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INTERACTIONS BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATORS – Contribution from the European Union

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Interactions between Competition Authorities and Sector Regulators

- Contribution from the European Union -

1. Introduction

1. The European Commission ("Commission") notes that competition authorities and sector regulators have different tasks: while the former are focused on protecting the competitive process in all markets by prohibiting certain conducts through competition enforcement, the latter are generally dedicated to supervise and intervene in a specific market or sector to achieve the various policy goals set by the applicable regulations.

2. Practically, this means that:

- Competition enforcers generally operate on a case-by-case basis after an infringement has already occurred,[1] whereas sector regulators set or enforce ex-ante rules, specific to certain situations, which the interested undertakings must respect and apply.
- Whereas sector regulators usually focus on a single sector, competition authorities are entrusted with promoting competition horizontally across all economic activities (including those affected by sector-specific regulations).
- In certain instances, through their interventions competition enforcers and sector regulators may pursue different objectives, since regulations may aim at broader policy purposes (e.g. environmental standards, data protection, etc.) which are not necessarily those of competition.

3. Usually, the enforcement actions taken by competition authorities and the activities of sector regulators complement each other, but there is also the risk that they could lead to uncoordinated results. In this context, cooperation between competition authorities and regulators can be an effective tool to defuse contradicting outcomes and provide coordinated responses. Furthermore, case-specific coordination with sector regulators also helps a competition authority to better understand the regulatory framework in which undertakings operate - which is useful for the competitive assessment and for the design of effective remedies.

4. The next paragraphs will provide a brief explanation on the roles of competition authorities and sector regulators in the European Union, highlighting the areas where their activities interplay (Section 2). Section 3 will analyse how these authorities cooperate in practice, focusing in particular on collaboration efforts during competition investigations and in the case of parallel proceedings *vis-a-vis* the same conduct. Section 4 offers a conclusion.

[1] A relevant exception is merger control, which is a form of ex-ante control in the EU and in most jurisdictions.

2. The roles of competition authorities and sector regulators in the EU, and the interaction between their activities

5. In the EU, the enforcement of competition rules is entrusted to the European Commission ("Commission") at the European level – and in particular to its Directorate General for competition ("DG COMP") – and to the national competition authorities (NCAs) in Member States.[2] Both DG COMP and the NCAs enforce the relevant provisions of competition law across all sectors with a case-by-case approach, i.e. investigating conducts after an alleged infringement has taken place or following a notification of a specific concentration.

6. As regards sector regulators, each Member State has created various authorities entrusted with regulating (and overseeing the correct implementation of regulations) in a number of specific economic sectors, such as telecommunications, energy, banking and data protection. Usually, these regulators operate at national level, are competent for a specific sector and apply a mix of EU and national law (depending on the level of integration and harmonization achieved by EU law in each specific market). In general, they enforce ex ante regulations, which tackle upfront certain conducts/issues, to foster set policy goals. The standard for enforcement of these regulations is usually different from that of competition rules.

7. Moreover, alongside the national regulators, in the last decade, the EU has set up a number of sector-specific agencies that operate at the European level, with the goal of ensuring a uniform enforcement of regulations for the entire EU and helping the national regulators in discharging their duties. Examples include: (i) ACER, operating in the energy sector;[3] (ii) BEREC and the BEREC Office, active in the telecommunication sector;[4] and (iii) the EDPB, which provides guidelines and recommendations on data protection.[5]

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[2] The Commission enforces Articles 101 and 102 TFEU pursuant to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, p. 1) ("Regulation 1/2003"). In parallel to the Commission, the public enforcement of Articles 101 and 102 TFEU in the EU is carried out by the national competition authorities (NCAs) of the Member States, which also enforce their own national competition rules. Together, the NCAs and the Commission form a network of public authorities that apply the Union competition rules in close cooperation (the "European Competition Network"). With respect to merger control, the Commission's powers are established by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the "EC Merger Regulation"), while each Member States has its national merger control system, applicable when the EC Merger Regulation does not apply.

[3] The European Union Agency for the Cooperation of Energy Regulators (ACER) was established in March 2011 as an independent body to foster the integration and completion of the European Internal Energy Market for electricity and natural gas. ACER was created by the so-called Third Energy Package (and in particular by Regulation (EC) No 713/2009 of the European Parliament and of the Council of 13 July 2009 establishing an Agency for the Cooperation of Energy Regulators, OJ L 211, 14.8.2009, p. 1–14).

[4] The Body of European Regulators for Electronic Communications (BEREC) assists the European Commission and the national regulatory authorities in implementing the EU regulatory framework for electronic communications. BEREC and its Office were created by Regulation (EU) 2018/1971 of the European Parliament and of the Council of 11 December 2018 establishing the Body of European Regulators for Electronic Communications (BEREC) and the Agency for Support for BEREC (BEREC Office), OJ L 321, 17.12.2018.

[5] The European Data Protection Board (EDPB) is an independent European body, which contributes to the consistent application of data protection rules throughout the European Union, and promotes cooperation between the EU's data protection authorities. It has been established by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the

8. In the EU, sector regulators are tasked with applying their respective sector-specific regulations. Their role is broadly complementary with the Commission's (and the NCAs') enforcement of competition law. In fact, the differences mentioned at point 2 above allow regulation and competition to complete each other, by tackling problems together in a complementary fashion.[6] While in principle sector regulators do not deal specifically with competition enforcement, in certain instances they nevertheless may also apply the competition rules.[7]

9. Notwithstanding this complementary approach and the distinct purposes of the different legal instruments, as a matter of fact, the activities of sector regulators and competition enforcement by antitrust authorities may indeed overlap. This overlap may take different forms, but mainly occurs in the following circumstances.

- First, the Commission may initiate a competition investigation against undertakings that operate in a regulated sector and have already been subject to sector-specific obligations or interventions by the regulator. In those instances, the regulatory framework and the enforcement activities carried out by the sector regulator may prove crucial in understanding if a certain conduct is in violation of EU competition law, in two respects. First, according to EU competition law principles, if a certain conduct is specifically required by regulation, in principle the provisions on competition law do not apply. This is because the restriction of competition would not be attributable to the undertaking, given that it would not be acting autonomously. However, competition enforcers may still act in a regulated sector if it is found that the relevant legislation, while regulating their conduct, leaves open the possibility for undertakings to act in an autonomous and possibly anti-competitive manner.[8] Second, and more generally, it is useful for the competition authority to take into account the regulatory framework to understand whether existing rules in any way address or limit an undertaking's ability to engage in a certain conduct.
- Second, a single and specific conduct by one or more undertakings can be the subject of separate proceedings by both a sector regulator and the Commission (or a NCA), for the purpose of assessing and possibly sanctioning that same conduct

protection of natural persons with regard to the processing of personal data and on the free movement of such data, OJ L 119, 4.5.2016.

6 This has been also confirmed by the Court of Justice of the EU ("CJEU"), which clarified that the EU competition rules supplement, by an ex post review, the legislative framework adopted by the Union legislature for ex ante regulation of the telecommunications markets. Court of Justice, 14 October 2010, case C-280/08 *Deutsche Telekom AG v European Commission*, ECLI:EU:C:2010:603, paragraph 92. See also the European Union's submission to the OECD on "competition enforcement and regulatory alternatives", DAF/COMP/WP2/WD (2021)13, available at https://one.oecd.org/document/DAF/COMP/WP2/WD(2021)13/en/pdf

7 This may be case if the relevant legislation grants the sectoral regulator the power to also enforce Articles 101 and 102. Moreover, with specific reference to the railway sector, the Court of Justice has also clarified that, where sectoral regulation attributes to a regulator an exclusive competence to hear all aspects of the disputes brought before it, that regulator should also assess claims raised by applicants in relation to the violation of the non-discrimination obligations provided for by Article 102 TFEU (C-721/20 *DB Station*). In other instances, several sectoral regulators and the NCA may be merged into a single entity, which is competent both for the competition and the sector-specific rules (for instance, the Comisión Nacional de los Mercados y la Competencia, "CMNC", in Spain or the Authority for Consumers and Markets, "ACM", in the Netherlands).

8 See case C-280/08, *Deutsche Telekom AG v Commission.*

on the basis of the respective legal frameworks. This can be the case where a competition authority intervenes when there has already been a decision by the sector regulator on that same conduct, or where proceedings are occurring in parallel. In those instances, the application of the *ne bis in idem* principle can come into play. This is a criminal law principle under which a person cannot be punished and be subject to multiple procedures for the same facts, in order to avoid double prosecutions and double punishments. The CJEU has consistently held that the *ne bis in idem* principle is a general principle of EU law that must be observed in all proceedings having criminal nature, including those for the imposition of fines pursuant to EU competition law.[9]

10. In each of the above situations, there are good, practical reasons for the Commission and sector regulators to cooperate.

3. Cooperation between the Commission and the sector regulators

3.1. The different types of cooperation

11. Cooperation between competition authorities and sector regulators can take various forms. The main cooperation instruments identified by legal commentators[10] – not mutually exclusive – are:

- The institution of a general framework of cooperation between competition authorities and sector regulator. This form of cooperation – which is usually established through legislation – provides for a formal collaboration between the authorities with the aim of facilitating a consistent approach in the long-term and avoiding inconsistent outcomes between the enforcement activities.
- Granting competition authorities the right to intervene before sector regulators when new regulations or other regulatory decisions are issued. This model of collaboration gives the competition authority the power to make its voice heard directly by the sector regulator before new regulations are adopted. This may help diminishing the risk of unnecessary anticompetitive regulations being introduced in the regulated sector.
- Informal exchange of information. Even in the absence of a formal collaboration framework, competition authorities and sector regulators may decide to exchange certain information on open cases or draft decisions, seeking assistance on competition or regulatory issues.

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9 Case C-17/10, *Toshiba Corporation and Others*, EU:C:2012:72, paragraph 94 and the case-law cited. The *ne bis in idem* principle is expressed in Article 50 of the Charter of Fundamental Rights of the European Union: "*No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.*" The origin of the application of the *ne bis in idem* principle in the field of EU competition can be traced back to the case *Walt Wilhelm and Others* (Case 14/68, judgment of the Court of 13 February 1969, EU: C: 1969: 4).

10 See for example, *The relationship between competition authorities and sector regulators*, Maher M. Dabbah, Cambridge Law Journal, 70(1), March 2011, pp. 113–143; *The relationship between Competition Authorities and Sector-Specific Regulators*, Wernhard Moschel, European Business Organization Law Review, 3:823-831 (2002); *The relationship between Competition Authorities and Sectoral Regulators*, OECD, DAF/COMP/GF(2005)2.

- Allowing a competition authority to engage with sector regulators in the context of competition enforcement. This cooperation mechanism usually entails allowing (or obliging) competition authorities to consult a sector regulator whenever they initiate an investigation against an undertaking operating in that sector. This allows competition authorities to avoid misinterpretations or mistakes in the analysis of the legal framework of the relevant sector and to better understand its market conditions.
- Encouraging staff exchange programmes. The institution of secondment programmes between sectoral regulators and competition authorities may improve knowledge of competition law for the seconded regulators' employees and vice versa, and also facilitate communications between the authorities.

12. Moreover, depending on the characteristics of each particular jurisdiction, cooperation may be mandatory – and therefore constitute a legal obligation whose breach can have serious consequences on the legality of the act adopted by the competition authority or the sector regulator – or simply an optional instrument that the authorities can use at their own discretion.

3.2. The European framework for cooperation between the Commission and sector regulators

3.2.1. The cooperation during competition investigations carried out by the Commission (DG COMP)

13. In the EU, cooperation between the Commission and the sector regulators during investigations operates mostly on a case-by-case, informal basis.

14. The Commission (and, more specifically, its Directorate General for Competition) does not have any formal, over-arching agreement with sector regulators establishing specific cooperation protocols in the field of competition. Nor does it have any specific legal obligation to consult sector regulators when it intends to carry out competition investigations against undertakings operating in regulated sectors.[11] The Commission must respect a general duty to cooperate in good faith with national authorities, including sector regulators, as enshrined in Article 4(3) of the Treaty on the European Union.[12]

15. However, the lack of specific legal obligations to consult sector regulators does not mean that there is no cooperation between the Commission and sector regulators during competition investigations. Indeed, the Commission regularly consults sector regulators in the course of

[11] Similarly, sector regulators generally do not have a specific legal obligation to consult the Commission or DG COMP if they want to adopt a regulation that may affect competition in a certain sector. However, sector-specific legislation may include a general encouragement to cooperate with competition authorities. This is for example the case of the BEREC and the BEREC Office, whose main goal is maintaining a consistent application of regulations in the field of telecommunications across the EU. Regulation 2018/1971, which establishes BEREC, explicitly recognizes the "*increasing convergence between the sectors providing electronic communications services, and the horizontal dimension of regulatory issues*" and, for this reason, allows BEREC and its Office to "*cooperate with the European Competition Network*". In this context, BEREC and the BEREC Office are explicitly allowed to sign general framework of cooperation ("*working arrangements*") with the competition authorities (Regulation (EU) 2018/1971, Art. 35(1)).

[12] See Case C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, opinion of Advocate General Rantos of 20 September 2022, ECLI:EU:C:2022:704, paragraph 28.

competition investigations (be it a merger or antitrust case) that concern market players operating in a regulated market.

16. This may occur in particular when, in its competitive assessment, the Commission needs to assess the relevance of sector-specific regulations on an undertaking's conduct (for instance, whether a specific conduct by the undertaking is required by regulation, as mentioned in point 9 above; or whether sector-specific regulation may affect the ability of an undertaking to engage in a specific conduct). This may also occur in those instances where the Commission "factors in" as a relevant parameter of competition a certain value, or objective - to which consumers attach importance - that may be covered by another regulatory system. In such instances, cooperation allows the Commission to (i) rely on the sector regulator's expertise and knowledge of the relevant regulated market and (ii) avoid that its competition enforcement would contradict sector-specific regulations.[13]

17. The informal nature of these interactions allows the Commission to cooperate with sector regulators in a flexible manner, as appropriate. Indeed, given the high number of merger and antitrust investigations carried out by the Commission, any general obligation to consult sector regulators would impose a very significant burden and would risk to significantly delay all the proceedings related to regulated sectors, in particular in cases where either no competition concerns arise or no sector-specific inputs are necessary for the assessment of the case.

18. In practice, in the course of its investigations, the Commission would directly contact the sector regulator in order to obtain the necessary inputs and expert opinions that it considers necessary to conduct a proper competitive assessment of a specific conduct. Depending on the specifics of the case and the geographical scope of the investigation, the Commission may choose to consult an authority that operates at the EU level or one that is active only in a single Member State. The details and results of the interactions with the regulators are generally reported in the final decision.

19. Examples of such cooperation efforts carried out by the Commission in the context of competition investigations include the following.

- In the energy sector, in antitrust case AT.39849 – *BEH Gas*, the national regulatory authority provided information to the Commission on the organisation and interconnection of the gas transmission networks in Bulgaria. In antitrust case AT.39316 – *GDF Foreclosure*, the national regulatory authority provided information to the Commission on the organisation of the gas transmission networks in France and the interconnections with the transmission networks in the neighbouring countries. The merger cases COMP/M.10139 - *DESFA/COPELOUZOU/DEPA/GASLOG/BTG/GASTRADE* and COMP/ M.10619 - *SNAM/ENI/JV*, which related to gas import infrastructure in Greece and Italy respectively, are recent merger examples where the Commission engaged with the relevant national regulatory authority. Also in antitrust case AT.40278 – *Greek Wholesale Electricity Market*, the Commission is closely cooperating with the national regulatory authority with a view to gathering relevant data on the functioning of the Greek wholesale electricity market.
- In the telecommunication sector, in merger case M.9728 - *ALTICE/OMERS/ ALLIANZ/COVAGE*, the Commission contacted during the pre-notification phase the French electronic communications, postal and print media distribution regulatory authority in order to obtain its informed view on the relevant markets and the possible risks for competition following the transaction. The French

[13] Competition authorities should delegate interpretation of sector-specific regulations to the sector regulator. See Case C-179/16, *F. Hoffmann-La Roche Ltd and Others v AGCM,* OJ C 354, 26.10.2015.

authority provided its observations on the market conditions and on the regulatory framework, which were taken into account by the Commission in the substantive assessment of the case. In merger case M.8864, *VODAFONE / CERTAIN LIBERTY GLOBAL ASSETS*, the German telecommunications regulator was consulted by the Commission on the draft commitments proposed by the merging parties, as these commitments included a series of behavioural measures regarding wholesale access to cable. The regulator was also assigned an advisory role with regard to certain aspects of the commitment: in particular, the monitoring trustee can seek the expert advisory opinion of the national regulator concerning the German regulatory framework for telecommunications. In case M.7758 *HUTCHISON 3G ITALY / WIND / JV*, the Commission included the Italian telecommunications regulator (AGCOM) in its market test of the commitments proposed by the merging parties, aimed at maintaining a fourth mobile operator in the Italian telecommunications market.

- In the transport sector, in merger case M.9779, *ALSTOM / BOMBARDIER TRANSPORTATION*, during the investigation the Commission contacted the regulator for United Kingdom's rail networks, which provided relevant information on the market conditions and the parties' position in the United Kingdom. The regulator further sent observations on the commitments proposed by the parties to the transaction. Also in merger case M.8677 *SIEMENS/ALSTOM*, the Commission consulted a series of national rail regulators on the text of the commitments proposed by the parties to address the competition concerns that had emerged during the investigation.
- In digital mergers, in case M.9660 *Google/Fitbit*, concerning Google's acquisition of the manufacturer of wearable devices Fitbit, the Commission investigated possible competition issues related to the data collected via Fitbit's wearable devices and the interoperability of wearable devices with Google's Android operating system for smartphones. Throughout its investigation, the Commission had contacts with both the EDPS (which provides the EDPB's secretariat) and the EDPB itself, to understand the regulatory framework applicable to the processing of personal data by Google and Fitbit. The EDPB also provided feedback, on behalf of its members, to the market investigation and to the market test of the commitments.

3.2.2. Cooperation to avoid ne bis in idem: the new legal standard set by the Court of Justice in Bpost

20. As already explained above, a different but connected issue is the need to respect the *ne bis in idem* principle in cases where the same facts are assessed by a competition authority under competition law and by a sector regulator under sector-specific regulation. This particular situation was recently the subject of a judgment by the CJEU that has provided some clarity on the concrete application of this principle and on the obligations of the relevant authorities in this respect.

21. In *Bpost*,[14] a recent preliminary ruling case, the Court of Justice was consulted on the application of the *ne bis in idem* principle in the specific scenario of competition law enforcement following a previous intervention by a national regulatory authority.

22. The context of the dispute concerned two separate proceedings against Bpost, Belgium's postal operator, with respect to its new pricing model. The proceedings led to the imposition of two

[14] See Case C-117/20, *bpost SA v Autorité belge de la concurrence*, ECLI:EU:C:2022:202, request for a preliminary ruling from the *Cour d'appel de Bruxelles* (Belgium).

administrative penalties, one by the national regulatory authority for postal services in Belgium ("IBPT") for breach of the non-discrimination obligation laid down in Belgian legislation, and a second by the Belgian competition authority for abuse of dominant position under Article 102 TFEU.[15]

23. The referring Belgian Court was essentially asking whether the *ne bis in idem* principle barred the Belgian competition authority from pursuing its separate competition investigation on the same conduct that had already been sanctioned by the IBPT.

24. In its judgment, the Court of Justice stated that *ne bis in idem* principle applies when two cumulative criteria are met: (i) there must be a prior final decision on the merits of the case (the "*bis*" condition) and (ii) the subsequent proceeding must concern the same person and the same material facts[16] of the first (the "*idem*" condition).[17] In such event, carrying out parallel proceedings would constitute a limitation of the fundamental right guaranteed by Article 50 of the Charter of Fundamental Rights of the European Union ("Charter").

25. However, the Court stated that, even when the above criteria are met, a limitation of the fundamental right guaranteed by Article 50 of the Charter may be justified on the basis of Article 52(1) of the Charter, which establishes when individual rights can be limited. According to the Court, such conditions are the following:

- The two proceedings must be provided for by law under different legislations, and must pursue distinct legitimate objectives;[18]
- The duplication of proceedings and, eventually, penalties must respect the principle of proportionality, i.e. they must be complementary and not represent an excessive burden for the individuals concerned;[19]
- Such duplication must be strictly necessary and predictable. This means in practice (i) that the individuals concerned must be able to predict which acts may be subjects to two different proceedings and (ii) that "*there will be coordination between the different authorities*".[20]

26. With particular reference to this last criterion, the Court explained that a duplication may lawfully occur only when the two sets of proceedings have been conducted "*in a manner that is*

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15 For a more detailed description of the case and the judicial proceedings, see *Competition Enforcement and Regulatory Alternatives – Note by the European Union*, submitted at the 71st OECD Working Party 2 meeting on 7 June 2021, available at https://one.oecd.org/document/DAF/COMP/WP2/WD(2021)13/en/pdf.

16 See *Bpost* ruling (C-117/20), paragraph 33. In relation to the identity of material facts, the Court recalled that "*material facts* [should be] *understood as the existence of a set of concrete circumstances which are inextricably linked together and which have resulted in the final acquittal or conviction of the person concerned"*.

17 In *Bpost*, the Court therefore definitively dropped the last prong of the previous legal standard it had established for the application of the *ne bis in idem principle* in competition proceedings. Indeed, the former standard employed a three-prong test: (i) the facts in the two proceedings must be the same, (ii) the offender must be the same, and (iii) the legal interest protected must be the same (Joined Cases C-204/00, C-205/00, C-211/00, C-213/00, C-217/00, C-219/00, *Aalborg Portland and Others v Commission*, EU:C:2004:6, paragraph 338).

18 See *Bpost* ruling (C-117/20), paragraphs 41-44.

19 See *Bpost* ruling (C-117/20), paragraphs 48-50

20 See *Bpost* ruling (C-117/20), paragraph 51.

sufficiently coordinated" and "*within a proximate timeframe*", and when penalties imposed in the first case are "*taken into account in the assessment*" of the second penalty.[21]

27. For the purposes of the present document, it is relevant to observe that – in analysing the compliance of the Belgian investigations to such "cooperation" requirement – the Court noted that the existence (in national regulations) of a provision providing for cooperation and exchange of information between the national competition authority and the IBPT "*would constitute an appropriate framework for ensuring the coordination*" necessary to avoid the violation of the *ne bis in idem* principle.[22]

28. In short, the *Bpost* judgment clarified that cooperation between a competition authority and sector regulators is not only welcome but also required by law, in cases where the same facts are under scrutiny by different authorities, to avoid issues of double jeopardy.

29. In that regard, this type of cooperation will be required in the context of the future application of the Digital Markets Act ("DMA").[23] The DMA introduced a set of rules that aim at tackling in a clear-cut and upfront manner those practices by the so-called "digital gatekeepers" that are considered to be recurrent and systemically harmful in the digital sector.[24]

30. In essence, given that the rules introduced by the DMA can be considered similar to those aimed at regulating specific sectors from an ex-ante perspective, their application will need to be coordinated with competition enforcement to avoid uncoordinated results. This is all the more necessary given that the DMA establishes a system of fines and periodic penalty payments (including for violation of its obligations), which could lead to potential situations of double jeopardy with competition enforcement. The need for this cooperation is already reflected in the text of the DMA, which – at recital 86 – states that "*appropriate levels of fines and periodic penalty payments should also be laid down for non-compliance with the obligations and breach of the procedural rules subject to appropriate limitation periods, in accordance with the principles of proportionality and ne bis in idem. The Commission and the relevant national authorities should coordinate their enforcement efforts in order to ensure that those principles are respected. In particular, the Commission should take into account any fines and penalties imposed on the same legal person for the same facts through a final decision in proceedings relating to an infringement of other Union or national rules, so as to ensure that the overall fines and penalties imposed correspond to the seriousness of the infringements committed*." (emphasis added)

31. More recently, a similar suggestion for coordination efforts between competition authorities and sector regulators can be found in the opinion by Advocate General Rantos in the Meta Platforms preliminary ruling case, referred to the Court of Justice by a German court.[25] The case originated from an antitrust investigation against Meta Platforms (the owner of Facebook, Instagram and WhatsApp) carried out by the German competition authority ("FCO"). The investigation focused on an alleged violation of data privacy rules that resulted in an abuse of

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21 *Ibidem*.

22 See *Bpost* ruling (C-117/20), paragraph 55.

23 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act), OJ L 265, 12.10.2022, p. 1–66.

24 Digital gatekeepers will be identified based on certain quantitative criteria or following a qualitative assessment, carried out through an investigation by the Commission (see Art. 3 of the DMA).

25 See Case C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*.

dominant position by Meta. The same conduct was at the time under investigation by the competent data protection authority.

32. According to Advocate General Rantos, in such instance a competition authority has, even in the absence of clear rules on cooperation mechanisms, "*a duty to inform and cooperate with the competent*" sector regulators as well as a duty "*possibly to await the outcome of that authority's investigation before commencing its own assessment, in so far as that is appropriate and is without prejudice to the competition authority abiding by a reasonable investigation period and the rights of defence of the data subject*".[26]

33. It remains to be seen if the Court of Justice will follow in its judgment Advocate General Rantos's views on cooperation obligations, in particular as regards the opportunity for the competition authority to stay its proceedings until adoption of a final decision by the sector regulator.

4. Final remarks

34. The Commission believes that competition and regulation should coexist and be applied together, as they are both key to protect consumer welfare and other legitimate objectives protected by the relevant regulations. Considering the interconnections between the different disciplines, cooperation between competition authorities and sector regulators is essential. In its enforcement of EU competition law, as explained above, the Commission routinely consults sector regulators during investigations in regulated sectors to obtain sector-specific information and specialist knowledge on the regulatory framework and market conditions.

35. Moreover, when the activities of competition enforcers and sector regulators risk overlapping, cooperation is an effective tool to avoid inconsistent outcomes and preserve as much as possible legal certainty for all the stakeholders involved. The recent case law of the Court of Justice in this respect confirms the necessity of close cooperation and imposes further reflections on the opportunity of a specific and codified framework for this cooperation.

[26] See Case C-252/21, *Meta Platforms and Others (Conditions générales d'utilisation d'un réseau social)*, opinion of Advocate General Rantos delivered on 20 September 2022, ECLI:EU:C:2022:704, paragraphs 29-31.