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The following summary highlights key developments in EU competition law between January 2019 and June 2020. In addition to European Commission (Commission) decisions, it covers selected judgments of the EU courts (the General Court and the Court of Justice) as well as significant policy initiatives.

Mergers

Robust merger control enforcement continued during the reporting period, culminating in no fewer than three prohibition decisions. In addition, the General Court (GC) issued an important judgment on the application of the EU Merger Regulation's (EUMR) substantial impediment to effective competition (SIEC) test in oligopolistic markets. And there have been several important developments concerning the rights and obligations of parties during the EUMR review process.

Siemens/Alstom – a prohibition decision triggering a major policy debate

In February 2019, the Commission prohibited Siemens' proposed acquisition of Alstom, a transaction that would have combined Siemens' and Alstom's transport equipment and service activities in a new entity controlled by Siemens. While any prohibition decision under the EUMR is bound to attract some attention, Siemens/Alstom has achieved almost unprecedented "celebrity status", as it has been drawn into the broader debate about the global competitiveness of EU industries.

The Commission's investigation focused on railway signaling systems, where the combined entity would have become the "undisputed market leader" in several markets, and on very high-speed trains, where the transaction was essentially a two-to-one merger. The proposed remedy package was rejected by the Commission, which found that the "complex mix" of asset transfers would not enable a potential buyer of the divested assets to compete effectively and independently in future.

The Commission's findings concerning harmful effects and the insufficient nature of the proposed remedies package as such were not particularly remarkable. They were also in line with the views expressed by customers of the merging parties and by other stakeholders, including several national competition authorities. The prohibition decision has, however, attracted unprecedented attention and become a major topic in the EU's industrial policy debate. This debate focuses on the controversial question whether the Commission should have given greater weight to the argument by the parties (and certain politicians) that the merged entity would eventually have been constrained by emerging, strong global competition, most notably by the Chinese train manufacturer CRRC. The Commission rejected this argument, finding that Chinese suppliers had not participated in any tenders for signalling systems in the European Economic Area (EEA), and were highly unlikely to represent a competitive constraint on Siemens/Alstom in the supply of very high-speed trains in the EEA in the foreseeable future. The Commission's careful review of the relevant evidence, however, has not silenced its critics.

While the Commission's prohibition decision has become final, the argument about the role of global competition in EU merger control has remained very much alive. Soon after the prohibition was announced, a joint French–German paper was published calling for a new European industrial policy to favour the promotion of "European champions", arguing that EU merger control should not limit itself to an analysis of short-term effects on competition in the EEA, but should also consider emerging global competitors and the ability of European firms to compete more effectively on a global scale. Although the French–German paper and similar calls for a more "globally oriented" merger review have not yet resulted in concrete changes to EU merger control, the debate about whether and to what extent EU competition policy should incorporate EU industrial policy consideration continues (see also the summary of policy developments in the last section of this contribution).

Wieland/Aurubis & Thyssenkrupp/Tata – two prohibition decisions in basic metals industries

During the reporting period, the Commission prohibited two additional proposed mergers. In June 2019, the Commission prohibited a joint venture between Thyssenkrupp and Tata Steel aimed at combining Thyssenkrupp and Tata's flat carbon and electrical steel activities in the EEA. In this case, the Commission focused on the horizontal overlap between the parties in two highly concentrated markets, and concluded that the proposed joint venture would harm competition in the market for metallic-coated and laminated steel products for packaging (namely tinplate and electrolytic chromium-coated and laminated steel) as well as the market for automotive hotdip galvanised steel products. Given the specialist nature of the steel concerned, the Commission concluded that insufficient imported steel was available to meet the needs of downstream customers in terms of both quality and timely delivery requirements. The remedies offered by the parties were deemed insufficient as they lacked critical upstream components (production assets to manufacture necessary steel inputs) and, in the case of galvanised steel, adequate finishing assets to effectively serve customers.

In contrast to Thyssenkrupp/Tata Steel, the February 2019 decision blocking Wieland's proposed acquisition of Aurubis was ultimately based on a vertical/input foreclosure theory of harm. Although the Commission had also been concerned about the parties' direct overlap as producers of rolled-copper products, it appears that Wieland's proposed divestiture of two rolled-copper plants in Germany and the Netherlands would have effectively addressed these concerns.

Wieland was not prepared, however, to offer effective remedies to address the Commission's vertical concerns, which focused on Wieland's strong position in an input market post-merger. Prior to the transaction, Wieland and Aurubis each had a 50 per cent interest in Schwermetall, a producer of pre-rolled copper strips, which it supplied not only to its parents, but also their downstream competitors. Overall, Schwermetall accounted for over 60 per cent of European pre-rolled strip sales and the Commission found that in particular smaller rolled-copper manufacturers relied to a significant extent on Schwermetall's pre-rolled copper strip supplies. The Commission was concerned that the transaction would eliminate Schwermetall's operational independence from its (pre-merger) parents, and that Wieland would be able to raise input costs for smaller competing rolled-copper manufacturers and/or gain access to their confidential information. As Wieland was not willing to divest Aurubis' 50 per cent stake in Schwermetall, the Commission prohibited the transaction, citing concerns about (vertical) input foreclosure of rivals seeking to purchase pre-rolled copper strips.

Hutchison/O2 – Greater clarity (and stricter standards) for the application of the EUMR's SIEC test

In May 2020, the GC annulled the Commission's decision prohibiting the proposed acquisition of Telefónica UK (O2) by Hutchison 3G UK (Three) and, in a judgment that is very critical of the Commission's evaluation of evidence, provided important guidance as to how the Commission should apply the SIEC test when evaluating mergers in an oligopolistic market that do not create or strengthen single-firm dominance. Although the judgment can be expected to have the greatest impact on future telecommunications mergers, it is highly likely to become relevant in other mergers as well assuming that the Commission's appeal to the Court of Justice is not successful.

In 2016, the Commission prohibited a proposed merger of Hutchison's and O2's mobile communications activities in the UK. The Commission concluded that the transaction would have resulted in a significant impediment to effective competition, as it would have removed an important competitor in the oligopolistic mobile phone market in the UK, reducing the number of operators from four to three. In addition, the Commission found that the transaction would have had a negative impact on the two network-sharing agreements among the mobile operators in the UK and would have reduced these operators' incentives to invest in network infrastructure, as well as reducing competition in the wholesale market for network access.

The GC rejected each of the Commission's theories of harm on substantive grounds. In laying out the analytical framework for the application of the SIEC test, the GC clarified that for the SIEC test to be met, and for a transaction to have significant "non-coordinated effects" (ie, enable the merged entity to unilaterally exercise market power), the transaction would have to eliminate important competitive constraints that the merging parties had exerted on each other and reduce competitive pressure on the remaining competitors. The "mere effect" of reducing competitive pressure on the remaining competitors would not be sufficient for the finding of a significant impediment to effective competition, as otherwise any merger reducing the number of competitors in an oligopolistic market – which would inevitably reduce competitive pressure – could be prohibited.

Setting a very demanding evidentiary threshold, the GC concluded that when a prohibition decision rests on a body of complex indicia pointing to multiple theories of harm, the Commission is required to produce sufficient evidence to demonstrate "with a strong probability" the existence of a significant impediment to effective competition, a standard of proof that is stricter than an "on-the-balance-of-probabilities" assessment.

In applying this framework, the GC faulted the Commission's finding of a significant impediment to effective competition on the retail market for mobile telecommunications in the UK and held that the Commission had failed to show that Three was an "important competitive force". Specifically, it rejected the Commission's position that an undertaking can be an "important competitive force" even if it does not stand out from its competitors in terms of its impact on competition. In addition, although the Commission might have established that the parties were relatively close competitors in some segments of the concentrated market, it had failed to show that the parties were particularly close competitors to one another as compared to the remaining competitors. Interestingly, the GC also concluded that the Commission's quantitative model should have taken into account certain standard efficiencies, such as the reduction in employees or elimination of duplicate structures, as part of the calculation of whether the merger was capable of producing restrictive effects.

In a similar fashion, the GC rejected the Commission's other theories of harm, finding that the evidence relied on by the Commission was not sufficient to support the finding of a significant impediment to effective competition.

Major decisions concerning the merger review process

Warehousing arrangements create significant gun-jumping risks

Gun jumping remains a high-risk area in the M&A space, as shown by the Commission's June 2019 decision imposing a €28 million fine on Canon for partially implementing a transaction through a warehousing arrangement prior to receiving EUMR clearance. This is so despite the May 2018 Ernst & Young judgment in which the Court of Justice (ECJ) held that the EUMR's stand-still obligation will be infringed only by acts that contribute to a change of control over the target. Perhaps not surprisingly, Canon confirms that the Commission will adopt a narrow reading of Ernst & Young.

The Commission's Canon decision was related to Canon's acquisition of TMSC, a manufacturer of medical equipment such as X-ray imaging systems. Canon purchased TMSC through a two-step "warehousing" transaction involving an interim buyer. As a first step, the interim buyer acquired 95per cent of TMSC's share capital for a nominal amount of €800, while Canon purchased the remaining 5 per cent and an option over the interim buyer's stake for €5.28 billion. After notifying the proposed transaction and receiving EUMR clearance, Canon implemented the second step of the transaction by exercising its option and purchasing the remaining 95 per cent of TMSC's shares from the interim buyer. In a subsequent investigation, the Commission concluded that Canon had violated the EUMR's notification and standstill provisions when implementing the first step of this warehousing transaction. Despite the ECJ's ruling in Ernst & Young, which strongly suggested a narrower reading of the EUMR's standstill obligation, the Commission found that both steps of the transaction constituted parts of a single, notifiable merger, as the first step contributed to (and was necessary for) Canon's acquisition of control over TMSC. Therefore, by carrying out the first step before notifying the transaction or receiving clearance, Canon partially implemented the merger in violation of the EUMR's standstill obligation. Canon's appeal of the Commission decision will give the EU courts the opportunity to revisit gun-jumping issues in the foreseeable future.

The Commission continues enforcement action to protect the integrity of the EUMR review process

In April 2019, the Commission imposed a fine on General Electric related to the provision of incorrect information during the EUMR review process, following earlier decisions for similar procedural infringements in Facebook/WhatsApp and Altice.

When GE notified its proposed acquisition of LM Wind under the EUMR, it stated that it did not have any higher output wind turbines for offshore applications in its development pipeline beyond its 6MW turbines. However, the Commission was later informed by a third party that GE was offering a 12MW offshore wind turbine to potential customers. After GE withdrew its initial notification and refiled the notification with complete information, the Commission unconditionally approved the transaction in Phase I. Subsequently, however, the Commission opened an infringement procedure. It found that GE had initially provided incorrect information and should have been aware of the relevance of the information for the assessment, which the Commission characterised as a serious procedural infringement. Similar investigations remain pending, reflecting the Commission's commitment to protect the integrity of the EUMR review process.

Re-affirming the parties' rights of defence

During the reporting period, there was also a re-affirmation of the parties' rights of defence under the EUMR, as the ECJ's January 2019 UPS judgment upheld the GC's annulment of the Commission's UPS/TNT Express prohibition decision on due process grounds.

In 2017, the GC had found that the Commission decision prohibiting UPS' acquisition of TNT on the ground that the transaction would harm competition on the market for the international express delivery of small parcels had infringed UPS' rights of defence. Specifically, the GC faulted the Commission for relying in its prohibition decision on an econometric model that was different from the model it had shared with the parties.

The ECJ upheld the finding that the Commission had infringed UPS' rights of defence by failing to place UPS in a position in which it could effectively make known its views on the accuracy and relevance of "all factors that the Commission intends to base its decision on" – particularly with respect to the econometric models the Commission used in examining how the concentration might affect competition on the relevant markets. Tight EUMR deadlines could not justify the Commission's conduct, as the Commission had to reconcile the "need for speed" with the observance of the notifying parties' rights of defence. The ECJ also rejected the Commission's argument that it was for the parties to demonstrate that – but for the procedural irregularity – the decision in question would have been different in content to justify an annulment. In the ECJ's view, when the Commission failed to disclose the methodological choices inherent to econometric models, it was sufficient for the parties to establish that there was "even a slight chance that [the notifying party] would have been better able to defend itself" in the absence of the procedural irregularity.

Abuse of dominance

The Commission adopted several important decisions concerning article 102 during the reporting period, most notably in the cases of Broadcom, Qualcomm, Aspen and Google.

Broadcom – interim measures in an article 102 case

For the first time in 18 years, as well as since the adoption of Regulation 1/2003, the Commission adopted interim measures in an article 102 case, ordering Broadcom to stop applying exclusivity provisions in agreements with six of its main customers in the TV and modem chipset markets, and to refrain from applying these provisions for a period of three years. The Commission adopted the interim order after it had opened proceedings to determine whether Broadcom restricted competition by engaging in anticompetitive practices in these markets, including through exclusivity, tying, bundling, interoperability degradation and abusive use of intellectual property rights. In its investigation, the Commission found prima facie that Broadcom was dominant in systems-on-a-chip markets for several products, including TV set-top boxes and modems. The Commission also found prima facie that Broadcom was engaged in abusive conduct through a series of provisions in agreements with manufacturers of TV set-top boxes and modems, including exclusive and quasi-exclusive purchasing obligations and price and non-price advantages conditional on the customer buying systems-on-a-chip for cable modems exclusively or quasi-exclusively from Broadcom. The Commission considered that interim intervention was justified considering the risk of serious and irreparable harm to competition posed by Broadcom's abusive practices. Broadcom has appealed the Commission decision, providing the European courts with an opportunity to develop guidance on the adoption of interim orders. In the meantime, Broadcom has moved to resolve the underlying investigation on the merits by offering commitments.

Qualcomm – low prices result in a predation decision

Following the Commission's 2018 decision finding that Qualcomm had engaged in exclusionary practices, the Commission in July 2019 adopted a second decision against Qualcomm, finding that Qualcomm had engaged in predatory conduct in the market for 3G baseband chipsets, and imposing €242 million fine. The Commission's investigation focused on Qualcomm's pricing strategies for baseband chipsets complying with the 3G standard that enable smartphones and tablets to connect to cellular networks. The Commission found that Qualcomm held a dominant position in this market between 2009 and 2011, and relied both on a price/cost test and qualitative evidence to support its conclusion that Qualcomm had engaged in predatory strategy to eliminate a rival. In particular, the Commission determined that Qualcomm sold certain quantities of chipsets below cost to Huawei and ZTE, which the Commission regarded as two strategically important customers, with the intention of eliminating its main rival, Icera. Qualcomm's conduct took place when Icera was becoming a viable supplier of chipsets and was posing a growing threat to Qualcomm's chipset business, and aimed to prevent Icera from expanding and building market presence.

Aspen ¬– high prices result in excessive pricing allegations

Although at the time of writing the case is not yet finalised as the Commission is market testing proposed commitments, it is worth mentioning that the Commission has investigated its first excessive pricing case in many years. Since 2017, following the lead of national competition authorities, the Commission has investigated Aspen for significantly raising prices for critical off-patent cancer medicines it had acquired from another company. The Commission apparently used a price/cost test to determine that Aspen's prices were excessive, finding that Aspen has consistently earned very high profits from its sale of cancer medicines in Europe, and that its prices exceeded its relevant costs by almost 300 per cent on average, including when accounting for a reasonable rate of return. The Commission also determined that there were no innovation-related justifications for Aspen's price increase. Aspen has submitted commitments to reduce its prices by approximately 70 per cent for a 10-year period, and at the time of writing the Commission is market testing Aspen's commitments.

Google – for a third time – the target of an infringement decision

In March 2019, the Commission adopted a third infringement decision against Google and imposed a €1.49 billion fine, this time in relation to Google's practices as an intermediator in online advertising markets. The Commission determined that Google held a share above 70 per cent in online search advertising intermediation from 2006 to 2016. It found that Google had engaged in exclusionary practices during the relevant time period, including exclusivity agreements with the commercially most important web publishers (websites such as newspaper websites, blogs or travel site aggregators that often have an embedded search function), which it later replaced with premium placement provisions that required publishers to reserve the most profitable space on their search results pages for Google's ads. The Commission alleged that these practices made it difficult for other suppliers of online search advertising intermediation services to grow their business and try to compete with Google.

Policy initiatives that will shape EU competition law enforcement

Although, as described above, there have been several important case law developments in 2019 and early 2020, the reporting period will probably be best remembered for the unprecedented number of policy initiatives. While some of these initiatives are likely to result in measured updates of existing regulations and guidance documents, others have the potential of fundamentally changing the enforcement framework governing EU competition law.

Review of existing instruments

In 2019 and 2020, the Commission has continued its review of the Vertical Agreements Block Exemption (VABER), which is set to expire on 30 May 2022. It has recently published a working paper with a detailed summary of the public consultation which it launched in February 2019. The working paper provides little insight into the Commission's preferences concerning revisions of the block exemption, although it generally suggests that there will be no fundamental changes to the existing rules in the VABER. The working paper nevertheless usefully highlights a number of areas where revisions may be considered in order to update the existing framework and provide better guidance to market participants, including restrictions on sales over online platforms, the scope for price differentiation depending on whether product is sold on- or off-line, 'dual' online distribution by brands (involving both direct online sales to consumers and sales through third party retailers) and price parity clauses. Greater clarity concerning the exceptional conditions under which resale price maintenance can meet the conditions of article 101(3) seems likely.

Separately, the Commission has launched a review of the rules applicable to vertical agreements in the motor vehicle sector by publishing for consultation in February 2019 a roadmap for the initial evaluation phase.

In addition, in 2020 the Commission has launched a review of the guidelines on horizontal cooperation agreements, which cover important areas such as information exchanges among competitors, R&D agreements, joint purchasing and marketing arrangements, as well as standard setting and licensing of standard essential patents. An updated version might also include guidelines on competitor collaboration furthering sustainability goals.

In April 2020, the Commission also launched a review of the 1997 Market Definition Notice with a view to updating the Notice, incorporating more recent decisional practice, and ensuring the Notice's continued relevance in today's market conditions. It can be expected that market definition and market power assessment in digital markets as well as evidentiary issues will play central roles in the review process. It remains to be seen whether (political) pressures to reflect concerns about global competition and European competitiveness (see above the discussion of the Commission's Siemens/Alstom decision) in EU competition law will also have an impact on the revision of the Notice.

Proposals for new instruments and enforcement powers

In 2020, the Commission also launched two major – controversial – policy initiatives, which would significantly extend the Commission's existing enforcement powers in the areas of antitrust, EU state aid control and merger review. One initiative would create a New Competition Tool (NCT). The NCT would confer on the Commission ex ante regulatory powers and would enable the Commission to intervene in markets where it has identified structural problems hindering effective competition and to impose structural and behavioral remedies. Clearly, the ongoing discussion about digital markets and widespread calls to intervene against the perceived market power of large digital platforms has inspired the idea of an NCT, but the debate is ongoing whether the NCT would ultimately have a wider scope and broadly authorise the Commission to intervene in a wide range of markets that do not work well. It also remains to be seen what procedural rules would be created for the NCT, a critical component to ensure that the NCT would be used in an objective and transparent manner and would respect the rights of parties targeted by ex ante market intervention.

The second important policy initiative launched in 2020 is the Commission's White Paper on foreign subsidies control. The White Paper essentially explores various ways to extend the current EU state aid regime to foreign subsidies granted by third countries, addressing a perceived competitive disadvantage for EU-based firms that, unlike their non-EU rivals, are subject to strict state aid control when receiving contributions from their governments. The White Paper proposes three different instruments (modules) to control foreign subsidies: (i) a general instrument to investigate foreign subsidies that distort competition within the EU; (ii) an M&A specific instrument to review whether foreign financial contributions facilitate the acquisition of an EU target; and (iii) an instrument investigating whether foreign subsidies impact procurement processes in the EU. For each instrument, the Commission (or potentially member state authorities, or both) would have remedial powers to address the distortive effects of foreign subsidies. Despite great political pressure to act in this area, the proposal appears to be at a rather early stage, and it remains to be seen how quickly it will result in concrete legislative action.

Andrzej Kmiecik

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Andrzej Kmiecik focuses on competition law, with particular expertise in merger control, cartels, dominance, distribution, pricing and intellectual property. He represents clients before the European Commission, the EU courts and in national competition law proceedings.

Andrzej's practice covers a wide range of industries, including the automotive sector, pharmaceuticals, paper and board products, office equipment, consumer electronics, aerospace, shipping, petrochemicals, clothing and footwear, and financial infrastructure.

Some of the high-profile EU merger control cases he has handled include: Boeing/McDonnell Douglas; Enso/Stora; Boeing/Hughes; Caemi/Mitsui/CVRD; Boeing/Lockheed/ULA; SABIC/Huntsman; SABIC/GE Plastics; DFDS/CRO Ports/Älvsborg; Canon/IRIS (article 22 referral), London Stock Exchange/Deutsche Börse and Boeing/Embraer.

His experience in EU cartel investigations includes acting as defence counsel in: Occupant Safety Systems; Newsprint; Amino Acids (on appeal); Carbonless Paper (also on appeal); Publication Papers; Fine Papers; and Car Parts.

Andrzej has also successfully defended clients against complaints of exclusionary conduct before the European Commission, including Canon (ink jet consumables) and Honda (racing engine technology).

His experience extends to acting as counsel in major EU antitrust investigations involving the life sciences sector, including: Becton Dickinson/Novo Nordisk (diabetes care); Lederle/SKB (vaccines) and Chiron/DRK (blood screening). He was actively involved in the Commission's pharmaceutical sector inquiry.

He has also developed a niche practice in the field of motor vehicle distribution. He counsels and defends a number of manufacturers, combining extensive experience with in-depth industry knowledge.

He regularly lectures and writes on competition law matters.

Andreas Reindl

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Andreas Reindl focuses on European competition law. In particular, he has significant experience advising clients in the digital, energy, transport and other sectors on the full range of EU competition law issues.
He has worked on high-profile merger investigations initiated by the European Commission and national competition authorities, including the German Federal Cartel Office. Notably, he advised Halliburton in the EU merger control filing and review of its proposed US$34.6 billion acquisition of Baker Hughes, one of the largest and most complex transactions ever to be subject to an EU merger control proceeding. Other examples of high-profile EU merger control cases include London Stock Exchange/Deutsche Börse and Boeing/Embraer.

Andreas has represented several clients in abuse of dominance investigations by the European Commission and national competition authorities. In addition, he has broad experience advising clients on online distribution, strategic pricing strategies, licensing and other collaboration agreements.

Most recently, Norbert wrote a paper on the closeness of substitution between big data datasets in merger control.

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