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Aidan Synnott

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PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. Indeed, there are several examples of cross-border engagement in the chapters that follow, including discussions of parallel investigations in multiple jurisdictions. We also read of bilateral and multilateral exchanges between and among various countries' competition officials, including a report from Turkey noting its entry into memorandums concerning international cooperation with several Balkan countries last year.

We continue to see the evolution and refinement of approaches to competition law enforcement in several jurisdictions. For example, our Argentine contributors provide an informative discussion of a new Antitrust Law, enacted following 'many years of effort by practitioners and authorities.' The authors note that this new law introduces 'significant changes to antitrust enforcement in Argentina.' Notably, in this edition we welcome for the first time in the *Review* a contribution from Indonesia, which provides an informative overview of competition enforcement there.

Cartel enforcement remains robust. In the pages that follow, we read that, late last year, the Italian Competition Authority levied 'its largest ever overall fine in a cartel case'. This case involved automotive companies' captive banks, which provide consumer financing. A record administrative penalty was also assessed by South African authorities in connection with allegations related to an alleged auto parts cartel. While the chapter from China notes that fines in 2018 were 'relatively low compared with . . . previous years,' it also points to a 'significant increase in the number of cartel cases'. Meanwhile, leniency applications have increased in both India and in France, where our contributors suggest the uptick 'could be explained by the increasing number of small and medium-sized companies applying for leniency'. In 2018, Canada revised its immunity and leniency programmes, and those revisions are discussed in that chapter.

Online platforms – and the 'digital economy' more generally – have been the subject of regulatory scrutiny by European Union, French, German, Japanese, Swedish, Taiwanese, and British authorities, among others. These chapters contain useful discussions of developments in those areas. In addition, the EU Overview provides a helpful primer on the record fine imposed by the European Commission on Google related to internet search and its Android operating system. Italian authorities released preliminary results of an investigation into 'big data' and called for regulation in that area. The chapters from France and Germany highlight a cooperative study being conducted by the Autorité de la Concurrence and the Bundeskartellamt concerning competitive effects of algorithms. Elsewhere in the areas of restrictive agreements and dominance, authorities in Greece issued fines in two cases that included allegations of resale price maintenance, a practice that was also met with scrutiny by authorities in Poland. Both Italian and Polish authorities focused on issues of dominance in the utilities sector.

Merger review and enforcement activity remains robust. The chapters that follow note activity in many diverse sectors. The United States chapter discusses the recent news of the government losing its appeal in the *AT&T/Time Warner* case: the appeals court there ruled that the lower court did not commit a clear error when it denied the government's request to block that deal. Several chapters – including the submissions from Argentina, Brazil, Canada, China, India, Mexico, and the United States – discuss investigations of the *Bayer/Monsanto* deal. China conditionally cleared the *Essilor/Luxottica* deal in the eyeglasses industry, while Italy cleared a different Luxottica deal with conditions. The *United Technologies/Rockwell Collins* deal is discussed in the China and United States chapters; and the *Praxair/Linde* deal is discussed in the Brazil, India, and United States chapters. Both Argentine and Colombian authorities issued updates to their merger review guidelines, which are discussed in the respective chapters. Similar to last year, the report from China notes several enforcement actions arising from reporting violations.

Particularly notable again this year is the chapter from the United Kingdom, as authorities there adapt to a post-Brexit enforcement regime. Readers will be quite interested in the informative discussion of the effect of Brexit on the future of competition enforcement. In that regard, the authors discuss recent guidance from the Competition and Markets Authority (CMA), potential consequences of various Brexit scenarios, and the expected increase in the CMA's workload. We will watch with interest to see how Brexit may affect competition enforcement in the United Kingdom and the European Union in the year to come.

Aidan Synnott
Paul, Weiss, Rifkind, Wharton & Garrison LLP
New York
April 2019

Chapter 1

EU OVERVIEW

Frédéric Louis and Anne Vallery[1]

I THE YEAR IN REVIEW – A BUSY YEAR WITH A SPECIAL EMPHASIS ON ABUSE OF DOMINANCE DEVELOPMENTS

As usual, it would be impossible to cover all the significant developments, touching upon all aspects of European Commission (EC) enforcement of the TFEU antitrust rules, under the supervision of the EU courts in Luxembourg, that took place over the past year. The period saw a decline in the number and importance of new EC cartel decisions, yet a flurry of abuse of dominance cases, with a new monster fine on Google shattering the previous record fine imposed on the company the year before. In addition, and as expected, we saw a renewed EC drive against vertical restraints aiming to limit price competition in retail distribution markets.

i Adoption of ECN+ Directive

The EU legislature formally adopted the ECN+ Directive in December 2018.[2] The aim of this legislation is to create a competition enforcement level playing field across the EU, by harmonising the basic powers of national competition authorities (NCAs) and bring them closer to the EC's own powers. In addition, the Directive seeks to strengthen the independence of the NCAs vis-à-vis the Executive in their respective countries.

The Directive does not significantly improve upon the need for would-be immunity applicants to embark upon a tour of European NCAs, if they wish to be guaranteed immunity protection in the event the EC decides not to assert jurisdiction over their case. The Directive allows NCAs to accept leniency applications and markers in another official EU language than their own, but subjects this possibility to the agreement of the NCA concerned in each concrete case.

In an unfortunate failure to understand that legal certainty is the key condition for successful leniency programmes, the Directive does not manage to guarantee full immunity from criminal prosecution to current and former directors, managers and staff of the immunity applicant. Instead, '[i]n order to ensure conformity with the existing basic principles of their

1 Frédéric Louis is a partner and Anne Vallery is a special counsel at Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale). The present contribution would not have been possible without the invaluable discussion of developments in John Ratliff's yearly review of 'Major Events and Policy Issues in EU Competition Law' 2017–2018, to be published in the *International Company and Commercial Law Review*.

2 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, OJ L11 of 14 January 2019, p. 3.

legal system,'[3] Member States whose criminal law provides for sanctions on cartelists may opt for a system whereby individuals linked to the immunity applicant may only be entitled to a reduced criminal sanction, and this only if their contribution to the immunity application outweighs the interest in prosecuting or sanctioning them.

ii Liability of private equity structures for cartel infringements

The EU General Court approved the EC's fine on Goldman Sachs for its investment in a company having participated in the *Power Cables* cartel.[4] During part of the cartel, Goldman Sachs had administered funds owning 84 to 91 per cent of the cartelist's shares. Normally, such shareholding would not have sufficed in itself to trigger the presumption of parental liability existing under the Court of Justice's (CJEU) case law but the GC held that the presumption could still apply as Goldman Sachs held 100 per cent of the voting rights in the cartelist during that time. The GC also found that, during the period after Goldman Sachs' shareholding fell to 31.69 per cent, although the EC could no rely on the presumption, Goldman Sachs was in fact able to exercise decisive influence so as to trigger parental liability. Goldman Sachs' defence that its investment was a purely financial one was rejected. According to the GC, a pure financial investor must have no involvement in the management or control of a company (i.e., must be unable to exercise decisive influence). This case and the outcome of the pending appeal to the CJEU are important for most private equity investment-management structures.

iii Review of fining methodology and cartel fining calculations

The EU courts continue to subject EC cartel fining calculations to intense scrutiny.

In the *Smartchips* cartel, the CJEU disagreed with the GC, holding that the GC should have considered whether the amount of the fine on Infineon was proportionate to the infringement. In particular, the GC should have examined Infineon's claim that the limited amount of anticompetitive contacts it had with competitors bore on the gravity of the infringement.[5] The issue is complex as the fine on this cartel was based on a gravity factor of 16 per cent, at the low end of the penalty scale for cartels, which starts at 15 per cent. Indeed, with a few exceptions, gravity factors tend to hover around 15 to 18 per cent, leaving little room for manoeuvre to take into account precise gravity factors, which is compounded by the fact that the EC chooses to work with one single gravity factor per cartel, using mitigation reductions to account for certain cartelists' more limited involvement. The case is now back to the GC for reconsideration and a further reduction in the fine is not a foregone conclusion.

In the *North Sea Shrimps* cartel, the EC was censored for having failed to properly reason the different percentages of fine reductions it had granted to participants on the basis of them being so-called mono-product companies, a characterisation that only properly fitted one of the four participants.[6]

3 Idem, Article 23(3), p. 27.

4 Case T/419/14, *The Goldman Sachs Company v. Commission*, judgment of 12 July 2018. Appeal pending, case C-595/18P. Parental and successor liability gave rise to another interesting judgment during the period, whose facts are too complex to be described in this contribution, see case T-640/16, *GEA Group AG v. Commission*, judgment of 18 October 2018.

5 Case C-99/17P, *Infineon Technologies v. Commission*, judgment of 26 September 2018.

6 Case T-58/14, *Stührk Delikatessen Import v. Commission*, judgment of 13 July 2018. The Commission re-adopted its decision in the *Envelopes* cartel, after the GC had annulled the decision for failure to reason

iv Reasonable time for judicial adjudication

The Court of Justice prevailed on its appeals to itself on the GC's award of damages to compensate for bank guarantee costs supported for the period exceeding the reasonable time it should have taken the GC to rule on cartel appeals.[7] The Court of Justice found an absence of causal link, as the applicants should have terminated the bank guarantee (and pay the fine plus interest) as soon they saw that the GC had exceeded the reasonable time to adjudicate on their appeals.

v Selective distribution and online marketplaces

Bans on online selling within selective distribution systems have been frowned upon for some time by the EC. One lingering question that arose in Germany was whether suppliers having set up a selective distribution system could prevent their selected distributors from selling on online marketplaces such as Amazon or eBay. The concern voiced notably by the German Bundeskartellamt was that small retailers would find it hard to drive significant business to their own webshops due to lack of name recognition beyond the traditional area around their brick-and-mortar shop. On a preliminary question from a German court, the CJEU found that such restrictions were justified.[8] The implications of the ruling are still hotly debated. Despite the ruling having originated from a question from a German court, the Bundeskartellamt appears keen to limit its scope in Germany.

vi Sanctions for resale price maintenance following e-commerce sector inquiry

Following the completion of the EC's sector inquiry into online distribution, the Commission adopted four fining decisions for resale price maintenance against Asus (€63.3 million), Philips (€29.8 million), Pioneer (€10.1 million) and Denon & Marantz (€6.3 million).[9] Additional investigations on other restrictive vertical restraints uncovered during the sector inquiry are pending.

vii Spreading misleading information to prevent off-label drug prescriptions is an infringement by object

The CJEU held that for the holder of a marketing authorisation for a given drug and the distributor of a rival drug to agree to limit off-label competition from the former with the latter by spreading misleading information about safety concerns associated with off-label use of the former drug constituted an infringement by object of Article 101 TFEU.[10]

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the fine on one of the participants (Case AT.39780). The Commission provided detailed reasoning but maintained the fining levels of its original decision.

7 Judgments of 13 December 2018 in cases C-138/17 P and C-146/17 P, *European Union v. Gascogne Sack Deutschland and Gascogne*; C-150/17 P, *European Union v. Kendrion NV*; C-174/17P and C-222/17P. *European Union v. Plásticos Españoles, SA (ASPLA)* and *Armando Álvarez, SA v. European Union*. Cases C-447/17 P and C-479/17 P, *European Union v. Guardian Europe Sàrl*, which raise additional issues, are still pending.

8 Case C-230/16, *Coty Germany*, judgment of 6 December 2017.

9 Respectively case AT.40465, AT.40181, AT.40182 and AT.40469.

10 Case C-179/16, *F. Hoffmann-La Roche Ltd and Others v. Autorita Garante della Concorrenza e del Mercato*, judgment of 23 February 2018.

viii Clarification on the conditions for a finding of abusive discrimination

In *MEO*, the CJEU clarified further the conditions for differentiated tariffs set by a dominant supplier to be deemed abusive.[11] Under existing case law, price discrimination by a dominant player only falls foul of the prohibition of abuse of a dominant position if it is capable of leading to a distortion of competition between competing customers (or suppliers) of the dominant player. The Court held that this means that the differentiated pricing must place one or more of these companies at a competitive disadvantage compared to the others. In reviewing the facts of the case, the Court noted that where the effect of the tariff differentiation on the costs of the profitability of the disadvantaged player is not significant, then it can be concluded that the differentiation is not capable of leading to a competitive distortion.

This is a key ruling for dominant companies facing multiple requests for 'better deals' in individual customer negotiations. The Court has formally confirmed that non-discrimination does not require absolute equality of terms.

ix Qualcomm payments for exclusive supply relationship

The EC ordered Qualcomm to pay a significant fine of nearly €1 billion (4.9 per cent of Qualcomm's 2017 worldwide turnover) for having made payments to Apple in return for a commitment by Apple to procure all its requirements of LTE chips from Qualcomm, over a five-and-a-half-year period.[12] Following in the footsteps of the CJEU's *Intel* ruling, the appeal by Qualcomm is likely to hinge on the EC's handling of the economic evidence used by Qualcomm in defence of its position, in particular a critical margin analysis submitted to show that the exclusivity payments were incapable of having exclusionary effects.

x Google Android

On 18 July 2018, the EC continued its crusade against Google, shattering the previous record by imposing a mammoth fine of €4.34 billion for restrictions imposed on Android mobile device makers and mobile network operators.[13] Google was held to have abused its dominant position for general internet search services, licensable smart mobile operating systems and app stores for the Android mobile operating system.

The market definition for mobile devices' operating systems is particularly contentious as the EC's choice to include licensability in the definition automatically excludes Apple's iOS. However, the EC investigated whether downstream competition for end users between Apple and Android devices could constrain Google's market power for the licensing of Android. It found such constraint to be insufficient, on the basis of four factors:

a End users make their purchasing decisions on the basis of multiple factors independent from the mobile operating system. It is not clear whether the EC is contending that the operating system is irrelevant to end users or that it plays no significant role in their decisions – a surprising proposition in either case.

11 Case C-525/16, *MEO – Serviços de Comunicaçoes e Multimédia SA v. Autoridade da Concorrência*, judgment of 19 April 2018.

12 Case AT.40220, *Qualcomm (Exclusivity Payments)*. Only a two-page summary of the decision is publicly available at this stage.

13 Case AT.40099. Only the EC's press release is available at this stage.

b Apple devices are typically priced higher than Android devices and may not be accessible to a large part of the Android user base. Despite the price range of Apple devices having significantly broadened in the past years, that proposition appears correct.

c Android device users face switching costs when switching to Apple devices. Again, this proposition appears generally correct.

d Even if Android users were to switch to Apple devices, this would have a limited impact on Google's core business as Google Search is the default search engine on Apple devices. It is unclear how this factor is relevant to the question of Google's dominance on the putative market for licensable smart mobile operating systems.

As for the market for app stores for the Android mobile operating system, the EC unsurprisingly found dominance there, based on its previous analysis that the possibility to switch to Apple devices does not place a sufficient constraint on Google, thereby excluding competition from Apple's own App Store.

Turning to the practices the EC deems abusive, these relate to tying of Google's search and browser apps with the Play Store app, payments conditional on exclusive pre-installation of Google Search, and obstruction to the development and distribution of competing Android operating systems ('Android forks').

As to tying, the EC found that Google's Play Store was a must-have for device makers. Therefore, the requirement to take this app as a bundle with other Google apps such as the Google Search app and the Google Chrome browser guaranteed that these would be pre-installed on practically all Android devices. This created a 'status quo bias', evidence showing that a large majority of users favour the search apps pre-installed on their devices. Google's tying practice therefore reduced the incentives for device makers to pre-install competing apps as well as for users to download such apps. The EC dismissed Google's defence that such tying was necessary to monetise its investment in Android. In a rare foray into what constitutes adequate remuneration for significant innovation, the EC considered that Google would still enjoy other significant revenue streams from the use of Android devices.

Google made payments to device makers and mobile operators conditional on these pre-installing Google Search on all their Android devices on an exclusive basis. The EC found that rival search engines were unable to compensate device makers or mobile operators for the loss of the conditional payments as these applied across all the Android devices made by or for these players. It is unclear from the press release how and whether the EC applied the as efficient competitor test in considering the exclusionary effect of the payments.[14] All the press release tells us is that, to conform its analysis to the CJEU's *Intel* ruling, the EC 'considered, amongst other factors, the conditions under which the incentives were granted, their amount, the share of the market covered by these agreements and their duration.' The

14 It appears from the summary of the grounds of appeal that the EC would have carried out an as efficient competitor analysis, see action brought on 9 October 2018, case T-604/18, *Google and Alphabet v. Commission* (available on http://curia.europa.eu/juris/document/document.jsf?text=&docid=208802&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=3546950). From the summary of the fifth plea, it would appear that this analysis may have been conducted *in extremis*, as it was communicated to Google in a letter of facts, after the administrative hearing.

EC was unconvinced by Google's defence that these payments, which were discontinued in 2013–2014, had been necessary to convince device makers and mobile operators to develop and market smart devices running the Android operating system.

As regards the obstruction of Android forks, the EC found that, in order to be allowed to pre-install Google's proprietary apps, device makers had to commit not to develop or sell 'even a single device running on an Android fork'. This in particular would have affected Amazon's Android fork 'Fire OS'. The EC rejected Google's defence that this was necessary to protect the Android ecosystem from fragmentation.

For the EC, these three practices are part of an overall strategy to cement Google's dominance in general internet search.

Like the EC's previous decision concerning *Google Shopping*, the *Android* decision is under appeal. A key question will be whether the EU courts will agree with the EC's sidestepping of the Android-iOS competition issue. The Android operating system was offered for free, enabling a quick spread of the thus far only workable competitor to Apple's iOS and the rapid spread of smartphone technology among all categories of users. Big companies that the EC once thought unassailable, such as Microsoft or Nokia, proved incapable of putting forward valid alternatives. In the ongoing debate as to how antitrust can best protect innovation, the EC's forceful attack on the business model that made Android possible is bound to be discussed for years to come.

xi The Gazprom commitments

The EC adopted a decision imposing legally binding obligations upon Gazprom to put an end to practices that had been subject to a statement of objections issued three years earlier in April 2015.[15]

The EC's preliminary views were that Gazprom had abused its dominant position on the markets for upstream wholesale supply of natural gas in Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia in an overall strategy of fragmenting and isolating these gas markets, restricting the free flow of gas across these national markets and therefore leading to higher pricing policies. The alleged abusive practices related to territorial restrictions in Gazprom's supply agreements (e.g., explicit contractual export ban and destination clauses), tying gas supplies to unrelated infrastructure advantages (thus leveraging Gazprom's alleged dominant position on the wholesale gas supply market in Bulgaria), and excessive pricing practices (in comparison with the competitive European price benchmark).

Gazprom offered two sets of commitments in March 2017 and in March 2018, after the first offer triggered negative reactions. Most of the final obligations imposed on Gazprom were already offered in March 2017 but were significantly complemented and strengthened in March 2018. First, Gazprom has been forced to remove all direct and indirect contractual territorial restrictions in the contracts with its customers. Second, Gazprom has to actively promote and contribute to the integration of the gas markets between the Baltic States and Bulgaria. Third, Gazprom should offer its customers an effective price tool and pricing revision mechanism which would guarantee competitive prices. Fourth, Gazprom committed for 15 years not to seek any damages from its Bulgarian partners following the termination of the South Stream pipeline project.

15 Case At.39816 – Upstream gas supplies in central and eastern Europe.

While Gazprom escaped the imposition of a substantial fine, one cannot help wondering whether some of the obligations imposed on Gazprom do not relate more to market integration concerns than to competition policy, which recalls early EC Article 101 decisions on cooperation between France Telecom and Deutsche Telekom that, through the guise of a competition investigation, imposed concessions in the telecommunications sector whose true goal was to liberalise the French and German markets. Commissioner Vestager defended the EC's decision by stating that the 'case is not about the flag of the company – it is about achieving the outcome that best serves European consumers and businesses'. The Commissioner's protestations notwithstanding, the EC's focus on fixing the issue without seeking to sanction the conduct, while certainly helpful for diplomatic reasons, may also have enabled further-reaching concessions from Gazprom.

Appendix 1

ABOUT THE AUTHORS

FRÉDÉRIC LOUIS

Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale)

Frédéric Louis focuses on all aspects of EU competition law, including cartel, parallel imports and abuse of dominance investigations (including internal investigations and leniency applications); complaints and litigation; merger clearance; state aid investigations; and complaints and counselling. He advises clients across a wide variety of industry sectors, from basic industries (construction materials, chemicals) to consumer goods, including service industries (telecommunications, transport, banking, media and sports).

Mr Louis also advises on other aspects of EU regulatory law, including product regulations and data protection. He has been centrally involved in pioneering transparency litigation, having won a series of cases mandating freedom of access to information held by the EU institutions. He also litigates and represents clients before Dutch, French and Belgian courts (including antitrust damages claims) and competition authorities.

Mr Louis's litigation experience before the EU courts ranges over various aspects (including freedom of commerce and constitutional issues) with a focus on competition litigation. Mr Louis has argued cases before the Grand Chamber of both the GC and the ECJ of the EU.

Mr Louis is antitrust and regulatory counsel to a dozen European and worldwide industry associations. He has represented the European Commission and is adviser to the European Central Bank and the Single Resolution Board.

ANNE VALLERY

Wilmer Cutler Pickering Hale and Dorr LLP (WilmerHale)

Anne Vallery has practised EU competition and regulatory law in Brussels for over 20 years, with a particular focus on electronic communications. She has litigated numerous cases before the European Commission, European courts, national competition authorities, Brussels courts and other national courts.

Ms Vallery has been involved in a host of major transatlantic cartel investigations, including the *Soda Ash*, *Cement*, *Vitamins*, *Belgian Banks*, *Parcel Tankers*, *Chloroprene Rubber*, *Emulsion Styrene Butadiene Rubber*, *NBR*, *Flat Glass* and *LCD* cases.

In addition to her considerable cartel experience, Ms Vallery has been involved in major abuse of dominance investigations, state aid litigation, damages litigation, international arbitration and telecoms matters.

WILMER CUTLER PICKERING HALE AND DORR LLP (WILMERHALE)

Bastion Tower
Place du Champ de Mars/Marsveldplein 5
1050 Brussels
Belgium
Tel: +32 2 285 49 00
Fax: +32 2 285 49 49
frederic.louis@wilmerhale.com
anne.vallery@wilmerhale.com
www.wilmerhale.com

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