HOUTHOFF

Competition Outlook 2025

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In our Competition Outlook 2025, we look back at the main competition law developments over the past year and offer our insights on the key trends for 2025.

Developments in competition law and enforcement continue to be dynamic. The call for new enforcement powers in the form of "new competition tools" is gaining momentum, aiming to resolve "market failures" that cannot be addressed under conventional competition law. EU Member States are also introducing powers to call in below-the-threshold mergers, while the Commission lost its power to do so in the Illumina Grail case. Enforcement against unfair trading practices and cross border trade restrictions in the agri-food sector is picking up pace. Meanwhile, deglobalisation and geopolitical rivalry continues to drive investment scrutiny. Like 2024, 2025 will be a year of continued transformation of the competition law and regulatory landscape.

In this Competition Outlook 2025, we identify the ten key competition trends to watch out for. We look back at recent developments and offer our predictions for the new year.

1. Empowering competition: the rise of New Competition Tools in Europe

The perception that conventional competition law has fallen short of protecting effective competition is driving momentum both at European and national levels for the introduction of New Competition Tools (NCTs). These would enable authorities to conduct market investigations and implement remedies to address structural competition issues that cannot be addressed under conventional competition law.

On a European level, this concept resurfaced after previously having been abandoned in favour of the Digital Markets Act (**DMA**) (further addressed in the second section). Now, in 2024, the Draghi report again highlighted the need for a revitalisation of competition policies. Draghi's report underscores the importance of fair competition as one of the 'pillars of prosperity'. He identifies four market types where current tools are inadequate and where NCTs could be impactful: markets with tacit collusion, markets needing enhanced consumer protection, markets with weak economic resilience, and markets where past remedies have failed to foster competition.

Despite Draghi's influence on Ursula von der Leyen's strategic agenda for 2024–2029, which sets out the priorities of the European Union (**EU**) for the coming years, an NCT is not explicitly included. This casts doubt on any legislative initiatives in 2025. Similarly, Italian Prime Minister Enrico Letta's report on the future of the European Single Market makes no mention of the need for an NCT at EU level either.

Nationally, the landscape is different. Several EU Member States have recently enhanced their national competition authorities' powers. Some countries have long had a form of an NCT. The UK, for example, has had powers to investigate sectors in light of public interests since 1948. Other countries, like Germany, Italy, Finland, Norway and Denmark, have introduced similar powers more recently.

In the Netherlands, the Dutch Authority for Consumers and Markets (*Autoriteit Consument en Markt*, (**ACM**)) has been actively calling for an NCT. It has conducted market investigations into markets where competition appears to be lacking, for example in the wholesale gas and electricity market (in Dutch), which it ultimately found to be competitive. In another investigation, the ACM found the Dutch savings market (in Dutch) to be an oligopolistic market that is not functioning properly, with possible tacit collusion among banks to keep savings interest rates low. The ACM has noted that competitive flaws in these markets cannot be corrected under conventional competition rules, highlighting a regulatory gap that should be filled with an NCT. It is anticipated that the ACM will conduct further market investigations continuing into 2025, as it also announced that it would be publishing guidance with respect to market investigations in early 2025.

The ACM expects the Dutch Minister of Economic Affairs to decide on proposing an NCT in the course of 2025. The coming year will therefore be pivotal for the introduction of an NCT in the Netherlands. While 2025 may bring clarity on a Dutch NCT, a similar consensus at the European level remains unlikely in the near future due to divergent views among policymakers.

2. The European Commission vs. Big Tech: the DMA battle

The regulatory grip on Big Tech is tightening, primarily due to the enforcement of the DMA. In September 2023, several tech giants were designated as gatekeeper under the DMA, and they have had to comply with it since March 2024. This has led to a 'DMA battle' between the European Commission (Commission) and these Big Tech firms.

This battle is expected to continue into 2025 and has led gatekeepers such as Google and Apple to take precautionary measures, aiming to avoid the potential severe penalties for non-compliance. More preventive actions can be expected in the coming year. In the past year, Meta, ByteDance (the company behind TikTok) and Apple have all challenged their gatekeeper status. To date, only ByteDance's challenge has resulted in a court decision, with the General Court of the EU (**EGC**) dismissing the claim. ByteDance has appealed, and a judgment by the Court of Justice (**ECJ**) is expected in 2025.

We also expect to see an increase in new gatekeeper designations in 2025. In May 2024, the Commission designated the European hotel reservation platform Booking as a gatekeeper for its online intermediation services and concluded that X should not be designated under the DMA. More services and entities are anticipated to be designated as gatekeepers in 2025. In addition, the Commission has opened non-compliance investigations against Alphabet, Meta and Apple. Notably, in June 2024, Apple became the first company to be preliminarily found non-compliant with the DMA. If the Commission's preliminary findings are confirmed by March 2025, Apple faces a potential fine of up to 10% of its worldwide turnover of approximately EUR 35.7 billion. Furthermore, concerning Amazon, the Commission is likely to initiate investigations into whether the company gives preferential treatment to its own brand products on its platform. Additional information on this matter is anticipated in 2025.

Moreover, significant developments are expected on DMA investigations in 2025. The Commission has demonstrated its commitment to enforcing the DMA and asserting its authority. However, the responsibility for enforcing the DMA will be extended to national authorities. For example, with the upcoming entry into force of the Dutch DMA Implementation Act (*Uitvoeringswet digitalemarkten-verordening*, in Dutch), the ACM looks set to play a larger role in 2025. Although the Commission remains the sole enforcer of the DMA, the new Act will enable the ACM to initiate *ex officio* investigations into non-compliance. These investigative powers are similar to its competences in antitrust cases. However, the Dutch legislature will not allow the ACM to conduct dawn raid inspections as part of a DMA investigation. The powers that national authorities will have differ per EU Member State.

Lastly, competitors, end users and other third parties are predicted to play an increasingly important role in the regulation of the DMA. Multiple complaints from companies have already been lodged, and more are anticipated. Moreover, the Commission launched a whistleblower tool in April 2024, which is likely to lead to an increase in reported infringements. Alternatively, the complainants also have the option to seek redress through private enforcement. As Dutch legislation offers a favourable environment for collective damages actions, the Netherlands could become an attractive jurisdiction for litigating private damages actions under the DMA. Therefore, we expect a significant increase in private enforcement cases in 2025.

3. Competition authorities seek broader merger review powers

The Illumina/Grail judgment made clear that the Commission does not have the power to call in below-threshold mergers after all, delivering a stinging defeat to the Commission. However, a clear trend has been set as EU Member States are introducing call-in powers of their own, targeting both killer acquisitions and roll-up strategies.

Both the national competition authorities and the Commission are seeking to extend their powers to investigate seemingly problematic acquisitions that fall below the merger thresholds and over which they consequently have no jurisdiction. This includes so-called killer acquisitions which occur where an undertaking that already has some market power acquires a new innovative undertaking with the aim of foreclosing competition. The Commission has used Article 22 EU Merger Regulation (**EUMR**) referrals as the basis for investigating such acquisitions. However, the Illumina/Grail case highlights the current limits of the Commission's jurisdiction in this respect. In accordance with the judgment of the Court of Justice of the European Union (**CJEU**), the Commission's power to review below-threshold mergers is limited to instances where the referring EU Member State either lacks its own merger control system (currently only Luxembourg, where the adoption of merger control legislation is imminent) or has jurisdiction under its national merger control rules. The Commission does not have the power to review mergers referred by EU Member States that fall below the thresholds of their national merger control regimes. The Illumina/Grail judgment has had a significant impact on the Commission's agenda to combat such acquisitions and has led to seven EU Member States withdrawing their initial referral requests to review Microsoft's acquisition of Inflection.

As the appetite to combat seemingly problematic acquisitions that fall below the merger thresholds remains, the Illumina/Grail case has created a need for alternative methods. The Commission continues to rely on Article 22 EUMR referrals in certain cases, as it follows from the Nvidia/Run:ai case that the Commission can still rely on this Article where transactions fall within the scope of national merger control rules. However, with regard to situations where Article 22 EUMR cannot be applied, we expect that the Commission will prioritise finding new approaches to review the seemingly problematic acquisitions. This will be in line with the Political Guidelines set out by the Commission President and the Mission Letter of the Executive Vice-President for Clean, Just and Competitive Transition.

At national level, competition authorities are also looking for ways to review seemingly problematic acquisitions that fall below the merger thresholds. Indeed, several European countries (e.g. the UK and Denmark) have introduced or are considering the introduction of call-in provisions in their national legislation, allowing competition authorities to investigate mergers that fall below the merger thresholds. These provisions, alongside market share and transaction value thresholds, aim to capture killer transactions. In the Netherlands, the Dutch government has requested the inclusion of a call-in provision in the Dutch Competition Act (*Mededingingswet*, in Dutch) to enable the ACM to review smaller acquisitions that could be problematic for businesses and consumers in the Netherlands. Martijn Snoep, chairman of the ACM, is a strong advocate of the call-in power at both national and European levels in his blogs (e.g. Small mergers, big problems (in Dutch) and ACM's view on private equity (in Dutch)). The ACM has indicated that it intends to use the call-in power not only to investigate killer-acquisitions but also to counter the 'roll-up strategy', whereby a company expands its market share through a series of acquisitions of smaller players that do not meet the turnover thresholds for a filing. The ACM considers that the additional administrative burden of this new power could be compensated by raising the Dutch domestic turnover threshold from EUR 30 million to EUR 50 million, ensuring that many smaller mergers would no longer need to be notified. As mentioned, another method of extending the powers of competition authorities is the introduction of an NCT, allowing them to address market failures without having to find a breach of competition law (further addressed in the first section).

Looking ahead, it is expected that the focus will remain on the expansion of the competition authorities' jurisdiction and thresholds, and that tools such as the call-in power will be introduced, as actively promoted by the Commission. Review of below-threshold mergers is here to stay and likely to expand to other EU Member States. Although the Commission lost the battle over Article 22 EUMR, the Illumina/Grail case created traction in the EU Member States and has fueled a possible bottom-up movement from them.

4. State Aid reform 2025: accelerating a clean, fair and competitive transition and strengthening EU competitiveness

In 2024, State aid policy has played an important role in mitigating the severe effects of the energy crisis and facilitating the clean, just and competitive transition to a net-zero economy. However, despite the significant amounts of aid approved for environmental measures, the current price levels of renewable energy are putting pressure on the EU's climate change targets and its competitiveness vis-à-vis the rest of the world. The new Commissioner for Competition, Teresa Ribera, has announced a reform of the State aid framework to speed up the implementation of the Clean Industrial Deal and to support innovation and ensure the EU's competitiveness.

Commissioner Ribera announced a further reform of the State aid framework for 2025 to meet the challenges of the EU's internal market in the transition to a net-zero economy while maintaining its competitiveness. This reform responds to the recommendations made in the reports by Mario Draghi and Enrico Letta. The reports in question stress the urgency of aligning EU industrial policy with climate goals and advocate accelerating investments in renewable energy, clean technologies and decarbonisation initiatives.

The announced new framework will build on the experience of the Temporary Crisis and Transition Framework. It will provide for a simplified and accelerated State aid approval procedure that will allow EU Member States to quickly and effectively provide State aid to support the rapid implementation of the Clean Industrial Deal. The new framework will be based on the following objectives: (i) accelerating the further deployment of renewable energy production; (ii) investing in industrial decarbonisation and energy efficiency, in particular in sectors that are crucial for the green transition, such as steel, chemicals and energy-intensive industries; and (iii) ensuring sufficient clean technology manufacturing capacity in the EU and avoiding the diversion of investments to third countries.

To avoid undermining the level playing field between EU Member States, the new framework provides for an enhanced role and more flexible support for Important Projects of Common European Interest (**IPCEIs**). IPCEIs are large-scale projects that have the potential to drive innovation and transformation across industries. The Draghi and Letta reports underline the importance of fostering cross-border cooperation to scale up breakthrough technologies through IPCEIs.

In addition, to ensure a clean, just and competitive transition, the President of the Commission's mission letter to Commissioner Ribera announced the development of the most cost-effective combination of private, national and EU funds, including the implementation of a new European Competitiveness Fund to ensure coherence between State aid policy and the financing of IPCEIs for the most strategic sectors and technologies.

Given the current challenges the EU is facing in meeting climate change targets, maintaining competitiveness and ensuring a level playing field on the internal market, 2025 is poised to be a pivotal year for the announced reform of the State aid rules. Together with the other instruments of competition policy, the reform must enable the EU to position itself to lead the global green transition while ensuring fair competition and economic resilience.

5. Increased scrutiny of inbound and potentially outbound investments as globalisation falters

The EU's investment landscape is experiencing a profound transformation with the recent implementation of the Foreign Subsidy Regulation (FSR) and the Foreign Direct Investment (FDI) Screening Regulation. These regulatory measures underscore a changing geopolitical climate and a desire to prevent the weakening of the internal market and strategic independence of the EU. Foreign investments are no longer universally embraced within the EU's internal market, and the EU's intent to exert greater control over both inbound investments into EU Member States and outbound investments to third countries is evident. As the initial impacts of these regulations unfold, further amendments are already underway, signaling a dynamic and evolving regulatory environment.

The year 2024 marked the first full year of FSR enforcement. The Commission has been very active, handling at least 120 concentration filings, 1,400 public procurement notifications and two *ex officio* investigations. Notably, the Commission exercised its dawn raid powers on Chinese-owned Nuctech offices in Warsaw and Rotterdam. Despite Nuctech's appeal for interim relief, the EGC ruled on 12 August 2024 that EU subsidiaries must provide access to email accounts and data held by their overseas parent companies. Nuctech has since appealed to the ECJ.

In September 2024, the Commission concluded its first in-depth merger review under the FSR, conditionally approving the acquisition of parts of PPF Telecom by e&. The approval included behavioural remedies, notably preventing PPF Telecom from using the unlimited funds of e& to finance further acquisitions in the EU, as this would distort the internal market. We expect the Commission to continue favouring conditional approvals with behavioural remedies rather than outright prohibitions under the FSR regime.

Businesses have raised concerns about the transparency of the Commission's broad discretionary powers under the FSR. While investigations predominantly target companies with Chinese links, the criteria for launching an in-depth investigation remain unclear. The Commission is expected to increase the use of *ex officio* investigations, with more guidance anticipated soon. In January 2026, the Commission Guidelines on FSR will be published, with a simplified procedure for private equity notifications expected by mid-2026.

While awaiting the 2026 FSR guidance, steps towards regulating outbound investment by EU-based companies are already expected in 2025. On 24 January 2024, the Commission released a White Paper on Outbound Investments, proposing a detailed analysis of EU outbound investments. The Commission's assessment of whether a policy response is warranted is expected by autumn 2025.

With regard to the FDI Screening Regulation, the Commission has also proposed revisions, including setting minimum assessment criteria for investments and expanding the scope to include investments made by EU-based entities controlled by foreign investors. Nationally, the Dutch transposition of the FDI Screening Regulation, the Investments, Mergers and Acquisitions (Security Screening) Act (*Wet veiligheidstoets investeringen, fusies en overnames* (**Vifo Act**), in Dutch) is set to be amended in early 2025, notably including vegetable and seed breeding companies as vital suppliers.

The Netherlands has enhanced its capacity to scrutinise FDIs across all sectors, focusing on vital processes and sensitive technologies. The Investment Screening Bureau (*Bureau Toetsing Investeringen*, (**BTI**)), the Dutch FDI regulator, requires mandatory *ex ante* filings and has the authority to review completed transactions retroactively if they pose national security risks. Although no prohibition decisions have been publicly disclosed, the BTI has retroactively investigated at least four transactions. This retroactive review power expired in February 2024, so the number of such investigations will not increase further. More information about ongoing investigations is expected in 2025.

In its first year and a half, the Vifo Act has extended deal timelines but has not resulted in any surprises. The BTI has shown a keen interest in the semiconductor sector, cybersecurity and dual-use goods. While the Vifo Act does not specify countries, most inquiries have been directed at Chinese investors. Additionally, there is a frequent focus on the underlying structure of the foreign acquirer, even if they do not have any influence or control. We expect the current Dutch government to continue this trend, possibly supplemented by an additional focus on national security.

6. Private Enforcement: international aspects and a growing emphasis on quantum

The Dutch lower courts are awaiting decisions from the Dutch Supreme Court and the CJEU on issues regarding international jurisdiction, the law applicable to damages claims and the validity of assignments of claims. Some of those long-awaited rulings will be rendered in 2025. Dutch courts will also increasingly deal with quantum-related topics, such as theories of harm, the determination of the value of commerce and methods for damage calculation.

The Netherlands has firmly established itself as a leading hub for antitrust damages actions. The Dutch courts are currently handling numerous high-profile cartel damages cases, including those related to airfreight, trucks, TV and computer monitor tubes, bitumen, power cables, elevators, financial benchmarks, ethylene, and the foreign exchange (forex) spot trading market. In addition, Dutch courts are increasingly focusing on abuse of dominance damages actions, such as cases relating to Google Shopping, Google Ads, Greek beer, the Apple App Store and AbbVie's blockbuster medicine Humira.

The aforementioned cases often involve claims based on pan-European competition law infringements brought by or for aggrieved parties located outside of the Netherlands. In the past couple of years, this has resulted in extensive debates on the international jurisdiction of the Dutch courts and the law applicable to the claims.

Traditionally, Dutch courts seem to readily accept jurisdiction. However, the Dutch Supreme Court and the Amsterdam Court of Appeal have requested preliminary rulings (in Dutch) from the CJEU in this regard. In essence, they are seeking clarification on whether and when Dutch courts may accept jurisdiction if the summoned Dutch anchor defendant is not an addressee of the infringement decision of the relevant competition authority and may not be active on the same market as the activities that form the subject matter of the infringement.

In addition, the Dutch Supreme Court will have to rule on the possibility for claimants to rely on the choice of law provision of the Rome II Regulation and opt for the applicability of Dutch law. The matter specifically concerns cases where (i) the infringement (or part of it) took place prior to the entry into force of the Rome II Regulation and (ii) the asserted claims have no direct link with the Dutch territory. In this context, the Dutch Supreme Court may also address the question of whether a single and continuous infringement of competition law results (i) in one single claim for damages consisting of several loss items, regardless of the amount of transactions concluded by the claimant which were allegedly affected by the infringement; or (ii) in separate claims for damages which arise every time a claimant enters into such a transaction. If the latter were to be the case, this could have an impact on the claimant's evidentiary burden, as in their writ of summons they would in principle have to fully substantiate their claims on a transaction level basis.

Quantum-related topics will likely also play a pivotal role in the years to come, as major antitrust damages cases are set to enter the quantum phase shortly. Earlier this year, the Amsterdam District Court rendered a judgment in the airfreight damages proceedings (in Dutch) on the suitable data sets and economic methods for damage calculation. In other major antitrust damages cases, courts may have to consider the econometric analyses submitted by the parties and consider arguments on matters such as the determination of the relevant value of commerce and pass-on at different levels in the distribution chain. We look forward to discovering how Dutch courts will deal further with these quantum-related issues, a topic which is likely to be more vital than ever in antitrust damages cases in the coming years.

7. Cultivating fairness: navigating agri-food regulations in 2025

In our Competition Outlook 2024, we anticipated heightened enforcement against unfair trading practices in the agricultural and food supply chain. Moving into 2025, this focus is set to persist. Two issues remain at the forefront of regulation in the agri-food sector: sustainability and fairness in the food supply chain.

In its Mondelēz decision, the Commission addressed territorial supply constraints (**TSCs**). These constraints prevent retailers from importing a manufacturer's products from other EU Member States. Wholesalers of Mondelēz' products, for example, were only allowed to resell products within a designated territory. Furthermore, Mondelēz was found to have abused its dominant position by refusing or ceasing supplies to certain customers, thereby hindering the resale of its products across borders. In the wake of the Mondelēz case a number of EU Member States have called for EU legislation to specifically address TSCs.

In recent years, retailers have increasingly sought to counter TSCs by forming European buying groups to compare prices across different EU Member States, negotiate lower prices and increase their bargaining power against international manufacturers. Although the Commission opened an investigation into a buying group, it did not find any violation.

At a national level, the ACM has maintained its focus on sustainability by revising guidelines (in Dutch) for farmer collaboration, which apply to joint sustainability initiatives between farmers and other market players in the agricultural sector, and by informally assessing Stichting Milieukeur's sustainability fee scheme. As explained in its letter (in Dutch) to the Stichting Milieukeur, the ACM concluded that the proposed fee for producers with the On the way to PlanetProof label would not restrict competition, as it had a clear sustainability objective with minimal impact on consumer prices. The EU Directive on unfair trading practices in the agricultural and food supply chain seeks to protect small suppliers of agricultural products against the abuse of bargaining power – in the form of unfair trading practices (**UTPs**) by large buyers. It has been implemented in the Netherlands by the Dutch UTP Act (*Wet oneerlijke handelspraktijken landbouw- en voedselvoorzieningsketen*, in Dutch). In the Netherlands, enforcement against UTPs has focused on the dairy and meat sectors, while other EU Member States have targeted the retail sector. The ACM's decisions in the *Vion*, *ZuivelNL* and *Lactalis* cases and the decision of the UTP Complaints Board in the *Vreugdenhil* case suggest a very broad interpretation of the UTP Act's prohibitions. This position will be scrutinised by the courts in 2025. For more detailed information on the latest developments regarding the UTP Act, please refer to our October 2024 News Update.

Looking ahead to 2025, we expect the ACM to continue to focus on sustainability initiatives in the agri-food sector, supported by the general trend in the EU. We also expect continued regulatory action to promote fairness in the agri-food supply chain, as has been recently encouraged by the ACM in a blog (in Dutch). Such action could take the form of further investigations under the UTP Act. Furthermore, practices such as TSCs will continue to be scrutinised under competition law. Retailers are likely to continue to cooperate to improve their bargaining position vis-à-vis large suppliers in order to overcome TSCs.

8. Healthcare: outcry against private equity

Looking ahead to 2025, the landscape of free market practice in healthcare in the Netherlands is set to undergo significant changes. This sector, which commands approximately 20% of the Dutch annual budget, has become a focal point for regulatory and now also political scrutiny.

The momentum to curtail free market practices within this sector is intensifying, driven by concerns over care quality and the view that public money spent on healthcare should not result in profits for private equity (**PE**) companies. The ACM has been at the forefront of advocating stringent oversight, as evidenced by its refusal to grant a licence for acquisitions by *Bergman Clinics* and *Mediq* (news items in Dutch). Despite the ACM's efforts, the courts ultimately overturned its decisions in these cases.

Another notable point of contention was the ACM's opposition (in Dutch) to the removal of the lowered turnover thresholds for healthcare transactions. This opposition was ignored by the then Minister of Health, Welfare and Sport, as he recognised a need for more cooperation and a lower administrative burden in the healthcare sector. Nevertheless, the ACM continues to ask for a call-in power, further addressed in the third section, allowing it to address concentrations that it deems concerning (in Dutch), particularly in sectors with significant PE involvement, such as pharmacies, veterinary services and dental practices. The ACM has recently published (in Dutch) its approach to PE investments, where it believes particular vigilance is required.

The political discourse has been notably influenced by the downfall of Co-Med, a commercial entity that failed to maintain adequate care standards after acquiring GP practices, leading to partial bankruptcy. Although Co-Med is not PE-owned, its collapse has catalysed broader debates about PE's role in healthcare. The political impetus for banning PE in healthcare is rooted in fears that profit maximisation could compromise care quality, accessibility and affordability. This is despite an EY report (in Dutch) commissioned by the former Minister of Health, Welfare and Sport, which found no demonstrable differences in quality, accessibility and affordability between PE-owned and other healthcare providers.

Parliament's agreement (in Dutch) to ban PE in healthcare, contrary to the Minister's own views (in Dutch), sets the stage for a complex legislative process. The challenges are manifold: defining what constitutes PE, especially when socially-oriented entities like pension funds are involved; formulating a ban that respects ownership rights; and mitigating the broader implications for the Dutch healthcare landscape.

Despite the strong political will to curb PE and profit-driven practices, the practical benefits of legislation to this end are debatable. PE constitutes a minor segment of the Dutch healthcare sector, and more pressing issues, such as staff shortages, remain unaddressed by this initiative. The Minister of Health, Welfare and Sport has announced an action plan to be presented before the Spring Memorandum of 25 April 2025. As the government navigates these complexities, the effectiveness and impact of any new regulations will be closely watched.

9. The EU's strategic shift on abuse of dominance

The prohibition on the abuse of dominance was a focal point in 2024, particularly within the European context. The CJEU provided significant guidance on Article 102 Treaty on the Functioning of the European Union (TFEU), while the Commission not only actively enforced this provision but also introduced draft Guidelines (Guidelines) on exclusionary abuses of dominance. The impact of these Guidelines, expected to be adopted in 2025, on the enforcement of Article 102 TFEU remains uncertain. The Commission seems to be pushing for a lower standard of proof, but the EU courts might chart a different course.

The Commission was able to draft the Guidelines in 2024 as the body of case law on exclusionary abuses of dominance had become sufficiently detailed to form an adequate basis. The aim was to enhance legal certainty for businesses and ensure more consistent enforcement of Article 102 TFEU by the Commission, national competition authorities and national courts.

The Commission seems to be aiming for a less rigorous assessment under Article 102 TFEU from 2025 onwards, proposing legal presumptions regarding the burden and standard of proof. The Guidelines categorise conduct based on its likelihood to produce exclusionary effects: (i) conduct requiring proof of the capability to produce exclusionary effects; (ii) conduct for which a rebuttable 'soft presumption' of exclusionary effects exists: exclusive dealing, predatory pricing, margin squeeze (when leading to negative margins) or tying (obligation to buy a second product with the purchase of a product); and (iii) conduct with no economic interest other than restricting competition, for which a non-rebuttable 'hard presumption' of exclusionary effects exists.

Moreover, the Commission appears to want to broaden the scope of Article 102 TFEU by prohibiting not just conduct that excludes as-efficient competitors from the market, but even conduct that only excludes actual or potential competitors. This shift allows for more flexibility to deviate from the 'as-efficient competitor test'.

While the adoption of the Guidelines is envisioned for 2025, recent EU court judgments suggest that the current draft may not fully align with the law as established by the cases of the CJEU. Illustrative is the latest Intel judgment, rendered after the publication of the Guidelines, which does not endorse the 'soft presumption' concept for exclusive dealing and where the CJEU continued to apply the 'as-efficient competitor test'.

The developments in 2025 will be intriguing. Will the Commission take on an activistic role to achieve the desired workable effect-based approach which is firmly grounded in economic thinking and conducive to the robust and effective enforcement of Article 102 TFEU? The legal landscape awaits a decisive turn.

10. Artificial Intelligence and competition: the role of the Commission and ACM

Artificial Intelligence (AI) is reshaping markets at an unprecedented pace, drawing intense scrutiny from legislators and regulators. From a competition law perspective, the objective seems to be to understand markets thoroughly and intervene as effectively as possible using current and future tools. By the end of 2025, this is likely to manifest itself in the form of market studies and the publication of their findings, as well as in the deployment of the full range of enforcement tools in the field of AI. This could potentially offer deeper insights into the proper application of the existing AI legal framework.

In an attempt to keep pace with AI's rapid market transformation, the Commission and the ACM have taken action in a number of ways in 2024. Companies involved in generative AI and virtual worlds received requests for contributions and questionnaires from the Commission, while AI-related mergers were closely monitored. In the Netherlands, the ACM strengthened its Taskforce Data and Algorithms and notified a non-notifiable merger in the AI sphere to the Commission (which notification it withdrew following the recent judgment in Illumina/Grail, further addressed in the third section).

Looking ahead to 2025, we expect first and foremost a high degree of market monitoring, both from the Commission and the ACM. While the Commission might take some time to digest the input from the calls for contributions and questionnaires, the ACM is likely to push right away for an NCT to address competition concerns in AI-transformed markets.

The AI Act is also expected to play a significant role in competition enforcement in 2025. The extensive procedural powers granted to the relevant supervisory agencies, which include examining evidence and accessing data and documents, can be transferred to national competition authorities. In addition, the transparency obligations in the AI Act, which require companies to share certain important information, may require competition authorities to take action to prevent breaches of competition law.

In terms of actions by competition authorities in 2025, we foresee that authorities will come up with novel interpretations of the current legal framework. Although the Commission might be more cautious after the CJEU's finding that its interpretation of Article 22 of the EUMR was overly broad (further addressed in the third section), we expect the boundaries of Articles 101 and 102 TFEU to be extended in line with market developments. For example, the Commission has indicated a preference for a more flexible interpretation of the DMA to regulate the surge in AI technologies. Moreover, in a recent policy brief, the Commission elaborated on how it aims to apply Articles 101 and 102 TFEU in AI-related cases, identifying potential competition concerns about key inputs to AI technologies and the deployment and distribution of AI technologies.

Finally, we anticipate enhanced international cooperation in the field of competition and AI. The announced collaboration at the levels of the European Competition Network, the International Competition Network and the Organisation for Economic Cooperation and Development concerning generative AI-related markets is expected to result in more predictable and coordinated enforcement on international markets.

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