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# EUROPEAN COMPETITION DEVELOPMENTS – ISSUE 4

## GOVERNMENT ENFORCEMENT

### EC extends Phase II review of Boeing/Embraer joint ventures

The European Commission ("EC") has restarted the clock on its Phase II review of two joint ventures proposed by Boeing and Embraer, two of the largest aircraft manufacturers in the world. The EC previously stopped the clock on the investigation late last year while it awaited receipt of certain requested information.

When originally initiating an in-depth review, the EC expressed concerns about "higher prices and less choice" that could result from combining "one of the two leading globally active manufacturers of commercial aircraft, in particular as regards single-aisle and twin-aisle large commercial aircraft" (Boeing), with its "third-largest global competitor" and the "leading globally active manufacturer of regional jets" (Embraer).

The new deadline for the Phase II review is 23 June 2020.

### Poland's competition and consumer protection authority launches abuse of dominance proceeding against e-commerce platform Allegro

On 10 Dec. 2019, Poland's Office of Competition and Consumer Protection (UOKiK) announced that it had initiated a proceeding against online shopping platform Allegro for alleged abuse of dominance, following complaints and a dawn raid.

In addition to allowing third party vendors to sell their products on its e-commerce platform, Allegro also competes with those vendors for products that it sells on its own shop. The authority alleges that Allegro may have used consumer data and designed the search algorithm on its website to favour its own listings over those of third-party vendors, as well as allegedly having made certain sales or promotional features (including special advertising banners) used for its own shop unavailable to third-party vendors.

It is another in a line of the so-called "self-preferencing" cases, including the EC's *Google Shopping* decision, which is cited by the Polish authority in explaining the basis for the proceeding against Allegro.

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### France's competition authority fines Google

On 20 Dec. 2019, France's Autorité de la concurrence imposed a fine of € 150 mn on Google for alleged abuse of dominance stemming from the terms and conditions for its search advertising platform, Google Ads.

Google Ads allows publishers of online content to bid on keywords to get a placement as a sponsored link on a Google search result. The French authority found that rules put in place by Google to protect users of its search engine from harmful advertisements–as well as the conditions under which advertisers could have their ads blocked or their accounts suspended –are opaque and subjective and that they are applied in a discriminatory manner. For example, rules against using Google Ads to advertise paid-for content that is normally available for free elsewhere online were alleged by the authority to be vaguely defined and inconsistently enforced.

The authority concluded that evidence did not show Google sought to disrupt competition downstream; it was only noted that the conduct may have had the effect of benefitting publishers relying on advertising-based business models (on which Google generates revenue through search and display advertising).

In addition to a fine, Google is required to clarify its rules and put in place procedures that administer them in a way that is necessary and proportionate to the objective of protecting users of Google search from harmful advertisements.

Google has said it will appeal the decision.

## TRENDING: DIGITAL & E-COMMERCE

### Germany publishes draft competition law reforms

On 24 Jan. 2020, Germany's economy ministry published draft changes to its competition laws to invigorate enforcement in the digital economy.

The draft changes seek to protect market conditions for start-ups and SMEs to innovate and compete by bolstering abuse of dominance enforcement against digital companies (in particular, digital platforms) who achieve market power through network effects and economies of scale and scope.

The new tools would include treating "intermediation power" (i.e., platforms acting as intermediaries for multi-sided markets) as a criteria for determining a market-dominant position, and an expansion of the essential facilities doctrine to capture data access from dominant "gatekeepers". And for certain platforms deemed to have "outsized cross-market significance", the amended law would impose heightened standards for self-preferencing, data portability, and use of data.

Another proposal includes the use of interim measures for earlier intervention to protect market conditions. In addition, heightened turnover thresholds in the merger control regime and use of comfort letters under cartel law would seek to promote pro-competitive combinations and collaborations among smaller businesses.

Germany's competition authority has weighed in on the draft and appears to be generally in agreement on its major proposed changes.

### French and Portuguese competition authorities ramp up digital enforcement capacity

On 9 Jan. 2020, France's competition authority announced that it had established a unit to focus on enforcement in the digital economy. Its staff—which will include data specialists and technologists, in addition to lawyers and economists—will conduct competition analysis and support investigations with technical expertise in areas like AI, algorithms, and blockchain.

On 30 Dec. 2019, the Portuguese competition authority announced that it would set up a task force in 2020 to focus on competition policy in the digital economy.

These steps follow a worldwide trend to institutionalize digital enforcement. In late 2019, the US Federal Trade Commission converted its digital task force into a permanent Technology Enforcement Division, while EC head Margarethe Vestager was appointed Executive Vice-President for the agency's Europe fit for the Digital Age.

## TRENDING: MERGER CONTROL

### Concrete proposals emerge in debate over national champions in EU competition policy

The debate rages on about the role of national champions, sparked last year by the EC blocking the *Alstom/Siemens* merger despite the parties' arguments about strong competition from China.

French lawmakers published a detailed report that pushes to reform EU competition law and the EC's competition enforcer to help European companies compete in an increasingly globalized and digitized competitive paradigm.

In addition to substantive changes to EU merger control that would emphasize a more forward-looking and dynamic competitive analysis, the report also proposes procedural changes like voluntary merger notification and replacing turnover-based filing thresholds. The report also suggests administrative changes like reorganizing DG Comp to inject more voices from the EU government into competition decisions, as well as speeding up judicial review of competition decisions.

On the other side of the debate, the Austrian competition authority published a position paper saying that national champions in competition policy would disadvantage smaller businesses, which, according to the authority, may in some cases be better suited to compete than larger ones yet less likely to garner political support for preferential treatment. Such policy would also, the authority argues, benefit larger EU member states over smaller ones when it comes to EC-level merger control review, and also might provoke retaliatory measures from key EU trade partners.

Instead, the authority encourages the use of trade policy, foreign direct investment regulation, and other avenues to help level the playing field between European companies and foreign state-backed competitors.

Against the backdrop of this heated debate, the EC's President, Ursula Von der Leyen, has expressed support for a review of the EU competition regime to see how it might be updated to promote European competition on worldwide markets.

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