

End of Year Competition Law Roundup

15 December 2016

Over the last two weeks a number of important events for the antitrust community took place. Competition officials from across Europe shared some interesting insights and outlooks on 2017 which we would like to pass on to you in order to alert you to some developments to expect.

Vertical Enforcement

Andreas Mundt, president of the Federal German Cartel Office (FCO), announced at the annual meeting of Studienvereinigung Kartellrecht on 1 December that the FCO will publish their long awaited 'Draft Vertical Guidelines' still before Christmas. The need for such guidelines was triggered by the uncertainty that manufacturers and retailers, mostly in the food sector, were facing after the FCO's large investigation into vertical restraints and resale price maintenance and the substantial fines imposed for such conduct. The last outstanding fining decisions in these proceedings were issued earlier [today](#).

There was an internal consultation process during which the FCO sought insights from various practitioners, including a group of experienced antitrust lawyers of which our partner Anna Huttenlauch formed part. Now, the FCO will launch a public consultation inviting all stakeholders to provide their views.

Convergence / Digital economy

Over the past years, the FCO has been a pioneer in antitrust enforcement in the digital economy in Europe. Apart from notable enforcement decisions regarding selective distribution systems / platform bans, most favourite nation clauses or data-related conduct of dominant firms, the FCO has published several policy papers (see e.g. our previous [briefing](#)). At a conference in Brussels on 7 December, the activity of competition authorities in the digital economy not only in Germany but also in other member states was discussed.

Andreas Mundt reacted to policymakers' aspiration to regulate issues such as the "free flow of data" between platforms. Mundt commented that tech giants such as Google, Facebook and Apple should see the FCO as an ally, since competition law enforcement would be more flexible and efficient than legislation in order to tackle antitrust concerns related to online platforms. In March 2016, the FCO had opened an investigation against Facebook. Because of the social network's popularity, it is suspected that users have no choice but to accept Facebook's terms of service even where these are in violation of data protection laws. Such conduct, according to the FCO, could amount to an abuse of market power.

Chris Fonteijn, head of The Netherlands Authority for Consumers and Markets (ACM), announced that the ACM will soon publish the results of its sector inquiry into the market for online platforms streaming videos and movies. These may eventually provide more clarity on which conduct is considered harmful in relation to platforms and which not and reduce some of the uncertainty manufacturers and retailers are currently facing in relation to platform bans while the Coty decision is pending at the European Court of Justice. The sector inquiry was launched on 21 September 2016 and not only looks into the conduct of platforms but also associated business activities, such as digital marketplaces and content producers. At the time of its launch, the ACM also published a paper dealing with the role of consumers' data in the assessment of market power of online platforms and the role of competition law enforcement as a means of data privacy protection.

The French Competition Authority (FCA) launched a sector inquiry into the online advertising sector in May 2016. Isabelle de Silva, the FCA's new president, announced that results will be published in 2017. Also, a decision of the authority on the competitive landscape in the pay and free TV sector is expected

for July 2017. The FCA had launched a public consultation in July 2016 in order to determine whether the injunctions it had imposed on the acquisition of TPS, a company offering subscription television packages via satellite, by the Canal Plus Group in 2012 should be renewed for another 5 years. This was especially aimed at analysing the changes in the market brought by new actors such as Netflix and other “over-the-top” offers.

Harmonisation of Procedural Rules

At a conference in Berlin hosted by the Federal Ministry of Economic Affairs and Energy, Armin Jungbluth, head of Competition and Consumer Policy, spoke about latest developments regarding the harmonisation of procedural rules within the EU. The European Commission’s initiative “ECN+” pushes for further harmonisation of competition procedures and aims at empowering national competition authorities (NCAs) to be more effective enforcers. ECN+ focuses on four key areas: (i) independence of NCAs; (ii) enforcement toolbox of NCAs; (iii) fining powers of NCAs; and (iv) leniency programmes (i.e. one-stop-shop model). The initiative was subject to public consultation earlier in 2016. According to Armin Jungbluth, a draft EU Directive can be expected in early 2017. After the Damages Directive, this would be the second Commission harmonisation initiative in a short time period in this area of the law.

Competition Law Reform

In Germany, the competition law reform implementing the Damages Directive and some adjustments considered necessary in order to meet challenges brought about by the digital economy (e.g. introducing a transaction value based threshold for merger control) will probably enter into force in Q2 2017. The draft law (see our previous [briefing](#)) is still undergoing minor adjustments, in particular relating to transitional rules on limitation periods for “old cases” while the bulk of the rules implementing the Damages Directive are expected to be passed unchanged.

The introduction of a transaction value based threshold is also considered at EU level. The European Commission has launched a [public consultation](#) and invited stakeholders to provide their views until 13 January 2017. Parallel to the discussion in Germany, thoughts for revision were particularly triggered by the Facebook/WhatsApp transaction. Despite a purchase price of USD 19 billion it was not notifiable in Brussels as WhatsApp had virtually no turnover and could only be reviewed by the Commission following referrals. The introduction of a transaction value based threshold would also impact other sectors, such as the pharmaceutical sector, where companies with a high market potential may not have yet generated high revenues at the time of transaction.

At EU level, the debate on a possible review of minority shareholdings has been considered mute since Commissioner Margrethe Vestager demonstrated significant doubts on the benefit of such a reform. The debate may however come back to life in light of two recently published economic studies on common ownership, which show that a small list of large institutional shareholders own large minority stakes in numerous companies that are active the same industry.

In concentrated markets, such common ownership can have a negative impact on competition since the institutional shareholder will not be interested in the competitive performance of “their” company but only in the good overall performance of the industry. In light of the recent findings, it does not seem unlikely that the FCO and other European competition authorities will turn their attention to minority shareholdings of institutional shareholders and closely monitor compliance with the law in the near future.

We will continue to monitor the developments described closely. For further information please contact

Dr. Anna Huttenlauch
anna.huttenlauch@blomstein.com

Dr. Max Klasse
max.klasse@blomstein.com