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EU Competition Law Newsletter

Highlights

— Spotify Alleges Abuse Of Dominance By Apple

— *Skanska*: The Court Of Justice Rules That The Principle Of Economic Continuity Is Also To Be Applied In Private Damages Actions

— *Nike*: The Commission Continues Fight Against Territorial and Online Sales Restrictions in Licensing and Distribution Agreements

Spotify Alleges Abuse Of Dominance By Apple

The Complaint

On March 13, 2019, Spotify filed a complaint against Apple with the European Commission, alleging a breach of Article 102 TFEU. The complaint touches on many of the issues surrounding digital platforms that have been a key focus for the Commission in recent years. In particular, there are parallels with the allegations in *Google Shopping*, that Google abused its platform dominance in general search to benefit its comparison shopping service.[1] Here, Spotify asserts that as "*both owner of the App Store and Spotify's competitor*" Apple has abused its position as "*referee and player in the world of audio streaming.*"[2] Spotify raises an issue with two related practices:

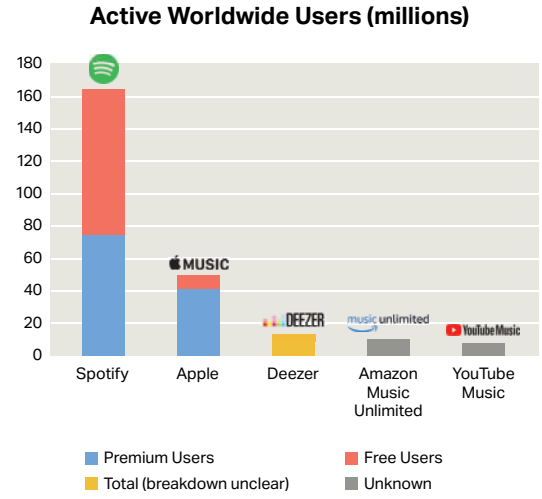
App Store fee. Spotify alleges that Apple imposes a fee on apps that compete with Apple, whereas Apple's own services and non-competitors are exempt. All app purchases and purchases of digital content within apps on iOS must be made through Apple Pay, and are subject to a 30% fee (for subscription-based services, like Spotify's music streaming, the fee drops to 15% after the first year). This includes all payments for Spotify's "Premium" service[3] made within the Spotify app. By contrast, Uber and Deliveroo, which do not compete with Apple, do not pay a fee when using Apple Pay. Spotify claims that when it started accepting Apple Pay in 2014, the fee forced it to raise its prices from €9.99 to €12.99. It notes that when Apple Music launched the following year it was not subject to the fee and was able to undercut Spotify with a price of €9.99. In 2016, Spotify decided to stop using Apple Pay and lowered the subscription price back to €9.99. As a result, Spotify customers are no longer able to upgrade to Premium through the app on their Apple devices.

[1] *Google Shopping* (Case COMP/AT.39740), Commission decision of June 27, 2017.

[2] *See* Spotify's video 'Time to Play Fair', available at: https://www.timetoplayfair.com/.

[3] Spotify has two membership tiers: a free, ad-funded service (Freemium), and an ad-free version with additional features available to subscribers paying a monthly fee (Premium).

Streaming Music Service Market[4]



Apple's technical restrictions. The App Store's terms of service also prohibit Spotify from referring customers to other payment methods (including its own website). Spotify argues that this prohibition unfairly hinders their efforts to attract Premium subscribers. Spotify claims that Apple has blocked numerous app updates to effect this prohibition and regularly subjects its service to other technical restrictions without any objective justification. Spotify also alleges that Apple unfairly restricts access to various Apple products, including Siri, the Apple Watch, and HomePod.

The complaint is not publicly available and Spotify's statements have left a number of questions unanswered. It is unclear in which market Spotify alleges Apple's dominance. One line of argument might be that Apple's App Store is an aftermarket for Apple devices. This approach to market definition for online platforms is endorsed by the Commission expert panel's recent report, 'Competition Policy in the Digital Era' (discussed in greater detail below): it finds that consumers are often locked into digital ecosystems such that "*ecosystem-specific aftermarkets may need to be defined*."[5] The Commission took a similar position in the *Android* decision, in which Google Play was held to be the dominant app store on Google's Android OS.[6]

Possible Theories of Harm

The Commission could possibly pursue a line similar to that in *Google Shopping*,[7] that the abuse lies in Apple's favoring of its own services over those of competitors. In *Google Shopping*, the Commission held that Google had abused its dominant position on the general search market by featuring its own comparison shopping service more prominently on the search results page compared with other comparison services. Alternatively, the claim could be framed as a margin squeeze—that Apple set the prices for downstream competitors to render them unprofitable. The prohibition here is against excluding "as efficient rivals."[8] The question then, would be whether Apple Music could profitably compete if it were subject to the same fees. Regardless of the theory pursued, it is clear from what Apple has already said that it views the fee as objectively justified to recoup their investments in iOS, the App Store, and Apple Pay.

Apple's Response

In its public response, Apple argues that the fee is needed to support the App Store ecosystem, upon which Spotify has relied heavily.[9] It denies the discriminatory nature of the App Store fee, stressing that there are a well-defined range of exemptions: free and ad-supported apps, digital goods purchased outside of apps, and physical goods. Notably, Apple's statement does not directly address the self-preferencing aspect of the complaint—the fact that Apple's own services are not subject to the fee. Spotify have not responded to Apple's statement, though its public statements evidence the view that Apple's policy is inherently discriminatory and targets competitors.

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[4] Source: *Apple/Shazam* (Case COMP/M.8788), Commission decision of September 6, 2018. Spotify, a streaming music service ("SMS"), launched on Apple's App Store in October 2008—just three months after the App Store itself—and is now the leading SMS in the EEA and worldwide, with over 160 million subscribers. In 2015, Apple launched its own SMS, Apple Music, which has since become the second most popular service in the EEA, with over 50 million users.

[5] European Commission, *Competition Policy for the Digital Era*, Final Report of April 5, 2019, page 48.

[6] *See* the Commission Press Release issued on July 18, 2018, available at: http://europa.eu/rapid/press-release_IP-18-4581_en.htm.

[7] *Google Shopping* (Case COMP/AT.39740), Commission decision of June 27, 2017.

[8] *See, e.g.*, Case C-295/12 P *Telefónica v Commission* EU:C:2014:2062, para 14.

[9] *See* Apple' statement '*Addressing Spotify's claims*', March 14, 2019, available at: https://www.apple.com/newsroom/2019/03/addressing-spotifys-claims/.

Other Recent Complaints Against Apple

Apple has received a number of similar complaints in recent years, reflecting dissatisfaction with the App Store's rules.

On April 11, 2019, the Netherlands Authority for Consumers and Markets ("ACM") concluded its market study on app stores and announced the launch of an investigation into abusive practices by Apple.[10] As in the Spotify case, app providers complained that they are not given a fair chance against Apple's own services, noting the 30% fee on in-app purchases and restricted access to certain iPhone features in particular. The ACM also expressed its concerns about the potential for Apple to exploit its upstream position. The report concluded that Apple's (and Google's) "*unique role*" as operators of app stores could induce them to distort competition, suggesting that further inquiries were necessary to consider whether there is "*competition on the merits between apps*." The investigation will initially focus on Dutch news media apps, due to the large number of complaints the ACM received from such providers. Apple's service, Apple News, aggregates content from other providers and recently launched a subscription service offering access to a number of top publications for a monthly fee.

In 2018, the media streaming service provider Netflix decided to stop offering in-app subscriptions on iOS. To subscribe to Netflix, users now have to go through a web browser.[11] Apple currently offers Apple TV, which allows users to purchase content from its library and stream the content of other providers, including BBC iPlayer and Amazon Prime Video. Apple is also launching its own subscription service with original TV shows and movies, called Apple TV+, later this year.

In the US, a class action lawsuit alleging that Apple's App Store rules lead to higher prices on downstream markets is currently being considered by the US Supreme Court.[12] The plaintiffs, iPhone owners, claim that by forcing consumers to buy apps through the App Store, subject to a 30% fee, Apple significantly inflates app prices. The Supreme Court is considering whether the plaintiffs have standing to sue, in which case a lower court would rule on the merits of the case. Apple is relying on a series of precedents that limit the ability of indirect purchasers to bring antitrust suits, claiming that app-developers, not Apple, set app prices.

The Regulation of Digital Platforms

The Spotify complaint is evidence of a wider trend: increased scrutiny of digital platforms by competition authorities and regulators alike in recent years. Notable antitrust enforcement and regulatory initiatives in this area include:

European Commission. The Commission has issued three infringement decisions against Google in a little less than two years, and is currently investigating Amazon's conduct with a focus on the collection of competitors' data and favoring Amazon's own products on its platform. According to Commissioner Vestager, "*these are the most recent cases. We have more to come. It's a busy workshop.*"[13] In addition, on April 4, 2019, three special advisers appointed by Commissioner Vestager published a 130-page report addressing competition enforcement in the digital domain.

The Report argues that structural features of digital economies strongly favor incumbents, namely: network externalities, economies of scale and access to data. While it concludes that existing competition law prohibitions are sufficient to address the challenges of such markets, the Report also recommends that they be tweaked to ease the Commission's burden of proof. As well as offering proposals on merger control and data, the Report dedicates a chapter to platform industries. Dominant platforms should be obliged

[10] *See* ACM Report '*Market study into mobile app stores*', April 11, 2019, available at: https://www.acm.nl/sites/default/files/documents/2019-04/marktstudies-appstores.pdf; see also ACM Press Release, '*ACM launches investigation into abuse of dominance by Apple in its App Store*', April 11, 2019, available at: https://www.acm.nl/en/publications/acm-launches-investigation-abuse-dominance-apple-its-app-store.

[11] *See* '*How much does Apple stand to lose as Netflix stops in-app subscriptions?*', January 2, 2019, available at: https://www.forbes.com/sites/greatspeculations/2019/01/02/how-much-does-apple-stand-to-lose-as-netflix-stops-in-app-subscriptions/#4cc0f7977589.

[12] *See Pepper v Apple* (Docket 17-204), US Supreme Court.

[13] Commissioner Vestager's speech at the Youth and Leaders' Summit in Paris, January 21, 2019.

to preserve competitive conditions on their platforms. In particular, the report suggests that when dominant platforms self-preference, they should bear the burden of proving that this has no long-run exclusionary effects on product markets.

P2B Regulation. EU institutions are currently working on wide-ranging regulatory proposals to promote fairness and transparency for business users of online platforms (the "P2B Regulation").[14] The P2B Regulation forms part of the Commission's Digital Single Market Strategy and was proposed in the context of the Commission's mid-term review. On February 13, the Parliament, Council, and Commission reached a political deal on the proposal (*i.e.*, an informal agreement). The P2B Regulation provides for:

— Bans on certain unfair practices, including sudden and unexplained account suspensions, unclear, discriminatory and non-transparent terms and conditions, and suspensions without notice.

— Improved transparency: online platforms will have to make their ranking parameters known and available, disclose any advantage they give to their own services that compete on the platform, and inform users about the data they collect and how they use it.

— New dispute resolution mechanisms: the creation of internal complaint-handling systems, and appointment of mediators.

— Judicial proceedings: digital platforms failing to comply with the rules may be brought before national courts.

If enacted, the P2B Regulation could have a major impact on the functioning of digital platforms in Europe and its provisions touch on much of the conduct that has drawn the ire of antitrust authorities in recent years. In this context, in September 2018, the Commission also appointed 15 high-profile experts as the Observatory of the Online Platform Economy, to monitor the evolution of online platforms.

EU Member States. The French Competition Authority is reviewing two complaints against Google, to determine whether the policies of their online advertising service Google Ads are sufficiently clear, transparent, and applied in a non-discriminatory way. The German Bundeskartellamt issued a decision against Facebook in February this year for abusing its dominant position for linking data collected from third party websites to users' profiles. German and Austrian authorities are also cooperating on separate investigations into whether the terms Amazon imposes on businesses selling on its platform abuse its dominant position. Andreas Mundt, president of Germany's Federal Cartel Office described the authority's investigation as considering whether Amazon's role as both the largest online retailer and largest online marketplace in Germany "has the potential to hinder other sellers on the platform."[15] On April 16, the Italian Competition Authority announced yet another investigation into Amazon, this time based on suspicions that it has been giving preferential exposure on its site to third-party vendors that subscribe to its logistics service.

Developments Outside Of Europe. There have been a series of similar initiatives by authorities outside of Europe in recent months. A report commissioned by the UK Government, entitled 'Unlocking Digital Competition' was published on March 13, and contained a wide range of recommendations to improve competition enforcement.[16] For further details on the Report, see our Alert Memorandum on the topic. In December 2018, Australia's Competition and Consumer Commission recommended imposing regulation to curb the market power of Google and Facebook.[17] Japan's Fair Trade Commission opened a market study on competition and digital platforms in December 2018.

[14] The Commission made this Regulation proposal on April 26, 2018. The draft is available at: https://ec.europa.eu/digital-single-market/en/news/regulation-promoting-fairness-and-transparency-business-users-online-intermediation-services.

[15] *See* Bundeskartellamt Press Release issued on November 29, 2018, available at: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.html.

[16] Digital Competition Expert Panel, *Unlocking Digital Competition*, March 13, 2019, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

[17] ACCC, *Digital Platforms Inquiry Preliminary Report*, December 2018, available at: https://www.accc.gov.au/system/files/ACCC%20Digital%20Platforms%20Inquiry%20-%20Preliminary%20Report.pdf.

Skanska: The Court Of Justice Rules That The Principle Of Economic Continuity Is Also To Be Applied In Private Damages Actions

On March 14, 2019, the ECJ held that the determination of persons liable for damages for an EU competition law infringement is governed by EU law, not national law.[18] The ECJ clarified that an acquirer company may be held liable for private damages caused by a cartel participant even after the cartel participant was subsequently liquidated, provided that the acquirer took over the assets that constituted the business. The ECJ agreed with Advocate General Wahl[19] that the principle of economic continuity should apply not only in public, but also in private antitrust enforcement.

Background

The case arose from a reference for a preliminary ruling by the Finnish Supreme Administrative Court (the "Supreme Court") concerning a cartel in the Finnish asphalt market between 1994 and 2002.

Skanska, Asfaltmix, and NCC Industry, had each acquired a participant of the asphalt cartel in 2000 (Sata-Asfalti, Asfalttineliö, and Interasfaltti, respectively). After the acquisition, the cartel participants' legal entities were liquidated and their businesses were transferred to their respective parents. In its 2009 decision, the Supreme Court applied the principle of economic continuity and imposed administrative fines on the parent companies, *i.e.* Skanska, Asfaltmix, and NCC Industry.

Subsequently, a customer brought an action for follow-on damages against the addressees of the Supreme Court judgment in the administrative case, which included Skanska, Asfaltmix, and NCC Industry. The Finnish district court concluded that the same principles should apply to the attribution of liability for private damages and for fines imposed by a competition authority. The Helsinki Court of Appeal disagreed on the grounds that, under Finish law, civil liability attaches only to an entity that committed the infringement. In this case it meant that Skanska, Asfaltmix, and NCC Industry, as distinct legal entities, could not be held liable for the harm caused by the legal entities that participated in the cartel, where those entities had already been dissolved. In turn, the Supreme Court asked the ECJ whether (i) Finnish civil liability rules or EU competition law principles should apply in private damages actions; and (ii) if EU law was applicable, whether the successor companies should be liable for private damages even where they themselves, as legal entities, did not participate in the infringement.

The ECJ's findings

The ECJ found that—contrary to the European Commission's view that it was a question of national law—EU law must apply to the attribution of liability for private damages because Article 101 TFEU has direct effect, creating legal consequences between individuals. The ECJ noted that although the Damages Directive[20] is silent on which entities are to be held liable for harm caused by an infringement of EU competition law, it specifies that those are the 'undertakings' which committed the infringement. In this respect, the ECJ recalled that under Article 101 TFEU the concept of 'undertaking' covers any entity engaged in an economic activity and may, in fact, consist of several persons, natural or legal. Therefore, under EU law, a legal or organizational change—including liquidation—does not necessarily create a new undertaking, free of liability for the predecessor's anticompetitive

[18] *Skanska Industrial Solutions and Others* (Case C-724/17) ECLI:EU:C:2019:204 ("Skanska").

[19] *Skanska Industrial Solutions and Others* (Case C-724/17), opinion of Advocate General Wahl, ECLI:EU:C:2019:100.

[20] Directive No 2014/10 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1 ("Damages Directive").

conduct. As explained in Advocate General Wahl's opinion, liability attaches to business assets, rather than to a particular legal entity. Hence, the successor company is considered to take over both the cartel participant's assets and liabilities, including its liability for EU law violations.[21]

The ECJ held that the concept of 'undertaking' in public and private enforcement of EU competition law should be identical. On the basis of prior case law in the context of public enforcement, this means that an acquirer of assets may be held liable for the seller's previous infringement of EU competition rules if the seller has ceased to exist.[22] In the present case, the ECJ concluded that the acquirer of the legal entities involved in the cartel should also be liable for civil damages caused by these entities, even if they were liquidated subsequently, assuming that the acquirer continued to operate the assets, and regardless of whether the purpose of liquidating the entities was to escape liability.

The Skanska judgment demonstrates the ECJ's willingness to strengthen private enforcement of competition rules. The judgment also highlights the importance for acquirers to conduct comprehensive due diligence prior to entering into M&A agreements, including in particular asset deals.

Nike: The Commission Continues Fight Against Territorial and Online Sales Restrictions in Licensing and Distribution Agreements

Background

On March 25, 2019, the Commission fined Nike €12.5 million for breaching Article 101 TFEU by imposing restrictions on cross-border and online sales of football merchandising products within the EEA.[23] The Commission granted Nike a 40% fine reduction in return for its cooperation.

Football merchandising products such as mugs, keychains, and toys have logos or images of football clubs and federations, which are protected by intellectual property rights such as trademarks or copyright ("IPRs"). During the infringement period, certain football clubs licensed their IPRs to Nike, who would then manage the club's retail, merchandizing, apparel, and product licensing business.[24] In particular, Nike would have an exclusive right to use and sub-license these IPRs to third parties who manufacture and distribute the merchandising products featuring the brands of a football club or federation. The Commission's investigation in this case concerned trademarks of clubs such as FC Barcelona, Manchester United, Juventus, Inter Milan and AS Roma, as well as national federations like the French Football Federation. The Commission found that Nike's licensing and distribution agreements, which were in place between 2004 and 2017, included the following direct and indirect territorial restrictions:

— Nike restricted the licensees' right to sell outside of their assigned territory in the EEA. Direct restrictions included express prohibitions of, obligations to refer orders to Nike for, or double royalties on out-of-territory sales. Indirect restrictions included threats to terminate contracts or not to supply "official product" holograms to licensees that sold out-of-territory, and audits to ensure compliance with the restrictions.

[21] *Skanska Industrial Solutions and Others* (Case C-724/17), opinion of Advocate General Wahl, para. 80, ECLI:EU:C:2019:100.

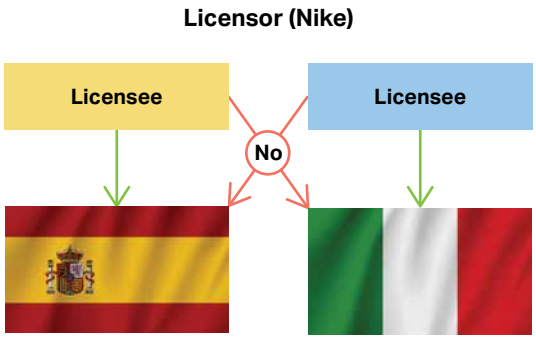
[22] *See, e.g., SNIA v Commission* (Case C-448/11 P) ECLI:EU:C:2013:801, para. 25.

[23] *Ancillary sports merchandise* (Case COMP AT.40436), decision not yet published. See Commission Press Release IP/19/1828.

[24] *See, e.g.*, Manchester United Annual Report 2014: https://ir.manutd.com/~/media/Files/M/Manutd-IR/Annual%20Reports/manchester-united-plc-20f-20141027.pdf, page 43 ("*Our retail, merchandising, apparel & product licensing business is currently managed by Nike. We are now in the final year of a 13-year agreement with Nike, which guaranteed an aggregate minimum of £303 million in sponsorship and licensing fees to the club, subject to certain reductions. Under the terms of the agreement, we granted Nike an exclusive license to exploit certain of our intellectual property, retail, promotional and image rights, subject to certain exceptions.*").

— In certain cases, Nike used "master licensees" in each territory to sub-license the IPRs. Nike subjected master licensees to the direct and indirect territorial restrictions, which compelled them to stay within their territories and to pass them on into their contracts with sub-licensees.

— Nike prohibited licensees from supplying merchandising products to customers, often retailers, who could be selling outside the allocated territories. In addition, it obliged its licensees to mirror the territorial restriction clauses in their contracts with retailers. Nike would also directly intervene to ensure that retailers such as fashion shops and supermarkets would cease to source the relevant products from licensees located in other EEA territories.



The Commission found that the restrictions prevented consumers from being able to shop around Europe—one of the main benefits of the EU Single Market—resulting in less choice and inflated prices for football merchandising products.

Although the Commission's press release does not provide any details of its legal analysis, the Commission's approach appears to be consistent with the Commission's recent precedents. As the Commission noted in *Cross-border access to pay-TV*, in analyzing territorial restrictions in trademark licenses, EU courts have distinguished between the existence and the exercise of IPRs. The right to assign a trademark under national trademark law cannot be exercised to frustrate EU competition law.[25] In *Football Association Premier League*, a case that involved licensing agreements restricting cross-border provision of broadcasting services, the Court of Justice held that agreements aimed at "*partitioning markets according to national borders or that make the interpenetration of national markets more difficult*" infringe Article 101(1) TFEU by object.[26] Finally, the Vertical Block Exemption Regulation would not apply to Nike's arrangements as it does not cover IPRs licenses unless such licenses constitute an ancillary part of a vertical agreement.[27]

Implications

Focus on territorial and online sales restrictions in licensing and distribution agreements. This is the latest Commission decision stemming from the concerns discussed in the Final Report on the e-commerce sector inquiry.[28] The Report highlighted the use of contractual restrictions on product distribution across EU Member States including territorial restrictions in licensing agreements,[29] and geo-blocking measures.[30] The inquiry has already resulted in a number of infringement decisions, including *Guess*[31] and *Pioneer*,[32] in which the Commission imposed fines for, amongst others, restrictions of retailers' cross-border, online sales within the EU included in distribution agreements. Following the same line of investigations, the Commission has also recently accepted

[25] *Cross-border access to pay-TV* (Case COMP AT.40023), Commission decision of March 7, 2019, para. 64 (citing Joined Cases 56/64 and 58/64, *Établissements Consten S.à.R.L. and Grundig-Verkaufs-GmbH v Commission*, ECLI:EU:C:1966:41).

[26] Report, para. 48 which refers to *Football Association Premier League Ltd and Others v QC Leisure and Others* (C-403/08) and *Karen Murphy v Media Protection Services Ltd* (C-429/08), ECLI:EU:C:2011:631 ("*Football Association Premier League*"), para. 139.

[27] Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices OJ L 102, 23.4.2010, Article 2(3) and Guidelines on Vertical Restraints OJ C 130, 19.5.2010, para. 31(a).

[28] *See* Report from the Commission to the Council and the European Parliament, Final Report on the E-commerce Sector Inquiry, COM/2017/0229 final of May 10, 2017; and Commission Sector Inquiry into E-commerce: http://ec.europa.eu/competition/antitrust/sector_inquiries_e_commerce.html.

[29] Report, paras. 21-22.

[30] Report, paras. 45 and 49.

[31] *Guess* (Case COMP/AT.40428), Commission decision of December 17, 2018. *See also* Cleary Gottlieb EU Competition Newsletter, December 2018. The Commission fined Guess €40 million for, amongst others, online sale and territorial restrictions.

[32] *Pioneer* (Case COMP/AT.40182), Commission decision of July 24, 2018.

commitments offered by Disney, NBC Universal, Sony Pictures, Warner Bros and Sky not to include in the film licensing contracts clauses that would restrict cross-border passive sales of retail pay-TV services and grant absolute territorial exclusivity.[33]

The Nike decision did not end the Commission's scrutiny into agreements that partition the EU Single Market. On April 5, 2019, the Commission announced that it addressed a Statement of Objections to Valve, owner of the world's largest PC video game distribution platform, and five PC video game publishers, Bandai Namco, Capcom, Focus Home, Koch Media and ZeniMax for potential restrictions on cross-border sales of PC video games within the EU included in distribution agreements, and geo-blocking.[34] The Commission has two additional pending investigations into potential restrictions on cross-border and online sales in licensing and distribution agreements for merchandising products: *Character merchandise*[35] and *Licensed merchandise – Universal Studios*.[36]

Cooperation reductions in non-cartel cases. The decision also shows the Commission's continuing willingness to reduce fines in return for cooperation in non-cartel cases.[37] Other non-cartel cases where the Commission granted a reduction for cooperation include *Guess*,[38] *Consumer Electronics*,[39] and *ARA*.[40]

News

Commission Updates

The Commission Launches New Online eLeniency Tool

On March 19, 2019, the Commission introduced eLeniency, a new online tool for submitting documents and corporate statements in the context of leniency and settlement procedures in cartel and non-cartel cooperation cases. Available 24/7, eLeniency allows for submissions independent of location or regular Commission business hours. Submissions are made via Web interface directly into the Commission's server, and printing and saving functionalities are disabled on the applicant's end. According to the Commission, eLeniency is functionally equivalent to the currently used oral submission procedure, intended to reduce the risk of leniency statements becoming discoverable in (US) civil litigation. Applicants remain free, however, to choose between the new tool and the pre-existing procedure, which is still available as an alternative.

The Commission Publishes A Paper On EU Industrial Policy After Siemens/Alstom

In a March 18, 2019 paper entitled "EU industrial policy after Siemens/Alstom: Finding a New Balance Between Openness and Protection," the Commission's think tank, the European Political Strategy Centre, responds to the "*significant backlash against EU competition policy*" stemming from its prohibition of the Siemens/Alstom merger in February (reported in the EU Competition Law Newsletter of February 2019).[41] Many prominent voices, French and German politicians in particular, condemned the decision for blocking the emergence of a "European champion" to meet the threat of Chinese competition. The report defends the decision, warning that weakening merger control enforcement would lead to

[33] *Cross-border access to pay-TV*, para. 76.

[34] *See* Commission Press Release IP/19/2010.

[35] *Character merchandise* (Case COMP AT.40432), decision not yet issued. *See* Commission Press Release IP/17/1646.

[36] *Licensed merchandise - Universal Studios* (Case COMP AT.40433), decision not yet issued. *See* Commission Press Release IP/17/1646.

[37] *See* Commission Fact Sheet on Cooperation – FAQ, which outlines a road map for cooperation reductions in non-cartel cases: http://ec.europa.eu/competition/publications/data/factsheet_guess.pdf.

[38] *Guess* (Case COMP/AT.40428), Commission decision of December 17, 2018.

[39] *Asus* (Case COMP/AT.40465), *Denon & Marantz* (Case COMP/AT.40469), *Philips* (Case COMP/AT.40181), and *Pioneer* (Case COMP/AT.40182), Commission decisions of July 24, 2018.

[40] *ARA Foreclosure* (Case COMP/AT.39759), Commission decision of September 20, 2016.

[41] *Siemens/Alstom* (Case COMP. M.8677), decision not yet published. *See* Commission Press Release IP/19/881.

economic inefficiency and political arbitrariness. The Commission also accepts that Europe's industrial policy is in need of reform, however, and proposes certain solutions to the challenges posed by rising competition, particularly from China, and by digitization of the economy.

The report details Europe's sluggishness in responding to digitization, noting that the world's largest tech companies are predominantly American and Chinese, while only 28 "Fortune 100" businesses are now European (versus 42 in 2007). The Commission also loudly sounds the alarm on the threat posed by asymmetric Chinese competition, underpinned by "*generous state subsidies, significant market protection and a lengthy track record of unfair trade practices, commercial espionage and intellectual property right infringements.*"

The Commission advocates a two-pronged response: lobbying to level the global playing field, whilst strengthening European industrial policy. On the former, the paper suggests engagement with the WTO to remove China's preferential treatment under its "developing economy" status, improving the EU's defensive tools (including anti-dumping measures and scrutiny of foreign direct investment) and updating its reciprocal market access agreements. In this regard, on March 19, 2019, the EU adopted the FDI Screening Regulation (Regulation (EU) 2019/452), which sets out minimum standards for Member States' existing screening mechanisms and creates a system of cooperation and information exchange between Member States and the Commission (including the Commission's right to opine on FDI screening cases under certain circumstances).[42] In terms of industrial policy, the Commission pitches for Member States to coalesce around a common strategy. It proposes greater harmonization of digital regulations and taking a more active role on the global stage in promoting standards, as well as norms promoting good governance, transparency and accountability. Finally, it argues for greater funding at European level for strategic industries, including the creation of a European Sovereign Wealth Fund.

The Hearing Officer For Competition Proceedings Publishes The Activity Report For 2017-2018

On March 22, 2019, the European Commission's Hearing Officer published his Activity Report for 2017-2018.[43] The Report provides key statistics on the Hearing Officer's activity as well as a useful summary of case law on various procedural issues.

Notably, the Hearing Officer reported an increase in oral hearings from 5 in 2017 to 11 in 2018, including antitrust and merger control cases, the highest number so far. Some of this increase is attributable to more oral hearing requests in merger control proceedings, which is likely the result of the Commission having initiated almost twice as many Phase II investigations in 2018 as in 2017.

The Report also highlights the Hearing Officer's views on several recent developments regarding procedural issues, such as the right to be heard, access to file, and confidentiality claims in the process of publishing decisions. For instance, in the aftermath of the Court of Justice's judgment in *Intel*,[44] the Hearing Officer received several requests to obtain notes of meetings or calls between the Commissioner, her Cabinet, or DG Competition officials on the one hand, and complainants or other interested third parties on the other hand. In *Intel*, the Court had clarified that the Commission is obliged to record any interviews conducted for information gathering purposes during the course of an investigation.[45] The Hearing Officer however clarified that it does not have the authority to compel the Commission to draft such notes. The Hearing Officer can only grant access to such notes when they actually exist in the case file.

[42] The Regulation will come into force on April 11, 2019, though its provisions will apply from October 11, 2020.

[43] The European Commission's Hearing Officer ensures impartiality and objectivity in competition proceedings. This is the case in both merger and antitrust proceedings, including, for example, organization of oral hearings, resolving procedural disputes between the case team and the parties, reviewing confidentiality and privilege claims, and preparing a report at the end of the case.

[44] *Intel v Commission* (Case C-413/14 P) EU:C:2017:632.

[45] The Commission has the power to conduct such interviews under Article 19 of Regulation 1/2003.

The Commission Fines Google €1.49 Billion For Breaching EU Antitrust Rules In The Google AdSense Investigation

On March 20, 2019, the Commission fined Google €1.49 billion for breaching Article 102 TFEU by imposing restrictive clauses in contracts with owners of third-party publisher websites, such as newspapers, blogs, or travel site aggregators.

These publishers use Google's search engine to provide search functionality on their website. In that case, to monetize the website, publishers will use allocated space to show Google ads alongside search results. Through AdSense for Search ("AFS"), Google's online search advertising intermediation platform, Google acts as intermediary between advertisers and website owners, and provides targeted search ads to website owners. Revenues generated from clicks on such ads are then shared between Google and the website owner.

The Commission concluded that Google abused its dominance in the market for online search advertising intermediation by including in the contracts; (i) exclusivity clauses which hindered publisher websites from showing competing search adverts, (ii) "premium placement" clauses, which prevented website owners from placing competing search adverts in their websites' most visible and profitable space, and required a minimum number of Google ads to be shown, and (iii) clauses subjecting website owners' right to modify the design of search adverts to Google's prior written approval. According to the decision, this prevented Google's online search rivals, such as Microsoft and Yahoo, from growing and offering alternative online search advertising intermediation services. Upon receipt in July 2016 of the Commission's Statement of Objections, Google ceased the contested practices.

This decision follows the Shopping decision in 2017 and the Android decision in 2018. It is yet another example of the Commission's close scrutiny of online platforms and, more broadly, the digital economy. National competition authorities are also looking into digital platforms and online advertising. On January 31, 2019, the French Competition Authority issued interim measures against Google in proceedings related to its online advertising service. On March 6, 2018, following a sector-investigation, the French Competition Authority published an opinion on data processing in the online advertising sector, which also discusses advertising intermediation. In February 2018, the Bundeskartellamt issued a paper on online advertising, which mentions search advertising and intermediation. On December 10, 2018, following its digital platforms inquiry, Australia's Competition and Consumer Commission published a preliminary report, which deals with digital platforms and online advertising.

The Commission Imposes A €368 Million Fine On Autoliv And TRW In The Occupant Safety Systems Cartel Settlement

On March 5, 2019, the Commission fined car safety equipment suppliers Autoliv and TRW €368 million for breaching Article 101 TFEU by taking part in two infringements consisting of an exchange of commercially sensitive information and illegal coordination in relation to the supply of car seatbelts, airbags, and steering wheels to Volkswagen and BMW.[46] Autoliv and TRW qualified for leniency and benefitted from, respectively, 30% and 50% fine reductions. Takata, another addressee of the decision, received full immunity as it was first to report the two infringements to the Commission. The decision ends the second part of a Commission's investigation in car safety systems, which was bifurcated and led to a first decision in November 2017.[47] In the first decision, the Commission fined car safety equipment suppliers for four infringements related to the supply of the same products to Asian car manufacturers, including Toyota, Suzuki, and Honda. The bifurcation of the investigation departed from the Commission's previous practice to investigate related infringements in single proceedings, particularly in the automotive parts industry.[48]

[46] *See* Commission Press Release IP/19/1512 "Antitrust: Commission fines car safety equipment suppliers € 368 million in cartel settlement", March 5, 2019.

[47] *Occupant Safety Systems* (Case COMP/AT.39881), Commission decision of November 22, 2017.

[48] *See Automotive Wire Harnesses* (Case COMP/AT.39748), Commission decision of July 10, 2013 and *Thermal systems* (Case, COMP/AT.39960), Commission decision of March 8, 2017.

The Commission Accepts Commitments By Disney, NBCUniversal, Sony Pictures, Warner Bros., And Sky In Its Pay-TV Investigation

On March 7, 2019, the Commission accepted the commitments offered by Disney, NBCUniversal, Sony Pictures, Warner Bros., and Sky in the pay-TV investigation.[49] The Commission's concerns related to alleged restrictions on the cross-border sale of pay-TV services in film licensing agreements between the studios and Sky UK.[50] Paramount, also part of the investigation, had already offered commitments to address the Commission's concerns in April 2016, which the Commission accepted in July 2016.[51]

Disney, NBCUniversal, Sony Pictures, and Warner Bros. offered (1) not to (re)introduce any broadcaster or studio obligation preventing passive sales in pay-TV license agreements; (2) not to enforce any broadcaster or studio obligation before a court or tribunal in an existing agreement; and (3) not to act upon any broadcaster or studio obligation to which they are subject in an existing agreement. Sky agreed not to (re)introduce any broadcaster or studio obligation in pay-TV license agreements and not to enforce or honor any broadcaster or studio obligation in existing agreements. Unlike the Paramount commitments, the commitments offered by Disney, NBCUniversal, Sony Pictures, Warner Bros., and Sky explicitly preserve their rights under copyright law, as well as their right to unilaterally employ geo-filtering measures to limit access to their own retail pay-TV services.

The commitments apply to online and satellite premium tier pay-TV services and any on-demand service included in the same subscription. The commitments have a term of five years.

The Commission Approves The Acquisition Of Asco By Spirit Subject To Commitments Addressing Coordinated Effects Concerns

On March 20, 2019, the Commission cleared Spirit's acquisition of Asco, both being active in the supply of aircraft components.[52] The case raised no vertical or horizontal unilateral concerns. However, the Commission imposed remedies to address coordinated effects in the market for slats and slat systems[53] making this the first such case since *Hutchison 3G Italy/WIND/JV* in 2016.[54]

Spirit and Asco operated at different levels of the slat systems supply chain.[55] Asco was a member of a joint venture ("JV") called Belairbus, through which it developed and produced slat systems for Airbus. Spirit was one of the only two suppliers of slats worldwide. Sonaca, Spirit's competitor, was one of Asco's partners in the JV. The Commission was therefore concerned that the acquisition—which would have resulted in Spirit and Sonaca becoming partners in a JV—would increase market transparency and facilitate coordination in the slats and slat systems markets.

To address the Commission's concerns, Spirit offered to amend Belairbus's organization to ensure that each member of the JV would separately carry out all future negotiations with Airbus. In addition, all commercially sensitive information that Asco held on Sonaca would be destroyed to prevent it from being transferred on to Spirit post-transaction. Spirit also committed not to receive any such information going forward.

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[49] *Cross-border access to pay-TV* (Case COMP/AT.40023), Commission decision not yet published. Commission Press Release IP/19/1590, "Antitrust: Commission accepts commitments by Disney, NBCUniversal, Sony Pictures, Warner Bros. and Sky on cross-border pay-TV services," March 7, 2019.

[50] *See also* EU Competition Law Newsletter, November 2018, p.3.

[51] *Cross-border access to pay-TV* (Case COMP/AT.40023), Commission decision of July 26, 2016.

[52] *Spirit/Asco* (Case COMP. M.8948), decision not yet published. *See* Commission Press Release IP/19/1775.

[53] Slats are aerodynamic surfaces that extend from the leading edges of the wing at take-off and landing, which allow the aircraft to function at a higher angle of attack, improve the wing's lift, and enable the aircraft to fly at lower speeds. Combined with other aircraft components, slats form part of a "slat system."

[54] *See Hutchison 3G Italy/WIND/JV* (Case COMP/M.7758), Commission decision of September 1, 2016. The Commission has considered coordinated effects in more recent cases, but ultimately did not require a remedy. *See ArcelorMittal/Ilva* (Case COMP/M.8444), Commission decision of May 7, 2018 and *Tronox/Cristal* (Case COMP/M.8451), Commission decision of July 4, 2018.

[55] Respectively, manufacturing of slats (Spirit) and development/production of slat systems (Asco).

Courts

Crédit Agricole, JPMorgan Chase Lose Fight Against EU Releasing EIRD Decision

On March 21, 2019, the Court of Justice issued two orders dismissing Crédit Agricole's and JPMorgan Chase's applications for interim measures requested to prevent the Commission from publishing its decision in the *EIRD* cartel case.[56] The parties had appealed an order issued in October 2018 by the General Court,[57] which rejected the parties' claims that the Commission should not be allowed to publish its decision on the cartel case while a court appeal against its publication is pending.

The Court of Justice agreed with the General Court's assessment that the parties did not have a *prima facie* case to prevent publication of the decision. First, the Court of Justice did not agree with the applicant that the case was similar to *Pergan v Commission*, where the General Court found that the Commission is prevented from publishing its findings if the person found liable of an antitrust infringement was not able to contest the decision before the EU Courts.[58] In the present case, however, the Parties had already challenged the EIRD decision before the EU Courts. Second, the Parties had argued that the decision's publication could harm certain individuals' reputation because the decision found the applicants' "*management [...] to have been aware of or at least, should have been aware of, of [sic] the essential characteristics of the collusive scheme and their employees' involvement in it*."[59] The Court of Justice disagreed and upheld the General Court's finding that this part of the decision did not identify any specific individuals, either by name or their place in the applicants' hierarchy. On this basis, the Court of Justice held that the decision's publication could not harm any identifiable individuals, without assessing whether the Commission's finding a member of the addressee's management to be aware of illegal conduct could harm that person's reputation and whether such finding should be redacted from the public version. Taking these factors into consideration, the publication of the decision—which, as any act of the Commission, is presumed to be legal—did not, on its face, violate the parties' presumption of innocence for the above stated reasons.

The Court of Justice had, in a similar vein, recently rejected Nexans' request to enjoin the Commission from publishing its decision in the *Power Cables* cartel because the parties failed to establish a *prima facie* case against such publication.[60] The parties had not proven the confidential nature of the contested information, which the Court viewed as historical, as well as the serious and irreparable harm that publication of the decision would cause.

Following the Court of Justice's orders, the Commission published the EIRD decision on April 9, 2019.

The Court Of Justice Dismisses Eco-Bat's Appeal And Clarifies The Applicable Time Limits For Appealing Commission Correcting Decisions

On March 21, 2019, the Court of Justice upheld the General Court's dismissal of the action lodged by Eco-Bat, a British lead recycling company, against the Commission decision imposing a €32.7 million fine in the *Car Battery Recycling* cartel case.[61]

The Commission issued its prohibition decision in February 2017.[62] Two months later, the Commission issued a "correcting decision," which addressed the initial decision's failure to indicate the value of sales used in calculating the fine imposed

[56] *Crédit Agricole and Crédit Agricole Corporate and Investment Bank v Commission* (Case C-4/19 P(R)) EU:C:2019:229; *JPMorgan Chase and Others v Commission* (Case C-1/19 P(R)) EU:C:2019:230.

[57] The General Court's order on Crédit Agricole's application for interim measures has been reported in the EU Competition Law Newsletter, October 2018, p. 5.

[58] The Parties cited *Pergan Hilfsstoffe für industrielle Prozesse GmbH v Commission* (Case T-474/04) EU:T:2007:306.

[59] *Euro Interest Rate Derivatives* (Case AT.39914), Commission decision of December 7, 2016, para. 465.

[60] *Nexans France and Nexans v Commission* (Case C-65/18 P(R)) EU:C:2018:426; *see* EU Competition Quarterly Report, April–June 2018, pp. 10–11.

[61] *Eco-Bat Technologies and Others v Commission* (Case C-312/18 P) EU:C:2019:235.

[62] *Car Battery Recycling* (Case COMP/AT.40018), Commission decision of February 8, 2017.

on Eco-Bat.[63] Upon receiving the correcting decision, Eco-Bat withdrew its original application for annulment—which, in any event, had been submitted one day late—and submitted a new application against the correcting decision. However, the General Court dismissed the second application on the grounds that it was submitted after the expiration of the applicable time limits, which, as the Court clarified, started running as of the date of the initial decision's notification.[64]

Before the Court of Justice, Eco-Bat maintained that the period for bringing an action for annulment should start running from the moment of receiving a "complete and correct" decision (*i.e.*, in this case, with the correcting decision). The Court of Justice referred to its case law, according to which the Commission's decision is considered to be properly notified when its addressee is "*in a position to become acquainted with the content of that decision and the grounds on which it is based*."[65] The Court of Justice concluded that the addressee of a decision may still become acquainted with its content and grounds even when the decision contains an error or omission.

Eco-Bat brought it to the Courts' attention that at least in one other case the Commission informed the addressees of its decision that the time limit for an appeal would run anew as of the date of notification of the amended decision.[66]

The General Court pointed out that the period for bringing an action for annulment, "*as a result of the public-policy nature [...] are not subject to the discretion of the parties*." The Court of Justice refused to review the General Court's conclusion on this point, because Eco-Bat had not identified any error of law.

The General Court Annuls The Commission's Decision In Tercas And Explains That Support Measures Adopted By A Private Law Consortium Do Not Constitute State Aid

On March 19, 2019, the General Court annulled the Commission's decision finding that the voluntary intervention by Fondo Interbancario di Tutela dei Depositi ("FITD") in support of Banca Tercas ("Tercas") constituted State aid, granted in violation of Article 108(3) TFEU.[67]

The FITD is the main Italian Deposit Guarantee Scheme ("DGS"). It is a consortium of banks established as a so-called mutual benefit body. FIDT guarantees its members' deposits in the event of a compulsory liquidation. In addition, the FITD has a right to assist a member bank in distress as a preventive measure if the bank has prospects of recovery and the intervention is less expensive than the reimbursement of deposits in the event of a bank's eventual liquidation ("voluntary intervention").

The FIDT's voluntary intervention in support of Tercas—approved by the Bank of Italy—was aimed at covering Tercas' losses and facilitating its sale to Banca Popolare di Bari ("BPB"). These measures would avoid Tercas' compulsory administrative liquidation and the subsequent reimbursement of depositors by the FITD. The support consisted of a capital injection (€265 million) and guarantees (€65 million). The Commission found this support to be State aid.

The Court disagreed with the Commission. First, the Court found that the Commission failed to prove that public authorities exercised control upon the FITD's intervention. The FITD's governance structure does not include public authorities. Voluntary interventions pursue member banks' private interests and do not follow any obligations imposed by Italian law. The Bank of Italy only

[63] *Car Battery Recycling* (Case COMP/AT.40018), Commission decision of April 6, 2017.

[64] *Eco-Bat Technologies and Others v Commission* (T-361/17) EU:T:2018:173, para. 39.

[65] *Eco-Bat Technologies and Others v Commission* (Case C-312/18 P) EU:C:2019:235, para. 27. *See also Portugal v Commission* (Case C-337/16 P) EU:C:2017:381, para. 47.

[66] *See SP v Commission* (Case T-472/09 and T-55/10), EU:T:2014:1040, para. 46.

[67] *Italian Republic and Others v Commission (Joined Cases T-98/16, T-196/16 and T-198/16) ECLI:EU:T:2019:167; Aid to Banca Tercas (Case SA.39451)*, Commission decision of December 23, 2015.

exercised its prudential supervisory functions and did not have any power to force the FITD to intervene.

Second, the Court found that the Commission failed to show that the funds granted to Tercas were controlled by public authorities. In adopting the voluntary measure, the FIDT did not act under a public mandate. The measure originated from BPB's initial proposal, and was unanimously adopted by the FIDT's member banks. The funds granted to Tercas were provided *ad hoc* by the FITD's member banks and in their sole interest.

The judgment may have important implications for the management of bank bail-outs. DGS' voluntary support measures may not fall within the scope of State aid rules if they are adopted by the DGS' member banks without any control from public authorities.

The ruling came after six other Italian regional banks, including Banca Etruria, had been put into costly and complex resolution procedures. This resulted in losses for approximately 200,000 shareholders and bondholders. This outcome could have been avoided if the FITD funds had been used. Following the judgment, the Italian government sped up the process to finalize a reimbursement plan to compensate some savers, which it is discussing with the Commission to ensure its compliance with EU State aid rules.[68]

[68] *See* https://www.politico.eu/article/eu-commission-margrethe-vestager-italian-banking-fight-plays-into-euroskeptics-hands/.

Upcoming Events

Date	Conference	Organizer	Location
April 30	UK Competition Law 2019	Knect365	London
May 1	Antitrust in the Financial Sector: Hot Issues & Global Perspectives	Concurrences	New York
May 2	16th Annual BIICL International Mergers and Antitrust Conference	BIICL	London
May 6	Austrian State Aid Day (Österreichischer Beihilferechtstag 2019)	Austrian Society for European Law	Vienna
May 9	Competition Section annual conference 2019	The Law Society	London
May 14 – May 15	Advanced EU Competition Law	Knect365	London
May 15	Les enquêtes de concurrence	Concurrences + Mayer Brown	Paris
May 15	Sedona WG6 Membership-Building Event: The Tension between Data Protection Compliance and Investigatory Demands	The Sedona Conference	Brussels
May 15 – May 16	2019 Antitrust and Competition Conference - Digital Platforms, markets, and democracy: a path forward	Stigler Center	Chicago
May 21	Competition Law Central & Eastern Europe	Knect365	Warsaw
May 21	Competition Law Challenges in the Financial Services Sector	Knect365	London

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