A new series: Main Developments Competition Law and Policy 2020 – Kick off with the EU

Kluwer Competition Law Blog
December 21, 2020

Lena Hornkohl (Deputy Editor) (Max Planck Institute Luxembourg for Procedural Law, Luxembourg)

Please refer to this post as: Lena Hornkohl (Deputy Editor), 'A new series: Main Developments Competition Law and Policy 2020 – Kick off with the EU', Kluwer Competition Law Blog, December 21 2020, http://competitionlawblog.kluwercompetitionlaw.com/2020/12/21/a-new-series-main-developments-competition-law-and-policy-2020-kick-off-with-the-eu/

What an eventful year, also for competition law. The Kluwer Competition Law Blog has a little treat for you: a series of posts on the main 2020 developments in key jurisdictions by many of our dear contributors. We will release a number of articles in the next month. Today, we kick off with the EU!

Main Developments in Competition Law and Policy 2020: European Union

A year in the grasps of COVID. Luckily, the many disruptions we still face day to day did not substantially slow down the Commission and the Court. Both have been very active this year (which thankfully lead to many blog posts for us, including this – apologies – certainly lengthy one).

Article 101 – a year in the light of addressing fundamental questions

Generics and Budapest Bank: the by-object by-effect saga

Article 101 was not the main focus on EU level this year. Nevertheless, the Court issued two significant judgments in the by-object and by-effect saga. First, the Generics judgment indeed constitutes a landmark decision. The Court clarified that the by-object category must be interpreted restrictively. It is limited to agreements, for which the only plausible explanation is the restriction of competition. Second, in Budapest Bank (discussed on KCL here), the Court gave the necessary analytical framework and evidentiary considerations for by-object assessments. There needs to be 'robust and reliable experience' about the nature of the agreement as previously confirmed by authorities and supported by case law – otherwise, a by-effects assessment is necessary. An authority needs to consider the content and objectives effectively established of the agreement as well as its economic and legal context – a degree below the by-effects assessment. This assessment includes (which is still highly debated in the aftermath of the judgment) a counterfactual analysis on the by-object stage. The parties can counter with providing strong indications about the pro-competitive or ambivalent effects of the respective agreement already on the 101 (1) level.

Pay-for-delay agreements: ongoing struggles

Coming back to Generics, with pay-for-delay agreements, the judgment confirmed that such settlements could be considered by-object restrictions. High barriers for any defence exist. The Court did not even accept an award of an interim injunction against the generic. This interim injunction sheds no light on the outcome of any dispute concerning the validity of that patent. Uncertainty as to the outcome of those proceedings cannot be sufficient ground to exclude from characterisation as a restriction by object. Advocate General Kokott also confirmed this in this year's opinion in Lundbeck (a case where we await a final decision by the ECJ any moment now, discussed on the KCL here).

We are not done with Generics (and Lundbeck) yet. The judgment was also crucial concerning the ongoing discussion about pay-for-delay agreements and the key hurdle of potential competition. For the Court, it is sufficient that there are 'real concrete possibilities' of entry. This is the case when a generic manufacturer has a firm intention and an inherent ability to enter the market and that any barriers to entry are not insurmountable. Surprisingly, a process patent 'of an active ingredient that is in the public domain' does not constitute an insurmountable barrier due to circumstantial evidence, such as the fact that there are a dispute and a reverse payment. Litigation against generic entries can thus be used against the original drug makers. As for the intention and ability to enter, AG Kokott in Lundbeck held that business decisions intending to enter the market, such as investments, contracts with suppliers, etc., are sufficient.

The Commission was not lazy when it came to pay-for-delay cases this year. In November, it fined Teva and Cephalon in a pay-for-delay agreement case. This case completes, at least on enforcement level, the cycle of pay-for-delay investigations launched with the Commission's 2009 sector inquiry into the pharmaceutical sector. The agreement itself was concluded quite some time before Cephalon became a subsidiary of Teva and included an agreement to delay for several years the market entry of a cheaper generic version of Cephalon's drug for sleep disorders (modafinil) after Cephalon's main patents had expired. A standard pay-for-delay case. The decision is not public yet. It will be interesting to see how the Commission reacted to the Generics judgment.

International Skating Union: no sport exception

In December, the General Court issued a ruling in the International Skating Union case. It confirmed the Commission's standpoint that the eligibility rules of the ISU violate competition law. In particular, the General Court disregarded arguments aimed at the 'integrity of sport' in the sense of Article 165 TFEU as a justification. The rules adopted by the ISU go beyond what is necessary to achieve such objectives and, accordingly, are not proportionate.

NBC Universal and Mélia: cross-border restrictions

The Commission issued some other exciting decisions on Article 101 this year. Most notable where two decisions on restrictions of cross-border sales and partitioning the EU Internal Market. The decision on NBC Universal concerned vertical restraints and resulted from the Commission's e-commerce sector inquiry. NBC Universal restricted traders from selling licensed merchandise within the EEA to territories and customers beyond those allocated to them. In Mélia the Commission fined the fact that Mélia had entered into contracts with tour operators that restricted active and passive sales for hotel accommodation other countries than previously specified. The Commission certainly uses the true 'European' theory of harm of partitioning the EU Internal Market more often in the last years.

COVID and Article 101

As for COVID specificities, in the beginning, fear of crisis cartels or other ways companies could take anticompetitive advantages of the crisis existed. To the best of my knowledge, the Commission has not initiated any proceedings on a European level so far. Furthermore, with the beginning of the COVID pandemic, the cry for competitor collaboration was loud. The Commission provided a Temporary Framework specifically aimed at competitor collaboration. The Commission also offered to provide written comfort letters for specific, temporary cooperation projects. It sent the first one to Medicines for Europe in April.

Article 102 – tech companies in the focus (again)

Qualcomm: exclusivity payments

The Commission activities on Article 102 once again heavily relate to big tech companies. The authority finally published its Decision on Qualcomm (discussed on KCL here), the first one on exclusivity payments since the 2017 Intel Judgment (discussed on KCL here). The Commission used the Intel-presumption according to which exclusivity payments by a dominant undertaking are presumed to have anticompetitive effects unless rebutted. For the latter, the undertaking has to offer evidence that the conduct does not have the capability to restrict competition and produce a foreclosure effect. The Commission then has to analyse such capability in depth. The decision now shows how the Commission understands its standard of proof in that regard. In line with what recital 139 of the Intel judgment demands, the Commission analysed (1) the degree of Qualcomm's dominance, (2) the fact that Apple was a key customer, (3) the significant share of the market affected (25–35% of the worldwide market for LTE chipsets in a time of strategic market development), (4) the long duration (2011-2016), (5) the significance of the payments (in absolute and relative terms) and, lastly (6) the reduction of Apple's incentive to switch to competing suppliers. For the last point, once again, internal documents played an important role, which showed that Apple refrained from switching to Intel due to the exclusivity payments. The Commission analysed and rebutted an as-efficient-competitor test that had been prepared and submitted by Qualcomm. However, contrary to Intel, the Commission did not run its own as-efficient-competitor test, because, in its opinion, it is only one of the factors to analyse whether conduct is abusive. About Qualcomm's claimed efficiencies, the Commission held that Qualcomm failed to submit any contemporaneous evidence supporting the link between the exclusivity and the alleged need to recoup investments for tailor-made products.

Broadcom: more exclusivity

In October, the Commission also accepted Broadcom's commitments that go beyond the interim measures in a relatively straightforward abuse case. The Commission investigated Broadcom for exclusivity practices, exclusivity-inducing rebates and other advantages, bundling, abusive IP-related strategies and interoperability concerns. The commitments more-or-less address these issues. They do not cover the initial matter relating to abuse of IP rights, as the Commission already dropped those concerns for the interim measures. While the interim measures obliged Broadcom to cease the practices towards its six main customers, the final commitments cover all current and potential customers. They distinguish between the EEA and worldwide level and contain obligations that envisage circumventing future anticompetitive behaviour.

Apple: in the footsteps of Google Shopping

Tech companies continue to be in the 102-focus of the Commission. In June, following complaints, the Commission opened four investigations into Apple. Three on the App Store and one on Apple Pay. All the investigations concern a theory of harm connected to self-preferencing and follow in the footsteps of the Google Shopping case. In the general App Store investigation, the authority looks into the terms that govern the use of Apple's App Store by third-party developers offering competing apps. Two investigations particularly concentrate on the terms that govern the use of Apple's App Store by developers of music streaming apps on the one hand and e-book/audiobook apps on the other hand. In all three cases, the Commission will look into the question of whether Apple has been using the mentioned terms to a disadvantage of the app developers that compete against Apple's own apps. Allegedly problematic is that Apple requires that the competing app developers need to use Apple's own proprietary in-app purchase system (for which Apple charges a 30% commission) and are forbidden to advertise alternative purchasing possibilities. The Apple Pay investigation deals with the supposedly (1) foreclosure of competing mobile payment solutions related to the integration of Apple Pay for purchases made from iOS devices and (2) singling-out Apple Pay as the only payment solution that has access to the Near Field Communication (tap-and-go) technology embedded on iOS devices.

Amazon: dual-rollin'

We are not done with tech giants yet. The EU Commission was one of the increasingly numerous antitrust authorities that dealt with Amazon this year. In November, the Commission sent Amazon Statement of Objections for the use of non-public independent seller data because the authority has come to the preliminary conclusion that Amazon's practice amounts to a breach of Article 102 TFEU (discussed on KCL here). Two years have passed since informally initiating procedures (following concerns raised by retailers in the course of the already mentioned e-commerce sector inquiry) and a year since formally opening proceedings (discussed on KCL here). Amazon's dual role as gatekeeper marketplace and online retailer is problematic in the view of the authority. The Commission accuses Amazon to systematically rely on non-public business data of independent sellers who sell on its marketplace, to the benefit of Amazon's own retail business, which directly competes with those third-party sellers.

Furthermore, on the same day, the Commission opened a second investigation relating to practices regarding Amazon's Buy Box on the one hand and Prime label on the other hand. The Buy Box prominently shows the offer of one single seller for a chosen product on Amazon's websites. It allows customers to add items from a specific retailer directly into their shopping carts. The investigation concerns the conditions and criteria that govern the selection mechanism of the Buy Box. The other aspect of the investigation focuses on the criteria that govern the eligibility of third-party sellers to offer products under the Prime label to users of Amazon's Prime programme – a conduct that is comparable to Brand-Gating which is currently investigated by *inter alia* the German competition authority (discussed on KCL here – self-preferencing from my side). Prime is more and more becoming a gatekeeper itself since the number of Prime users is continuously growing, and Prime users tend to generate more sales on Amazon's marketplaces than non-Prime users.

Aspen: excessive pricing

For readers who dozed-off after all this digital stuff – stay with us! The Commission also had some non-tech related 102-activity in 2020. The Aspen case is gradually moving forward. In 2017, the Commission opened a formal investigation into concerns that Aspen Pharma has engaged in excessive pricing concerning life-saving cancer medicines. Article 102(a) TFEU forbids excessively high prices. The Commission initially suggested that the price was 300% above Aspen's relevant costs. Is that excessive? A long strain of EU and Member State case law deals with the question when a price is excessive, and there is still much debate. United Brands, confirmed in AKKA/LAA (discussed on KCL here), established that a dominant firm's price is excessive if it has no reasonable relation to the economic value of the product supplied. There is no fixed percentage of excess. In the pharmaceutical sector, a further complexity arises due to regulators that have powers to intervene on pricing and reimbursement issues. The Commission could avoid additional hustle this year since, in July 2020, Aspen offered commitments (discussed on KCL here). Those include that Aspen will reduce its prices across Europe for the six cancer medicines by, on average, approximately 73% retrospectively from October 2019. Aspen guarantees the supply of the drugs for the next five years, and, for an additional five-year period, will either continue to supply or make its marketing authorisation available to other suppliers (generics). In the meantime, the Commission should have received answers to the market test and is now deciding to settle the case.

Lithuanian Railways: on candid boycotting of competitors

The Court also gave its two cents on abuse of dominance in 2020. In November, the General Court issued its decision in the very strange but quite straightforward case on Lietuvos geležinkeliai AB, or more commonly known as Lithuanian Railways. Back in 2008, Lithuanian Railways dismantled 19 km of railway connecting Lithuania and Latvia to prevent a major customer from using the services of a competitor. The customer needed to use a much longer route to Latvia on Lithuanian Railways tracks. In 2017, the Commission has fined Lithuanian Railways and decided that the railway company breached Article 102. The Commission held that in the legal and factual circumstances in question, the removal of the track was not a practice which was consistent with those which condition normal competition. The Court dismissed the appeal and took the authority's side. A conduct that is so blatantly anticompetitive (which reminds us of Generics discussed above) where there is no plausible purpose other than the restriction of competition, are capable of giving rise to anticompetitive effects – regardless of the actual effects. The applicants had brought arguments that relate to the Bronner case-law on essential facilities and indispensability. The General Court shut those down concerning the regulatory context of railways: "In cases where there is a legal duty to supply, the necessary balancing of the economic incentives, the protection of which justifies the application of the exceptional circumstances developed in Bronner, has already been carried out by the legislature at the point when such a duty was imposed". In its capability of having unlimited jurisdiction, the General Court determined the amount of the fine with regard to the circumstances of the case and taking-into-account of additional information which is not mentioned in the Commission decision imposing the fine once again. The Court set the fine at roughly € 20 mil (compared to the € 28 million fine of the Commission).

COVID and Article 102

When the pandemic broke out high demand and price volatility for certain products, such as masks, where an issue which led to concerns for the above-mentioned excessive pricing policies by companies. Commissioner Vestager warned against using the crisis as an excuse for anticompetitive behaviour. Excessive-pricing concerns were specifically addressed, *inter alia*, in a joint ECN statement. According to the statement, essential health product should remain available at competitive prices. Contrary to some Member States, the Commission did not initiate any proceedings so far.

Merger Control – on gun-jumping, non-coordinated effects and more

Mowi v Commission: two fines for gun-jumping

The Court was undoubtedly active in merger control this year. In a procedural merger case, the Court of Justice dismissed the appeal of Mowi (previously Marine Harvest) against two separate violations and fines for gun-jumping (discussed on KCL here). The Court did not follow the Advocate General Tachnev, who advised to partially annul one of the fines (discussed on KCL here). In December 2012, Marine Harvest acquired 48,5 % of Morpol's shares. Since Morpol was listed on the Oslo Stock Exchange, under Norwegian law, the acquirer of more than one-third of the shares was obliged to launch a public tender for the remaining shares. Marine Harvest followed that obligation and acquired a further 38.6% of Morpol's shares in March 2013 and the remaining 12.9% in November 2013. Only after the closure of the first transaction, Marine Harvest started pre-notification and in August 2013 formally noticed the transaction. Even though the Commission had cleared the transaction in December 2013, it fined Marine Harvest for gun-jumping in July 2014 because it found that Marine Harvest had acquired *de facto* control over Morpol upon the closure of the first transaction in December 2012. In the view of the Commission, the company violated the standstill obligation in Article 7(1) EUMR and the notification requirement in Article 4(1) EUMR and, accordingly, issued two separate fines. The General Court already held up the Commission's decision, now the CJEU followed. The Court did not follow the argument that recital 20 EUMR makes clear that transactions linked by condition constitute a single concentration. In the view of the Court of Justice, recitals do not have a binding force. Furthermore, the *ne bis in idem* principle is not violated, as the Commission issued both fines in the same decision. Lastly, the Court dismissed the notion of concurrent offences that the Advocate General followed due to the lack of specific rules on concerning concurrent offences in EU competition law.

Hutchison Three/Telefónica UK: non-coordinated effects are back

One of the much-discussed cases was the General Court's decision in Hutchison Three/Telefónica UK (discussed on KCL here). Back in 2016, the Commission blocked the 4-to-3 acquisition of Telefónica UK by Hutchison Three. The authority considered that the acquisition would have eliminated competition between two important players on the UK mobile telephony market. Allegedly, Hutchison Three was a powerful competitive force, and O2 held a strong position. The General Court overruled the Commission. For the first time concerning the 2004 Merger Regulation, the Court has interpreted the SIEC-test in a non-coordinated effects case dealing with a concentrated oligopolistic market. The Court's ruling mainly concerned the standard of proof. The Court held that the Commission must envisage various chains of cause and effect to ascertain which of them are most likely and' produce sufficient evidence to demonstrate with a strong probability' the existence of a SIEC. The Court established, in particular, that the Commission made errors in assessing the concept of 'important competitive force' as well as the closeness of competition between Three and O2 and in the quantitative analysis of the effects of the concentration on prices.

Heidelberg Cement: undertakings concerned

In 2017, the Commission prohibited the proposed acquisition by Heidelberg Cement and Schwenk Zement, through their 50/50 full-function joint venture Duna-Dráva Cement of Cemex Croatia and Cemex Hungary. In 2020, the General Court backed the Commission in their findings (discussed on KCL here). The decision is particularly interesting when it comes to the Court's analysis of the notion of 'undertakings concerned' in the sense of the EUMR. The parties argued that Duna-Dráva Cement was the undertaking concerned and not its parent companies Heidelberg Cement and Schwenk Zement, due to which the transaction was not under the notification obligation (on EU level). The General Court, however, when the driving factors behind a transaction are the parent companies, not the JV, the parent companies are relevant for the merger thresholds. The parent companies had participated in various meetings and negotiations and also had discussions among themselves on the deal. This 'economic reality' behind the transaction was relevant to the General Court.

UPS/TNT: questioning the business model of law firms?

The aftermath of the UPS/TNT merger continues to surprise. Back in 2017, the General Court had annulled the Commissions 2013 decision to block the UPS/TNT merger. The CJEU backed the General Court in 2019. Following, UPS filed an application for the recovery of costs pursuant to Article 170(5) of the Rules of Procedure of the General Court that included over € 1.5 million of lawyers and economists fees as well as professional disbursements for the annulment proceedings. The General Court only ordered the Commission to pay € 270.250. The General Court applied Article 140 (b) of the Rules of Procedure of the General Court and dismissed a large portion of the claimed costs. The Court distinguished between lawyers' and economists' costs. Economists' costs are only recoverable if they relate to the winning plea, lawyers' costs can relate to all the pleas. The Court held that while the action was complex and the transaction value significant, the amount of work mainly from the lawyers was excessive (1.871,1 hours). The argumentation of the General Court contains various attacks on the business models of big law firms. The Court, inter alia, criticised the long hours spend on formatting annexes (music to the ears of every first-year associate) or repetitive work of multiple lawyers dealing with the same issue. The hours of work for the appeal were also not justified because the same law firm had already dealt with the merger procedure in front of the Commission and was therefore familiar with the case. All in all, law firms must be much more vigilant when it comes to their cost structure – at least when they want recovery from the Commission.

Dutch clause revival

As we will see below, the Commission was very active when it comes to issuing new legal instruments to tackle competition problems in the digital economy. Sometimes, the authority takes recourse at old reliables, though. In an attempt to better catch 'killer acquisitions' in the future, Vestager proposed to revive referrals from national competition authorities under Article 22 EUMR, the so-called 'dutch clause' (discussed on KCL here). Under Article 22 national competition authorities are allowed to refer transactions even if they do not meet the filing thresholds or otherwise be reportable in the referring Member State. The only condition is that the transaction affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request – two conditions up to the Commission's consideration, i.e. legal uncertainty for merging parties. Previously, the Commission discouraged referrals under Article 22 EUMR but wants to change its policy now. Now, the authority encourages such referrals. The Commission can go beyond that even and invite Member States to make such a referral, Article 22 (5) EUMR.

Market recovered from slowdown?

Even though merger control intermittently slowed down when the COVID pandemic hit Europe in the fall, the sector somewhat nearly recovered again. By the end of October 281 mergers were notified, out of which the majority was cleared under the simplified procedure. Most notably, after blocking the much-discussed Siemens/Alstom deal last year, the Commission cleared the Alstom's acquisition of Bombardier, subject to conditions, in Phase I. The competition concerns on the markets for very high-speed rolling stock, mainline rolling stock, and mainline signalling were met in particular with a mixture of divestiture from both parties. Moreover, the Commission launched a number of in-depth Phase II investigations this year, including, *inter alia*, Google/Fitbit, Air Canada/Transat and Fiat Chrysler/Peugeot, which are all still ongoing. Just before its Christmas holiday, the Commission cleared the Google/Fitbit merger after Google agreed on restrictions on how it will use customers' health-related data. Let's see how this will play out.

COVID and Merger Control

The pandemic led to a temporal dip in merger activities in the spring of 2020. In the first weeks, the

Commission did ask parties to delay filings where possible (discussed on KCL here). The authority managed quickly to largely work remotely and tried to ensure business continuity. In merger control, former halfway dead subjects came back to life as well: the failing firm defence (discussed on KCL here). In the spring, lawyers who were eager to contribute with one of the many COVID-related articles discussed, if better-situated companies could use the failing firm defence to acquire others that may be facing bankruptcy. However, the barriers set by case-law for the failing-firm defence are high, and the defence is rarely accepted. The 2008 financial crisis did also not lead to a successful increase in the instrument – we will have to see for the coming month if the instrument makes a real return outside of blogposts.

State aid – State aid regime abandoned?

COVID and State Aid

The COVID pandemic certainly had the most significant impact on state aid. Just like in the 2008 financial crisis, the Commission had to issue many aid decisions in a short period of time. Just like in the 2008 financial crisis, the Commission adopted a Temporary Framework. In the meantime, the authority has expanded it four times (discussed on KCL here, here, here, here and here). The Temporary Framework is applicable until 30 June 2021, except for recapitalisation measures, which are applicable until 30 September 2021. Let's see how COVID proceeds and if we need to prolong and expand the measures once more.

This yearly overview cannot explain all the rules in detail. I refer you to our excellent posts. Anyhow, the Temporary Frameworks contains many exceptions based on Article 107(3)(b) and 107(3)(c) TFEU to standard state aid rules. Furthermore, the Commission has used Article 107(2)(b) TFEU to compensate for direct damage suffered as a result of the COVID-19 outbreak. The question came up if the Commission has given up state aid enforcement to some extent during COVID? Furthermore, with some Member States having bigger pockets than others, one (i.e., *inter alia*, Jens van 't Klooster and me) can certainly question if the Commission has taken (regional) equality into account. In any case, the Commission cleared many measures very quickly, sometimes within 24 hours. In particular, the high-volume decisions for airlines were criticised and already led to (fast-track) litigation in front of the General Court.

Apple: a ruling on taxes

The big bang of state aid cases this year was the Apple decision of the General Court (discussed on KCL here and here). In 2016, the Commission had concluded that Ireland granted undue tax benefits of up to €13 billion to Apple. The Commission decision concerned two tax rulings in favour of two Apple subsidiaries, which were incorporated in Ireland but not tax resident. The tax rulings allocated most of the taxable profits, including revenues relating to Apple's IP to both subsidiaries, as opposed to their taxable local branches. This led the Commission to conclude that the tax rulings granted both subsidiaries a selective advantage.

On 15 July, the General Court annulled the decision because the Commission had not proven to the required standard that Ireland had granted any selective advantage to Apple. At first, the judgment contains many essential statements in favour of the Commission. The Court reiterated that the Commission could investigate tax rulings under state aid law. Furthermore, the three-limb test to determine the existence of a selective advantage is still valid. Moreover, the Court approved the Commission's use of the arms' length principle and Authorised OECD approach to establish the existence of an advantage. The Court rejected the application of these principles by the Commission in the concrete case. While the judgment contains many interesting statements here, the most interesting focused on Apple's profit allocation. The Commission did not prove that the mentioned profits should have been allocated to the two Apple branches. Especially regarding the profits from the IP licences, the Court held that the allocation depends on who actually controls the IP licences in question. It concluded that the strategic decisions were taken in the Apple headquarter in California for the whole Apple Group.

This case is far from over. The Commission will not give in so easily as there are possibly 11 other Staid aid investigations and decisions at stake. In September, they appealed the case to the Court of Justice (discussed on KCL here).

The Court will give a first outlook soon since it has other tax ruling cases in the pipeline. AG Kokott already advised to set aside the General Courts' judgment from 2019, which annulled the Commission decision in the Belgium Excess Profits case, another tax ruling case. In the Fútbol Club Barcelona case, AG Pitruzzella advised setting aside the General Court's decision to annul the Commission's decision. The Commission had decided that the corporate tax rates enjoyed by, *inter alia*, FC Barcelona were incompatible State aid.

Sanctions and procedures

Canal+: beware of third party contractual rights

A lot was going on in sanctions and procedures this year, both at the Commission and the Court of Justice. One big bang came in December. The Canal+ judgment (discussed on KCL here) makes a dent in the Commission's usage of the commitment procedure. The Court of Justice annulled the Commission decision that made commitments legally binding for Paramount. The Commission failed to assess the proportionality of the commitments proposed by Paramount in the cross-border pay-TV investigation concerning the protection of the contractual rights of third parties (Canal+) when it decides to make commitments binding. Even though the investigation concerned the contracts Paramount (and other film studios) had with Sky UK, the commitments lead to Paramount disregarding several contractual obligations also with Canal+ in France. The decision will have a significant impact on both the Commission accepting and undertakings proposing commitments. Both will have to take the effect of the commitments on third parties into account, in particular when contracts are involved. However, the rights of third parties should, in general, 'not be deprived of their substance'.

Nexans and Prysmian: the Commission's powers of inspection

The Nexans and Prysmian cases both relate to the Power Cables cartel and the same procedural question: is the Commission allowed to make copy-images of employee's hard drives without examining the nature and relevance of the documents beforehand to examine them at the Commission's premises? The Court of Justice dismissed both appeals against each General Court's decisions that confirmed the Commission's practice. In the investigation of Nexans and Prysmian, the Commission copied the hard drives of employees and later examined them in Brussels. In the view of the ECJ, Article 20(2)(b) Regulation 1/2003 gives the Commission to create copies of hard-drives without a prior examination. The inspection only has to begin on the premises but can continue somewhere else. The Commission had a legitimate reason to continue in its offices in Brussels due to procedural effectiveness and not to hamper with the operations of the respective undertakings unnecessarily. This is particularly the case when large volumes of data are involved.

French retailers: when can the Commission order dawn raids?

In October, the General Court partially annulled decisions of the Commission to order dawn raids of several French retailers (discussed on KCL here). The case relates to an investigation on the French food and non-food distribution market and concerns allegedly illegal exchange of information between retailers. The General Court is once again intervening against fishing expeditions of the Commission. While the Commission does not need to be sure to find a concerned practice, the authority must have sufficiently strong evidence to launch an inspection. Furthermore, the Commission needs to define its investigation in a precise manner, including the suspected infringement and its nature as well as the affected market. On the other hand, the General Court rejected a violation of the right to an effective remedy. The inspected undertaking has multiple legal remedies at its disposal to react to unlawful inspections, such as annulment, interim relief and non-contractual liability.

The strange case of Facebook invoking privacy rights

In March, Facebook went to the General Court in an ongoing investigation challenging that two formal RFIs that the Commission has sent them relate to wholly irrelevant or personal documents of Facebooks users and employees. In the RFIs, the Commission has asked Facebook to produce all kinds of electronic documents corresponding to far-reaching keywords, for example, 'grow' or 'advertising'. While Facebook provided most of the initially identified documents, it withheld roughly 10% of the documents. The social media platform filed an action for annulment and an application for interim measures invoking both a violation of Regulation 1/2003 and the Charter of Fundamental Rights. In October, the President of the General Court endorsed Facebook's concerns in two almost identical orders (discussed on KCL here and here) and provided a solution. The orders first focused on the necessity of the RFIs under Article 18(3) regulation 1/2003 and stated that the Commission could only request documents that are legitimately expected to have a connection with the alleged infringement depending on the format and scope of the RFI. Then, the orders acknowledged the importance of the right to privacy, in particular of Facebook's users. The right to privacy of its employees could not be invoked, however. The President of the General Court then proposed an ad-hoc mechanism to handle the personal data that involves a virtual data room process and negotiation. One thing is clear: the Commission needs to be careful with their extensive RFIs and consider parties' rights.

Anesco: a competition authority is not a court

In September, the Court held a preliminary request of the Spanish National Commission on Markets and Competition inadmissible (discussed on KCL here). A competition authority cannot be a court or tribunal in the view of Article 267 TFEU. Back in 1992, the Court still had accepted a reference from a Spanish competition authority, but back then, the institutional framework in Spain was different, with a competition court distinct from the competition investigatory body. Now, pain follows a model where the investigative and decision-making activities are functionally separated but handled by one (administrative) institution. The Spanish authority lacks the key judicial feature of independence. Furthermore, the procedures before the Spanish authority are of an administrative and not a judicial nature. Efficiency arguments were not discussed. In my initial blog post, I discussed that direct references by specialised authorities on the periphery of the national judicial systems could create procedural efficiencies and are benevolent for the sake of uniform and effective application of European competition law.

LL-Carpenter: the Commissions considerable discretion in rejecting complaints

The General Court backed the Commission when it comes to the authority's margin of discretion in rejecting complaints. Back in 2012, LL-Carpenter, a Czech distributor of motor vehicles, complained against Subaru, the car manufacturer with the Commission. It had filed a similar complaint with the Czech Competition Authority already in 2010. LL-Carpenter held that Subaru had infringed both Articles 101 and 102 TFEU because it did not make LL-Carpenter an authorised distributor and restricted its authorised distributors to deal with LL-Carpenter. The Czech Competition Authority could not find sufficient compelling evidence and ended its investigation. Subsequently, the Commission rejected the complaint in 2018. The Commission found that the complaints that Carpenter had filed with the Czech authority were already dealt with by that authority. Whatever is going beyond that, the Commission is rejecting based on its discretion in setting enforcement priorities. LL-Carpenter appealed. The General Court sided with the Commission. The Court confirmed that the Commission has a wide margin of discretion when it is applying Article 13 (2) Regulation 1/2003, to reject a complaint if a national competition authority has already dealt with the respective practices. A formal decision by the national authority is not necessary. It is sufficient if the authority has effectively dealt with the complaint. Moreover, the Commission also has a wide margin of discretion when it comes to its enforcement priorities. There is no manifest error if the Commission rejects an in-depth investigation because it would require resources disproportionate to the likelihood of finding an infringement.

Back to Broadcom: interim measures and commitments

Broadcom comes back to us in this section. In the past, the Commission came under criticism concerning the duration of the proceedings, in particular when it comes to abuse of dominance investigations and big tech companies. Broadcom begs to differ and may lead to a new practice of the Commission to realise procedural efficiencies and expedited solutions in tech market investigations. From the formal opening of proceedings in June 2019 to the first interim measures in ten years in October 2019 (discussed on KCL here), the consultation on the proposed commitments in April 2020, Broadcom's amended commitments in July 2020, and, finally accepting the commitments in October 2020, 16 months passed. From a procedural standpoint, the case is interesting, since it combined the use of interim measures and the commitments procedure, two procedural instruments already in the Commission's toolbox (validating those who question the necessity of new enforcement tools in the digital sector – more on that in a minute).

Beyond commitments, the Commission continues heavily to rely on companies' collaboration. We saw quite some settlement this year again, for example in the ethylene purchasers cartel or the car parts cartel. The Commission also reduced fines again in the context of cooperation, for example in the above-mentioned Mélia and NBC Universal cases.

Private enforcement

Booking: abuse of dominance is a tort for jurisdictional purposes

Private enforcement mainly is an issue for the Member States. Nevertheless, guidance often comes from the EU level. In Wikingerhof v. Booking.com (discussed on KCL here), the Court of Justice decided that a hotel in Germany can sue Booking.com, the Dutch hotel reservation platform, in Germany for injunction relating to an abuse of a dominant position implemented in the context of a services contract between both companies. The judgment concerned the interpretation of Article 7(1) and (2) of the Brussels Ibis Regulation, the rules of special jurisdiction on contracts and torts. The Court of Justice held that injunction orders for an abuse of a dominant position are tort actions, not contractual ones. This is even the case when these practices are implemented in the context of a contractual relationship. The claimant is seeking relief for a competition law infringement and not for a contractual breach. Article 7(2) Brussels Ibis Regulation gives those courts jurisdiction 'where the harmful event occurred'. In case of an abuse of a dominant position, it is where the abuse took place, so where the claimant suffered. This could lead to jurisdiction in the claimant's home country.

Commission Guidance for confidentiality claims during disclosure

According to the Antitrust Damages Directive national courts have the power to order the disclosure of evidence, including confidential information. Member States are neither familiar with disclosure, nor the accompanying protection of confidential information. This July, the Commission adopted a Communication to help the Member States and their courts. The Commission proposes various measures for different degrees of confidentiality claims. The proposals include redactions, confidentiality rings, use of experts or closed hearings.

Report on the Damages Directive: when is a report really a report?

Speaking of the Damages Directive, on 15 December, the Commission issued a report on the Directive as required by its Article 20 (discussed on KCL here). The report only gives a few insights and falls short of a real considerable impact report on the Damages Directive. It remains on the surface and is not the slightest bit (self-)critical. However, the information that has been gathered so far shows a positive effect, the overall transposition of the Directive provisions and an increase in the number of private actions for damages. For a substantial study, the Commission needs more data, which will only become available in the next coming years.

Legislation, Consultation and Reports

Digital Services Act, Digital Markets Act and the (forgotten) New Competition Tool

2020 was certainly the year for legislative proposals, consultations, reports and guidelines. Some I have mentioned above. The majority of them, I will discuss now. Digital questions dominate this section of the blog post. On 15 December, the Commission published the long-awaited and much-discussed proposals for the Digital Services Act and the Digital Markets Act (discussed on KCL here). The DSA does not have a competition-specific focus. It is broadly applicable to all providers of intermediary services (albeit some exceptions). The DSA aims at regulating, *inter alia*, measures to counter illegal content online or transparency measures for online platforms, including on the algorithms used.

The DMA, on the other hand, is more targeted to competition issues. The influence of the German Draft 19a ARC (discussed on KCL here) is clearly visible. The DMA is only enforceable by the Commission and applies to gatekeeper platforms. The proposal defines Gatekeepers and even contains a rebuttable presumption for them. A platform that meets these conditions is obliged to notify to the Commission. The gatekeepers must comply with certain obligations. For example, gatekeepers may not use data obtained from their business users to compete with these business users. Readers will recognise many of these obligations from past Commission cases. In case of non-compliance, fines of up to 10% of group turnover, periodic penalty payments and commitments are possible. A break-up of companies remains a last-resort.

The Commission has more or less abandoned its envisaged New Competition Tool. The New Competition Tool was supposed to be an ex-ante enforcement instrument, to impose measures on digital platforms even in the absence of any abusive conduct. Apparently, the toolbox is complete.

Market Definition Notice: fit for the digital age?

Late last year, Vestager announced that the 1997 Notice on Market Definition would need a makeover. On the product market side, digital issues play a significant role, and they are unmentioned in the 1997 Notice. Free online services are hard to cover with SSNIP. On the geographic market side, the Commission wants to address competitive pressure coming outside of Europe. Thus, from June to October, the Commission held a public consultation. Results are envisaged at the beginning of 2021.

VBER: E-Commerce and more

We continue with digital markets, mainly. The Commission's plan to revise the VBER almost follows the envisaged timeline. In September 2020, the Commission published a report on the stakeholder feedback, public consultation and dialogue with national competition authorities. Then, the authority entered the impact assessment phase and published the inception impact assessment in October (discussed on KCL here). The deadline for stakeholders' feedback on this inception impact assessment expired on 20 November 2020. The whole impact assessment phase will last approximately 24 months. Open public conversation is envisaged to follow next. The Commission aims at closing the following gaps in the existing vertical rules: First, it wants to address digital issues, such as the treatment of new market players when it comes to agency and dual distribution. Second, it intends to clarify the treatment of efficiencies with regard to RPM. Third, the Commission wants to allow tacitly renewable non-compete obligations. Fourth, the authority envisages changing the rules on dual distribution, active sales restrictions, indirect measures restricting online sales, and most-favoured-nation clauses.

White Paper on AI: Commission AI strategy

The last thing on digital, I promise. In February, the Commission issued its White Paper on Artificial Intelligence. The paper focusses more on a policy discussion around AI. Substantively, the White Paper stressed the impact of AI on fundamental rights and the lack of appropriate legal concepts to tackle these issues. It was accompanied by an online survey and citizens as well as stakeholders had time until 14 June to participate in the public consultation. A final report from the Commission followed in November 2020. The Commission will now with an in-depth analysis of the consultation results as well as a detailed impact assessment. Various regulatory options are envisaged, and a regulatory proposal will be presented, most likely next year.

White paper on foreign subsidies: competition law enforcement beyond Europe

The big discussions from last year on European Champions as well as the discussions related to the Siemens/Alstom merger made an impact on the Commission. In June, the authority issued a White Paper on levelling the playing field as regards foreign subsidies (discussed on KCL here). The White Paper envisages filling the regulatory gap regarding foreign subsidies. It set out three Modules: 1) distortions caused by foreign subsidies affecting general market operations, 2) distortions caused by foreign subsidies facilitating the acquisition of EU undertakings, and 3) distortions caused by foreign subsidies in the context of procurement procedures. A public consultation was open until the end of September. Shortly afterwards, Kluwer held a webinar, involving leading experts from the Commission, WTO, OECD, and private practice (discussed on KCL here). A general need for regulatory action exists. Module 1, which basically exports the EU state aid regime, was the favourite tool of the conference participants, while some fear a chilling effect on M&A in the EU through Module 2. The Commission is working on a proper proposal now, which the authority will probably publish next year.

Sustainability and competition law

Lastly, on the other big buzzword this year: sustainability! The Commission jumped on the bandwagon of other authorities and published a call for contributions to gather ideas on how EU competition rules and sustainability policies can best work together (discussed on KCL here). The call for contributions covers all three pillars of competition enforcement: state aid, antitrust and merger control. The deadline for contributions was 20 November 2020. The contributions will feed into a conference taking place in early 2021. Sustainability will likely play a major role in future competition enforcement. Regulatory tools are expected. The urgency that the climate crisis constitutes can and should not exclude competition law and policy. Everyone has to be a team player.

Congratulations! You made it to the end.

We thank you for being such great readers this year. The Kluwer Competition Law Blog Team wishes you happy holidays!