

EUROPEAN COMPETITION DEVELOPMENTS

GOVERNMENT ENFORCEMENT

EC fines Qualcomm € 242 mn for predatory pricing of 3G chipsets

On 18 July 2019, the European Commission (“EC”) [fined Qualcomm](#) € 242 mn for predatory pricing by selling 3G chipsets at prices below cost to allegedly push a key competitor out of the market.

The EC found that, between 2009 and 2011, Qualcomm held a dominant position in the global market for certain baseband chipsets and sold three products to two strategically important customers at below cost in an attempt to eliminate its main competitor, Icera. The EC relied on a quantitative “price-cost” test to establish pricing was below-cost, as well as unspecified contemporaneous qualitative evidence showing an alleged intention to prevent Icera from expanding its market presence.

Qualcomm [says that it plans to appeal](#).

EC approves IBM’s \$ 34 bn purchase of Red Hat

On 27 June 2019, the EC unconditionally [approved IBM’s proposed \\$ 34 bn acquisition of Red Hat](#).

The parties overlapped in markets for middleware and system infrastructure software, but the EC found that the merged entity would continue to face significant competition from other players. It also found that the merged entity would not have sufficient market power to leverage its position by degrading the interoperability of IBMs’ competitors with Red Hat’s enterprise product, nor would they have an incentive to do so because Red Hat’s customers could switch to an open-source solution.

It also observed potential benefits to customers from IBM’s plans to use Red Hat’s complementary capabilities to develop open hybrid cloud solutions.

PRIVATE ENFORCEMENT ACTIONS

EC adopts pass-on calculation guidelines and invites comments on information disclosure guidelines to assist courts in private lawsuits

The EC [adopted guidelines](#) on 1 July 2019 to help national courts hearing private damages suits to calculate pass-on, raised “offensively” (i.e., an indirect purchaser claims an overcharge on a product containing a cartelized input) or “defensively” (i.e., a defendant argues a claimant passed on an overcharge to its customers).

The guidelines provide an overview of the economic theory and quantification methods relevant for estimating pass-on. The economic theory focuses on what factors impact pass-on of price effects of two kinds: “actual loss” (i.e., inflated prices paid) and “loss of profit” (i.e., the value of lost sales). The quantification methods seek to, first, estimate the total price effects on the cartelized input by comparing a “counterfactual” scenario in which the infringement did not take place to the “observed” situation in which it did and, second, to estimate how those price effects were passed on to subsequent purchasers of the input (or products incorporating it). The discussion covers the type of data and information required for the analysis, as well as what role economic experts can play in it.

The EC [initiated a consultation period](#) on 29 July 2019 on draft guidance for the disclosure of confidential information in private enforcement actions. It covers when a party may have to provide such information and how to protect its confidentiality (i.e., with redactions, *in-camera* hearings, court-appointed experts, and “confidentiality rings” granting access to limited persons).

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Both, the adopted damages guidelines and the proposed disclosure guidelines, which are non-binding on national courts, are follow-ons to the EC's Damages Directive (2014) setting out minimum standards for EU states to permit private damages actions before national courts.

TRENDING

DIGITAL & E-COMMERCE

EC opens a formal investigation of Amazon, while Germany and Austria close theirs upon receiving commitments from Amazon

The EC [formally opened an investigation](#) into whether Amazon abused a dominant position in how it used competitively sensitive information about third-party sellers on its online marketplace platform to improve sales of its products. One key area of inquiry will be how Amazon uses seller data to select who is placed on a valuable "Buy Box" listing other sellers of a given product. The EC is reported to be coordinating with ongoing investigations being conducted by Luxembourg and Italian competition authorities.

On the same day, competition authorities in [Germany](#) and [Austria closed their investigations](#). Amazon will revise its general terms and conditions with third-party sellers worldwide to:

- replace Amazon's total exemption from liability to its sellers with a more limited one;
- eliminate Amazon's unlimited right to terminate sellers with one requiring notice (and sometimes giving a reason) to sellers;
- revise a clause establishing Luxemburg as the exclusive jurisdiction for sellers seeking

legal action with one that permits national courts to have jurisdiction over some matters;

- grant sellers the right to obtain returned items and to object to unjustified customer refunds;
- eliminate a "parity requirement" that sellers use product information of the same quality or specificity as on any other sales channels, and limit the extensive rights granted to Amazon to use such information; and
- pare back a confidentiality provision limiting sellers from speaking about their dealings with Amazon without prior authorization.

As for complaints that Amazon advantages its sales over those of third-party sellers by prohibiting them from displaying any product reviews from external rating providers, no commitments were sought, with the German authority acknowledging Amazon's arguments about the considerable risk of fake and manipulative reviews being used on its platform. The authority also noted its ongoing sector inquiry into inauthentic online reviews and the EC's overlapping investigation of seller rankings.

G7 publishes joint statement on competition policy in the digital economy

The competition agencies of the G7 member states (Canada, Germany, France, Italy, Japan, UK and US, together with the EC) [published a statement of "common understanding"](#) about competition policy in the digital economy, dated 5 June 2019.

They lay out four seemingly pragmatic principles: (i) enforcement in digital markets should seek competitive markets that promote innovation and consumer welfare, (ii) "wholesale changes" to the competition framework are not necessary to "adapt" to the challenges of the digital economy, (iii) rules impacting the digital sector need close assessment from a competition standpoint to understand the net impact on consumers, and (iv) international

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cooperation and convergence will be especially important in the “borderless” digital economy.

MERGER CONTROL

Regulators mull over merger control changes to tackle “killer acquisitions”

European regulators are considering changes to merger control rules to deal with so-called “killer acquisitions” in which incumbents in innovative industries like tech and pharma acquire start-ups or early-development assets to discontinue or limit their pipelines to cut-off future competition.

The Portuguese competition authority (*Autoridade da Concorrência*) [released a report](#) to analyze the digital sector and found, among other things, a risk that incumbents engage in “pre-emptive mergers” (or “killer acquisitions”) with potential rivals “close the entry point” to the market by discontinuing or limiting the introduction of new products or services. The presence of strong network effects, difficult-to-replicate assets (such as data, infrastructure, or human capital), and close customer substitution between the incumbent and target, can create an incentive to pursue such deals. The report notes that notification thresholds may need to be modified to capture such deals (especially when the target is in its infancy) based on deal value, changes to the standards of review, or reversed burden of proof.

The French competition authority (*Autorité de la concurrence*) [issued its forward-looking report](#) on competition policy that covered, among other things, the issue of killer acquisitions. It notes several potential solutions, including (i) notification thresholds based on transaction value, (ii) some combination of ex-post and ex-ante merger review for certain transactions which permit companies to seek clarity in advance of a transaction but which do not foreclose regulatory review after-the-fact,

and (iii) use of interim protective measures pending a future merits decision on a given transaction.

Debate widens on whether EC merger control should protect “European champions”

The debate continues about whether changes to EC merger control are needed to foster “European champions” in increasingly globalized markets.

Directors of the Nordic competition authorities [published a joint response](#) to a German/French manifesto calling for substantive and procedural changes to the EC merger control regime in response to its blocking of an *Alstom/Siemens* merger. In their statement, the authorities of Sweden, Finland, Iceland, Denmark, and Norway advocated against making changes that would “subject merger control to the uncertainties of political decision-making.” They warned that competition enforcement untethered to a predictable and clear consumer welfare standard would weaken competition policy and thereby competition itself within Europe and its domestic markets. The statement also argues that a competition policy which encourages companies to become more efficient and make better products within Europe will ultimately help them succeed on the global markets, whereas a policy that allows anti-competitive consolidations without offsetting efficiencies will benefit a select few large players.

On the other side, Germany, France, and Poland [published a statement](#) encouraging the EC to make several substantive changes. First, it called for the EC to more stringently take into account state control, subsidies, or financial backing when calculating the turnover of an undertaking (an apparent response to perceived shortcomings in current rules to adequately measure the strength of state-backed competitors). Second, it called for a flexible definition of markets to account for global

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competition, particularly in assessing long-term potential competition from imports or entry despite low profits from state-backed entities (which appears to tackle the perceived short-term focus of the EC in its competitive analyses).

SINGLE-FIRM CONDUCT

EC takes the rare step of seeking interim measures in Broadcom investigation

Upon initiating a formal abuse of dominance investigation of chipmaker Broadcom for alleged

exclusivity clauses in its agreements with customers in modem and TV chipset markets, on 26 June 2019 the EC [issued a statement of objections to impose interim measures](#).

This marks the EC's first such attempt in nearly two decades to seek interim relief and follows criticisms that such measures were not used in other major investigations, such as the recent investigation into Google's practices with its shopping platform.

An oral hearing is scheduled for later in August.

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