Editorial

Is There Too Much Focus on Digital Markets?

Before logging off for the summer break, the European Commission typically announces the resolution of a ‘big’ antitrust case or, at the very least, the opening of a new high-profile investigation. This year the Commission made the headlines with a cartel decision. It fined three German carmakers €875 million for conspiring to limit the development of clean emission technology for diesel cars. Daimler, BMW, and the Volkswagen Group agreed that they would not use the full potential of this technology and that none of them would aim at reducing emissions above the minimum standard required by law.¹

Disregarding the technical details and jargon (‘selective catalytic reduction of nitrogen oxides’ - not really a standard topic at the dinner table), this cartel case is a sexy as they come. It is a ‘modern’ case that breaks new ground. This is the first time that the Commission concluded that technical cooperation, as opposed to price-fixing or market-sharing, amounts to cartel conduct. The story should also resonate with many consumers who can easily identify, in particular following the ‘Dieselgate’ scandal, the harm that such collusive practices may cause them. And, from a policy perspective, the case serves as a glorious example of how EU competition law enforcement can contribute to the Green Deal.

Shortly after the announcement of the cartel prohibition decision, DG Competition published a factsheet highlighting all its antitrust enforcement activity since the start of the Commission’s current mandate (December 2019).² The twofold message that day was clear: EU cartel enforcement is alive and kicking and also in also other antitrust matters the Commission is right on track to deliver on its mission!

But what is that mission, exactly?

Contrary to some national competition authorities (NCAs), the European Commission does not disclose how it intends to exercise its enforcement discretion in a very informative manner. For overall strategies and priorities, one needs to look for DG Competition’s Strategic Plan. In terms of enforcement action, the current version (2020-2024) mostly echoes Commission President Von der Leyen’s insistence on ‘strengthening competition enforcement in all sectors’ in support of the EU’s wider political ambitions, a mantra that is often repeated in speeches and press releases as well.³ The Strategic Plan

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1 European Commission, ‘Antitrust: Commission fines car manufacturers €875 million for restricting competition in emission cleaning for new diesel passenger cars’ (Press release, 8 July 2021) IP/21/3581 <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581> accessed 2 August 2021.

2 Commission, ‘Factsheet: Competition enforcement in antitrust and cartels’ (8 July 2021) <https://ec.europa.eu/competition-policy/competition-enforcement-antitrust-and-cartels_en> accessed 2 August 2021.

3 President von der Leyen’s mission letter to Margrethe Vestager (1 December 2019) <https://ec.europa.eu/commission/commissioners/sites/default/files/commissioner_mission_letters/mission-letter-margrethe-vestager_2019_en.pdf> accessed 2 August 2021.

does, however, signal that special attention will be paid to antitrust enforcement in digital markets (generally referred to as the e-commerce sector), the sector of Internet of Things for consumer-related products and services, the telecoms sector, the pharmaceutical and biotechnology sectors, and the insurance and financial services sector (in relation to data pooling). As usual, cartel enforcement will remain a key priority, both on an *ex officio* basis and through leniency applications.⁴ In comparison, the sectorial priorities mentioned in the previous Strategic Plan were a bit more diversified. For 2016-2020, the Commission contemplated direct antitrust enforcement action (other than cartels) in the following sectors: energy; e-commerce; telecoms; financial services; basic industries, manufacturing, and consumer goods; food/retail and agricultural; and transport (rail, maritime, and aviation).⁵ The annual management plans, which are supposed to set out more specific ambitions for the year ahead, are less helpful. For 2021, for instance, the plan repeats that the European Commission will 'pursue a rigorous cartel and antitrust enforcement in all sectors, including digital ones'. It then takes stock of all the ongoing investigations and presents those as the enforcement priorities for the coming year.⁶

When it comes to actual case selection, the Commission leaves its priority-setting process wrapped in mystery. A number of prioritisation criteria are set out in the 2004 Notice on the handling of antitrust complaints, but these are not well-defined and could lend themselves to diametrically opposite conclusions. The list of criteria is also non-exhaustive.⁷ Although this ensures (almost) unfettered discretion, it at the same time minimises transparency, predictability, and external scrutiny. The European Court of Auditors recently identified this as a shortcoming. It recommended the Commission to both clarify and objectify its internal priority-setting methodology by using weighted criteria. The Commission rejected that idea. It considers that its prioritisation criteria are not suited for mathematical treatment, as they include parameters like precedent value and whether antitrust enforcement (and if so at the EU or national level) is the most effective answer.⁸ Fair enough. But the plea for improved transparency should not have been so readily dismissed.

In the past five years, between 1 July 2016 and 1 July 2021, the European Commission initiated 28 new (non-cartel) antitrust proceedings.⁹ Table 1 below presents an overview. In terms of matching the sectors identified in the Strategic Plan, the list ticks of most of the boxes. The distribution of the cases among these different priority areas is remarkably uneven, however.

4 Directorate-General for Competition, 'Strategic Plan 2020-2024' (2 December 2020) Ares(2020)5180558 <https://ec.europa.eu/info/system/files/comp_sp_2020_2024_en.pdf> accessed 2 August 2021.

5 Directorate-General for Competition, 'Strategic Plan 2016-2020' (20 April 2017) Ares(2017)2034104 <https://ec.europa.eu/info/sites/default/files/comp_sp_2016_2020_en.pdf> accessed 2 August 2021.

6 Directorate-General for Competition, 'Management Plan 2021' (1 February 2021) Ares(2021)847979 <https://ec.europa.eu/info/system/files/management-plan-comp-2021_en.pdf> accessed 2 August 2021.

7 Commission, Notice on the handling of complaints by the Commission under Articles 8 and 82 of the EC Treaty [2004] OJ C 101/65.

8 European Court of Auditors, 'Special Report No 24/2020: The Commission's EU merger control and antitrust proceedings: a need to scale up market oversight' (19 November 2020) <https://www.eca.europa.eu/Lists/ECADocuments/SR20_24/SR_Competition_policy_EN.pdf> accessed 2 August 2021.

9 Some of these investigations concerned a single proceeding against various undertakings; they are only counted as one.

Table 1. EU antitrust proceedings opened between July 2016 and July 2021

Date	Case no	Case title	Sector
2021			
22/06/2021	AT.40670	Google ad tech	E-commerce
04/06/2021	AT.40684	Facebook leveraging	E-commerce
30/03/2021	AT.40700	Intraday trading of wholesale electricity	Energy
16/03/2021	AT.40278	Greek wholesale electricity market	Energy
04/03/2021	AT.40588	Teva blockbuster multiple sclerosis medicine	Pharma
28/01/2021	AT.40632	Mondelez trade restrictions	Food
2020			
10/11/2021	AT.40703	Amazon – Buy Box	E-commerce
16/06/2021	AT.40716	Apple – App Store Practices	E-commerce
16/06/2021	AT.40652	Apple – App Store Practices (e-books/audiobooks)	E-commerce
16/06/2021	AT.40437	Apple – App Store Practices (music streaming)	E-commerce
16/06/2021	AT.40452	Apple – Mobile Payments	Financial/insurance
2019			
14/07/2019	AT.40462	Amazon Marketplace	E-commerce

More than half of the newly opened investigations (15 out of 28, or 54%) concerned digital markets (e-commerce). The energy sector is also relatively prominent on the enforcement agenda: the Commission opened five formal investigations in this area (18%). The other eight antitrust proceedings that were initiated in the last five years are spread evenly across six other key sectors. The pharmaceutical sector and the insurance and financial services sector each have been the target of two new investigations (7%). A single investigation was initiated in the food sector, the telecoms sector, the manufacturing sector (semiconductors), and the transport sector (4%).¹⁰ If we would only consider the antitrust investigations that were opened since the mandate of the current Commission started, the same overall picture emerges: an overwhelming focus on the digital economy (6 out of 11) and, to a lesser extent, on energy (2 out of 11).

¹⁰ The one investigation in the transport sector, concerning airline ticket distribution systems (Cases AT.40617 and AT. 40618) was closed without further action on 19 July 2021.

26/06/2019	AT.40608	Broadcom	Manufacturing
14/05/2019	AT.40511	Insurance Ireland: Insurance claims database and conditions of access	Financial/insurance
2018			
23/11/2018	AT.40618 AT.40617	Airline ticket distribution (Sabre) Airline ticket distribution (Amadeus)	Transport
21/06/2018	AT.40416	LNG Supply to Europe	Energy
19/03/2018	AT.40461	DE/DK Interconnector	Energy
2017			
14/06/2017	AT.40436	Ancillary Sports Merchandise	E-commerce
14/06/2017	AT.40433	Film Merchandise	E-commerce
14/06/2017	AT.40432	Character Merchandise	E-commerce
06/06/2017	AT.40428	Guess	E-commerce
01/06/2017	AT.40335	Romanian gas interconnectors	Energy
15/05/2017	AT.40394	Aspen	Pharma
02/02/2017	AT.40528 AT.40527 AT.40526 AT.40525 AT.40524	Holiday Pricing (Melia) Holiday Pricing (Kuoni) Holiday Pricing (Thomas Cook) Holiday Pricing (TUI) Holiday Pricing (REWE/DER)	E-commerce
02/02/2017	AT.40496 AT.40465 AT.40182 AT.20181	Vertical restraints (Denon & Marantz) Vertical restraints (Asus) Vertical restraints (Pioneer) Vertical restraints (Philips)	E-commerce
02/02/2017	AT.40424 AT.40422 AT.40420 AT.40414 AT.40413	Video Games (Capcom) Video Games (Bandai Namco) Video Games (Zenimax) Video Games (Koch Media) Video Games (Focus Home)	E-commerce
25/10/2016	AT.40305	Network sharing – Czech Republic	Telecom
14/07/2016	AT.40411	Google Search (AdSense)	E-commerce

Source: compiled by the author.

Throughout this five-year period, and in particular in the wake of the e-commerce sector inquiry, the digital economy has been a key priority for the Commission. But so

have been the other six more traditional sectors, whose weight in the overall EU economy is much more significant. It is quite telling that only four companies – Google, Amazon, Facebook, and Apple (the GAFA-companies) – are the subject of about one third of the antitrust investigations initiated at the EU level in the last five years (9 out of 28).

An easy explanation for this uneven and patchy distribution of cases is difficult to find. Why is, in relative terms, the focus on enforcement in digital markets so overpowering? Perhaps it is all about precedent value. Digital markets pose significant challenges, so certainly there is a need to develop the law and give guidance to the various NCAs (who are also vigorously pursuing enforcement action against the GAFA-companies). Perhaps a richer body of relevant decisional practice at the EU level will soon be needed for the enforcement of the Digital Markets Act. Perhaps there are many other good reasons for allocating so many scarce resources to a single priority. Reasons that could very well offset any risk that more traditional businesses (outside but even within the confines of the other ‘priority’ sectors) will get the impression that they effectively operate below the Commission’s radar. The point raised here is that it would be valuable to know how and why these particular cases are being selected. Which priority-setting criteria are being used? More transparency would not only bolster the legitimacy of the Commission’s exercise of its enforcement discretion. It would also facilitate closer coordination with the NCAs, which is all the more important given that reallocation of cases between the NCAs and the Commission is so exceptional.

Also in relation to cartel enforcement, that other top priority, questions about case selection also arise, albeit of a very different nature.

The European Commission depends almost exclusively on leniency applications for detecting cartels. Of all the cartels investigated over a period spanning more than a decade, only two resulted from the Commission’s own detection work.¹¹ The problem is that the number of leniency applications has been in sharp decline in recent years – a trend, also observed at the national level – that is frequently attributed to the growing risk of more painful follow-on damages claims. In 2017, the Commission launched a new anonymous whistleblowing tool, but despite initial high hopes,¹² this has not yet resulted in the opening of any formal investigation. Consequently, cartel enforcement action has started dwindling. With less cartels being detected, there is less room for selecting the ‘right’ cases to pursue. Throughout the last five years, the Commission closed more investigations (three) without further action than it has opened new proceedings (one in 2019 and one in 2018).¹³

11 Case AT.39780 (Envelopes) and Case AT.39952 (Power exchanges).

12 See eg, J Laitenberger, ‘Enforcing EU competition law – recent developments and a glance to the future’ (Speech delivered at the CMS EU Competition Conference, Brussels, 19 October 2017) <https://ec.europa.eu/competition/speeches/text/sp2017_18_en.pdf> accessed 2 August 2021.

13 Case AT.40466 (Alliance Casino & Intermarché) and Case AT.40178 (Car emissions).

In its recent audit report, the European Court of Auditors urged the Commission to find a better balance between pro-active and reactive cartel detection tools.¹⁴ This makes sense. An over-reliance on leniency applications and the domino effect of existing probes will not deliver vigorous enforcement action across a broad range of sectors. The multiple cartel decisions that we have seen in relation to car parts and the financial sector exemplify how this approach mostly uncovers clusters of cartels in sectors that are already of active interest.

Some measures have already been put in place. In 2019, DG Competition set up a special unit dedicated to pro-active intelligence gathering and improved investigative data analysis. And the new long-term EU budget (2021-2027) includes for the first time a programme to support EU competition policy, which makes it possible to make further investments in state-of-the-art IT tools, infrastructure, and expertise. Hopefully this will enhance the Commission's capabilities to monitor markets and, at least in the longer term, complement leniency cases with independent *ex officio* investigations. Because also in this area, prudent case selection is key to making the threat of enforcement action credible and, hence, effective.

Challenges and obstacles to effective competition law enforcement action are also a central theme of this issue of CoRe. In 'Killer Acquisitions and Other Forms of Anti-competitive Collaborations', Björn Lundqvist addresses the issue of (under-)enforcement of competition law in reference to killer acquisitions (and strategic alliances more broadly), particularly in the pharmaceutical sector. This first part of a two-part article analyses, both from an innovation economics and an empirical perspective, the applicability of various theories of harm. He finds that pharma mergers would generally benefit from heightened competition law scrutiny, setting the scene for the exploration of how this can be achieved in the upcoming, second part. And in 'Beyond the Policy Debate: How to Quantify Sustainability Benefits in Competition Cases', Adina Claiici and Jasper Lutz examine how well-established tools and methodologies from environmental economics can be used to quantify environmental and sustainability benefits and thus to integrate sustainability considerations in competition cases.

A special edition of our reports section is dedicated to the implementation of the so-called ECN+ Directive. Directive (EU) 2019/1, which aims to empower NCAs to be more effective enforcers of the EU antitrust rules, had to be transposed into national law by February 2021.¹⁵ Now, six months later, we wanted take stock of that transposition process. The result is the very first comprehensive and up-to-date overview of the (anticipated) implementation of the ECN+ Directive, with no less than 23 national reports covering all the Member States that have transposed it or at least started the legislative process to that effect. We are very grateful to all our country correspondents and other national experts that contributed to this exciting project.

14 European Court of Auditors (n 8) 19-20.

15 Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market [2019] OJ L 11/3.

In the case note section you will find a commentary on the Court of Justice's judgment in *Groupe Canal + v Commission* (Case C-132/19), annulling for the first time a Commission commitment decision (adopted under Article 9 of Regulation 1/2003). Finally, this issue includes with a book review of Professor Ariel Ezrachi's *Competition and Antitrust Law: A Very Short Introduction* and the most read post in the last 6 months from our companion CoRe Blog - 'Corona and EU economic law: Free movement of goods' by Wouter Devroe and Caranina Colpaert.

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