

EU COMPETITION POLICY FOR THE DIGITAL AGE – KEY DEVELOPMENTS AND EMERGING TRENDS



BY DR. SALOMÉ CISNAL DE UGARTE & STELIOS CHARITOPOULOS¹



¹ Salomé Cisnal de Ugarte, LL.M. (Harvard) is an Antitrust and Competition Partner and the Managing Partner of the Brussels office of Hogan Lovells International LLP. Stelios Charitopoulos is a trainee lawyer at Hogan Lovells International LLP.

CPI ANTITRUST CHRONICLE OCTOBER 2019

The Vertical Block Exemption Regulation – Time for Boldness?

By Ian Forrester & Nathalie Leyns



What Agenda for the Second Term of Commissioner Vestager?

Mario Todino & Emilie Ry Schou



Revival of Commission Interim Measures?

By Bo Vesterdorf



EU Competition Policy for the Digital Age - Key Developments and Emerging Trends

By Salomé Cisnal de Ugarte
& Stelios Charitopoulos



Shortcuts and Courts in the Era of Digitization

By Alfonso Lamadrid de Pablo



The Spanish Competition Act: An Evaluation and Future Perspectives

By Beatriz de Guindos



Reflections on Consumer Trust and Competition in the Digitalized Economy

By Ania Thiemann & Sophie Flaherty



Visit www.competitionpolicyinternational.com for
access to these articles and more!

CPI Antitrust Chronicle October 2019

www.competitionpolicyinternational.com
Competition Policy International, Inc. 2019© Copying, reprinting, or distributing
this article is forbidden by anyone other than the publisher or author.

I. INTRODUCTION

On July 15, 2019, the European Commission (the “Commission”) published its Report on Competition policy for 2018 (the “Report”). This report is prepared annually for the European Parliament, the Council of the European Union, the European Economic and Social Committee, and the Committee of the Regions. Once produced, it is debated in the European Parliament and is the subject of a non-legislative resolution. It presents an opportunity for the Commission to provide an update on the most important decisions and legislative and policy initiatives adopted in the field of EU competition law during the previous calendar year. It thus covers the entire range of competition policy issues, from cartels and investigations to mergers and State aid.

II. COMPETITION LAW IN THE NEW DIGITAL ECONOMY

The most extensive section of the Report deals with developments resulting from the digitization of the economy. The Report notes that this digital transition has profoundly transformed the entire economy, changing consumer attitudes and the way in which markets operate. However, it places particular emphasis on four specific challenges: (i) the treatment of data which are necessary to improve increasingly important algorithms and make them more “intelligent”; (ii) the growing market power of digital platforms, especially when they market their own products in the same digital marketplace; (iii) the need for competition law to assist in the creation of a well-functioning Digital Single Market so that Europe can take full advantage of the opportunities afforded by digital technology; and (iv) the need to ensure that new market players that have grown rapidly into major technology providers do not use their market power to foreclose new competitors. The overall policy objective is to ensure that the digital market serves the people of Europe and not the other way around.²

A. Competition Policy Fit for the Digital Single Market

To that end, in 2018, the Commission started a process of reflection to determine the best way for competition policy to serve consumers in the digital market. It appointed Professors Heike Schweitzer, Jacques Crémer and Assistant Professor Yves-Alexandre de Montjoye as Special Advisers and commissioned a report on “Competition Policy for the Digital Era” which was published on April 4, 2019. The report: (i) identifies the main features of digital markets; (ii) suggests the objectives that competition law should pursue; (iii) examines the role of merger control in balancing fair competition and support for innovation; and (iv) discusses the application of competition rules to digital platforms and data.³ This report will inform the Commission’s thinking as it seeks to develop competition policy to address the new challenges presented by the digital market.

² Report on Competition Policy 2018, p. 7.

³ Report on Competition Policy 2018, p. 8.

B. Antitrust and Cartel Enforcement

In 2018, the Commission adopted a series of antitrust decisions relating to the digital market. On January 24, 2018, the Commission found that Qualcomm had abused its dominant position in the market for LTE baseband chipsets by making significant payments to Apple in exchange for the exclusive use of Qualcomm chipsets in iPhone and iPad devices.⁴ Moreover, in the context of a global investigation involving the competition authorities of Brazil, Japan, Singapore, Taiwan, South Korea, and the United States the Commission fined eight producers of capacitors for participating in a 14-year long cartel to coordinate future behavior and avoid price competition in the market for the supply for electrolytic capacitors.⁵ On July 18, 2018, the Commission also found that Google had abused its dominant position in respect of general internet search and fined the company €4.34 billion.⁶ Finally, it also continued an investigation against the same company in respect of potential restrictions on the ability of certain third party websites to display search advertisements. The investigation was concluded on March 20, 2019 and Google was fined €1.49 billion.⁷

C. Price Competition in E-commerce

The online commerce market plays a central role in the Commission's vision for a Digital Single Market. The Report notes the significant benefits afforded by e-commerce to both consumers and businesses. E-commerce has provided customers with unprecedented access to choice of goods and services and has allowed them to compare prices from all over Europe. Simultaneously, businesses can market their products and services to over 500 million Europeans through a single website.

The Commission conducted a sector inquiry in respect of e-commerce which was published on May 10, 2017. The final report highlighted the threat of resale price restrictions combined with automatic software facilitating price monitoring as well as cross-border sales restrictions in distribution agreements.⁸

Following the results of the sector inquiry, the Commission is particularly keen to protect price competition in the European online commerce market (which is now worth more than €500 billion per year) and ensure that it is not fragmented. On December 17, 2018, it fined the clothing company Guess approximately €40 million (with a 50 percent reduction to reflect the company's cooperation) for preventing cross-border sales advertising in distribution agreements.⁹ Moreover, on July 24, 2018, the Commission adopted separate decisions in respect of Asus (Taiwan), Denon & Marantz, Pioneer (Japan) and Philips (the Netherlands) and imposed a total fine of €111 million for restricting the ability of retailers to determine their online resale prices independently.¹⁰

D. State Aid and the Commission's Digital Agenda

Finally, the Report illustrates how State aid rules can be used to further the Commission's "digital agenda" by enabling European governments to support broadband deployment. An estimated €500 billion in the form of private and public investments in infrastructure will be required within the next decade to achieve the Commission's Single Digital Market connectivity goals. In this context State aid rules play a crucial role in ensuring that public investments do not stifle private ones and that publicly-funded infrastructure is accessible to all operators. In 2018, in its first decision directly supporting its connectivity goals, the Commission approved a Bavarian project to install very high capacity networks in six municipalities.¹¹

4 Case AT.40.220 *Qualcomm* (exclusivity payments) Commission decision of January 24, 2018.

5 Case AT 40136 *Capacitors*, Commission decision of March 21, 2018.

6 Case AT.40099 *Google Android*, Commission decision of July 18, 2018.

7 Case AT.40411 *Google Search (AdSense)*.

8 Report on Competition Policy 2018, p. 10.

9 Case AT.40428 *Guess*, Commission decision of December 17, 2018.

10 Cases AT.40181 *Philips*, AT.40183 *Pioneer*, AT.40465 *Asus*, and AT.40469 *Denon & Marantz*, Commission decisions of July 24, 2019.

11 Report on Competition Policy 2018, p. 12.

III. ENHANCING THE EFFECTIVENESS OF COMPETITION ENFORCEMENT

The Report also focuses on the Commission's efforts to streamline procedure in competition cases in order to improve the effectiveness and efficiency of its enforcement actions. The Report points to the updated guidance for companies regarding business secrets and other confidential information as well as the templates and guidance for the use of confidentiality rings in the context of access to file.¹² In addition to that, the Commission pursues specific policies to streamline the application of competition law.

A. Efficiency in Cartel Enforcement

To enhance the efficiency of cartel enforcement procedures, the Commission has introduced an Anonymous Whistleblower Tool that allows individuals with insider knowledge of competition law infringements to alert the Commission via a two-way encrypted messaging system.

The Commission also makes extensive use of the settlement procedure which in 2018 accounted for 75 percent of decisions adopted during the year.¹³ In such cases, the relevant undertakings acknowledge their participation in the infringement and accept their liability in exchange for a reduction in fines. This allows the Commission to apply a faster, simplified procedure thus freeing resources for further investigations. To further encourage undertakings to take advantage of that procedure, the Commission published informal guidance explaining how companies can cooperate with anti-trust investigations in exchange for lower fines.

Under the settlement procedure, on February 21, 2018, the Commission adopted three different decisions relating to a cartel in the markets for the maritime transport of cars and the supply of car parts imposing a total fine of €546 million.¹⁴ Finally, on September 18, 2018, the Commission opened an investigation into the potential collusion of certain car manufacturers in the development of emission cleaning system for passenger cars.

B. Efficiency in State Aid Rules

To enhance efficiency in State aid proceedings, the Commission has been pursuing a major reform package since 2012, the so-called State Aid Modernization. Within that framework, in 2014, the Commission introduced the General Block Exemption Regulation ("GBER") under which Member States do not have to notify certain less distortive aid measures to the Commission. According to the 2018 State Aid Scoreboard, since 2015, more than 96 percent of measures fell within the ambit of the GBER.¹⁵ This allowed the Commission to focus on the more challenging cases and permitted more rapid implementation of the more uncontroversial measures.

C. Empowering National Competition Authorities

Finally, following the Commission's proposal, on December 11, 2018, the European Parliament and the Council of the European Union adopted the so-called ECN+ Directive. Once transposed into national law (by February 4, 2021), ECN+ will empower national competition authorities to be more effective enforcers of EU competition law by providing them with appropriate enforcement tools and resources to adopt decisions entirely independently. The Directive will also allow them to impose deterrent fines and to coordinate their leniency programs.¹⁶

¹² Report on Competition Policy 2018, p. 2.

¹³ Report on Competition Policy 2018, p. 4.

¹⁴ Cases AT.40009 *Maritime car carriers*, AT.40113 *Spark plugs*, and AT.39920 *Braking systems*, Commission decisions of February 21, 2018.

¹⁵ Report on Competition Policy 2018, p. 3.

¹⁶ Report on Competition Policy 2018, p. 3.

IV. MERGER CONTROL AND THE SINGLE MARKET

Another area of interest in the Report is the application of merger control rules by the Commission. The Report notes that companies may expand either through organic growth or by entering into mergers in order to penetrate new markets, take advantage of economies of scale, or to combine complementary portfolios. While consumers may benefit from such mergers the Commission is vigilant to ensure that price competition, quality, choice, and innovation are preserved. The Report provides various examples of in-depth investigations in the agro-chemical and steel markets where extensive remedy packages worth billions of euros were required to obtain clearance.

A. Steel Market

In respect of the Steel market the Report emphasizes that merger control “goes hand in hand with decisive EU action to protect the EU’s steel industry from unfair trade and distortions from third countries.”¹⁷ It appears, therefore, that the Commission is receptive to the concerns of the European steel industry. Indicatively, the Commission required an extensive remedy package to authorize the acquisition of Ilva by ArcelorMittal in order to ensure that European customers will have access to steel at competitive prices enabling them to compete with imported products.¹⁸

B. Transport Sector

The Report also highlights the crucial role of a competitive transport sector for a properly functioning Single Market and sustainable growth. In this context, on July 13, 2018, the Commission opened an in-depth investigation into the proposed acquisition of Alstom by Siemens. The Commission ultimately prohibited the acquisition over concerns that the transaction could lead to higher prices and restrict choice and innovation.¹⁹

The air transport market appears to occupy a particularly prominent place within the transport sector. Therefore, the Commission uses the full range of competition tools at its disposal to ensure that it functions properly. Indicatively, in 2018, the Commission opened an investigation into the market for airline ticket distribution services, adopted a series of merger decisions to facilitate the timely disposal of Air Berlin’s assets following its bankruptcy, and used the State aid rules to ensure that a fair market price is paid for airport concessions.²⁰

V. OTHER SIGNIFICANT DEVELOPMENTS

The Report also addresses various ancillary topics which can provide meaningful insight into how the Commission’s competition policy fits within the context of its other objectives.

A. Competition Policy in Support of the EU’s Energy and Environment Objectives

One of the Commission’s core objectives is the creation of a European Energy Union, i.e. a market where clean energy flows securely and unimpeded. The Commission uses competition law to further this objective. It, therefore, adopted a decision forcing Gazprom to remove obstacles to the free flow of gas in Central and Eastern Europe thus ensuring competitive prices.²¹

Additionally, the Commission applies State aid rules to support investments in renewable energy and energy-efficient plants,²² in green and decarbonisation technology, and in improving the security of supply. Additionally, through the EU Emissions Trading Scheme (in respect of which a revised Directive was adopted in March 2019), State aid rules contribute towards achieving the EU’s climate objectives.

¹⁷ Report on Competition Policy 2018, p. 19.

¹⁸ Case M.8444 *ArcelorMittal/Ilva*, Commission decision of May 7, 2018.

¹⁹ Case M.8677 *Siemens/Alstom*, Commission decision of February 6, 2019.

²⁰ Report on Competition Policy 2018, p. 21.

²¹ Case AT.39816 *Upstream gas supplies in Central and Eastern Europe*, Commission decision of May 24, 2018.

²² In 2008, the Commission approved 21 such schemes.

B. Level Playing Field in the Area of Taxation

The Commission also deploys the State aid rules to preserve confidence in the Single Market by ensuring that competition on the merits is not skewed by unfair tax advantages. This is achieved by reviewing the tax treatment of certain undertakings as well as by investigating individual tax rulings in Member States.

C. Fostering a Global Competition Culture

Finally, according to the Report, the rising number of global market players and value chains necessitates worldwide cooperation between competition authorities and the creation of common standards and procedures. The Commission strives to be a leading force in international cooperation. On a bilateral level, the Commission negotiates the inclusion of competition State aid provisions in the various Free Trade and Association agreements with third countries. In 2018, it continued negotiations with Chile, Mexico, Mercosur, Azerbaijan, Tunisia, Indonesia, Andorra, Monaco, and San Marino. It also started negotiations with Australia, New Zealand, Kyrgyzstan, and Uzbekistan and signed an Administrative Arrangement with Mexico.

VI. THEMES AND TRENDS

The Report provides significant insights into the Commission's future priorities. In order to fully understand their significance the Report must be viewed in the context of recent political developments in the EU and global competition law trends. In respect of the former, the announcement of the make-up of the Von der Leyen Commission is particularly informative as the current Competition Commissioner and soon-to-be Executive Vice-President Vestager has obtained an expanded brief which except for the competition portfolio includes responsibility for ensuring that Europe is "fit for the Digital Age."

A. Markets that Work for Consumers

A central theme that emerges from the Report is that the Commission wishes to ensure that markets work for consumers and not the other way around.²³ Such rhetoric is connected to the need make sure that competition policy not only materially benefits consumers but that it is also plainly seen to be being doing so in order to foster trust and confidence in the Commission's work. This means that the Commission is likely to prioritize cases with obvious benefits to consumers.

B. Focus on Digital Markets

The Report makes clear that the application of competition law in the Digital Market was a priority for the Commission in 2018. This focus will certainly persist and will likely be reinvigorated in the foreseeable future and at least throughout the mandate of the new Commission. The incoming Executive Vice-President Vestager's expanded brief is likely to have a significant impact on this. In her Mission Letter, the President-Elect asks Vestager to "focus on maintaining [the EU's] digital leadership where [it] has it, catching up where [it] lags behind and moving fit on new-generation technologies."²⁴

In this context, an area of particular interest is likely to be the treatment of data due to their crucial role in most digital technologies and especially new-generation technologies. This is specifically recognized as a challenge in Report and is also addressed in the Mission Letter. The latter requires the incoming Executive Vice-President to coordinate, within the first 100 days of the new Commission's mandate, Europe's approach to "how we can use and share non-personalised big data to develop new technologies and business models."²⁵ Although this responsibility is derived from Vestager's mandate to make "Europe fit for a digital age," the latter is intended to have a broad application and will likely affect competition policy.

²³ Report on Competition Policy 2018, p. 7.

²⁴ Mission Letter to Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age, p. 4.

²⁵ Mission Letter to Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age, p. 5.

A connected issue is interaction between competition and data protection law in the treatment of big data. Until now, these two issues were treated separately even though sometimes the dividing line was blurred. With Vestager's enlarged brief and considering the absence of direct enforcement powers in respect of privacy law, the Commission might become more tempted to blur the line further.

The Report strongly underlines the benefits of the sector inquiry into e-commerce.²⁶ Simultaneously, the Mission Letter includes a requirement to consider whether to launch sector inquiries into “new and emerging markets that are shaping our economy and society,” a description which fits neatly with the Single Digital Markets or certain markets within that. Therefore, it is likely that the Commission will launch a sector inquiry in respect of the Single Digital Market at some point “in the first part of [Vestager's] mandate.”²⁷

Sector inquiries use the targeted tools available in individual investigations to gather information on entire markets and sectors. Therefore, they can be particularly useful as the information collected can form both the basis both for policy development and for launching individual investigations into specific infringements. In this case, a sector inquiry might allow the Commission to start monitoring certain nascent markets involving new-generation technology from a very early stage. In this fast-moving environment, this will be a rare opportunity for the Commission to develop a coherent competition policy from the start.

Notably, this focus on Digital Markets is a global trend. The UK's Competition and Markets Authority (“CMA”) recently set up a Data Unit while a distinct Digital Markets Unit with powers to review mergers and impose remedies has also been announced by the UK Government. The CMA also recently completed a market study (the equivalent to a sector inquiry) into online platforms and digital advertising. This study included an examination of the control exercised by customers over their data and the market power of digital platforms. The CMA has since described the results of that study as forming the “core” of its Digital Market Strategy.²⁸ Equivalent studies have also been conducted by the French Competition Authority and the Australian Competition and Consumer Commission.²⁹

However, while the focus in relation to developing policy and collecting information will likely be on the Digital Market for the foreseeable future, it should be noted that, in the short term, the vast majority of merger reviews and anti-trust investigations are likely to relate to the more traditional industries.

C. Industrial Policy and Merger Control

Finally, the Report indicates that the Commission sometimes uses competition enforcement to achieve its wider objectives. In most instances, such as in relation to its energy and tax policies, this is fairly uncontroversial. However, when it comes to the EU's industrial policy, there appears to be a tension between the EU's political wish to support European champions and DG Competition's stated aim of preserving a level playing field conducive to innovation and investment. As demonstrated by the prohibition of the Alstom/Siemens transaction, that tension is usually resolved in favor maximising the perceived benefit for competition. It remains to be seen whether the inclusion of a responsibility to “co-lead [the EU's] work on a new long-term strategy for Europe's industrial future”³⁰ in the incoming Executive Vice-President's brief will shift this balance.

²⁶ Report on Competition Policy 2018, pp. 10-11.

²⁷ Mission Letter to Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age, p. 5.

²⁸ The CMA's Digital Markets Strategy, July 2019, p. 10.

²⁹ ACCC Preliminary report on the Digital platforms inquiry of December 10, 2018 and Autorité de la concurrence Opinion no. 18-A-03 of March 6, 2018 on data processing in the online advertising sector.

³⁰ Mission Letter to Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age, p. 5.

CPI Subscriptions

CPI reaches more than 20,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.

