

EUROPEAN COMPETITION DEVELOPMENTS – ISSUE 3

GOVERNMENT ENFORCEMENT

German Court suspends major data decision against Facebook in pending appeal

On 26 August 2019, a German appeals court [suspended the 6 February 2019 decision](#) of the German Federal Cartel Office (“FCO”) imposing restrictions on the way Facebook collected and pooled user data gathered through its apps or on third-party websites and apps and then connected that data to users’ Facebook accounts.

The FCO had found that Facebook’s terms of use constituted an abuse of market power under national competition laws in so far as users could only use the social network if they allowed Facebook to collect and pool data generated outside Facebook (e.g., via Instagram, WhatsApp or the “Like-Button”) and to merge it with information from the user’s Facebook account in ways that, in the FCO’s view, violated European data protection laws (GDPR). Facebook appealed the decision and sought a suspension of interim relief.

The court signaled that the FCO faces an uphill battle on the merits of the appeal, expressing “serious doubts as to the lawfulness of the cartel authority’s orders” and stating that the data law infringement relied on by the FCO may not pose a relevant anticompetitive effect. According to the court, the FCO had not sufficiently demonstrated what terms of use would have formed under competitive conditions nor ruled out that users’ consent was the result of their considerations of the benefits of a free social network. Furthermore, the court voiced concerns whether an alleged data law infringement could rise to the type of exploitative conduct contemplated by antitrust laws. The court further held that the required causal link between the contested conduct and Facebook’s market dominance was lacking because the FCO had not established that the consent given by users was due to Facebook’s dominance.

The FCO has announced it will appeal the Court’s interim decision to the German Supreme Court.

In the wake of these proceedings, Andreas Mundt, president of the FCO, talked about ways to bolster abuse of dominance enforcement [a 16 September 2019 interview](#), including whether national competition laws need to be updated to deal with tech companies that collect large amounts of data.

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Swiss authority closes precious metal spot trading cartel probe despite three leniency applicants

Switzerland's competition authority on 21 August 2019 [published the decision](#) (dated 27 May 2019) for its previously-announced closing of a cartel investigation into precious metal spot trading.

The probe involved Singapore-based trading activities by international banks Julius Baer, Barclays, Deutsche Bank, HSBC, Mitsui, Morgan Stanley and UBS, and was initiated by a 2014 leniency application which was followed by two more applications. Although the authority found evidence of communications between traders about bid-offer spreads for specific transactions, it could not prove collusive agreements because the traders were not "competing" over those same transactions. And the communications were too isolated, market prices too volatile, and trade sizes too small to improve "transparency" or "predictability" of competitor behaviour, as would be required to make out an infringement based on information exchanges alone.

A European Commission ("EC") investigation appears ongoing, while the U.S. Department of Justice ("DOJ") [brought criminal charges](#) alleging market manipulation in precious metal trading.

EC issues statement of objections in probe of telecom "active sharing" arrangement

The EC announced on 7 August 2019 that it [sent a statement of objections](#) to O2/CETIN and T-Mobile provisionally finding their "active sharing" arrangement in the operation of mobile networks in the Czech Republic had restricted competition.

Such arrangements generally involve shared use of national roaming or collaboration in the development and maintenance of mobile network infrastructure to achieve cost savings, efficiencies and service improvements, particularly in rural areas. The EC is concerned that the O2/T-Mobile arrangement may be too broad in its reach over all mobile technologies (2G, 3G, and 4G) and as much as 85% of the Czech population. The EC also noted the heightened potential for anticompetitive effects (on pricing and innovation) from an arrangement between the two largest operators (covering 75% of the nation's subscribers) in a three-player market.

The investigation could impact the rollout of the costly next-generation 5G mobile technology.

Novelis acquisition of Aleris cleared with commitments

Following an [in-depth investigation](#) launched in March, the EC on 1 October 2019 [conditionally cleared Novelis' proposed acquisition of Aleris](#) subject to the divestment of the target's entire aluminum body sheets capacity in Europe. (The U.S. DOJ has [filed a lawsuit](#) to block the deal.)

The EC expressed concerns that the deal would reduce competition in the supply of various semi-finished aluminum products for which both companies have manufacturing facilities in the EEA. The investigation focused on aluminum automotive body sheet--used in the body structure and closures of cars--which the EC concluded was a distinct product market with "very high" market shares in the EEA and limited third-party competitor capacity constraining the combined entity's pricing. The investigation had also looked at European overlaps in flat-rolled products used for building, construction and floor heating industries, but ultimately found no competitive concerns.

TRENDING: DIGITAL & E-COMMERCE

German government makes sweeping recommendations on changes to European regulation of digital sector

A 9 September 2019 "[Competition Law 4.0](#)" [Report](#) published by the German government presented 22 recommendations for a new competition framework for the digital economy.

First, the report recommends expanding laws and regulations that empower consumers to control and move their data to stifle the potential anticompetitive effects of the exclusive aggregation of data by a few dominant players. Second, it recommends a new platform regulation to set out clear rules of conduct governing dominant digital platforms that promotes competition both "on" and "for" the market. Third, it recommends a new voluntary notification procedure for companies to obtain more legal certainty about competitor cooperation in the digital space in order to encourage market entry and innovation. Fourth, it recommends strengthening the linkages between competition law and other digital regulations (such as consumer protection, data protection, etc.) to achieve more comprehensive policy solutions to the novel challenges of regulating digital markets.

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TRENDING: MERGER CONTROL

Austrian Cartel Court amends brewery merger remedies due to unintended circumstances

In a 14 May 2019 decision, the Austrian Cartel Court, at the request of the merged parties, [amended remedies](#) that had been imposed as a condition of the clearance of Austrian brewer Brau Union's acquisition of Vereinigte Kärntner Brauereien ("VKB") in February 2015.

The deal had been cleared by Austrian authorities subject to an obligation to continue VKB's brewery business (including maintaining its separate sales organisation and market presence) for at least five years and to extend those obligations for another three years in case of no or minor changes to the volume of the Austrian beer market. This was intended to strengthen regional brand competition by ensuring VKB's continued separate presence on the sales market.

However, these obligations are claimed to have had the opposite effect of weakening VKB's position, with no noticeable shift in market shares between Brau Union and its competitors. Due to these unforeseen and unintended circumstances, the court modified the remedies by lifting the obligation to extend the continuation of VKB's independent brewery business, including the keeping of a separate sales organisation, while also noting that combining the sales teams could lead to creating positive synergies.

TRENDING: SINGLE-FIRM CONDUCT

Dutch competition agency calls for ex-ante conduct review in digital sector

The Netherlands competition authority released a position paper in August 2019 [calling for ex-ante review](#) of certain conduct in the digital sector.

The proposed EU and national-level tool would impose non-punitive, "proportionate" behavioural remedies to prevent dominant firms from engaging in conduct to protect their positions by foreclosing competition or raising rivals' switching costs. Instead of trying to remedy the conduct after-the-fact, the contemplated remedies—including "platform access, data portability, data sharing and non-discriminatory ranking"—could be imposed ex-ante without a finding of an infringement (which the current EU framework requires before a remedy can be imposed).

Joint memorandum of Belgian, Luxembourg and Dutch competition authorities identifies areas for reform in regulating digital economy

The competition authorities of Belgium, Luxembourg, and the Netherlands [issued a joint memorandum](#) on 2 October 2019 making specific recommendations to study competition enforcement in the digital space.

In merger control, where regulators are asked to predict the impact of acquisitions of young start-ups in nascent industries with network effects and barriers to entry, the memorandum considers assessing an acquisition's "balance of harms" based not only on the likelihood but also the scale of potential competitive harm. It also considers reverting the burden of proof so that parties to such deals must prove their pro-competitive nature to obtain clearance. It also considers a filing threshold based on the market power of the acquirer (or value of the transaction) in order to flag more such deals for pre-merger review.

As to anti-competitive conduct, where regulators must stop anti-competitive acts before they create dominant positions in fast-moving and winner-takes-most markets, the memorandum calls for a less formal, "fast-track" commitment procedure. It also considers ex-ante intervention that allows regulators to review and impose non-punitive, behavioural remedies in certain contexts without a finding of an infringement.

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