COMPETITION ENFORCEMENT AGENCIES

HANDBOOK 2019

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Competition Enforcement Agencies Handbook 2019

A Global Competition Review Special Report

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Competition Enforcement Agencies Handbook 2019

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Global Competition Review's 2019 edition of the *Competition Enforcement Agencies Handbook* provides full contact details for competition agencies in over 100 jurisdictions, together with charts showing their structure and a Q&A explaining their funding and powers. The information has been provided by the agencies themselves and by a panel of specialist local contributors.

The *Competition Enforcement Agencies Handbook* is part of the *Global Competition Review* subscription service, which also includes online community and case news, enforcer interviews and rankings, bar surveys, data tools and more.

We would like to thank all those who have worked on the research and production of this publication: the enforcement agencies and our external contributors.

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Overview

Andrzej Kmiecik and Andreas Reindl
Van Bael & Bellis

This article highlights key developments in EU competition law in 2018. In addition to European Commission (Commission) decisions, this article covers selected judgments by the EU courts that had a major impact on EU competition law enforcement.

Mergers

The past year was busy for the Directorate-General for Competition's (DG Comp) merger control units, with 414 mergers notified, making 2018 the busiest year on record since the introduction of the EU Merger Regulation (EUMR). The number of decisions to open a Phase II investigation also increased from previous years, although no investigation ended in a prohibition decision. Almost 75 per cent of all notified mergers were cleared under the simplified procedure, similar to 2017.

Gun jumping – clearer rules, but significant risks remain

While 2018 has seen a number of major EU merger control cases that are interesting in their own right (such as *Essilor/Luxottica*, *Bayer/Monsanto*, *Qualcomm/NXP*), probably the most important development in EU merger control concerned the procedural framework of merger review, in particular pre-closing coordination and integration planning.

In May 2018, the Court of Justice (ECJ) clarified in its much anticipated *Ernst & Young* judgment that the standstill obligation in article 7(1) of the EUMR, which prohibits firms from implementing a notifiable transaction prior to clearance by the Commission, will be infringed only by acts that contribute to a change of control over the target.

By way of background, in November 2013 KPMG Denmark entered into a merger agreement with its competitor, Ernst & Young. Prior to clearance of that merger by the Danish competition authority, KPMG Denmark terminated its cooperation agreement with KPMG International in accordance with the merger agreement. Although the competition authority cleared the transaction, it later held that KPMG Denmark's termination of the agreement with KPMG International had infringed the Danish equivalent of the standstill obligation contained in the EUMR.

The ECJ considered the EUMR's standstill obligation applied only to transactions that give rise to a change of control. Importantly, the ECJ ruled that, contrary to the position taken by the Commission, ancillary or preparatory acts in the context of a merger that do not contribute to a change of control do not fall within the standstill obligation. It was immaterial whether those ancillary or preparatory acts give rise to market effects, although the ECJ also confirmed that actions that contribute to a lasting change of control are subject to the standstill obligations even if they do not have any effects on the market.

Although *Ernst & Young* brought greater clarity to gun-jumping rules under the EUMR and put limits on an overly expansive interpretation of the standstill obligation, the Commission's April 2018 *Altice* decision, which imposed a record €125 million fine for gun-jumping, highlighted that this remains a high-risk area that requires careful attention of merging parties and their advisors. The *Altice* gun-jumping decision came about after the Commission, which had already conditionally cleared Altice's acquisition of PT Portugal, opened a separate investigation into possible procedural infringements. The Commission found the transaction agreement provided Altice with the legal right to exercise decisive influence over PT Portugal by granting Altice veto rights over decisions concerning PT Portugal's ordinary business. It also found evidence that Altice had actually exercised decisive influence over aspects of PT Portugal's business prior to obtaining merger clearance by giving PT Portugal instructions on how to carry out a marketing campaign and by receiving detailed commercially sensitive information about PT Portugal outside the framework of any confidentiality agreement. The Commission decided that Altice infringed both the prior notification obligation under article 4(1) of the EUMR and the standstill obligation under article 7(1) of the EUMR.

A rare unconditional clearance of a four to three telecoms merger

Many recent mergers in the telecoms sector have been subject to strict scrutiny, with several mergers being approved only with significant remedies and others

prohibited or abandoned in light of the Commission's competition concerns.

The Commission's unconditional clearance decision in *T-Mobile/Tele2*, a transaction that combined the number three and number four players in the Dutch retail mobile telecommunications market, represents an exception to this trend. The Commission's unconditional approval, after issuing a statement of objections, was based on three factors:

- the relatively small combined market share of the parties;
- the limited market share of Tele2 NL; and
- the uncertainty regarding Tele 2NL's future.

The Commission has emphasised that these factors were highly case-specific, so the decision probably should not be understood as an indication of more lenient treatment of future telecoms mergers.

Abuse of dominance

In the area of article 102, 2018 brought several important developments, most notably the Commission's decisions in *Qualcomm* and *Google*. In addition, the European courts issued two important judgments concerning pricing conduct by dominant firms.

Qualcomm – the first post-Intel decision by the Commission on exclusionary pricing strategies

In a decision of 24 January 2018, the Commission found that chipset producer Qualcomm to have abused its dominant position on the market for LTE baseband chipsets by making significant payments to Apple, considered a key customer, on the condition of exclusivity. The decision imposed a €997 million fine on Qualcomm.

This was the Commission's first decision on retroactive, conditional rebates since the ECJ's judgment in *Intel*. The Commission's press release indicated that its legal assessment reflected the judgment in *Intel*. In particular, the press release explained that the Commission conducted a thorough assessment of various market factors and found that the exclusivity payments were so high that they effectively prevented Apple from purchasing from other suppliers. The Commission concluded that this prevented Qualcomm's competitors from competing effectively, considering Apple's importance as a customer in the market for LTE baseband chipsets and the share of the market covered by the Qualcomm–Apple agreement. The Commission also concluded that Qualcomm's exclusivity strategy did not create efficiencies that could have justified the conduct.

Because the public version of the decision has not yet been published, a number of interesting questions remain unanswered, including on what grounds the Commission rejected Qualcomm's as-efficient-competitor test and how the Commission established significant foreclosure effects as Apple accounted only for approximately one-third of the market.

Google – again the target of an infringement decision

On 18 July 2018, the Commission imposed its largest fine ever (€4.34 billion) on Google for abusing its dominant position on three markets:

- general internet services;
- licensable smart operating systems; and
- app stores for the Android mobile operating system.

The Commission found that Google had engaged in three types of anticompetitive practices:

- requiring device manufacturers to pre-instal the Google search app and Google Chrome browser as a condition for licensing Google's app store;
- making payments to device manufacturers on the condition they exclusively pre-instal the Google search app on their devices; and
- prohibiting original equipment manufacturers that installed Google apps on their phones from selling phones that ran on 'forked' versions of Google's Android operating system.

No public version of the Commission's decision is currently available, but the case is nonetheless notable on account of the size of the fine and the (potential) impact the decision will have on Google's business model. Publicly available information suggests that a key question on appeal will be whether the Commission was justified to narrowly analyse Google's conduct under a standard, 'classical' tying framework or should have given greater weight to Google's business model, the significant benefits to consumers brought about by Android, and the fact that Google's agreements may have been necessary to more effectively compete with Apple's iPhones.

Welcome guidance on price discrimination under article 102

In its April 2018 *MEO* judgment, the ECJ clarified that a more flexible legal standard applies for the evaluation of downstream price discrimination claims and provided some guidance on the factors that should inform such an assessment.

The judgment was delivered in response to a reference question from the Portuguese Tribunal for Competition, seeking clarification on when price differentiation would result in a 'competitive disadvantage' under article 102(c) of the Treaty on the Functioning of the European Union (TFEU). The ECJ confirmed that a finding of unlawful price discrimination did not require that there be harm to competition on the downstream market on which the dominant firm's customers were active. However, referring to the principles established in *Intel*, it held that a finding of a customer's 'competitive disadvantage' must be based on an analysis of all the relevant circumstances of the case. These circumstances include the period during which price discrimination existed, the impact of the discriminatory price on the customer's total cost base, the negotiating power of customers and whether there was any intent on the part of the dominant firm to foreclose a customer. Importantly, *MEO* clarifies previous case law, including *British Airways*, which could have been read to suggest that charging customers different prices will almost invariably be unlawful under article 102 TFEU(c).

Vertical agreements

Last year saw an exceptional level of output from the Commission, with the adoption of no fewer than five infringement decisions in which fines were imposed for violations of article 101. In contrast, prior to 2018, no fine had been imposed in respect of a vertical agreement since 2004. Only one of the cases started as a follow-up to the Commission's e-commerce sector inquiry, but all concerned online sales.

Pioneer, Asus, Philips and Denon & Marantz

In July 2018, fines totalling €111 million were imposed in separate decisions on Pioneer, Asus, Philips and Denon & Marantz. All four cases involved resale price maintenance and the *Pioneer* case additionally involved measures taken to prevent cross-border sales. Unsurprisingly, all the infringements were found to have the object of restricting competition under article 101(1).

The companies were found to have closely monitored the online resale prices charged by retailers (using sophisticated monitoring tools) and to have intervened when they considered prices to be too low, including after receiving complaints from other retailers, by issuing threats or sanctions including the withholding of supplies. The Commission found that the widespread use of price adjustment software by retailers exacerbated the effect of the measures taken. As price adjustment software may automatically adjust the prices of a retailer to match the lowest price advertised online, steps taken by a supplier to cause (a limited number of) retailers charging the lowest online prices to increase their prices may have automatically increased the prices charged by a broader group of retailers.

The Commission found no indications that the pricing restrictions were indispensable to achieve efficiencies under article 101(3), such as to induce retailer investment in certain promotional measures or presale services, or to alleviate the repercussions of free-riding between online and offline sales channels.

All four companies received reductions of between 40 to 50 per cent of the level of the fine by making use of cooperation procedure.

Guess

In December 2018, the Commission imposed a fine of close to €44 million on the US clothing supplier and retailer Guess for engaging in a multifaceted single and continuous infringement, which included prohibiting resellers in its selective distribution system from:

- using the Guess brand names and trademarks for the purposes of online search advertising;
- selling online without a prior specific authorisation by Guess (the company had full discretion over whether to grant such authorisation and no quality criteria were specified to make this determination);
- selling to consumers located outside the authorised retailers' allocated territories;
- cross-selling among authorised wholesalers and retailers; and
- independently deciding on the retail price at which they sell Guess products.

Most of the elements of the infringement follow well-established precedents and similar restrictions have previously been sanctioned by fines. Of primary interest is the fact that this is the first case where a prohibition on the use of trademarks in online search advertising has been found to be an infringement. Both the prominence and the extent of the analysis allocated to this element of the infringement in the decision is striking, especially as Guess had separately reserved to itself the much broader and restrictive right to prohibit online sales altogether. The Commission nonetheless found the restriction on the use of the trademark to restrict competition by object and claimed that up to 40 per cent of the sales made on Guess's own online store were generated by (Google) AdWords. Guess was granted a 50 per cent reduction in the fine under the cooperation procedure. In this regard, the Commission emphasised the fact that Guess had voluntarily disclosed the

prohibition on the use of trademarks in online search advertising that the Commission had been unaware of during the initial investigation.

Review of the Vertical Agreements Block Exemption

The Vertical Agreements Block Exemption is set to expire on 30 May 2022 and already in November 2018 the Commission published the roadmap for the major review of the current framework (including the Vertical Guidelines), which will inform its decision on what regime should apply on its expiry. As part of the initial evaluation phase, a public consultation was subsequently launched in February 2019. Intense efforts on the part of, on one side, major brands and, on the other, internet sales platforms can be expected with the aim of influencing the future rules in this area, taking into account the major changes in distribution and marketing that have occurred since the current framework was introduced in 2010.

The debate concerning online distribution is expected to focus on issues including:

- restrictions on sales over platforms (and the scope of the *Coty* ruling);
- restrictions on the use of price comparison websites (in the light of the *Asics* ruling in Germany);
- the scope for price differentiation depending on whether product is sold on- or offline and whether brands should be able to require retailers to have a brick and mortar store;
- 'dual' online distribution by brands (involving both direct online sales to consumers and sales through third-party retailers); and
- price parity clauses.

The Commission will even consider whether there should be a block exemption at all. In formulating the new regime, the Commission may to seek to contain the degree of divergence that has occurred in enforcement at national level, with the German Federal Cartel Office in particular adopting a markedly more restrictive approach to restraints such as restrictions on sales over platforms and price parity clauses.

The Commission launched a separate review of the rules applicable to vertical agreements in the motor vehicle sector by publishing for consultation in February 2019 a roadmap for the initial evaluation phase.

Territorial exclusivity clauses in copyright licensing agreements raise competition concerns

The General Court's *Canal+* judgment of December 2018, dismissing the application for annulment that Canal+ had brought against a Commission decision that had made commitments offered by Paramount in the context of copyright licensing agreements binding, contains important statements on the legality of territorial restrictions in copyright licence agreements.

By way of background, after an investigation into possible restrictions affecting competition in the supply of pay television services through licensing agreements between six American studios and main EU broadcasters, the Commission had reached the preliminary view that the following could be in breach of article 101(1) TFEU:

- territorial exclusivity clauses by which a studio would grant an exclusive territorial licence to a broadcaster, including a commitment by the studio to prevent other broadcasters from responding to unsolicited requests from consumers in the territory; and
- clauses that prevented broadcasters from responding to any unsolicited service requests from customers located in a member state different from that of the broadcaster.

To address these concerns, Paramount offered the commitment that it would not implement the contested clauses over a five-year period, which was made binding by a 2016 Commission decision.

Canal+, a Paramount licensee, sought annulment of the Commission decision, which the General Court dismissed. On the legality of the territorial restraints, the court shared the Commission's position that the contested clauses raised competition concerns because they partitioned national markets. Although an IP rights holder may conclude exclusivity agreements for defined periods of time, these agreements must be considered to have the object of restricting competition if they prohibit passive, unsolicited sales to customers located outside the territory for which the broadcaster has been granted exclusive rights. An examination of the object and the economic and legal context in which these clauses apply did not change the analysis. In particular, the General Court considered it irrelevant for the finding of an object infringement that the contested clauses concerned works covered by intellectual property rights, as these clauses were not necessary for the owner of the rights to secure appropriate compensation for the use of its rights.

Finally, although the court considered that it was not required to carry out an analysis under article 101(3) TFEU when passing judgment on the legality of a commitment decision, it made clear its view that

the contested clauses did not meet the criteria for the application of article 101(3), in particular because the restrictions were not indispensable for the production and distribution of the audiovisual works that require the protection of intellectual property rights.

Procedure

Harmonising competition law enforcement across the EU

The European competition law enforcement environment is set to change as a result of the ECN Directive (the Directive), adopted in December 2018. The Directive, which supplements Regulation 1/2003 and the creation of the European Competition Network, covers a wide range of issues, from institutional independence, sufficiency of resources, investigative powers, core parameters for the assessment of fines and the role of competition authorities before national courts.

A notable feature of the Directive is the (modest) step towards a more harmonised leniency system in the European Union, by harmonising the use of a marker system, clarifying the role of summary applications and partially harmonising the rules governing individual immunity from prosecution of current or former directors, managers and staff of a leniency applicant. Whether these – rather unambitious – reforms will in practice make the leniency regimes at member state level more effective, remains to be seen.

Andrzej Kmiecik
Van Bael & Bellis

Andrzej Kmiecik focuses on competition law, with particular expertise in merger control, cartels, dominance, distribution, pricing, and intellectual property. He represents clients before the European Commission, the EU courts and in national competition law proceedings.

Andrzej's practice covers a wide range of industries, including the automotive sector, pharmaceuticals, paper and board products, office equipment, consumer electronics, aerospace, shipping, petrochemicals, clothing and footwear, and financial infrastructure.

Some of the high profile EU merger control cases he has handled include: *Boeing/McDonnell Douglas*; *Enso/Stora*; *Boeing/Hughes*; *Caemi/Mitsui/CVRD*; *Boeing/Lockheed/ULA*; *SABIC/Huntsman*; *SABIC/GE Plastics*; *DFDS/CRO Ports/Älvsborg*; and *Canon/IRIS* (article 22 referral).

His experience in EU cartel investigations includes acting as defence counsel in: *Newsprint*; *Amino Acids* (on appeal); *Carbonless Paper* (also on appeal); *Publication Papers*; *Fine Papers*; and *Car Parts*.

Andrzej has also successfully defended clients against complaints of exclusionary conduct before the European Commission, including Canon (ink jet consumables) and Honda (racing engine technology).

His experience extends to acting as counsel in major EU antitrust investigations involving the life sciences sector, including: *Becton Dickinson/Novo Nordisk* (diabetes care); *Lederle/SKB* (vaccines) and *Chiron/DRK* (blood screening). He was actively involved in the Commission's pharmaceutical sector inquiry.

He has also developed a niche practice in the field of motor vehicle distribution. He counsels and defends a number of manufacturers, combining extensive experience with in-depth industry knowledge.

He regularly lectures and writes on competition law matters.

Andreas Reindl
Van Bael & Bellis

Andreas Reindl focuses on European competition law. In particular, he has significant experience advising clients in the energy, transport, pharmaceutical, high-tech and other sectors on the full range of EU competition law issues.

He has worked on high-profile merger investigations initiated by the European Commission and national competition authorities, including the German Federal Cartel Office.

Andreas has represented several clients in abuse of dominance investigations. He also advises companies holding a dominant market position on how to avoid abusive behaviour (such as through pricing and rebate policies).

Andreas has broad experience advising clients on online distribution, licensing and other collaboration agreements. He also prepares compliance programmes and assists companies with their implementation.

Andreas previously served as director of the Fordham Competition Law Institute at Fordham Law School, New York and as a principal administrator at the Organisation for Economic Co-operation and Development Competition Division. Prior this, Andreas worked for several years for a major international law firm in Brussels and Washington, DC.

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