

BRUSSELS REGULATORY BRIEF: FEBRUARY 2020

Date: 3 March 2020

European Regulatory / UK Regulatory Newsletter

By: Mélanie Bruneau, Giovanni Campi, Francesco Carloni, Antoine de Rohan Chabot, Francesca Lai, Nicolas Hipp, Alessandro Di Mario, Miguel A. Caramello Alvarez, Philip Torbøl

ANTITRUST AND COMPETITION

The Court of Justice of the EU rules provides clarity on the assessment of pay-for-delay agreements

The Court of Justice of the EU (*CJEU*) has backed the UK Competition and Markets Authority (*CMA*)'s decision to fine a pharmaceutical company for entering into financial deals with rivals to delay the introduction of generic versions of one of its drugs. In 2016, the *CMA* found that the pay-for-delay agreements had deprived the national health service of significant price reductions and imposed a fine of GBP 37.6 million on that pharmaceutical company. The latter appealed the *CMA* decision to the Competition Appeal Tribunal, which asked the *CJEU* to clarify the scope of the *CMA*'s theory of harm.

On 30 January 2020, the *CJEU* found that pay-for-delay agreements amount to an infringement of competition “by object” (i.e., a conduct that causes severe harm to competition) if the sole purpose of the payment by the patent holder is to prevent generics' market entry, unless the agreement is accompanied by sufficient proven pro-competitive effects. This confirms the findings of the General Court of the EU (the lower court of the EU) in two judgments of 2016 and 2018 regarding similar pay-for-delay agreements. In addition, the *CJEU* ruled that such agreements could constitute an abuse of dominant position if the patent holder is dominant on the market concerned and the agreement has exclusionary effects (i.e., deprive potential competitors of effective access to this market).

Over the last decade, pay-for-delay agreements have attracted significant scrutiny from the European Commission and the courts in Europe and heavy fines have been imposed on both originators and generics companies for engaging in pay-for-delay agreements. This judgement provides helpful clarification on the assessment of pay-for-delay agreements. For instance, generics companies must establish that they had a real and concrete possibility of access to the market. Also, it is necessary to ascertain whether customers were deprived of the benefits of entry into that market of potential competitors manufacturing their own medicine, which was delayed/prevented by the pay-for-delay agreement. The European Commission Executive Vice-President Margrethe Vestager, in charge of the competition enforcement at the EU level, welcomed the *CJEU* judgment saying “*the court ruling looks very promising on first reading, and in that of course we feel very much encouraged*”

because we find these cases important.”

The European Commission fines NBCUniversal EUR 14.3 million for restricting sales of film merchandise products

In June 2017, the European Commission (*Commission*) launched an antitrust investigation into certain licensing and distribution practices of NBCUniversal to assess whether those practices restricted traders from selling licensed merchandise freely within the EU Single Market, in violation of EU law.

The investigation has found that NBCUniversal's practices breached EU law, in particular Article 101 of the Treaty on the Functioning of the European Union, which prohibits agreements between companies that prevent, restrict, or distort competition. The litigious practices involved imposing on licensees a set of direct measures restricting online sales, out-of-territory sales, and sales beyond allocated customers or customer groups. NBCUniversal also obliged licensees not to supply their products to customers who could potentially sell them beyond the allocated territories, customers or customer groups, and implemented a series of measures to encourage, in an indirect way, compliance with the sales restrictions.

The Commission established that NBCUniversal's illegal practices, which lasted over 6.5 years (from 1 January 2013 until 25 September 2019) contributed to partition the EU Single Market and prevented licensees from across Europe to freely sell their products to the detriment of European consumers.

NBCUniversal fully cooperated with the Commission by acknowledging the infringement, providing additional evidence, and waiving certain procedural rights. In return, the Commission granted NBCUniversal a 30% fine reduction resulting in the total fine of EUR 14,327,000.

In addition to the aforementioned investigation concerning NBCUniversal, the Commission opened investigations into the licensing and distribution practices of two other companies following its 2017 e-commerce sector inquiry. Both companies, which were fined in 2019 for cross border sales restrictions, also benefited from the cooperation procedure. These decisions show that cross border sales and online sales restrictions remain a key concern for the Commission and further scrutiny is expected. Indeed, the Executive Vice-President of the Commission, Margrethe Vestager, commented that *“these three decisions send a clear message. The Commission will not tolerate restrictions, which undermine the EU single market.”*

The Commission opens an in-depth investigation into the proposed acquisition of GrandVision by EssilorLuxottica

The Commission's initial market investigation raised concerns that the transaction would create adverse effects on competition in the retail markets for optical products, such as higher prices and reduced choices for final consumers. These concerns relate, in particular, to the combination of EssilorLuxottica's strong market position in the wholesale supply of optical lenses and eyewear and GrandVision's leading presence in the retail distribution

of these products.

At this stage, under the Phase 2, the Commission will assess: (i) whether EssilorLuxottica will use its strong market presence to increase prices or degrade supply conditions for the competing retailers of GrandVision; (ii) the impact of combining the merging parties' activities in retail, especially in the countries and fields where they are currently competitors; and (iii) whether the merged entity could limit access of competing suppliers of lenses or eyewear to GrandVision stores.

The transaction was notified to the Commission on December 23, 2019. EssilorLuxottica and GrandVision have decided not to submit commitments. The Commission has 90 working days, until June 22, 2020, to reach a decision.

The decision to open an in-depth investigation comes two years after the Commission has cleared the proposed merger between the French Essilor International and the Italian Luxottica Group on March 1, 2018, concluding that the merger did not raise any competition concerns.

DIGITAL POLICY

The French Competition Authority issues proposals to regulate gatekeeper platforms

On 19 February 2020, the French Competition Authority (*FCA*) published its contribution ([in French](#)) to the debate to adapt competition rules in light of the challenges of the digital economy. Although the FCA lists various proposals for the evolution of competition rules (e.g., with respect to merger control rules), it mainly focuses on behaviors by operators of so-called gatekeeper platforms. In particular, the FCA proposes a definition of gatekeeper platforms and a list of practices these platforms cannot engage in.

The FCA proposes to define a gatekeeper platform as an undertaking, which provides online intermediation services with a view to exchange, buy or sell goods, content or services. Such a platform would hold a “structural market power” because of its size, financial capacity, community of users and/or the data it holds, enabling it to control the access or to significantly affect the functioning of the markets in which it operates. Such a platform is in relation to its competitors, its users and/or third companies that depend on the access to its services for their economic activity.

If adopted at EU and national level, this definition would allow the Commission and national competition authorities (*NCAs*) to enforce competition rules against the unilateral conducts of platforms even though they cannot be considered “dominant” in light of the current standard. It is worth mentioning that this definition is relatively similar to the definition of online intermediation services provided by the EU Platform-to-Business Regulation, which will apply from July 2020.

The FCA also suggests a non-exhaustive list of conducts, which would raise competition concerns due to the market power of such gatekeeper platforms:

- Discriminating against competitive products that make use of their services;
- Restricting access to markets on which they are not dominant;
- Using data on a dominated market to make access more difficult;
- Making interoperability of products or services more difficult;
- Making data portability more difficult; and
- Restricting the use of multihoming.

Beyond proposals to change the current legal framework, the FCA also proposes to improve the use of the notions and tools already into the hands of the Commission and the NCAs. The FCA notably suggests softening the legal standard for the “essential facility” theory to adapt it to platforms and using interim measures more often to prevent immediate harm to the digital economy.

In parallel to the FCA proposals, the Commission published a Communication setting out its strategy for “Shaping Europe's digital future” (see our alert on this [here](#)). The latter also suggests evaluating competition rules to ensure that they remain fit for purpose in the digital era.

EU to Enhance 5G Cybersecurity

As Europe is getting ready for the rollout of 5G networks across the continent, the Commission steps up efforts to provide an improved level of cybersecurity for the new networks and to ensure a coordinated approach between the EU Member States. In what it calls a ‘toolbox’ of risk mitigating measures, the Commission offers an overview of legal instruments and proposes measures to be taken across the EU.

The *toolbox* builds upon the EU Coordinated Risk Assessment on Cybersecurity in 5G Networks published in October 2019. The report identified the main threats and threat actors facing 5G networks, as well as their most sensitive assets and vulnerabilities. Overall, the report highlights the following security challenges that the toolbox is designed to address:

- Insufficient security measures (e.g., lack of access controls);
- The 5G supply chain (e.g., dependency on a single operator);
- The operation of networks (e.g., state interference, exploitation by organised crime);
- The interdependency between 5G networks and other critical infrastructure (e.g., links to the energy grid);
- End user service (e.g., exploitation of smart devices, privacy issues).

The measures comprised in the toolbox will contribute to the achievement of “important and mutually reinforcing security objectives” and address the aforementioned risks. Specifically, the measures aim at:

- Reinforcing security in the design, roll out, and operation of 5G networks;

- Raising security standards for the security of products and services related to 5G;
- Minimising risks stemming from individual suppliers;
- Avoiding or limiting dependency on a single supplier; and
- Promoting a diverse, competitive, and sustainable market for 5G equipment, while maintaining the EU's own capacity in that regard.

The Commission's toolbox will be implemented by the Member States or the Commission, in some cases jointly. To ensure that it “stands the test of time”, the proposal sets an ambitious timetable. Member States shall take “concrete, measurable steps” to implement the measures by 30 April 2020, and shall issue a first report on their implementation of the measures by 30 June 2020 to be then reviewed by the Commission by October 2020.

ECONOMIC AND FINANCIAL AFFAIRS

The ESMA sets out strategy on sustainable finance

Sustainable finance features high in the European regulatory agenda as a key driver to stimulate public and private sector investments in order to achieve the ambitious goals set by the European Green Deal.

European financial regulators and supervisors have a central role to play in the set-up, calibration, and operationalisation of the new sustainable finance rules.

Pursuant to its objectives “to protect the public interest by contributing to the short, medium, and long-term stability and effectiveness of the financial system, for the EU economy, its citizens and businesses”, the European Securities and Markets Authority (*ESMA*) published its [strategy](#) on sustainable finance on 6 February 2020. The strategy aims to ensure that the disclosure and integration of climate and wider sustainability risks is embedded across all ESMA activities.

To this end, ESMA will incorporate Environmental, Social, and Governance (*ESG*) factors across the Single Rulebook, Supervisory Convergence, and Direct Supervision, will include ESG related risks in its stress test scenarios and will monitor ESG-related market developments. More specifically, ESMA will:

- Complete the regulatory framework on transparency obligations via the Disclosures Regulation. In this regard, ESMA Chair, Steve Maijor, [announced](#) that ESMA will soon launch a public consultation on specific disclosure requirements;
- Work with the other European Supervisory Authorities to produce joint technical standards related to various pieces of EU legislation;
- Report on trends, risks, and vulnerabilities of sustainable finance by including indicators related to green bonds, ESG investing, and emission allowance trading;
- Use available data to analyse financial risks from climate change, including potentially running climate-related stress testing in different market segments;

- Ensure that the entities it supervises directly comply with the ESG guidelines, while being ready to accept any new supervisory mandates related to sustainable finance. In particular, ESMA will proceed with implementing its Guidelines on disclosure practices on credit ratings agencies;
- Pursue convergence of national supervisory practices on ESG factors with a focus on mitigating the risk of greenwashing, preventing mis-selling practices, and fostering transparency and reliability in the reporting of non-financial information;
- Engage with all relevant stakeholders and reinforce its cooperation with the International Organization of Securities Commission's Sustainable Finance Network; and
- Participate in the Platform on Sustainable Finance that will develop and maintain the European Union taxonomy and monitor capital flows to sustainable finance.

The ESMA's strategy is to be read in the context of the overall European sustainable finance agenda. The ESMA's key challenges will be around effectively addressing greenwashing and contributing to investor protection, when it is clear that sustainable finance is becoming the new “business as usual” for financial services.

KEY CONTACTS



MÉLANIE BRUNEAU
PARTNER

BRUSSELS
+32.2.336.1940
MELANIE.BRUNEAU@KLGATES.COM



GIOVANNI CAMPI
GOVERNMENT AFFAIRS ADVISOR

BRUSSELS
+32.2.336.1910
GIOVANNI.CAMPI@KLGATES.COM



FRANCESCO CARLONI
PARTNER

BRUSSELS, MILAN
+32.2.336.1908
FRANCESCO.CARLONI@KLGATES.COM



ANTOINE DE ROHAN CHABOT
COUNSEL

BRUSSELS
+32.2.336.1941
ANTOINE.DEROHANCHABOT@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.