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2020 EU Antitrust Update

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This update summarises recent developments and trends in the different areas of European Union (“EU”) competition law and gives an outlook on what can be expected in 2020.

Overarching Themes

Digital. There is intense debate in Europe as to how competition enforcement should tackle digital developments. In her mission letter, Ursula von der Leyen, the new President of the European Commission (“EC”), sets out her vision for the EU to become a key global digital player, and tasks Commissioner Margrethe Vestager with an expanded dual role as Competition Commissioner and responsibility for the EC’s digital agenda.

As part of Commissioner Vestager’s “digital mission”, the EC recently published white papers on the European data strategy and artificial intelligence (“AI”). In addition, as was to be expected, the EC will launch a sector-wide inquiry into digital platforms (Google, Amazon, etc.) in 2020. The EC is also considering targeted regulation that would give it “ex ante” powers with regard to potentially anticompetitive practices by dominant digital platforms. Such legislation would be aimed at addressing criticism that “ex post” investigations take too long and fines come too late to restore competitive market conditions. Commissioner Vestager has acknowledged that, in hindsight, she would have been “bolder” in her first term in taking action against big tech companies (despite the EC having imposed a total of more than €8 billion in fines in the three Google cases). The EC has used interim measures against Broadcom for the first time in 18 years, and has indicated that it will use such measures more often in fast-moving markets. There is also debate as to whether the EC should impose far-reaching restorative remedies on big tech companies, who have grown to a position of market power without close scrutiny from competition authorities. The EC is evaluating and reviewing various EU antitrust rules (including the vertical block exemption

regulation and horizontal co-operation block exemption regulations) that will expire in the course of Commissioner Vestager's new mandate, as well as the EC's market definition notice of 1997 in light of digital (and other) developments.

European Champions. France and Germany in particular continue to demand that EU competition rules are loosened to allow for the creation of "European Champions" and a more level playing field between European and non-European companies, which has raised concerns of a politicisation of competition cases. Developments in the United Kingdom ("UK") post-Brexit will likely influence this debate, with EU Member States watching closely how competition rules are applied in the UK going forwards.

EU Merger Control

Merger Statistics. In 2019, the EC received more than 380 merger notifications, which is the third highest number of notifications ever received and only down slightly from the record high of 414 filings lodged in 2018. Of these, the vast majority of cases were cleared unconditionally and under the EC's simplified procedure. 16 cases were approved by the EC subject to remedies (10 in Phase One, six in Phase Two) and three deals were prohibited, all concerning traditional heavy industries: the Siemens/Alstom rail merger; Wieland/Aurubis (relating to rolled copper products); and the Tata Steel/ThyssenKrupp JV (relating to steel).

Killer Acquisitions and Transaction Value Thresholds. Linked to the digital theme, as one of the priorities for her second term, Commissioner Vestager has suggested a closer examination of the potential anticompetitive harm of so-called "killer acquisitions", i.e., the buy-out of a nascent or smaller player in order to prevent future competition (e.g., in the digital or pharma sector), and whether there is a need to introduce transaction value based thresholds under the EU Merger Regulation ("EUMR").¹ The 2019 special advisers' report on digital challenges for competition policy concludes that the EC should better monitor the performance of transaction value-based thresholds that were recently introduced in Germany and Austria before taking action.² Despite this finding of the special advisers, Commissioner Vestager in September 2019 took the position that the EU merger regime must be able to capture all mergers that can harm competition in the EU and therefore did not rule out changes to the EU merger thresholds.

Continuous Strict Enforcement of Procedural Breaches. The EC continues to be tough on gun-jumping and other merger-related procedural violations. In June 2019, Canon was fined €28 million by the EC for a partial premature implementation of a

transaction through the use of a two-step warehousing type structure, in connection with the acquisition of Toshiba Medical Systems Corporation (“TMSC”). As a first step, an interim buyer acquired 95% of TMSC’s share capital for €800, with Canon acquiring the remaining 5% for €5.28 billion and share options over the interim buyer’s stake. This first step was carried out prior to notification to, or approval by, the EC. In a second step, following EC approval, Canon exercised its share options acquiring 100% of TMSC’s shares. The EC found that the first and second step in the transaction structure formed part of a single concentration, and that by not notifying the first step Canon partially implemented the transaction in violation of the EU notification requirement and the stand-still obligation. The EC’s approach to impose separate fines for failure to notify and gun-jumping violations may be curbed in 2020, pending the Marine Harvest gun-jumping appeal.³

With regard to other procedural breaches, General Electric (“GE”) was fined €52 million in 2019 for providing incorrect information during the EC’s review of GE’s proposed acquisition of LM Wind. In the Form CO, GE had stated that it was not developing higher power output wind turbines for offshore applications, whereas in fact GE had been doing so, and had already marketed these larger turbines in a series of customer letters, which were brought to the EC’s attention. The merger was cleared in Phase 1 (following a pull and re-file), but the EC still regarded the incorrect information provided as relevant to potential competition between the parties through innovation.⁴ There is also an ongoing investigation into Merck and Sigma-Aldrich relating to whether the companies failed to disclose information about an innovation project that the EC says would have required a remedy and therefore would have been crucial to the EC’s assessment.

Tougher Stance on Merger Remedies and Closer Monitoring. The EC continues to require far-reaching divestment remedies in complex horizontal cases including in cases of innovation concerns due to pipeline overlaps (e.g., in Takeda/Shire, Bayer/Monsanto and Dow/DuPont). Additional purchaser criteria not included in the EC’s Standard Model Commitments text are increasingly common (e.g., relating to a need for industry-specific expertise and experience in Europe). By way of example, in the 2019 Takeda/Shire case, the EC included seven additional purchaser criteria in addition to the three standard ones. At the same time, the EC’s threshold to assume *prima facie* competition concerns with regard to the divestment deal is a rather low one. The need for both industry-specific expertise and the absence of *prima facie* concerns can severely limit the universe of available buyers. In addition, upfront buyer requirements are increasingly common, which puts the purchaser risk on the parties and does not allow for closing of the main transaction prior to receipt of purchaser approval from the EC. The EC may also delay the approval of the purchaser if merger

filings for the divestment deal are necessary, which delays closing of the main transaction in case of an upfront buyer requirement (e.g., in Bayer/Monsanto or Solvay/Ineos).

Despite increased purchaser scrutiny by the EC (and the Monitoring Trustee), divestiture failures do happen (even though they are rare). A recent EU example of a divestiture failure is the Nidec/Embraco case that concerned the combination of two refrigeration compressor producers. The case was cleared by the EC subject to a divestiture of Nidec's plants in Austria, Slovakia and China. Only several months after having been approved by the EC, the new owner (ESSVP IV/Orlando, a consortium) announced plans to cease the production of refrigeration compressors in Austria. As a consequence, the EC is currently conducting a fact-finding exercise that includes investigating whether Nidec honoured the divestiture commitments (Nidec had promised significant funding for the divestment facilities). The EC has called ESSVP IV/Orlando's decision to shut down the Austrian refrigeration compressors production "regrettable", but it could, however, not force the consortium to continue the operation of the plant.

The EC is also paying close attention to compliance with commitments. In February 2019, the EC sent a statement of objections to Telefonica relating to a potential breach of its 2014 commitments in connection with its acquisition of E-Plus. The EC is investigating whether Telefonica properly implemented its obligation under the commitments to offer wholesale 4G services to all interested players at "best prices under benchmark conditions". This is the first breach of commitments case at EU level – at Member State level, the French Competition Authority previously fined SFR-Numericable and its shareholder Altice €15 million for imposing tariff increases on the divestment business in violation of their commitments.

EU Cartel and Antitrust Developments

Cartels. Cartel enforcement remains a priority for the EC. In 2019, total fines of €1.47 billion were imposed (up from €800 million in 2018), largely relating to the fines for several banks in the foreign exchange spot trading cartel (Forex). Four cartel decisions were adopted (two relating to Forex). All decisions were reached under the EC's cartel settlement procedure and all investigations were triggered by leniency applications. We are aware of two dawn raids conducted by the EC in 2019 (Farmed Atlantic Salmon and Casino/Intermarché). In the Casino/Intermarché case, the EC is investigating whether grocery retailers used a buying alliance to collude on their sales activities.⁵ The EC has more recently started to investigate possible cartel behaviour in purchasing markets

more closely: ongoing purchaser cartel investigations are ethylene (dawn raids took place in 2017) and styrene monomer (dawn raids in 2018), following fines of €68 million for several companies in the car battery recycling cartel case (2017). The EC's 2020 pipeline of cases also includes the investigation into whether several German car manufacturers colluded to avoid competition on the development and roll-out of technology to clean the emissions of petrol and diesel passenger cars.

The EC also launched a new "eLeniency tool" in 2019, designed to make it easier for companies to submit statements and documents online as part of leniency and settlement proceedings in cartel (and non-cartel) cases.

Finally, there is continuous debate in Europe (and elsewhere) about the effectiveness of leniency programmes in light of increased private damages action and also the potential competitive risks associated with algorithms used in the digital economy.⁶

Antitrust and Pharma. During 2019, we were awaiting several important judgments from the European courts in relation to patent settlements entered into between the supplier of a blockbuster drug and the owner of a generic version, which resulted in a delay to the introduction of the generic drug into the marketplace (so-called "pay for delay" cases).

A significant judgment on this issue was handed down by the EU Court of Justice ("CJEU") in early 2020 in the paroxetine case, following a reference from the UK Competition Appeal Tribunal ("CAT") under the Article 267 Treaty on the Functioning of the European Union ("TFEU") procedure (the timing of this judgment was interesting given that the UK left the EU the day afterwards). The CJEU found that a generic drug supplier can be regarded as a potential competitor to the supplier of the originator drug where there is ongoing patent litigation and even despite uncertainty with regards to the outcome. The CJEU also found that settlement agreements involving a transfer of value to the generic supplier in exchange for delayed market entry will not necessarily entail a restriction of competition by object under Article 101 TFEU. However, where the transfer of value "cannot have any explanation other than the commercial interest of both the holder of the patent and the party allegedly infringing the patent not to engage in competition on the merits", there is a restriction by object. The paroxetine case will now resume before the UK CAT, and the CJEU has still to decide on appeals from the General Court decisions in the Lundbeck and Servier "pay for delay" cases.

Antitrust and Vertical Restrictions. 2019 saw the EC continue its efforts in investigating vertical practices, particularly in respect of e-commerce and online trade.

This focus on vertical distribution issues itself is noteworthy, with the EC having a history of typically prioritising horizontal anticompetitive practices. 2020 will see travel technology companies Sabre and Amadeus continue to face an investigation by the EC concerning whether clauses in their contracts with airlines and travel agents are restrictive of competition. In particular, the EC is investigating whether terms in Amadeus' and Sabre's agreements restrict airlines and travel agents from using alternative suppliers of ticket distribution services. Similarly within the travel industry, the EC in January 2020 announced that it fined Meliá, a Spanish hotel group, €6.7 million for discriminating between customers originating from different Member States in its contracts with tour operators. The EC found that Meliá had entered into contracts with tour operators that restricted both active and passive sales for hotel accommodation; the EC closed parallel probes into the tour operators concerned.

The EC in 2019 also announced an investigation into the world's largest PC video game distribution platform, Steam, and five other video game publishers. This investigation will look into whether these companies have engaged in "geo-blocking" by preventing customers from purchasing and using PC video games from outside their country of residence.

Penalties were imposed in 2019 on AB InBev (€200 million) for restricting cross-border sales of beer between the Netherlands and Belgium, and on a US manufacturer (€12.5 million) and Sanrio (€6.2 million) for restricting cross-border sales of merchandising products, both online and in physical stores.

Abuse of Dominance

Dominance in the Technology Sector. The EC continues to focus on digital platforms in its abuse of dominance enforcement work. Following the EC's Shopping decision in 2017 and Android decision in 2018, Google received a third significant EU fine in 2019 (€1.49 billion) for abuse of dominance in the market for online search advertising intermediation. The EC is also looking at whether Google used its search platform to help its job search business, Google Jobs. There are furthermore press reports of another EU investigation in relation to Google's data collection practices. Qualcomm remained on the EC's radar in 2019, with the EC imposing a fine of €242 million for predatory pricing in relation to the market for 3G baseband chipsets. The EC is also investigating whether Qualcomm is leveraging its market position in the 5G baseband processors in the radio frequency front ends ("RFFE") space.

In July 2019, the EC issued preliminary findings in its investigation into Amazon's dual role as an online retailer and provider of an online marketplace. The EC found that Amazon appears to use data obtained through its role as a marketplace provider (on other retailers, their prices, products and transactions) for its own advantage as an online retailer (in potential contravention of both Articles 101 and 102).⁷

In October 2019, as part of the Broadcom investigation, the EC ordered the company to stop applying certain contractual provisions that gave customers commercial advantages (rebates, non-price advantages) under the condition that they purchase Broadcom's systems-on-a-chip for TV set-top boxes and modems exclusively or quasi-exclusively. The EC concluded that interim measures for a period of up to three years were warranted in order to prevent serious and irreparable damage to competition, as otherwise a number of future tenders would have been affected and other chipset suppliers would have been unable to compete with Broadcom.

Outlook – What to Expect in 2020?

- We expect strong enforcement by the EC in all areas of EU competition law, as set out in the mission letter of President von der Leyen.
 - A clear priority of Commissioner Vestager will be tackling the issues around big tech and digital topics (data, AI and platforms). There will be a sector inquiry into digital platforms, possibly big tech legislation, and the EC may impose far-reaching measures in abuse of dominance investigations concerning fast-moving markets (interim measures, restorative remedies).
 - The debate and work on a general reform of EU competition rules will continue going forwards. This will include possible changes to the EUMR thresholds, as well as the review of the antitrust block exemption regulations and the EC's market definition notice. We can also expect a continuation of the "European Champions" debate in 2020.
 - With regard to Brexit, the EU competition rules will continue to apply in the UK until the end of the transition period (which, for now, is 31 December 2020). Future cooperation of the UK with the EU (and EU Member States) will have to be agreed going forwards, as the UK will no longer be a member of the European Competition Network. There are some early signals that the UK may apply a tougher regime going forwards, but it is too early to tell how this will play out.
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1. The introduction of such thresholds had been considered by the EC already during Commissioner Vestager's first term in a public consultation on the reform of the EUMR (but no proposals were made in 2019).↔

2. Likewise in France, there is a proposed law that would require large digital companies identified as "systemic" to notify all of their deals to the French authority for review.↔

3. Advocate General Tanchev, in a non-binding opinion to the CJEU, opined that the EC cannot impose two separate fines, as the gun-jumping provision subsumes the notification obligation (since both provisions protect the same value, namely avoiding damage to competition). Altice, who was fined €124.5 million by the EC for gun-jumping in relation to the acquisition of PT Portugal in 2018, makes the same argument in its pending action against the EC's decision before the General Court.↔

4. The information was also relevant for a separate transaction reviewed by the EC, namely Siemens' acquisition of Gamesa.↔

5. At EU Member States level (France, Belgium), competition authorities are currently also investigating several purchasing alliances in the retail sector for possible cartel violations.↔

6. On the latter, see for instance the German-French working paper on algorithms published in November 2019.↔

7. Also in July 2019, Amazon reached a settlement with the German and Austrian competition authorities on a separate issue related to a change of business terms for online traders that use its marketplace platform.↔

Authors

[Sally Evans \(née Southwell\)](#)

Partner / [London](#)

[Dr. Thomas S. Wilson](#)

Partner / [London](#)

[Samantha Jones](#)

Associate / [London](#)

[Arjun Chandran](#)

Associate / [London](#)

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