse i artikel 101, stk. 3, TEUF – bøder.

Med deres søgsmål i henhold til artikel 263 TEUF har sagsøgerne, Teva Pharmaceutical Industries Ltd (herefter »Teva«) og Cephalon Inc., nedlagt påstand om annullation af Europa-Kommissionens afgørelse C(2020) 8153 final af 26. november 2020 om en procedure i henhold til artikel 101 [TEUF] og artikel 53 i EØS-aftalen (sag AT.39686-CEPHALON) (herefter »den anfægtede afgørelse«) og subsidiært om ophævelse eller nedsættelse af bøderne.

Dom:
1. Europa-Kommissionen frifindes.
2. Teva Pharmaceutical Industries Ltd og Cephalon Inc. betaler sagsomkostningerne.

C-11/22 - Est Wind Power.
Præjudiciel forelæggelse – støtte ydet af medlemsstaterne – støtte til vedvarende energi – opførelse af en vindmøllepark – Kommissionens meddelelse med overskriften »Retningslinjer for statsstøtte til miljøbeskyttelse og energi 2014-2020« – punkt 19, nr. 44, og fodnote 66 – begreberne »projektets påbegyndelse«, »arbejdet på investeringsprojektet«, »andre forpligtelser, som gør investeringen irreversibel« og »nødvendig national tilladelse til at gennemføre projektet« – type og intensitet af den undersøgelse, der skal foretages af den kompetente nationale myndighed.

Anmodningen om præjudiciel afgørelse vedrører fortolkningen af punkt 19, nr. 44, og fodnote 66 i Kommissionens meddelelse med overskriften »Retningslinjer for statsstøtte til miljøbeskyttelse og energi 2014-2020« (EUT 2014, C 200, s. 1, herefter »retningslinjerne af 2014«). Anmodningen er blevet indgivet i forbindelse med en tvist mellem Est Wind Power OÜ (herefter »EWP«) og transmissionssystemoperatøren Elering AS vedrørende lovligheden af en vurdering, der blev foretaget af Elering efter anmodning fra EWP, der fastslog, at det aktuelle stadium på et projekt til opførelse af en vindmøllepark ikke opfylder kravene i den nationale lovgivning, der gør det muligt at kvalificere EWP som »eksisterende producent« af energi og dermed at tildele sidstnævnte støtte til opførelsen af denne vindmøllepark.

Dom:

1. Punkt 19, nr. 44, i Kommissionens meddelelse med overskriften »Retningslinjer for statsstøtte til miljøbeskyttelse og energi 2014-2020«, sammenholdt med 42. betragtning til Kommissionens afgørelse C(2017) 8456 af 6. december 20 17 om ændringer af den estiske støtteordning for vedvarende energikilder og kraftvarmeproduktion (statsstøtte SA.47354 (2017/NN)), skal fortolkes således, at begrebet »projektets påbegyndelse« omfatter dels påbegyndelsen af et arbejde, der har sammenhæng med anlæggelsen af et investeringsprojekt, hvormed der skal produceres energi fra vedvarende energikilder, dels enhver anden forpligtelse, som, henset til dens art og omkostninger, bringer det pågældende investeringsprojekt til et udviklingstrin den 1. januar 2017, hvor det med yderst høj sandsynlighed ville kunne fuldføres.

2. Punkt 19, nr. 44, i Kommissionens meddelelse med overskriften »Retningslinjer for statsstøtte til miljøbeskyttelse og energi 2014-2020«, sammenholdt med 42.-44. betragtning til afgørelse C(2017) 8456, skal fortolkes således, at den kompetente nationale myndighed med henblik på at fastslå, at »projektets påbegyndelse« som omhandlet i dette punkt 19, nr. 44, foreligger, er forpligtet til i hver enkelt sag at foretage en analyse af det pågældende investeringsprojekts udviklingstrin og af sandsynligheden for, at projektet ville kunne fuldføres, som ikke kan begrænses til en rent faktuel eller formel vurdering og efter omstændighederne kan kræve en grundig økonomisk analyse.

3. Punkt 19, nr. 44, i Kommissionens meddelelse med overskriften »Retningslinjer for statsstøtte til miljøbeskyttelse og energi 2014-2020«, sammenholdt med 42. betragtning til afgørelse C(2017) 8456, skal fortolkes således, at
   a. begrebet »projektets påbegyndelse« som omhandlet i dette punkt 19, nr. 44, nødvendigvis indebærer, at bygherren har ret til at udnytte den grund, hvor det pågældende investeringsprojekt skal udvikles, og har den nødvendige nationale tilladelse til at gennemføre projektet
   b. begrebet »nødvendig national tilladelse til at gennemføre projektet«, der er omhandlet i denne 42. betragtning, skal fortolkes i lyset af national ret og således, at denne tilladelse i sin egenskab af endelig national tilladelse gør det muligt at foretage arbejdet på det pågældende investeringsprojekt
   c. den omstændighed, at der forelå en tvist, der verserede den 1. januar 2017, og som vedrørte et afslag på en sådan tilladelse og hindrede fortsættelsen af dette projekt, ikke skal tages i betragtning ved vurderingen af det pågældende projekts udviklingstrin på dette tidspunkt.

Læs mere
Dato: 12.10.2023

C-186/22 - Sad Trasporto Locale.
Præjudiciel forelæggelse – transport – forordning (EF) nr. 1370/2007 – offentlig personbefordring med jernbane og ad vej – anvendelsesområde – artikel 1, stk. 2 – tovbaneanlæg – en kompetent lokal myndigheds indgåelse af en kontrakt om offentlig personbefordring med en intern operatør uden forudgående udbud – overførsel af driftsrisikoen – kompensation for offentlige serviceforpligtelser.

Anmodningen om præjudiciel afgørelse vedrører fortolkningen af artikel 1, stk. 2, i Europa-Parlamentets og Rådets forordning (EF) nr. 1370/2007 af 23. oktober 2007 om offentlig personbefordring med jernbane og ad vej og om

ophævelse af Rådets forordning (EØF) nr. 1191/69 og (EØF) nr. 1107/70 (EUT 2007, L 315, s. 1), som ændret ved Europa-Parlamentets og Rådets forordning (EU) 2016/2338 af 14. december 2016 (EUT 2016, L 354, s. 22) (herefter »forordning nr. 1370/2007«), samt af artikel 107, stk. 1, TEUF. Anmodningen er blevet indgivet i forbindelse med en tvist mellem Sad Trasporto Locale SpA og Provincia autonoma di Bolzano (den selvstyrende provins Bolzano, Italien) vedrørende den direkte tildeling gennem en koncession til en intern operatør af den offentlige personbefordring med visse jernbane- og sværveanlæg til Strutture Trasporto Alto Adige SpA A.G. (herefter »STA«).

Dom:

1. Artikel 1, stk. 2, i Europa-Parlamentets og Rådets forordning (EF) nr. 1370/2007 af 23. oktober 2007 om offentlig personbefordring med jernbane og ad vej og om ophævelse af Rådets forordning (EØF) nr. 1191/69 og (EØF) nr. 1107/70, som ændret ved Europa-Parlamentets og Rådets forordning (EU) 2016/2338 af 14. december 2016, skal fortolkes således, at denne forordning ikke finder anvendelse på en blandet kontrakt om multimodal offentlig personbefordring, der omfatter transport med sporvogn, skinnebundne tovbaner og svævebane, selv i en sammenhæng, hvor jernbanetransporten repræsenterer størstedelen af de transporttjenester, for hvilke driften er blevet tildelt.

2. Artikel 107, stk. 1, TEUF skal fortolkes således, at kompensation for forpligtelser til offentlig tjeneste, som udbetales til en intern operatør inden for rammerne af en kompetent lokal myndigheds indgåelse af en kontrakt om offentlig personbefordring uden forudgående udbud – som er beregnet på grundlag af driftsomkostninger, der for det første er fastlagt under hensyntagen til tidligere omkostninger ved den tjenesteydelse, som den fratrædende operatør har leveret, og for det andet er knyttet til omkostninger eller modydelser, der ligeledes vedrører den tidligere indgåede kontrakt, eller under alle omstændigheder til standardparametre for markedet, der gælder for samtlige operatører i den pågældende sektor – ikke udgør »statsstøtte« i denne bestemmelses forstand, for så vidt som anvendelsen af sådanne elementer fører til fastlæggelse af de omkostninger, der afspejler de omkostninger, som en gennemsnitsvirksomhed, der er veldrevet og tilstrækkeligt udstyret med de nødvendige midler til at kunne opfylde de stillede krav til den offentlige tjeneste, ville have ved at opfylde forpligtelserne.

Læs mere
Dato: 19.10.2023

C-325/22 - Ministar na zemedelieto, hranite i gorite.
Præjudiciel forelæggelse – støtte ydet af medlemsstaterne – artikel 107, stk. 1, TEUF – begrebet »virksomhed« – forordning (EU) 2015/1589 – tilbagebetaling af en ulovlig støtte – afgørelse (EU) 2015/456 – ombytning af ejerskab af skovarealer – bestemmelse af »markedsværdien«.

Anmodningen om præjudiciel afgørelse vedrører fortolkningen af artikel 107 TEUF, artikel 16, stk. 3, i Rådets forordning (EU) 2015/1589 af 13. juli 2015 om fastlæggelse af regler for anvendelsen af artikel 108 [TEUF] (EUT 2015, L 248, s. 9) og Kommissionens afgørelse (EU) 2015/456 af 5. september 2014 om støtteordningen SA.26212 (11/C) (ex 11/NN – ex CP 176/A/08) og SA.26217 (11/C) (ex 11/NN – ex CP 176/B/08) iværksat af Republikken Bulgarien i forbindelse med ombytning af ejerskab af skovarealer (EUT 2015, L 80, s. 100, herefter »Kommissionens afgørelse af 5. september 2014«). Anmodningen er blevet indgivet i forbindelse med en tvist mellem en privatperson og en juridisk person på den ene side og Ministar na zemedelieto, chranite i gorite (ministeren for landbrug, fødevarer og skovbrug) på den anden side vedrørende en anmodning om tilbagebetaling af en statsstøtte, som de havde modtaget i forbindelse med en ombytning af ejerskab af skovarealer.

Dom:

1. Kommissionens afgørelse (EU) 2015/456 af 5. september 2014 om støtteordningen SA.26212 (11/C) (ex 11/NN – ex CP 176/A/08) og SA.26217 (11/C) (ex 11/NN – ex CP 176/B/08) iværksat af Republikken Bulgarien i forbindelse med ombytning af ejerskab af skovarealer skal fortolkes således, at det ikke kan fastslås, at det alene er de personer, der har erhvervet arealer som led i de af denne afgørelse omfattede transaktioner vedrørende ombytning af ejerskab af skovarealer, og som anvender disse arealer til en økonomisk aktivitet, der skal anses for at være virksomheder, som modtager statsstøtte som omhandlet i artikel 107, stk. 1, TEUF.

2. Artikel 107, stk. 1, TEUF og artikel 16, stk. 3, i Rådets forordning (EU) 2015/1589 af 13. juli 2015 om fastlæggelse af regler for anvendelsen af artikel 108 [TEUF] skal fortolkes således, at disse bestemmelser ikke er til hinder for, at de kriterier, der gør det muligt at fastsætte størrelsen af en statsstøtte, der oppebæres ved erhvervelsen af arealer i forbindelse med en ombytning af ejerskab af skovarealer, baseres på gennemsnitspriserne for registrerede ejendomstransaktioner vedrørende arealer med lignende karakteristika som dem, der er genstand for vurderingen, og som er beliggende i nærheden af disse arealer, hvor mindst en af

parterne er erhvervsdrivende, og som indgås inden for en frist på 12 måneder forud for vurderingen, forudsat at anvendelsen af sådanne kriterier er forenelig med Kommissionens afgørelse om tilbagebetaling af støtten, og at disse kriterier gør det muligt at fastsætte markedsværdien af disse arealer på tidspunktet for ombytningen.
Læs mere
Dato: 19.10.2023

Forslag til afgørelse

C-465/20 P - Kommissionen mod Irland m.fl.
Denne sag indgår i en nu relativt lang række af sager vedrørende anvendelsen af artikel 107, stk. 1, TEUF på »tax rulings«. Som bekendt kan virksomheder ved brug af »tax ruling« fra skattemyndighederne indhente en »forhåndsafgørelse« angående den skat, som de skal betale, og herved opnå disse myndigheders officielle holdning til anvendelsen af de nationale skatteregler og klare løfter om, hvilken skattemæssig behandling de vil blive omfattet af. Der er ingen tvivl om, at statsstøttereglerne ikke kan anvendes til at opnå en skjult skattemæssig harmonisering, som møder politiske hindringer, eller til at få bugt med skadelig skattekonkurrence. Udnyttelsen af forskellene mellem skatteordninger indebærer nemlig ikke tildelingen af en støtte, og skattekonkurrence mellem stater er i sig selv ikke forbudt. Kommissionen skal dog være i stand til at afgøre, om en medlemsstat ved en skatteforanstaltning såsom en skatteafgørelse giver en vis virksomhed en selektiv fordel. I et sådant tilfælde kan selskaber, der allerede i sig selv har en stærk markedsposition, såsom Apple, også i relation til dynamikken på de digitale markeder, som begunstiger koncentrationen af en sådan markedsposition, opnå en fordel i forhold til konkurrenter, som gør indgreb i de lige vilkår for virksomheder. Formålet med statsstøttereglerne er at undgå disse følger, som er til skade for konkurrencen og har skadelige virkninger for innovation og for forbrugerne.

Kommissionen har nedlagt påstand om ophævelse af dom af 15. juli 2020, Irland m.fl. mod Kommissionen (herefter »den appellerede dom«) (2), hvorved Retten annullerede Kommissionens afgørelse (EU) 2017/1283 af 30. august 2016 (3) (herefter »den omtvistede afgørelse«), der vedrører to forhåndsafgørelser på skatteområdet fra de irske skattemyndigheder angående Apple Sales International (ASI) og Apple Operations Europe (AOE), to selskaber, der er en del af Apple-koncernen (herefter samlet »skatteafgørelserne«).

Forslag til afgørelse fra generaladvokat G. Pitruzzella:

Det foreslås, at Domstolen ophæver den appellerede dom, hjemviser sagerne til Retten og udsætter afgørelsen om sagsomkostningerne.
Læs mere
Dato: 9.11.2023

Kendelse

Intet nyt.

Andet nyt fra EU-domstolen

Intet nyt.

Andet internationalt nyt

Intet nyt.

3 | LITTERATUR (DK)

Artikler fra UfR

Intet nyt.

Nye publikationer fra Erhvervsministeriet

Regeringen udpeger dansk vagthund til at tøjle tech-giganter.
Med et nyt lovforslag vil regeringen give Konkurrence – og Forbrugerstyrelsen rollen som national vagthund i forhold til tech-giganter, der udnytter deres magtposition til at indføre og fastholde uretfærdige vilkår for både forbrugere og virksomheder.

I en verden, hvor tech-giganternes platforme er en integreret del af mange menneskers hverdag, er det vigtigt, at brugerne og de mindre virksomheders rettigheder beskyttes.

Det er netop baggrunden bag den nye EU-lovgivning Digital Markets Act (DMA), der skal bl.a. skal sørge for, at tech-giganterne ikke udnytter deres magtposition til at indføre urimelige vilkår og betingelser. Det kan fx være, når virksomheder, der sælger via tech-giganternes platforme, begrænses i at vælge prisen på deres varer eller tjenester, eller når forbrugere ikke har kontrol over, hvordan deres data høstes eller bruges.

Med et nyt lovforslag giver regeringen Konkurrence – og Forbrugerstyrelsen rollen som vagthund inden for Danmarks grænser.

Det betyder, at de vil kunne lave undersøgelser af tech-giganters manglende overholdelse af loven. Samtidig vil både virksomheder og forbrugere kunne klage til styrelsen, hvis de oplever urimelige vilkår.

Det danske lovforslag betyder, at Konkurrence- og Forbrugerstyrelsen får mulighed for at tage danske klager videre til EU-Kommissionen, som så kan vælge at indlede en markedsundersøgelse.
Læs mere
Dato: 13.10.2023

Artikler fra Juristen

Intet nyt.

Artikler fra Erhvervsjuridisk Tidsskrift

Intet nyt.

Artikler fra Revision og Regnskabsvæsen

Intet nyt.

Artikler fra EU og Menneskeret

Årgang 30 (2023): Nummer 3 (Oct 2023)

Kommissionens nye retningslinjer for samarbejder mellem konkurrenter. Forfatter: Kristian Helge Straton-Andersen.
Kommissionen vedtog i sommeren 2023 nye retningslinjer for samarbejder mellem konkurrenter, der erstatter de tidligere fra 2011. Retningslinjerne har til formål at give virksomhederne retssikkerhed, når de skal vurdere, om deres aftaler er i overensstemmelse med forbuddet mod konkurrencebegrænsende aftaler i TEUF art. 101. Retningslinjerne behandler otte typer af samarbejde i tillæg til nogle generelle principper for vurderingen af aftaler mellem konkurrenter.

Udbudsretlig praksis august 2022-august 2023. Forfatter: Michael Steinicke.
I det følgende præsenteres nogle af de vigtigste domme afsagt det seneste år (sommeren 2022 til sommeren 2023) vedrørende EU's udbudsregler. De seneste års domme fra EU-Domstolen (herefter Domstolen) på udbudsområdet har omhandlet flere centrale udbudsretlige forhold, så som udelukkelsesgrunde, in house-undtagelsen, blandede kontrakter, koncessionsbegrebet, udvælgelseskrav, sikring af reel konkurrence, mv. I det følgende er det ikke alle domme, der præsenteres, men de domme, der vurderes at være de mest relevante.

Konkurrenceretlige emner

Intet nyt.

Anden dansk og nordisk litteratur

Intet nyt.

4 | LITTERATUR (UK)

Artikler fra European Competition Law Review

Intet nyt.

Artikler fra European Competition Journal

Intet nyt.

Artikler fra Journal of Competition Law and Economics

Volume 19, Issue 3, September 2023:

Sustainability Agreements and First Mover Disadvantages. Forfatter: Johannes Paha.
This article presents a model where the managers of two firms decide about adopting a sustainable production technology (or product). It demonstrates under what conditions a firm experiences a first mover disadvantage from going green, which may potentially be overcome by a sustainability agreement serving as a device for equilibrium selection in a coordination game with multiple equilibria. If the technology adoption game is, however, a prisoner's dilemma, the sustainability agreement must be structured like a hardcore cartel.

Algorithmic Personalized Pricing with the Right to Explanation. Forfatter: Zeyu Zhao.
Personalized pricing by algorithms has been widely deployed by digital platforms. Although this strategy provides economic efficiencies and benefits consumers, it precipitates discriminatory, exploitative, and exclusionary effects on the market. If massive market power and certain information asymmetry exist, this pricing behavior could be illegal as the negatives could outweigh the positives. The negatives could nevertheless not be fully addressed by current ex-post and ex-ante antitrust, consumer protection, and anti-discrimination approaches because the sloping pricing information between platforms and consumers based on data will not be effectively rebalanced considering these approaches. Data protection measures should be underlined, despite the flaws of some data rights. This article shows how the right to explanation as a synthetic right of data protection mitigates the damaging effects by providing consumers with the access to the result of algorithmic decision-making to optimize the information distribution, despite the application limits due to technological and cognitive immatureness of 'explanation'.

Recommender Systems and Supplier Competition on Platforms. Forfattere: Amelia Fletcher, Peter L Ormosi og Rahul Savani.
Digital platforms can offer a multiplicity of items in one place. This should, in principle, lower end-users' search costs and improve their decision-making, and thus enhance competition between suppliers using the platform. But end-users struggle with large choice sets. Recommender systems (RSs) can help by predicting end-users' preferences and suggesting relevant products. However, this process of prediction can generate systemic biases in the recommendations made, including popularity bias, incumbency bias, homogeneity bias, and conformity bias. The nature and extent of these biases will depend on the choice of RS model design, the data feeding into the RS model, and feedback loops between these two elements. We discuss how these systemic biases might be expected to worsen end-user choices and harm competition between suppliers. They can increase concentration, barriers to entry and expansion, market segmentation, and prices while reducing variety and innovation. This can happen even when a platform's interests are broadly aligned with those of end-users, and the situation may be worsened where these incentives diverge. We outline these important effects at a high level, with the objective to highlight the competition issues arising, including policy implications, and to motivate future research.

Public and Private Sanctions for Corporate Misconduct: Evidence From Listed Companies Clara Cardone-Riportella, Myriam García-Olalla og Camilo J Vázquez-Ordás.
This paper aims to evaluate the impact that the application of competition legislation exerts on financial markets. The sanctioning process is classified into three key moments: the announcement of an investigation when a case of corporate misconduct is suspected; the imposition of a fine, if applicable; and, finally, the rectification or ratification of the sanction. The impact of these announcements on share prices between 2013 and 2021 is analyzed using the event

study methodology. This research focuses on companies listed on the Spanish stock exchange, yielding 22 firms with 95 observations. The results show a negative and significant market reaction to the series of announcements. While this reaction intensifies if the fine is ratified, the response becomes positive when the sanction is rectified and annulled. In conclusion, the evidence found allows us to state that the market does in effect penalize corporate misconduct. Furthermore, the public sanction imposed by the competent authority is then followed by a private sanction, which manifests itself as a drop in market value. This is consistent with a hypothetical effect of reputational loss, especially in those cases in which the sanction is more significant in relation to the company's market value.

Relevant Generality of Antitrust Economics: Competitive Effects as Adjudicative and Legislative Facts. Forfatter: Jan Broulík.
Antitrust enforcement proceedings routinely rely on information provided by positive economics. Recognizing that this information may help the court to decide what happened in the case at bar as well as what substantive rule to apply to the case, this article examines how general the information needs to be to bear relevance to each of these decision-making tasks. The examination is conducted in the context of US law, relies on the conventional distinction between adjudicative and legislative facts, and focuses on competitive effects as the paramount type of antitrust facts. Economic inquiries into the competitive effects of the conduct under scrutiny are then shown to be relevant if they take sufficient account of the specifics of the case. This requirement will rarely be satisfied by inquiries based on generic models. In contrast, when deciding on the content of the applicable antirust rule, the court needs comprehensive information about the competitive effects of the entire conduct class. Economic analyses into the effects of specific conduct will hence be hardly relevant.

Concentration and Competition: Evidence From Europe and Implications For Policy. Forfattere: Gábor Koltay, Szabolcs Lorincz og Tommaso Valletti.
The paper provides new evidence on proxy indicators of market power for major European countries. The data show moderately increasing average industry concentration over the last two decades, a considerably increasing proportion of high-concentration industries, and an overall tendency toward oligopolistic structure. Estimates of aggregate profitability also show a sustained increase over the recent decades for European economies. Although the academic and policy debate is not settled as to whether the causes of these trends are policy driven or reflect technological improvement, our findings suggest that competition policy is likely to face more challenges as large companies are becoming more common in more and more industries.

Artikler fra Journal of Antitrust Enforcement

Volume 11, Issue 3, November 2023:

Regulating digital platforms: why, how, and why now. Forfatter: Gina Cass-Gottlieb.
Like many competition agencies and governments around the world, the Australian Competition and Consumer Commission has formed the view that ex ante regulation is a necessary complement to address the competition (and consumer) harms posed by digital platforms. Our existing laws are not sufficient to address the anti-competitive conduct and corresponding harms we have observed in relation to digital platforms and the markets in which they operate. This paper explains our recommended model for regulatory reform and how it will address the competition harms that we have identified. Collaboration with international agencies has influenced our thinking in this space and continues to be important to ensure international coordination and alignment in regulatory reform. This paper concludes by looking ahead to the remainder of 2023 and beyond, as there is much work that remains to be done.

Enforcing the Digital Markets Act: institutional choices, compliance, and antitrust. Forfattere: Jacques Crémer, David Dinielli, Paul Heidhues, Gene Kimmelman, Giorgio Monti, Rupprecht Podszun, Monika Schnitzer, Fiona Scott Morton og Alexandre de Streel.
This article discusses how the European Commission can achieve the goal of effectively implementing the Digital Markets Act. Based on legal and economic reasoning, we highlight the important role of the gatekeeper's compliance report, and discuss how to incentivize gatekeepers to write useful reports. In addition, we develop recommendations regarding the internal organization of the Commission, the prioritization of cases, and how to effectively use the concurrent enforcement powers of the Digital Markets Act and Article 102 of the TFEU. We illustrate the principles we develop using four different EU antitrust cases. Furthermore, we discuss coordination between the Commission and National Competition Authorities and the need to already develop an independent evaluation process for the Digital Markets Act.

Sustainability concerns in EU merger control: from output-maximising to polycentric innovation competition. Forfattere: Elias Deutscher og Stavros Makris.
This article examines whether sustainability concerns play and should play any role in EU merger control. While competition authorities have commenced exploring pathways to excuse prima facie anticompetitive mergers on sustainability grounds, little progress has been made in setting out whether and under which conditions mergers that adversely affect sustainability parameters can be found anticompetitive. Under the EU merger control regime, the adverse effects of mergers on sustainability are only cognizable as innovation-related issues, as recently evidenced in Dow/Dupont and Bayer/Monsanto. In these cases, the Commission pioneered a novel approach aimed at predicting the impact of a merger not only on prices but also on innovation competition. This theory of harm, although a welcome improvement to the current framework of merger analysis, fails to accommodate all competition-relevant sustainability concerns because of its exclusive focus on innovation capabilities, efforts, and output. On this basis, we argue that innovation competition should not be understood only as an output-maximizing device but also as a polycentric process under which independent decision-makers pursue various innovation paths. Such an approach gives prominence to the diversity, quality, and direction of innovation and constitutes an alternative to the predominant output-centred understanding of innovation. To operationalize this notion of innovation competition as a polycentric process we explore four pathways: adopting quality-related and sustainability-sensitive innovation metrics; using indicators of industry-wide structural effects; endorsing a structural filter; and protecting nascent competitors. Adding such an approach to the existing analytical framework would, arguably, enable the Commission to deal with all sustainability concerns related to the notion of innovation competition.

Impact of cartel enforcement on compliance in the chemical industry. Forfattere: Gianni De Stefano, Andreas Stephan.
This article examines the relationship between EU cartel enforcement in the chemical industry in the period 1997–2010 and compliance measures announced in the Annual Reports of the undertakings involved. It goes on to focus on Akzo Nobel NV's unique use of an internal amnesty programme, and the level of compliance in the industry following this period of enforcement. Its findings suggest cartel enforcement may have prompted significant investment in compliance measures, with some evidence of those measures resulting in earlier reporting in return for leniency.

Global licences under threat of injunctions: FRAND commitments, competition law, and jurisdictional battles. Forfatter: Renato Nazzini.
This article examines three, intertwined questions arising from the recent case law on global FRAND licences under threat of injunction. First, whether the obligation of an implementer to enter into a global licence of all the standard-essential patent (SEP) owner's relevant SEPs on pain of a national injunction is consistent with the policies underpinning a SEP owner's obligation to grant a FRAND licence. Secondly, whether the conduct of a SEP owner insisting on an implementer entering into a global licence under threat of an injunction is compatible with the UK Chapter II prohibition and Article 102 TFEU. Thirdly, whether the assumption and exercise by national courts of the power to settle the terms of global licences is a rational way of resolving global FRAND licensing disputes. On all three counts, the conclusion is that departing from territorial jurisdiction in the matter of FRAND licences is not advisable as it has the effect of distorting the incentives of SEP owners and implementers in such a way that FRAND licences and FRAND negotiations are less likely to reflect, or be driven by, the value of the underlying technology. As a result, global FRAND licences may apply excessive royalties or royalties for SEPs that are invalid, not essential, or not infringed. A system of national enforcement is better suited to striking a right balance between the interests of SEP owners and implementers, producing better outcomes in terms of effects on social welfare and productivity.

Legitimacy and effectiveness concerns in China's private antitrust enforcement regime: a comparative analysis with the EU and US regimes. Forfattere: Jing Wang og Dermot Cahill.
The year 2007 heralded a major advance in China's entry to the global economy's rules-based marketplace. Its Anti-MonopolyLaw 2007 (AML 2007) taking inspiration from European Union (EU) antitrust concepts contained internationally familiar key antitrust prohibitions. It appeared to satisfy key benchmarks, which any credible antitrust enforcement system should exhibit, namely Legitimacy and Effectiveness. However, in this original contribution, analysing 14 years of leading case law, the authors identify several key persistent Legitimacy and Effectiveness issues which arise when private parties attempt antitrust enforcement through the courts. On key issues such as: (i) Compensation awards inadequacy; (ii) Lack of rights for indirect purchasers; (iii) Absence of a passing-on defence; and (iv) Limitations of collective litigation mechanisms, deficiencies arising in each of these four areas are identified and analysed. Pathways to reform are set out. Comparative analysis with the corresponding EU and US jurisprudence is undertaken throughout, to illuminate the contrast in treatment for antitrust litigants facing similar antitrust situations. Recently enacted reform legislation (AML 2022) does not remedy the antitrust protection concerns identified by the authors. Private parties seeking antitrust redress in China will therefore continue to have weaker remedies in antitrust enforcement cases, in contrast with their EU and US counterparts. The absence of comprehensive reform means that Legitimacy and

Effectiveness deficiencies will continue to undermine legal protection for China's private antitrust enforcement litigants. Furthermore, the research demonstrates how norm adoption on its own cannot raise the propect of better outcomes, unless accompanied by corresponding evolution in the provision of more robust enforcement rights and remedies for antitrust litigants, as well as evolution in judicial interpretation to support antitrust norms acceptance.

A critical reflection on the 'Public Interest Exemption' in China's merger control regime. Forfattere: Huizi Ai og Niels J Philipsen.
The Anti-Monopoly Law (AML) in China allows the responsible authority for merger control to consider not only the competition interest but also other public interest reasons when it reviews a takeover or merger. Where the responsible authority considers that the benefits of a takeover or merger to the public interest outweigh the harms to competition, it may 'exempt' the transaction. This 'public interest exemption' has never been formally applied since the introduction of the law in 2008. One explanation for this can be found in the ambiguity of the law: there are no legal provisions that clarify the public interest considerations. A second explanation is that China did not establish a separate review procedure for this public interest exemption. In practice, some approval decisions made by the enforcement authority led to confusion, as it was unclear whether the transactions were 'exempted' for public interest reasons or for industrial policies. This article reflects on the role of the public interest exemption in China. By drawing lessons from the past and examining the public interest exemption regime in Germany, it aims to provide suggestions for future reforms, against the background of the promulgation of the Amendment to the AML in 2022.

Principles, personalities, or trade? Explaining Taft's 1911 prosecution of U.S. Steel. Forfatter: Mark R Brawley.
In 1911, the Taft Administration undertook one of the most consequential antitrust prosecutions, charging U.S. Steel with violating the Sherman Act. Some accept Taft's claim that he was bound to act by legal principles. Others view these prosecutions as a pre-emptive attack on Theodore Roosevelt, sparked by rivalries within the Republican Party. Neither account is persuasive. The Republicans did split, but the resulting cleavage does not align with either of these arguments. These prosecutions sprang from a struggle over trade policy. Taft tried to liberalize trade twice. With his second failure, Taft abandoned those efforts. He joined the protectionist Stand-Pat wing, turning to antitrust policy to defend the protectionists' interests. The trade-based interpretation resolves several inconsistencies in the traditional narratives, and yields a clearer description of the resulting cleavage. Taft shifted antitrust policy for tactical reasons, not because of legal principles, nor a personal rivalry with Roosevelt.

Introduction to the Contemporary Critique — Illumina and Grail merger.
Many would agree that 'competition law is traversing a "liminal" moment' of sorts.1 Global trends in merger control enforcement are particularly revealing in this regard. In short, enforcement has taken an aggressive turn: enforcers are increasingly challenging transactions, conjuring more forward-looking theories of harm, and growing warier of proposed remedies. Plus, gun-jumping has become a really big deal. No case illustrates this reality more than the one discussed in this issue's Contemporary Critique segment—the Illumina/Grail saga currently unfolding on both sides of the Atlantic.

Having their say: everyone weighs in on Illumina GRAIL. Forfatter: Gwendolyn J Lindsay Cooley.
Regardless of what happens as this merger battles its way through the American Court system, Illumina's reacquisition of GRAIL has proven a resurgence in substantive interest in merger enforcement as well as a resurgence in interest in the structure of one of America's competition enforcement agencies, where everyone wants to have their say. Whether the unanimous bipartisan decision of the Commission on the substance of this transaction ends up holding sway, only time—and the US Supreme Court—can tell.

Reflections on the Illumina–GRAIL merger. Forfattere: Brianna L Alderman og Roger D Blair.
The ultimate decision in this case will establish a precedent for the evidentiary burden that the Federal Trade Commission must shoulder in challenging vertical mergers. As we have clearly shown, ruling in favour of the FTC in this case would establish a precedent that would be especially problematic in future cases of proposed mergers that would ultimately eliminate the presence of successive monopoly in some industry or another. If companies are aware that US antitrust agencies are in the business of challenging mergers just to flex their governmental authority, this may dissuade businesses from attempting to merge. This could result in slower progress across the American economy.

A new regime for below threshold mergers in EU competition law? The Illumina/Grail and Towercast judgments. Forfattere: Jotte Mulder og Wolf Sauter.
The Illumina/Grail and Towercast rulings of July 2022 and March 2023 create new avenues for the control of concentrations below the European Union (EU) and national turnover thresholds. These new avenues concern (i) a referral to the European Commission by a national competition authority (NCA) and (ii) a review under the EU provision on abuse of dominance by an NCA. In both cases, the rationale seems predominantly based on the need to have effective competition law oversight on the so-called killer acquisitions of emerging competitors and undertakings that aim

to extend their dominance by acquiring existing (small but) effective or particularly innovative competitors. The obvious drawback of increasing possibilities of the ex-post merger control is that this comes at a cost to legal certainty and the one-stop-shop principle that has characterized the EU merger control so far. Especially the Towercast judgment calls into question the structure, purpose, and merits of merger control in the EU over the past 35 years. Looking forward, much will depend on how the NCAs and the European Commission will use their new-found powers; some reorganization of merger vetting procedures at the national level may be required. However, it appears likely that the system of merger control in the EU will come to focus more sharply on mergers that raise serious competitive concerns and less on providing a system of comprehensive administrative review, based mainly on size. This may also provide opportunities to rationalize the application of public enforcement capacity.

Artikler fra Competition Policy Brief

Intet nyt.

Artikler fra Competition Merger Brief

Intet nyt.

Artikler fra Journal of European Competition Law and Practice

Volume 14, Issue 6, September 2023:

What Happened to the ICN? Forfatter: D Daniel Sokol.
When the ICN was launched with much fanfare in 2001, the competition community was different. There were far fewer competition agencies globally. Furthermore, there was little meaningful dialogue between more advanced competition systems and newer systems as well as between public and private sector participants in the global competition system. In terms of existing institutions, the OECD Competition Committee existed largely to serve the more advanced economies with, at the time, little interest in developing world competition policy issues.

The Expected Impact of the DMA on the Antitrust Enforcement of Unilateral Practices. Forfatter: Jan Blockx.
Key Points:

- The DMA is unlikely to significantly change abuse of dominance enforcement by the European Commission and by NCAs.
- Tensions between the DMA and certain new national prohibitions of uniliteral practices are more likely, with their resolution depending on the interpretation of the Articles 1(5) and 1(6) of the DMA.
- In addition, for gatekeepers, the existence of regulatory obligations under the DMA may have an interpretative effect when assessing the existence of an abuse of dominance.
- However, spillovers to non-gatekeepers are unlikely.

Google Shopping and Article 106 TFEU: A Legal Dystopia in the EU Constitutional Order. Forfatter: Édouard Bruc.
Key Points:

- Article 106 and Article 102 TFEU have their own history, economic background, and case law, and these provisions cannot be blindly equated as the General Court did in Google Shopping.
- The unfettered incorporation of Article 106's equality of opportunity concept carries far-reaching consequences on the scope and workings of Article 102 and the various justifications provided for this paradigm shift are unconvincing, if not contra legem.
- Without due consideration of economic incentives, the Court has turned a self-made platform into a public facility.
- This analytical gap is particularly worrying when it comes to practices that do not constitute prima facie infringements and warrant careful scrutiny.

The Commission must apply strictly the provisions of the Temporary Framework, but State aid for Ryanair remains pie in the sky: Cases T-34/21, T-238/21, and T-268/21 Ryanair v Commission. Forfatter: Phedon Nicolaides.
Judgments of 10 May 2023, T-34/21, *Ryanair v European Commission*, EU:T:2023:248 and T-238/21, *Ryanair v European Commission*, EU:T:2023:247; Judgment of 24 May 2023, T-268/21, *Ryanair v European Commission*, EU:T:2023:279.

The General Court annuls Commission decisions authorising recapitalisation and compensation for damage caused by Covid-19 travel restrictions.

Probative Value of Decisions of National Competition Authorities in Civil Actions Not Subject to the Damages Directive: Case C-25/21 Repsol Comercial de Productos Petrolíferos. Forfattere: Victoria Heinen og Chloé Binet.
Judgment of 20 April 2023, Case C-25/21 *Repsol Comercial de Productos Petrolíferos*, ECLI:EU:C:2023:298.

The Court of Justice found that, where the Damages Directive does not apply, a final decision of the national competition authority is to be regarded by national courts as providing sufficient evidence of an infringement in the context of civil actions if the facts of the decision and the alleged infringement in the civil claim coincide.

The 11th Amendment of the German Act Against Restraints of Competition—A 'New Competition Tool', Facilitated Disgorgement and the DMA's Enforcement. Forfatter: Nada Ina Pauer.
Key Points:

- Following heated debate on current antitrust reform goals, the German antitrust law's 11th amendment introduces a 'New Competition Tool' (NCT) allowing for direct market intervention by the Federal Cartel Office (FCO) following a sector inquiry.
- The NCT comprises remedies for 'substantial and durable disruptions to effective competition' in reviewed markets, notably without an explicit antitrust infringement.
- The amendment further enhances the remedy of disgorgements by adding the legal presumption of generating commercial profits via antitrust violations.
- Finally, the FCO receives competences to assist the EU Commission (EC) in enforcing the Digital Markets Act and facilitating the latter's private enforcement.

The Polish Act on Competition and Consumer Protection and the Implementation of the ECN+ Directive. Forfatter: Szymon Gołębiowski.
Key Points:

- Poland has implemented the ECN+ Directive by way of a legislative act that entered into force on 20 May 2023.
- Notwithstanding the matters covered by the Directive, the new law has introduced some additional changes to the public antitrust enforcement framework related to LPP, the relevant authority's powers of inspection and privilege against self-incrimination.
- The amendment increases the maximum fines for substantive infringements to 10% of the turnover of a single economic unit instead of 10% of the individual turnover of the legal entity that committed an infringement.

What Should a Post-Towercast Post-Merger Antitrust Infringement Look Like? Forfatter: Maurice de Valois Turk.
Key Points:

- The Towercast judgment has introduced a legal route for mergers that are not notifiable to be reviewed.
- However, the Towercast judgment also contains substantive guidance on the threshold for finding an infringement of Art 102 TFEU.
- This article unpacks this substantive guidance, and explores which mergers would meet these criteria.
- It concludes that the threshold is high, meaning that there will be a very small set of mergers that would be caught.

EU Cartel Policy and Enforcement: Challenges and Responses. Forfatter: Maria Jaspers og Oliver Jany.
Key Points:

- The fight against cartels continues to be a priority for the European Commission ('the Commission'). In 2021–2022, the Commission adopted 12 decisions against almost 40 different company groups and launched several new cartel investigations.
- The Commission is deliberately pursuing a diverse case portfolio, covering different forms of cartels in different sectors, including e.g. buyer cartels and cartels that seek to limit technical development or competition on other parameters than price and quantity. By covering a wide range of different cartel scenarios, the Commission clearly seeks to send deterrent signals and set directions as companies are responding to changed market realities.
- In response to a more complex enforcement landscape, the Commission has taken active steps to maintain the attractiveness of its leniency program, including by publishing an FAQ document clarifying its leniency policy and practice and by investing further in its eLeniency tool.

- As a part of its diversification strategy, the Commission has also strengthened its ex-officio work. This includes further investments in its whistleblower tool and other channels. This seems to have generated leads outside the leniency programme that are being actively pursued.
- Although the cartel settlement procedure has been used in the majority of the cases the Commission has concluded during the last two years, it remains to be seen whether recent developments might dampen the Commission's interest to explore settlement to the same extent as it has done in the past.

Artikler fra World Competition

Intet nyt.

Artikler fra Antitrust Law Journal

Intet nyt.

Artikler fra Antitrust Bulletin

Intet nyt.

Artikler fra Competition Law and Policy Debate

Intet nyt.

Artikler fra Competition Law Scholars Forum

Volume 15, Issue 2:

Editorial: Exploring New Horizons in the Sustainability and Competition Law Debate. Forfatter: Julian Nowag.

The Complex Relationship between Competition Law and Initiatives for Halting Deforestation in the Amazon. Forfattere: Juan David Gutiérrez og Sebastián Solarte-Caicedo.
This article examines whether and how national competition law facilitates (or impedes) initiatives that aim at dealing with deforestation in the Amazon. The article follows a case-study design, with in-depth analysis of the cases of five South American countries: Bolivia, Brazil, Colombia, Ecuador, and Peru. We investigated whether competition law has had and/or could have incidence (positive or negative) on public and/or private initiatives that aimed at tackling deforestation in the Amazon. We report that we did not find significant competition enforcement and non-enforcement activities that explicitly and meaningfully promoted this type of environmental initiatives in Bolivia, Brazil, Colombia, Ecuador, and Peru. In contrast, based on the current laws and recent case law, we conclude that there is a high risk that antitrust gets in the way of initiatives that aim at dealing with deforestation in the Amazon, particularly in Brazil. The research attempts to contribute to the field of competition law and sustainability. The main article's contributions are three-fold. First, we contribute to research on how competition law can negatively affect certain environmental initiatives: those that aim at tackling deforestation. Second, while most of the scholarship focuses on the legislation and case law from North America and Europe, this paper contributes to the literature by exploring jurisdictions from the Global South. Third, this study contributes to research on the relationship between competition law and informal markets and highlights the limits and risks of using competition law as a public policy instrument in so-called 'developmental' contexts.

Artikler fra Journal of Regulatory Economics

Intet nyt.

Artikler fra International Review of Law and Economics

Intet nyt.

Artikler fra Competition Law Journal

Volume 22, Issue 2, October 2023:

A first review of the early application of the Umbrella Proceedings Practice Direction. Forfattere: Kim Dietzel og Naomi Reid.
On 6 June 2022 the Competition Appeal Tribunal published a Practice Direction enabling the President to make 'Umbrella Proceedings Orders' which would enable issues that are common across multiple separate proceedings to be dealt with at the same hearing. The purpose behind the Practice Direction is to avoid inconsistency across different proceedings. This article considers the approach that has been taken by the Tribunal under the Practice Direction so far in proceedings relating to: (i) multilateral interchange fees and (ii) the roll-on, roll-off shipping cartel.

The UK's new competition regime for digital markets: to remedy a gap in the CMA's toolkit. Forfattere: Stephen Whitfield, Ingrid Hodgskiss og Aimee Westley.
The Government has introduced a new Digital Markets, Competition and Consumers Bill to Parliament, which will as currently drafted have a significant impact on how competition law is enforced in the digital space. This article considers how recent CMA activity has shaped the rationale for the new legislation, and how the CMA's caseload has highlighted a desire for key reforms to the UK competition law regime.

In defence of judicial review: the established UK appeal standard is the best approach for a dynamic digital economy. Forfattere: Tom Smith og David Gallagher.
The Digital Markets, Competition and Consumers Bill seeks to create a new regulatory framework for firms with 'strategic market status' (SMS). The Digital Markets Unit (DMU), which will be part of the Competition and Markets Authority (CMA), will have the power to designate tech firms such as Google and Apple as having SMS for certain activities. It will be able to impose wide-ranging conduct requirements on those firms and will also have the power to make pro-competitive interventions. These are powerful tools. The DMU will be able to make significant changes to the SMS firms' business models with the objective of opening up their ecosystems and levelling the playing field for challenger firms. This article considers the standard of review that should apply in determining challenges to decisions of the DMU under this regime. In particular, we consider arguments that have been made against the use of the proposed 'judicial review' standard and in favour of an 'on the merits' appeal. As part of our analysis we consider consistency with analogous CMA regimes, forward looking assessments and the need for speed, expert opinions and consistency across different jurisdictions.

Merging for a sustainable future: integrating sustainability-driven efficiency claims into the merger control assessment. Forfattere: Gönenç Gürkaynak, Zeynep Ayata Aydoğan, Ersagun Berkay Kiltan og Beyza Nur Adıgüzel.
In the assessment of efficiencies, the European Commission narrowly interprets the conditions set out in the Horizontal Merger Guidelines which must be satisfied for each efficiency claim. Considering certain features of sustainability-driven efficiency claims, if the Commission maintains its current approach in analysing these claims, it may disproportionately limit the success of such claims. To avoid any impediment to the pursuit of sustainable goals through mergers, the Commission's approach to the relevant conditions should change. There are some alternative models and means of assessment of efficiency claims that can be used to strike the right balance between promoting competition and sustainability.

Strategic implications of changes in UK merger remedy policy. Forfattere: Joel Bamford og Carlo Sushant Chari.
2022 saw significant changes to policy on merger remedies in the UK. This article examines what they mean for merger clearance strategy along four vectors of change: (i) clarification of the Competition and Markets Authority's remedial powers and procedural constraints following recent judgments of the Competition Appeal Tribunal; (ii) the CMA's increased focus on intangible assets when designing remedies; (iii) a revolution in Phase 2 remedies procedure via the first use of a mechanism to concede a substantial lessening of competition to the CMA; and (iv) a substantive evolution in Phase 1 undertakings with the acceptance of creative remedies despite the high threshold for undertakings in lieu of reference to Phase 2 being accepted by the CMA.

Reflections on the intersection between economic and legal measures of pass-on in the context of competition litigation. Forfattere: Kimela Shah, Erika Pini, Joseph Bell og Raphael Gastal.
The right to compensatory damages and the principle of effectiveness are important legal principles shaping the private enforcement of competition law across the UK and EU. However, the issue of pass-on of loss gives rise to potential tensions in the application of these principles. Where the effect of an infringement is passed on and dissipates broadly across the downstream economy, courts are left with a choice between over-compensating a direct claimant (who has

passed on all or some of an overcharge) or waiting for a nebulous group of downstream claims (by final consumers) that may not materialize. Pass-on also creates problems of consistency between claims at different levels of the same value chain in which different information may be available, different methods of calculating loss may be applied, and different answers reached. This article provides some economic reflections on these challenges. It concludes that there is no single economic framework or methodology available that avoids these tensions, and procedural innovations that allow multiple levels of the value chain to be considered in a single process are likely to be needed if the principles of compensation and effectiveness are going to continue to be applied.

Artikler fra European Competition and Regulatory Law Review

Volume 7 (2023), Issue 3:

Editorial - Territorial Supply Constraints: A Hidden Driver of Grocery Price Inflation? Forfatter: Ben Van Rompuy.

Dawn Raids and Their Effect on the Stock Market. Forfattere: Seppe Maes, Caroline Buts og Marc Jegers.
Cartel investigations and subsequent Commission decisions can negatively impact a company's reputation and stock market value. Using an event study methodology, this paper quantifies the effect of a Commission decision on the market value of companies involved and investigates whether the fact that a dawn raid took place has an additional effect on the impact of the subsequent decision. The findings are based on an exhaustive recent sample of 373 observations of listed firms involved in cartel cases between 2001 and 2022. We conclude that a dawn raid has a clear negative effect of -2.04% on a firm's stock price in the anticipation period prior to a decision. We attribute this to the fact that a dawn raid generates media coverage, bringing more attention to the case and making it widely known to investors. An anticipation effect is absent in cartels where no dawn raid took place, suggesting that a dawn raid entails a more prolonged and more negative effect on stock prices.

From the As-Efficient Competitor to the Potentially As Efficient Competitor? A Reformulation Doing Justice to An Effects-Based Approach. Forfatter: Georgia D. Theodorakopoulou.
The AEC principle could be conceived as the other side of a competition policy serving to protect competition on the merits. The principle is of primal significance to Article 102 TFEU, which the CJEU has long interpreted as applying not only to the exploitation of market power vis-à-vis customers and suppliers, but also to conduct having as its object or effect the exclusion of actual or potential competitors. The exit from the market of less efficient competitors seems to be in sync with long standing policies. However, a more nuanced interpretation of the AEC principle providing for the protection of potential and not yet as-efficient competitors would reinforce competition on the merits.

Denmark · Insufficient Market Analysis: The Danish Eastern High Court Overturns Decision from the Danish Competition Council. Forfatter: Erik Kjær-Hansen.

Finland · FDI Screening Overview: A Notable Increase in Scrutiny. Forfatter: Satu-Anneli Kauranen.

Netherlands · The Key Questions on the Entry Into Force of the Vifo Act. Forfatter: Tim Raats.

Romania · The Romanian Competition Council: Towards Becoming a Markets' Authority. Forfattere: Bogdan Marius Chiriţoiu og Vlad Dan Roman.

Qualcomm: Numerous Procedural and Substantive Shortcomings Lead to Spectacular Commission Defeat. Forfatter: Anton Gerber.
Annotation on the Judgment of the General Court (Sixth Chamber, Extended Composition) of 15 June 2022 in Case T-235/18 Qualcomm v Commission. In 2018, the European Commission adopted a decision finding that Qualcomm had abused its dominant position on the relevant worldwide open market for LTE chipsets by offering exclusivity payments to its customer Apple. The EU General Court upheld Qualcomm's challenge of that decision. The ruling came shortly after another high-profile Commission defeat concerning Article 102 TFEU's application on presumed foreclosure effects, caused by a loyalty rebate scheme employed by another chipmaker (Intel). The Qualcomm judgment points out a number of procedural and substantive flaws, and its repercussions seem to have already changed the way the Commission conducts antitrust proceedings. It may have fuelled the Commission's recently launched process to update its approach for the assessment of exclusionary conduct by dominant undertakings.

Brewing Control: the Case of Super Bock. Forfattere: Seppe Maes, Caroline Buts og Marc Jegers.
Annotation on the Judgment of the Court (Third Chamber) of 29 June 2023 in Case C-211/22 Super Bock Bebidas SA and Others v Autoridade da Concorrência. In its judgment of 29 June 2023, following six questions referred for a preliminary ruling, the Court of Justice of the EU provided clarity in dealing with a vertical case involving resale price maintenance (RPM).1 A topic that had already undergone considerable evolution in existing case law, from a phenomenon that was considered as restrictive by object, following among others the Binon case, to a much more nuanced view in which the Court noted that the agreements should be assessed in their appropriate legal and economic context where the restrictive effect should be established first.

The End of Member State Autonomy in the Calculation of Fines in EU Competition Law? The Implications of the Zenith Communications Ruling. Forfatter: Francesco Rizzuto.
Annotation on the Judgment of the Court (Fifth Chamber) of 10 November 2022 in Case C-385/21 Zenith Media Communications SRL v Consiliul Concurenţei. National rules for calculating fines for infringements of competition rules which require national competition authorities to only consider an undertakings' total annual turnover, without factoring in evidence that that turnover does not reflect an undertakings' true economic situation, is contrary to Union law. In this regard, the Zenith Communications ruling reduces the discretion of the Member States in the setting of fines.

Artikler fra Communications Law

Intet nyt.

Artikler fra Computer and Telecommunications Law Review

Intet nyt.

Artikler fra Global Competition Litigation Review

Intet nyt.

Andre udenlandske artikler

Intet nyt.

5 | NYT FRA KONKURRENCEGRUPPEN

Konference v/CME: Hvad udgør (ikke) et kartel? Tidspunkt: 29. nov. 2023, kl. 12.00-16.00
Karteller kan være yderst skadelige for konkurrencen og anses, med rette, som de groveste overtrædelser af konkurrencereglerne. Siden 2013 har deltagelse heri kunnet straffes med fængsel, men afgrænsningen af kartelbegrebet er kun indirekte defineret. Konkurrenceloven rummer tilmed to karteldefinitioner, idet begrebet både defineres i konkurrencelovens §§ 5 b, nr. 6 og 23, stk. 4, 3. pkt., hvoraf alene det sidste kan straffes med fængsel. Praksis har tilmed tilføjet et tredje kartelbegreb, idet Konkurrenceankenævnet i sager har henvist til at der forelå et "ikke klassisk kartel". Konferencen vil behandle en række horisontale aftaler, der muligvis udgør et kartel, og eventuelt af en sådan beskaffenhed at fængselsstraf kunne være relevant.

Konferencen vil ikke søge at definere det strafferetlige kartelbegreb, men i stedet behandle en række horisontale aftaler, der måske (måske ikke) er omfattet heraf.

Fuldt program og tilmeldingsformular kan tilgås via dette link.