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EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2021

EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2021

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's Europe, Middle East and Africa Antitrust Review 2021 is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Americas and the Asia-Pacific region, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this edition, Sweden is a new jurisdiction alongside updates from the European Commission (including a new article on the abuse of dominance), Cyprus, Denmark, France, Germany, Greece, Norway, Portugal, Russia, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Angola, Israel, Mauritius and Mozambique.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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European Union: Abuse of Dominance

Bill Batchelor and Caroline Janssens
Skadden, Arps, Slate, Meagher & Flom LLP

In summary

The past year has seen aggressive use by the European Commission of article 102 of the TFEU to examine the business models of the technology sector. Those decisions, now all on appeal, remain controversial in applying decades-old precedents to complicated multisided markets. The EU courts, for their part, have shown a greater intensity of review on appeal and efforts to move away from form-based near *per se* judgments as to what conduct constitutes abuse. The Commission's decisions in the technology sector will be among the first to be tested against these less formalistic thresholds.

Discussion points

- EU courts' review of article 102 TFEU cases on appeal and efforts to move away from near *per se* judgments as to what constitutes abuse
- New enforcement trends in the decisional practice
- Competition law policy debate in the digital sector
- Abuse of market power in time of covid-19

Referenced in this article

- Case C-307/18, *Generics (UK) Ltd and Others v. Competition and Markets Authority*, of 30 January 2020 (Paroxetine)
- Case T-691/14, *Servier and Others v. Commission*, of 12 December 2018
- Case T-851/14, *Slovak Telekom a.s. v. Commission*, of 13 December 2018
- Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie*, of 3 April 2019
- Case COMP/AT. 40111, *Google Search (AdSense)*, prohibition decision
- Case COMP/AT. 40099, *Google Android*, prohibition decision
- *Facebook v. Bundeskartellamt*, VI-Kart 1/19 (V), of 26 August 2019
- Case COMP/AT. 40608, *Broadcom*, interim measures decision
- Case AT. 40134, AB InBev Beer Trade Restrictions, prohibition decision

Introduction

At a time when cartel enforcement has been limited, the past year has seen aggressive use by the European Commission (the Commission) of article 102 of the Treaty on the Functioning of the European Union (TFEU), particularly to examine the business models of the technology sector. Those decisions, now all on appeal, remain controversial in applying decades-old precedents to complicated multisided business models.

The EU courts, for their part, have shown a greater intensity of review on appeal. There have been rare reverses for the Commission in market definition and substantive abuse findings. But perhaps the more important trend has been the EU courts' efforts to move away from form-based near *per se* judgments as to what conduct constitutes abuse. Just as the case law in article 101 of the TFEU in *Cartes Bancaires* and *Budapest Banks* has sought to recalibrate the concept of 'by object' violation, so we see *Paroxetine*, building on earlier case law, remoulding article 102 in its mirror image. Regulators should not focus on the form of conduct but rather its capability to exclude having regard to 'all the relevant circumstances'. Where restrictions are found, objective justification involves a balancing of efficiencies, necessity and a non-elimination-of-rivalry test mirroring article 101(3) of the TFEU. Once the defendant has made a *prima facie* showing of justification, the burden reverts to the Commission to rebut. The Commission's series of decisions in the technology sector will be among the first to be tested against these less formalistic thresholds.

The EU courts

Market definition, dominance and pay-for-delay agreements

In *Generics (UK) Ltd and Others v. Competition and Markets Authority*,[1] the EU Court of Justice (ECJ) for the first time addressed an alleged 'pay-for-delay' patent settlement agreement, on a reference from the UK Competition Appeal Tribunal.[2]

After expiry of the substance patent, but before expiry of certain process patents concerning its manufacture, generic manufacturers entered the market with generic paroxetine. The originator, GlaxoSmithKline plc (GSK), brought infringement proceedings. The generics settled and agreed to refrain from market entry. As part of the settlements, GSK entered into distribution agreements for the supply of GSK-manufactured paroxetine, purchased the generics' own paroxetine stocks and paid marketing allowances. Although paroxetine is one of many SSRI (selective serotonin re-uptake inhibitors) anti-depressants, the UK authority alleged that the market could be defined as comprising only the originator and generic paroxetine.

1 Case C-307/18, *Generics (UK) Ltd and Others v. Competition and Markets Authority*, ECLI:EU:C:2020:52, judgment of 30 January 2020.

2 Case CAT/1251-1255/1/12/16, *GlaxoSmithKline PLC and others v. Competition and Markets Authority*, not yet determined, appealing the UK Competition and Markets Authority [CMA] Case CE-9531/11, *Paroxetine*, decision of 12 February 2016.

Molecular market definition

On referral, the ECJ held (1) that there could be a molecular market for a single active substance[3] and (2) that this was the case even if the generics were arguably not permitted on the market in light of GSK's extant intellectual property (IP) rights. Ordinarily, prior to generic entry, pharmaceutical markets tend to be defined by therapeutic substitutability. So, similarly effective antidepressants, patented or otherwise, should fall within the relevant market. The ECJ concluded, however, that the definition of the relevant market could change once generic entry is threatened (even before it actually occurs.) Market definition is 'naturally dynamic, in that a new supply of products may . . . justify a new definition'. Potential generic entry 'could lead to a situation where the originator medicine is considered, in the professional circles concerned, to be interchangeable only with those generic medicines and, consequently, to belong to a specific market, limited exclusively to medicines which contain that active ingredient'.[4]

It was not relevant, the ECJ held, that generics could not lawfully enter the market before expiry of the process patent.[5] The relevant question was whether the threat of entry was sufficiently timely and likely, and at a scale to be a 'serious counterbalance' to the originator.[6] Sufficiently concrete threat of entry is sufficient, for example, applying for a marketing authorisation or obtaining such an authorisation, supply contracts with third-party distributors[7] or the originator's perception of the immediacy of the generic-entry threat.[8] IP rights barring entry did not warrant a different conclusion.[9] There was no certainty these would prevent generic entry once the substance patent had expired, as they may not be valid or infringed.[10]

By contrast, in *Servier v. Commission*, [11] the General Court annulled the Commission's finding of dominance on the ground that it incorrectly restricted the relevant market for finished products to the single molecule of perindopril in its originator and generic versions, when it could be exposed to non-price competitive pressure from other medicines of the same therapeutic class (ie, other angiotensin-converting enzyme inhibitors (ACE inhibitors) available on the market).[12]

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3 Case C-307/18, *op. cit*., paras. 124 and 125. The European Court of Justice [ECJ] did not need to opine on whether other SSRIs were part of the same market, as this was not a question referred to it. The UK Competition Appeal Tribunal had reached its own conclusions on this point. Rather it considered only whether there could be a market for medicines containing the same active substance notwithstanding that intellectual property rights impeded generic entry.

4 Case C-307/18, *op. cit*., paras. 130 and 131.

5 Case C-307/18, *op. cit*., para. 123.

6 Case C-307/18, *op. cit*., para. 133.

7 Case C-307/18, *op. cit*., para. 134.

8 Case C-307/18, *op. cit*., para. 135.

9 Case C-307/18, *op. cit*., para. 136.

10 Case C-307/18, *op. cit*., paras. 137 and 138. The ECJ distinguished the situation in which a medicine has not received marketing authorisation and so is not marketed legally, and therefore should not be considered a competitor.

11 Case T-691/14, *Servier and Others v. Commission*, ECLI:EU:T:2018:922, judgment of 12 December 2018.

12 Case T-691/14, *op. cit*., para. 1590.

Because the Commission erroneously restricted the relevant market, it wrongly concluded that Servier held a dominant position on the perindopril finished product market in the four member states examined and on the upstream market for perindopril active pharmaceutical ingredient technology, and had abused that dominant position in breach of article 102 of the TFEU.[13] The Court noted that if the relevant market had been defined by the Commission at the level of all the ACE inhibitors and not at the level of the perindopril molecule, the average market share of Servier in the four member states analysed would have been less than 25 per cent (ie, below the thresholds indicative of the existence of a dominant position).[14] Appeals against the General Court ruling are pending before the ECJ. It remains to be seen whether and how the ECJ's assessment of the market in *Generics* will affect its determination of the *Servier* appeals.[15]

Abuse of dominance and objective justification

A peculiarity of the UK authority's findings was that one of the settlement agreements was exempt from the UK competition law cartel prohibition. But the authority nonetheless fined GSK because it held it was also an abuse of a dominant position. The ECJ found that it was legitimate to find that an agreement is illegal under both article 101 and article 102 of the TFEU.[16]

The ECJ took the opportunity to restate the necessary steps of article 102 analysis:

- whether the conduct was capable of restricting competition producing the alleged exclusionary effect;
- having regard to all the relevant circumstances; and
- if so, whether the dominant company can show that the conduct (1) generated efficiencies that outweigh any restrictive effects, (2) was necessary to achieve the efficiencies; and (3) did not eliminate competition.[17]

In doing so, it may be seen the ECJ seeks to mirror the steps involved in article 101 analysis, with the first step judging the restriction based on the necessary legal and economic context, and the second, similar to article 101(3), whether benefits outweigh any restriction.

In this case, the distribution agreements entered into between GSK and the generic manufacturers was likely to have secured favourable pricing to the UK National Health Service (NHS) relative to the originator price. The ECJ found it did not matter whether or not this benefit had been intended.[18] However, it also noted that it should be established how any price advantage resulting from the distribution agreement compared to the likely price reduction from independent generic entry.[19]

13 Case T-691/14, *op. cit.*, para. 1607.

14 Case T-691/14, *op. cit.*, para. 1604.

15 Case C-176/19 P, *Commission v. Servier and Others*; Case C-201/19 P, *Servier and Others v. Commission*, not yet determined.

16 Case C-307/18, *op. cit.*, para. 147.

17 Case C-307/18, *op. cit.*, para. 172.

18 Case C-307/18, *op. cit.*, para. 170.

19 Case C-307/18, *op. cit.*, para. 171.

By contrast, in *Servier v. Commission*,[20] the Commission had found that Servier had breached article 102 of the TFEU by misusing legitimate patents tools and buying out a number of competitors that had developed cheaper generic versions of the cardiovascular medicine perindopril. But the General Court annulled the Commission's finding of dominance on the ground that it incorrectly restricted the relevant market, as explained above.

Refusal to supply, margin squeeze and sector specific regulation

Slovak Telekom v. Commission[21] has provided further clarity in relation to the test for illegal margin squeeze. It was alleged Slovakia's incumbent telecommunications operator had abused its dominant position by refusing to provide wholesale access to its 'local loop' infrastructure on terms that allowed downstream competitors to compete for retail broadband internet.

First, the General Court clarified the indispensability limb of the EU refusal-to-deal abuse test. Slovak Telekom claimed there was no evidence that its infrastructure was indispensable for retail competitors, one of the necessary prerequisites for an unlawful refusal-to-deal. The General Court held that the Slovak regulatory framework mandated access to Slovak Telekom's local loop. This distinguished Slovak Telekom from prior refusal-to-deal indispensability case law.[22] The Commission was therefore not required to prove indispensability.[23]

Second, the General Court addressed the question of whether a dominant company can avoid an illegal squeeze by arguing that rivals were more efficient. The Commission alleged Slovak Telekom squeezed rivals by leaving an insufficient margin between its wholesale and retail prices. Slovak Telekom's retail business allegedly would have made a loss if it paid the wholesale prices Slovak Telekom charged retail rivals. Slovak Telekom argued that it should be allowed to assume, as its rivals would do, that if its retail business had operated as a stand-alone, it would have optimised its network utilisation and asset base so as to be profitable. The General Court refused to entertain these cost base adjustments. Margin squeeze must be assessed by actual rather than hypothetical costs. The case law only permitted regard to a competitor's cost base when it was not possible to determine the dominant company's own.[24]

Finally, the General Court faulted the Commission's squeeze methodology. The Commission relied on the long-run average incremental costs methodology to determine the costs of an equally efficient competitor and calculated the margin spread based on a multi-period approach, rather than year by year to show that the margin was negative. In fact, during the earliest period there

20 Case T-691/14, *op. cit.*

21 Case T-851/14, *Slovak Telekom a.s. v. Commission*, ECLI:EU:T:2018:929, judgment of 13 December 2018.

22 Case T-851/14, *op. cit.*, para. 118.

23 Case T-851/14, *op. cit.*, para. 121.

24 Case T-851/14, *op. cit.*, paras. 231 to 238.

was no margin squeeze, but this was masked by later negative margins owing to the Commission's temporal methodology.[25] The Court partially annulled the Commission decision.[26] An appeal to the ECJ is ongoing.[27]

Fundamental rights and double jeopardy

The ECJ ruled on the interpretation in the context of an abuse of dominance case of the fundamental principle of *ne bis in idem* protected by the Charter of Fundamental Rights of the European Union, according to which no one can be tried or punished twice for the same offence (article 50). It is settled case law that the protection against double jeopardy applies to fines for breaches of competition law and effectively prohibits EU competition authorities from prosecuting an undertaking twice for breaches of competition law for which it has already been sanctioned or found not liable in an earlier decision that can no longer be appealed. However, in *Powszechny Zakład Ubezpieczeń na Życie*,[28] a dispute between a Polish insurance company and the Polish competition authority, the ECJ clarified that the protection against double jeopardy does not preclude a national competition authority from fining an undertaking, in one and the same prohibition decision, for an infringement of the prohibition of abuse of dominance under national competition law, and under article 102 of the TFEU applied in parallel. In this circumstance, however, the national competition authority must ensure that the two fines, combined, are proportionate to the nature of the infringement.[29]

New enforcement trends in the decisional practice

Finding of dominance in digital markets

The Commission is increasingly intervening in technology business models and ecosystems. In *Google AdSense*,[30] the Commission examined Google's intermediation role in online advertising. Website owners sell advertising spots to Google (and other advertising intermediaries) around the website owner's search results pages. These are intermediated and sold to advertisers so the website owner can monetise advertising based on search results. Google would also provide the search functionality that returned these results. Google agreed with the website owner which web properties, or specific locations on those web properties, would be available for Google to intermediate and sell to advertisers. The Commission alleged these terms prevented rival advertising intermediaries from gaining access to that web inventory and, in turn, protected Google's position in search overall.

25 Case T-851/14, *op. cit.*, paras. 256, 259 and 260.

26 Case T-851/14, *op. cit.*, paras. 189 and 193.

27 Case C-165-19 P, *Slovak Telekom v. Commission*, not yet determined.

28 Case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie*, ECLI:EU:C:2019:283, judgment of 3 April 2019.

29 Case C-617/17, *op. cit.*, para. 39.

30 Case COMP/AT. 40111, *Google Search (AdSense)*, European Commission prohibition decision of 20 March 2019, text of decision not yet publicly available.

It may be seen, however, that these restrictions might be said to be inherent in the business model. Without knowing which web pages were available (or which locations on a web page were available) to Google to sell, then it could not promise advertisers attractive inventory for their adverts. Advertisers would value advertising spots less if there were a profusion of advertisements served to the same location by other intermediaries. And this would devalue the website owners' inventory. So the intermediation process would be less efficient at monetising the website owner's results. If the website owner can choose from time to time which intermediary should market its inventory then there would seem to be little effect on competition.[31]

In *Google Android*,[32] the Commission considered another two-sided market. Google licensed the Android operating system for free to handset manufacturers in return for the carriage (typically by pre-installation) of Google revenue generating apps on the handsets, including Google Play (an app store) and Google search. Google made substantial investments in Android to match the breakneck innovations in rival smart phones, most notably Apple, and its licensed operating system was generally considered to have expanded output of affordable, high-specification handsets by a range of manufacturers.

The Commission concluded that Google was dominant in licensable mobile operating systems, and that general search and requiring pre-installation of Google Play and other Google apps amounted to illegal tying. This allegedly sought to foreclose mobile search to rivals. It further found that Google's requirements that handset makers did not write divergent (fragmented) versions of Android if they carried Google apps foreclosed competition from forked versions of Android.

It may also be questioned whether the benefits of anti-fragmentation across the Android ecosystem, encouraging developers to create a critical mass of attractive apps for an unfragmented Android operating system, outweighed any detriment to potential competition between forked Android versions that chose not to comply with anti-fragmentation specifications.

Again, it may be questioned whether this conduct was inherent to the business model. Pre-installing revenue generating apps on handsets was the *quid pro quo* for Google's huge investments in Android, which was seemingly driving down prices and expanding demand for latest technology handsets. Google enabled handset manufacturers to compete aggressively with the innovations of handset makers with proprietary software, such as Apple.

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31 Guidance on the Commission's enforcement priorities in applying article [102 TFEU] to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/07, para. 36 (no abuse in contestable tender markets where fair opportunity to bid); European Commission decision of 19 March 2004 in Case COMP/E-2/38.316 – *Vega SpA/CIK-FIA*, paras. 78 and 79 (no abuse in winning the role as exclusive provider of go-cart tyres for individual racing events, because each supplier had a fair opportunity to win the tender); European Commission decision of 14 June 2018 in Case COMP/AT.40026 – *Velux v. Fakro*, para. 129 (Velux's *de facto* exclusive supply obligations had no impact on competition, as its competitor, Fakro, could readily obtain inputs from other suppliers); Judgment of 11 January 2017, Case T-699/14, *Topps Europe v. Commission*, ECLI:EU:T:2017, para. 142 ('[A]s regards the applicant's arguments relating to the alleged refusal to grant it the IP rights to market World Cup and Euro collectibles and the existence of foreclosure effects, it must, first, be found that the applicant was indeed invited to participate in the calls for tenders organised by the some of the targeted parties such as UEFA and the DFB.')

32 Case COMP/AT. 40099, *Google Android*, European Commission prohibition decision of 18 July 2018.

Against those benefits, it may be asked whether pre-installation has any exclusionary effect. The Commission cites *Microsoft*[33] as precedent that pre-installation forecloses. But that would seem to belong to a different era, in which operating systems were the principal route to market and pre-broadband downloads were slow and uncertain. Modern precedents, by contrast, find no foreclosure where switching is easy, multi-homing common and hardware platforms and app stores exist precisely to enable seamless downloads in seconds. The General Court had no concerns that Microsoft pre-installing Skype on the desktop would foreclose rival voice apps in *Microsoft/Skype*.[34] Similarly, in *Facebook/WhatsApp*, the Commission found switching or multi-homing between messaging apps was free, easy and engaged little smartphone capacity.[35] So, too, in offline contexts, the decisional practice suggests there is no exclusionary effect if rivals have ample opportunity to access the market.[36]

Intersection between antitrust and data protection

Since 2006, there has been the strongest authority that antitrust and data privacy are separate concerns. In *Asnef-Equifax*,[37] the ECJ had stated that privacy concerns raised by big data are outside the intervention of competition authorities. However, this orthodoxy was upended at national level by the German Federal Cartel Office (FCO) in *Facebook*,[38] finding that Facebook's terms and data collection, allegedly without the user's full consent, both violated the user's privacy and abused Facebook's allegedly dominant position. Facebook was allegedly able to collect extensive user data from third-party sources, allocate these to users' Facebook accounts and use them for a wide range of processes. These allegedly 'inappropriate contractual terms and conditions' were an 'exploitative abuse' of a dominant position, finding 'this applies above all if the exploitative practice also impedes competitors that are not able to amass such a treasure trove of data'. Facebook was not fined but was required to change its practices. On appeal, the Higher Regional Court of Düsseldorf suspended[39] the FCO's decision because it failed to explain how Facebook's violation of the General Data Protection Regulation affected competition. It held that 'even if the challenged data collection practices breached data protection rules, they would not breach competition law at

33 Case COMP/AT.37792, *Microsoft*, European Commission decision of 24 March 2004, and Case COMP/AT.39530, *Microsoft*, European Commission decision of 16 December 2009.

34 Case T-79/12, *Cisco*, ECLI:EU:T:2013:635, judgment of 11 December 2013; Case COMP/M.6281, *Microsoft/Skype*, European Commission decision of 7 October 2011.

35 Case COMP/M.7217, *Facebook/Whatsapp*, European Commission decision of 29 August 2014.

36 Case COMP/A.39.116/B2, *Coca-Cola*, European Commission decision of 22 June 2005, paras. 44 and 45 (availability of 20 per cent of a refrigerator for rivals does not foreclose); Case COMP/B-1/37966, *Distrigaz*, European Commission decision of 11 October 2007, paras. 27, 34, 36 and 38 (long-term contracts covered limited percentage of market).

37 Case C-238/05, *Asnef-Equifax*, ECLI:EU:C:2006:734, judgment of 23 November 2006, para. 63 ('any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law').

38 Case B6-22/16, *Facebook exploitative business terms*, German Federal Cartel Office [Bundeskartellamt] decision of 6 February 2019.

39 Oberlandesgericht Düsseldorf decision, *Facebook v. Bundeskartellamt*, VI-Kart 1/19 (V), 26 August 2019 (in German).

the same time'. Data volume alone, moreover, was not decisive for successfully operating a social network. Otherwise, the court observed, the unsuccessful social network Google+ would have quickly overtaken Facebook.[40] An appeal before the German Federal Supreme Court is pending.

It remains to be seen how, and whether, the trend will evolve at EU level. Within the merger control context, Google's purchase of health tracker Fitbit is sparking debate among competition authorities on whether large tech's concentration of personal data should be a concern of competition authorities or data protection regulators, or both.[41]

Interim measures

For the first time in almost two decades, the Commission imposed interim measures in an ongoing investigation into Broadcom's conduct in various television set-top box and modem chipset markets.[42] The Commission ordered Broadcom to stop applying certain provisions contained in agreements with six of its main customers 'to prevent serious and irreparable harm to competition likely to be caused by Broadcom's conduct'. The Commission justified the measures on *prima facie* conclusion that Broadcom holds a dominant position in three different markets and engages in practices that amount to an abuse of this position (ie, exclusive or quasi-exclusive purchasing obligations and leveraging that position in neighbouring markets). While an appeal against the decision was pending, Broadcom offered commitments to address the competition concerns, but Margrethe Vestager (Executive Vice President of the European Commission) indicated that she will use interim measures again if necessary.

This desire for swift intervention, especially in tipping markets, is echoed by national authorities of the EU member states. In the United Kingdom, the Furman Report[43] called for increased use of interim measures, and so do plans to amend competition law in Germany.[44] In France, the Competition Authority (FCA) has given Google three months to negotiate an acceptable fee to pay news publishers for displaying their content in its search results. These interim measures are intended to protect news websites from Google's potentially abusive practices, while the FCA continues an abuse of dominance investigation.[45]

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40 Non-official English translation of Oberlandesgericht Düsseldorf decision, *Facebook v. Bundeskartellamt*, VI-Kart 1/19 (V), 26 August 2019 by the University of Düsseldorf.

41 'Big Tech's personal data hoard raises EU antitrust, privacy concerns', MLex, 18 May 2020.

42 Case COMP/AT. 40608, *Broadcom*, European Commission decision to impose interim measures of 16 October 2019. Broadcom lodged an appeal against the decision to the General Court, Case T-876/19. Broadcom has since offered commitments to address the Commission's concerns: the case has not been determined yet.

43 'Unlocking Digital Competition', a report of the Digital Competition Expert Panel appointed by the UK's Chancellor of the Exchequer and chaired by Professor Jason Furman, former chief economist to US President Obama (the Furman Report), 13 March 2019.

44 'A new competition framework for the digital economy', a report by German Competition Law 4.0 Expert Panel set up by Germany's Federal Ministry for Economic Affairs and Energy, 9 September 2019.

45 French Competition Authority, Decision No. 20-MC-01 of 9 April 2020 granting requests for urgent interim measures presented by press publishers and the news agency Agence France Presse, requiring Google to negotiate with publishers and news agencies the remuneration due to them under the law relating to neighbouring rights for the reuse of their protected contents (available in French only).

New type of abuse: geographical limitation through product design

AB InBev Beer Trade Restrictions[46] is an interesting recent example of a new type of abuse. In May 2019, the Commission found Anheuser-Busch InBev SA (InBev) abused its dominant market position in Belgium by pursuing a deliberate strategy to restrict the possibility for supermarkets and wholesalers to buy Jupiler beer at lower prices in the Netherlands and importing it into Belgium. In addition to a system of rebates and promotions to prevent less expensive beer being imported from the Netherlands to Belgium, the Commission found that InBev had changed the packaging of some of its Jupiler beer products supplied to retailers and wholesalers in the Netherlands to make these products harder to sell in Belgium – it had removed the French translation of mandatory information from the label, and changed the design and size of beer cans. InBev proposed remedies to facilitate beer imports from France and the Netherlands to Belgium (mandatory labels in both French and Dutch on its packaging), which led to a 15 per cent reduction in InBev's fine for having cooperated with the Commission beyond its legal obligation.

The policy debate: it's all about digital

Scarcely a month goes by without new reports being published detailing the challenges of the digital sector for competition law policy. Starting with the French and German joint study in 2016 on big data and competition law,[47] there have been national and international studies, including by the Organisation for Economic Co-operation and Development,[48] the UK (the Furman Report),[49] the European Union (the Crémer Report),[50] Germany (the Competition 4.0 Report),[51] the Netherlands[52] and Australia.[53] In the United Kingdom, the Competition and Markets Authority (CMA) is also examining whether consumers are able and willing to control how data about them is used and collected by online platforms in its digital advertising inquiry. In an interim report issued on 18 December 2019, the CMA considers regulatory intervention to give users greater

46 Case AT. 40134, *AB InBev Beer Trade Restrictions*, European Commission prohibition decision of 13 May 2019.

47 Joint 'Report on Competition Law and Data' by France's competition authority and Germany's Bundeskartellamt, 10 May 2016.

48 Organisation for Economic Co-operation and Development, executive summary with key findings on the roundtable discussion 'Big Data: Bringing Competition Policy to the Digital Era', DAF/COMP/M(2016)2/ANN4/FINAL, 26 April 2017, and background note by the secretariat, DAF/COMP(2016)14, 27 October 2016.

49 'Unlocking Digital Competition', *op. cit*.

50 'Competition policy for the digital era', a report by Jacques Crémer, Yves-Alexandre de Montjoye and Heike Schweitzer, three special advisers appointed by Competition Commissioner Margrethe Vestager (the Crémer Report), 4 April 2019.

51 "A new competition framework for the digital economy", *op. cit*.

52 'Dutch Digitalisation Strategy 2.0', a report by the Dutch Ministry of Economic Affairs and Climate Policy, 13 November 2019, supported by the Dutch competition authority and calling for additional regulatory tools regarding online platforms.

53 'Digital Platforms Inquiry', final report by Australian Competition and Consumer Commission, June 2019.

control over their data and promote data access.[54] All these reports describe the main characteristics of the digital economy (market dynamics, extreme returns to scale, network effects and role of data). These features both encourage and reward innovation, but also can raise entry barriers favouring incumbents.

At the European Commission level, the Crémer Report on competition policy for the digital era, issued by the expert panel appointed by Vestager, will influence the Commission's enforcement activities. The report's key conclusions include a number of novel approaches, indicating, for example, that the Commission may view a company's access to data as a reflection of its market power; define market power more broadly than the traditional market definition; prohibit potentially anticompetitive conduct absent a showing of pro-competitiveness; and assess acquisitions of fast-growing start-ups to be part of an anticompetitive strategy to make up for the acquirer's own user defections.

Additionally, the Commission has started preparatory work for new legislation intended to address the gatekeeping function of digital platforms (ie, companies regulating their own platforms when those platforms are used by other businesses). The Commission is seeking experts to conduct a study on the subject, including proposed solutions to expand opportunities for competition to enter the digital platform space, such as *ex ante* regulations and pre-emptive competition enforcement powers designed to address market failures without a finding of an infringement.[55] This legislation would substantially expand current enforcement powers, introducing a substantial shift in the scope of EU antitrust enforcement that has been anticipated in the various reports presented by agencies in Europe during the past few months. The criteria and standards that this framework will adopt, as well as the implications for and rights of companies that are made subject to these new powers, will be critical. They may suggest that we will see a very different type of antitrust enforcement emerging with new standards of review that will increasingly be focused on industrial policy.

54 The CMA is carrying out a market study into online platforms and the digital advertising market in the United Kingdom. An interim report was issued on 18 December 2019, setting out initial findings and possible interventions. A final report is expected to be published in July 2020.

55 The European Commission is seeking experts to conduct a study into the gatekeeping power of digital platforms: see 'EC Launches Digital Platforms "Gatekeeping" Assessment Tender', *PaRR*, 11 May 2020; 'EC Set To Examine Digital Gatekeepers', *Global Competition Review*, 11 May 2020. On 2 June 2020, the European Commission launched two parallel public consultations exploring ways for the Commission to broaden its antitrust enforcement powers in digital markets. The proposed powers would eliminate the abuse concept. The open questions are whether these powers should be subject to a finding of dominance, and if they should be sector-specific. The implementation of the suggested new concepts would inevitably lead to presumptions supporting enforcement in relation to the conduct of larger companies. See European Commission press releases: 'Antitrust: Commission consults stakeholders on a possible new competition tool', (IP/20/977, 2 June 2020); and 'Commission launches consultation to seek views on Digital Services Act package' (IP/20/962, 2 June 2020).

Abuse of market power in time of covid-19

The covid-19 outbreak has disrupted daily life all over the world and imposed significant difficulties on the business community, leading to extreme fluctuations in supply, demand, costs and prices across all sectors. While there is a consensus among competition authorities around the world that cooperation between businesses may be necessary to ensure security of supplies of essential products and services, they warned they would take a strong stance against abuses of market power. The European Competition Network[56] and the European Commission voiced that they will not tolerate exploitative and profiteering conduct by companies in a dominant position, including temporary dominant positions conferred by the particular circumstances of the crisis. By way of example, 'exploiting customers and consumers (eg, by charging prices above normal competitive levels) or limiting production to the ultimate prejudice of consumers (eg, by obstructing attempts to scale up production to face shortages of supply)'.[57] Similar statements were issued by the International Competition Network,[58] the CMA[59] and, in the United States, the Department of Justice and the Federal Trade Commission.[60]

To date, the Commission has not opened probes under article 102 of the TFEU amid covid-19. By contrast, at EU member states level, national authorities are monitoring closely any significant price increases of essential healthcare products or food products (eg, prices of healthcare products in France, Italy, Greece, Spain; food prices in Poland and Italy; and the price of funeral services in Spain) and other profiteering or exploitation of the crisis (eg, access to test equipment in the Netherlands, and the role of e-commerce and digital platforms in France). Some agencies have set up dedicated taskforces to address the antitrust challenges posed by the pandemic. In the United Kingdom, as at May 2020, the CMA's covid-19 task force had received more than 3,100 complaints about large price rises for personal hygiene products, such as hand sanitiser, and food products.[61] It is also examining measures that digital platforms have introduced to tackle challenges presented by the coronavirus crisis and related pricing practices by third-party retailers, and it is reviewing large booking sites' contract changes in response to the pandemic.[62] A number of agencies in EU member states are examining unilateral conduct under the light of competition rules and consumer protection law, as is the case in the United Kingdom.[63]

56 European Competition Network, 'Antitrust: Joint statement by the European Competition Network (ECN) on application of competition law during the Corona crisis', 23 March 2020.

57 Commission Communication C(2020) 3200 final, 'Temporary Framework for assessing antitrust issues related to business cooperation in response to situations of urgency stemming from the current covid-19 outbreak', 8 April 2020.

58 ICN Steering Group Statement: 'Competition during and after the covid-19 pandemic', 8 April 2010.

59 Covid-19: CMA approach to essential business cooperation, 19 March 2020.

60 US DOJ press release, 'Justice Department and Federal Trade Commission Jointly Issue Statement on COVID-19 and Competition in U.S. Labor Markets', 13 April 2020.

61 See 'Protecting consumers during the coronavirus (COVID-19) pandemic: update on the work of the CMA's Taskforce', 31 May 2020.

62 'Expedia, Booking.com scrutinized by UK's CMA over Covid-19 contract changes', *MLex*, 30 March 2020.

63 UK government press release, 'Protecting consumers during the coronavirus (COVID-19) pandemic: update on the work of the CMA's Taskforce', 24 April 2020.

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