Perspectives

The EC Report on Competition Policy for 2018

By Anna Morfey
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On 15 July, the European Commission (EC) published its Report on Competition Policy for 2018. The Report – which the EC produces annually, for the European Parliament, Council, European Economic and Social Committee, and the Committee of the Regions – covers the full range of competition policy issues, from antitrust to mergers, State aid to sectoral policy. It provides an overview of the most important policy and legislative initiatives, as well as decisions adopted by the European Commission in application of EU competition law during the previous year.

In this handy digest, Anna Morfey focuses on the key themes and trends the report offers on the antitrust aspects and adds her perspective.

Communication from the Commission
Commission Staff Working Paper

The 2018 Report marks the 60th anniversary of the entry into force of the Treaty on the European Economic Community, the foundation for today's European Union. It is clear that EU competition law has come a long way since those early days: the 2018 Report addresses topics such as the digital economy, and issues such as the decentralised application of antitrust powers across the Member States and extensive international cooperation, which would have been unthinkable in the early days of the European Economic Community.

Given the breadth of the Report, these comments focus on some of the key themes and trends relating to antitrust issues.

ENHANCING THE EFFECTIVENESS OF COMPETITION ENFORCEMENT

(a) Investigations

Much has been done in recent years to streamline the procedural aspects of competition cases. The 2018 Report points to updated guidance for companies regarding business secrets and other confidential information during antitrust proceedings, and to guidance and templates for the use of 'confidentiality rings' for access-to-file purposes. These supplement previous guidance from the EC over the past few years on topics such as best practices in data rooms, guidance on confidentiality claims for the process of preparing public versions of its decisions, and recommendations for the use of electronic document submissions.

> **The 2018 Report also highlights the additional incentives the EC has put in place recently to encourage companies to cooperate with investigations outside the scope of the Leniency Notice, which applies to (horizontal) cartels only.**

Following its first non-cartel case in which the EC rewarded cooperation in 2016 (in an Article 102 decision against ARA, in which the company received a 30% discount on the fine), in 2018 the EC concluded several more non-cartel antitrust cases on the basis of cooperation by the companies under investigation, including a series of decisions in July 2018 against Philips, Pioneer, Asus and Denon & Marantz for restricting the ability of their online retailers to set their own retail prices for a range of consumer electronics products, and a December 2018 decision against Guess for distribution agreements aimed at preventing EU consumers from shopping in other Member States by blocking retailers from advertising and selling cross-border. Alongside the *Guess* decision, the EC published informal guidance on how companies can cooperate in antitrust probes in exchange for lower fines.

Insofar as these guidance papers published by the EC, and the extension of cooperation discounts offered outside the cartel context, serve to incentivise infringing companies to cooperate with the EC and streamline the investigation process – which in antitrust cases can last several years – these are to be welcomed. Certainly the EC appears to see the value in offering reductions in fine, having extended them from the initial cartel-only Leniency Notice of the 1990s, to the Settlement Notice (of 2008), and now more broadly.

(b) Effectiveness of Member States' competition authorities

On 11 December 2018, the 'ECN+ Directive' was adopted by the European Parliament and Council. The Directive is intended to empower Member States' competition authorities to be more effective enforcers of EU competition rules in the field of antitrust, by ensuring that when applying the same legal provisions – the EU antitrust rules – national competition authorities (NCAs) have the effective enforcement tools and the resources necessary to detect and sanction companies that break EU competition rules. It is also intended to ensure that NCAs can take their decisions in full independence, based on the facts and the law.

The Directive provides for NCAs to act independently when enforcing EU antitrust rules and work in a fully impartial manner; have the necessary financial and human resources to do their work; have all the powers needed to gather relevant evidence; have adequate tools to impose proportionate and deterrent sanctions for breaches of EU antitrust rules; and have coordinated leniency programmes which encourage companies to come forward with evidence of illegal cartels.

> **According to the EC, since 2004, it and the NCAs have adopted over 1000 antitrust decisions, of which over 85% have been taken by NCAs (in the period 2004-2014).**

It is therefore crucial to the effective enforcement of EU competition law that the NCAs have the tools and resource they need to perform their function. The Directive must be transposed into national law by 4 February 2021, and its implementation and impact will no doubt be watched closely.

(c) Fighting cartels

The 2018 Report highlights the introduction of a new whistleblower tool, and re-caps on the use of the settlement procedure in cartel cases:

The EC recently set up an 'Anonymous Whistleblower Tool', aimed at making it easier for individuals with insider knowledge of cartel conduct or other antitrust infringements to inform the EC via a two-way encrypted messaging system about anti-competitive behaviour, while maintaining their anonymity.

The Anonymous Whistleblower Tool has not, of course, yet led to any infringement decisions – and no doubt its use and effectiveness will be monitored carefully. Companies under investigation might be expected to raise concerns around how their rights of defence are impacted by this tool; and issues around anonymity of whistleblowers' identities in follow-on damages claims may also arise.

As regards the use of the settlement procedure in its enforcement activity against cartels: the settlement procedure was used in 75% of decisions adopted in 2018. Under a settlement, undertakings that have participated in a cartel acknowledge their participation in the infringement and their liability for it. A settlement allows the Commission to apply a simplified procedure and reduce the duration and costs of the investigation, while companies benefit from swifter decisions and a 10% reduction in fines.

Whereas the settlement procedure undoubtedly has benefits and procedural efficiencies from the EC's perspective, and benefits the settling parties insofar as they are able to negotiate a slimmed-down infringement decision and obtain a fine reduction, questions do arise

as to how these benefits are balanced against the lack of transparency that results.

Settlement decisions are now concluded not just in plain vanilla cartel cases: they have been used in much more complex infringements (e.g. the various *Interest Rate Derivatives* decision and, more recently, the *FOREX* decision) and a settlement-like process has also been applied in non-cartel cases (the *Guess* decision). In circumstances where the description of the infringing conduct in settlement decisions is often skeletal, these decisions will not necessarily assist outsiders in understanding how the law has been applied, nor does it assist those who may have suffered harm as a result of the conduct to recover their losses.

The massive swing towards use of the settlement procedure should therefore be monitored closely if the right balance is to be struck between procedural efficiency and transparent decision-making.

(d) Sector focus: automotive

Although not billed in the 2018 Report as a 'sector focus' as such, the Report notes the numerous decisions taken in 2018 (and previous years) in connection with cartels in the automotive industry. Specifically, on 21 February 2018 the EC imposed a total of € 546 million in fines for cartel participation in three different cases concerning the maritime transport of cars and the supply of car parts: the EC fined maritime car carriers €395 million, suppliers of spark plugs €76 million, and suppliers of braking systems €75 million, for breaching the EU antitrust rules. All companies acknowledged their involvement in the cartels and agreed to settle the cases. All cases started with applications under the Leniency Notice.
The Report highlights that these cartel decisions are part of a series of major investigations into cartels in the automotive parts sector, and notes that the EC had already fined suppliers of automotive bearings, wire harnesses in cars, flexible foam used (inter alia) in car seats, parking heaters in cars and trucks, alternators and starters, thermal systems, lighting systems, and occupant safety systems – in decisions spanning the five year period from 2013 to 2018.

The 2018 Report also notes that, in September 2018, the EC opened an in-depth investigation into the possible collusion of car manufacturers regarding technological development of emission cleaning systems for passenger cars. The EC is investigating whether these companies agreed not to compete against each other on the development and roll-out of emission control systems of cars sold in the EEA.

(e) International cooperation

Although not flagged in the 2018 Report as such,

> **the Capacitors decision adopted on 21 March 2018 demonstrates that international cooperation among antitrust enforcers is alive and well.**

In that case, the EC fined eight producers of capacitators (Elna, Hitachi Chemical, Holy Stone, Matsuo, NEC Tokin, Nichicon, Nippon Chemi-Con and Rubycon) €254 million for participating in a 14-year long cartel for the supply of electrolytic capacitors. Capacitors are electrical components that store energy electrostatically in an electric field and are used in a wide variety of electric and electronic products. The cartel meetings and contacts took place mainly in Japan but the cartel conduct was implemented on a global scale, including in the EEA.
The Commission's investigation was part of a global effort. The competition authorities in Brazil, Japan, Singapore and Taiwan had already imposed fines prior to the EC's infringement decision; in October 2018, Nippon Chemi-Con was the eighth company to be fined

in the United States; and the South Korean competition authority followed suit in December 2018 by fining nine companies.

TACKLING NEW CHALLENGES IN THE DIGITAL ECONOMY

(a) A digital single market

The 2018 Report notes that, over the past six decades of European competition policy, markets have changed significantly.

> **In particular, the digitalisation of the economy has profoundly transformed consumer behaviour and how markets operate.**

A particular challenge concerns data, against the background of the growing importance of algorithms. Algorithms need data to learn: the greater the quantity of data, the more intelligent the algorithms.

Another point of interest is the increasing market power of digital platforms with a dual role, providing for a distribution channel for others while marketing their own products. To make the most of the potential and opportunities that digital technology brings, Europe needs a genuinely connected Digital Single Market. Competition policy is an integral part of creating a well-functioning Digital Single Market.

The 2018 Report notes that on 7 June 2018, as part of the Multiannual Financial Framework (MFF) for the period 2021-2027, the Commission adopted the proposal for the Single Market Programme. This includes the new Competition Programme, with an indicative budget of €140 million over the programme period. When adopted by the co-legislators, the Competition Programme will help the Commission to tackle new challenges for EU competition policy linked to the use of big data, algorithms and further fast-moving developments in an increasingly digital environment, as well as strengthen cooperation networks between Member States' authorities and the Commission to support fair competition in the Single Market.

In 2018, the Commission also started a reflection process how competition policy can best serve European consumers in a fast-changing world. To this end, the Commission appointed Professors Heike Schweitzer, Jacques Crémer and Assistant Professor Yves-Alexandre de Montjoye as Special Advisers on the future challenges of digitisation for competition policy. The Special Advisers' Report "Competition Policy for the Digital Era" was published on 4 April 2019.

In their report, the Special Advisers:

(i) identify what they see as the main specific features of digital markets;
(ii) (ii) provide their views on the goals of EU competition law in the digital era; and
(iii) (iii) discuss the application of competition rules to digital platforms and data, as well as the role of merger control in preserving competition and innovation.

(b) Antitrust enforcement in digital markets

While such reports are no doubt helpful to shape policy and frame the debate, arguably it is action rather than a 'reflection process' that is needed in response to the rapid impact of tech and big data on competition.

The EC emphasises the decisions it has taken in this sphere: on 18 July 2018 it took a decision finding that Google had abused its dominant position and fined the company €4.34 billion for anticompetitive restrictions it had imposed, since 2011, on mobile device

manufacturers and network operators to cement its dominant position in general internet search (the *Android* decision); and in 2018, the EC continued to investigate restrictions that Google had placed on the ability of certain third party websites to display search advertisements from Google's competitors, leading to a decision on 20 March 2019 in which the EC fined Google €1.49 billion for those restrictions (the *AdSense* decision). These two decisions followed a third decision adopted in 2017 in respect of Google's abuse of dominance in relation to comparison shopping services (the *Google Shopping* decision).

It is not just Google in the spotlight: on 24 January 2018, the Commission fined Qualcomm €997 million for abusing its market dominance in LTE baseband chipsets. Between 2011 and 2016, Qualcomm made significant payments to Apple on condition that it would exclusively use Qualcomm chipsets in its iPhone and iPad devices, in breach of EU antitrust rules. And although not referred to in the 2018 Report (it being a 2019 development), the EC is now considering using its powers to impose interim measures in the context of an investigation into Broadcom's practices – a move that will be closely watched, given the potential for such powers to be deployed across a range of antitrust investigations in the tech space.

(c) Developments in e-commerce

According to the Report, the rapidly growing online commerce market is now worth over €500 billion in Europe every year, with more than half of Europeans shopping online.

> **The Commission's e-commerce sector inquiry, the results of which the Commission published on 10 May 2017 as part of its Digital Single Market strategy, showed that resale-price related restrictions are by far the most widespread restrictions of competition in e-commerce markets. The EC has not been particularly active in its enforcement of competition law in the context of vertical restrictions in recent years, but in 2018 it issued a series of decisions fining companies for imposing online resale price restrictions in breach of EU competition laws.**

On 24 July 2018, the Commission took separate decisions fining Asus, Denon & Marantz, Pioneer and Philips a total of €111 million, for restricting the ability of their online retailers to set their own retail prices for widely used consumer electronics products such as kitchen appliances, notebooks and hi-fi products.

The four manufacturers intervened particularly with online retailers, who offered their products at low prices. If those retailers did not follow the prices requested by manufacturers, they would face sanctions such as blocking of supplies.

The infringing companies received discounts of between 40% and 50% off the fines imposed, as a result of their cooperation with the EC during the investigation.

On 17 December 2018, the Commission fined the clothing company Guess close to €40 million for anticompetitive agreements to block cross-border sales. Guess' distribution agreements tried to prevent EU consumers from shopping in other Member States by blocking retailers from advertising and selling cross-border. This allowed the company to maintain artificially high retail prices, in particular in Central and Eastern European countries. Guess benefited from a 50% discount off the fine as a result of its cooperation with the EC during the investigation.

> **The EC's willingness to intervene against vertical as well as horizontal restrictions of competition is to be welcomed, in particular in the world of e-commerce where many companies use pricing algorithms that automatically adapt their prices to those of competitors – meaning the effects of anti-competitive conduct will be felt across the market well beyond the infringing companies.**

Although not noted in the 2018 Report, the EC's work in the vertical/e-commerce space continues: in July 2019 it fined Sanrio €6.2 million for banning traders from selling licensed merchandise to other countries within the EEA. These decisions sit alongside the rules on unjustified 'geo-blocking', which were introduced in a Regulation adopted in December 2018.

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Chambers UK, 2019