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"NEW YEAR SPECIAL": EUROPEAN COMMISSION'S DG COMP SETS OUT ITS STALL AT THE OECD'S GLOBAL COMPETITION FORUM

To Our Clients and Friends:

Reviving an old tradition of the European Commission disrupting competition lawyers' New Year breaks with the portents of increased intervention or narrower interpretation of certain antitrust doctrines than would otherwise be expected, the Commission's "New Year Special" came in the form of eight (8) papers which it delivered at the OECD Competition Forum held in December 2018.

The contributions made by the European Commission's DG Competition to the OECD Competition Forum provide an insight into the key positions covering its implementation policy in the immediate future in relation to a range of both substantive and procedural issues.^[1]

I. Procedural Issues

The Commission set forth its position in four (4) key areas of EU Competition law procedure, namely:

- the treatment of legally privileged information in competition proceedings;
- the effects of regional competition agreements;
- investigative powers in practice (*i.e.*, unannounced inspections in the digital age and respect for "due process" in relation to the gathering of evidence); and
- investigative powers, embodied in Requests for Information.

1. The treatment of legally privileged information in competition proceedings

The Commission summarised the EU Courts' views on Legal Professional Privilege ("LPP") , providing insight into how it interprets the Court's rulings in practice. As it has only been under European case-law that the concept of LPP has been recognised in the EU, it is case-law that has shaped its contours.

- The guiding light in the case-law is still provided by the Court of Justice's ruling *AM & S v Commission* in 1982, with the Court describing the concept as an "*essential corollary to the full exercise of the rights of defence*".^[2]
- The Court identified two conditions in order for LPP to apply at the EU level, namely: (1) the communication must be made for the purpose and in the interest of the client's defence in

competition proceedings; and (2) the principle only applies to communications with independent lawyers (*i.e.*, not in-house lawyers) that are registered with a Bar in one of the EU Member States.

- The protection extends to internal notes that report the content of privileged communications and documents that are exclusively drawn up for the purpose of seeking legal advice. However, the Commission notes that it will not consider communications between a company and third parties' lawyers or (normally) other professional advisers (such as patent attorneys) to be privileged. Nor does LPP, in the Commission's view, attach to communications between a lawyer and a firm if they are found at the premises of another firm.^[3] Even more controversially, the Commission also expresses the view that LPP should also not attach to communications between lawyers, nor to attachments to privileged documents.
- In the Commission's view, it is for the firm concerned to justify any claims of LPP. If such a claim is made during an on-site inspection, the Commission has the right to take a cursory look to verify the reasons being invoked to justify such a claim. In turn, the firm may refuse to grant a cursory look if this would reveal privileged content. However, if the reasons provided are insufficient, the Commission considers that it is able to take a cursory look (and even impose fines if the claim is found to be unjustified).
- The Commission can also resort to the "sealed envelope procedure", which allows it to seize documents and to address claims for privilege at a later stage. The parties concerned in any dispute as to the scope of the Privilege can also involve the Hearing Officer, who acts as an independent adjudicating third party in potential disputes.^[4] During inspections, the Commission can make electronic copies of documents, which allows it to exclude or hold separate privileged documents. The Commission also has the right to seize so-called "family documents" (*i.e.*, documents belonging to the same line of communication).
- In the United States, LPP extends to in-house counsel. However when the Commission requests documents physically situated in the United States, it is European Union law that applies. There will be occasions where this may conflict with a US firm's obligation not to disclose documents. It is in these cases that the Commission on occasion opts to send formal requests (instead of non-binding simple requests) to the party in question, so that US firms can comply with the obligation without waiving their protection in US legal proceedings.
- As the Commission is increasingly demanding the production of documents in complex merger proceedings, it is currently working on "best practice guidelines" on information requests under the EU Merger Regulation ("EUMR").

Comment: While the Commission's contribution is couched in terms that it is merely reflecting existing case-law, practitioners will be concerned that the Commission is stretching that jurisprudence to unforeseen limits. The two Commission propositions which will cause most disquiet are that: (1) (potentially privileged) communications found at the premises of *another* undertaking; and that (2) communications *between* lawyers, fall outside LPP. With respect, the citation of the *Pendropil* Case in support of this proposition does not justify the Commission's claims that LPP is lost in these two above-

listed circumstances.^[5] That case concerned communications between external counsel relating to the settlement of a commercial dispute, which were later obtained by the Commission pursuant to a dawn raid at the premises of one of the parties to that dispute. Because the documents in question were not generated with EU proceedings in mind, the relevance of the *Pendropil* Case is arguably not germane to the situations considered by the Commission.

Following the instructions of their respective clients, external lawyers may exchange communications in relation to EC investigations in a number of circumstances. For example, in merger cases, data and arguments may be exchanged on a counsel-to-counsel basis for the purposes of responding to RFIs or for the preparation of notifications. Another example can be found in relation to communications for the purpose of preparing a common defence.

There are legitimate public policy reasons why LPP should extend to communications between external lawyers, as well as to communications between firms and lawyers found at another firm's premises. The public policy reasons why such communications between external lawyers should benefit from LPP include: the exercise of legitimate rights of defence; the balancing of the Commission's ability to review evidence from more than one party, consistent with "equality of arms" doctrine; and the effective management of resources by enabling submissions to be made in an efficient manner. It is, therefore, important that the Commission's submission not be read as calling into question the applicability of LPP to joint defence communications.

The public policy mischief created by such an erosion of the traditional notion of LPP, which one can identify in the legal traditions of most EU Member States, supports the view that the Commission would be well advised to clarify its position further.

2. Regional competition agreements

The Commission sums up its experience of 14 years of cooperation with National Competition Authorities ("NCAs") within the European Competition Network ("ECN"), the network of cooperation under the de-centralised system of enforcement of European competition law that was introduced alongside Procedural Regulation 1/2003. Moreover, the Commission explains how the soon-to-be-adopted *ECN+ Directive* will deepen existing cooperation and will further harmonise the institutional framework of the national competition enforcement systems and the rules on leniency programmes.^[6] The new Directive will, *inter alia*, make it easier for applicants to obtain a leniency marker across multiple jurisdictions. The key points assessed in the paper include:

- Regulation 1/2003 provides that the Commission and the NCAs of the Member States should allocate cases to the NCA which is best placed to deal with the case. In cases where three or more Member States are involved, the Commission is often deemed to be best placed to hear a case. According to Regulation 1/2003, NCAs can also carry out inspections on behalf of one another, without the need for each of them to open proceedings, and subsequently to exchange information and rely upon it as evidence.
- Since the introduction of the ECN in May 2004, the affected Member State NCAs have informed the Commission and their fellow NCAs of decisions to open proceedings in 1031 cases. This

indicates that more than 85% of all decisions adopted within the framework of public enforcement of European competition law are now being adopted by Member State NCAs.

- In its 2014 paper on "Ten years of cooperation within the ECN", the Commission had singled out three issues where improvements in the current system of cooperation were necessary: (1) to guarantee the independence of NCAs, which presupposed the existence of sufficient resources; (2) to ensure that they have a set of effective investigative and decision-making powers at their disposal; and (3) that the NCAs in all Member States have powers to impose effective fines and that they have functioning leniency programmes in place. These goals will be reached by the *ECN+ Directive* passed in 2018, further to which the Member States will have a two-year timeframe for implementation.
- Upon implementation, all Member States will have a fining system according to which the NCA or a civil court can impose a fine, and also a leniency programme modelled after the "soft-law" ECN Model Leniency Programme, whereby firms can obtain reductions in fines up to full immunity in exchange for "blowing the whistle" on a cartel. The harmonisation of leniency programmes includes immunity for employees of the leniency applicant. The *ECN+ Directive* will also facilitate the securing of companies' leniency markers when they consider whether to apply for leniency in multiple jurisdictions, as cases may be re-allocated to other jurisdictions after the leniency application has been made.

Comment: The Commission's contribution on regional competition agreements contains few novelties and surprises. The Commission has previously published its findings and experiences with the ECN in various papers. It has also widely promoted and thoroughly clarified its Proposal for the *ECN+ Directive*. It can be expected that some time will pass for the additional support directed at less active National Competition Systems, as provided in the Proposal, to bear fruit, even beyond the two-year implementation period established under the Directive. Ever since the decentralisation of competition policy enforcement brought about by Regulation 1/2003, questions have been raised about whether all Member State NCAs had sufficient resources and independence to ensure that they could exercise effective decision-making.

Whilst it is hoped that the measures foreseen will effectively assist NCAs in this regard, the Commission's goal of supporting the independence of NCAs – while no doubt well-intentioned – might flounder in light of: (1) the susceptibility of certain NCAs to political interference in certain Member States, especially smaller ones, when prosecutions are lodged against large local vested interests; (2) the rise in consumer protection-style offences and "public interest" reviews introduced at Member State level, which are more vulnerable to political enforcement priorities; and (3) the limited financial resources available to certain NCAs to hire the right calibre of in-house attorneys and economists required in complex investigations against large incumbent operators or multinationals.

In contrast, the move towards a more harmonised system of leniency programmes across different Member States will likely have a more short-term effect, and its benefits to companies will become evident more quickly. It constitutes a welcome simplification in the coordination of leniency applications where numerous EU jurisdictions are affected by the same commercial activity.

3. Investigative powers in practice – unannounced inspections in the digital age and respect for "due process" in relation to evidence

The Commission has explained its practice in relation to on-site inspections, commonly known as "dawn raids", at a time when the bulk of a firm's data is stored digitally. The Commission has addressed several topics, including the challenges it faces with digitally-stored data (*e.g.*, access to data stored off-site) and its challenges in the gathering of physical documents. For example:

- With respect to digitally-stored data, the Commission sometimes faces problems in accessing documents that are archived or saved in back-ups; this is because the necessary hardware is no longer available. By contrast, identifying the location of servers or accessing third-party servers are issues that have not yet emerged as problematic. Accordingly, no legal challenges have been brought to date in relation to the so-called "access principle". According to this principle, the Commission inspectors have the right to access all information that is accessible to the entity which is subject to the inspection.[7]
- In general, the Commission takes copies of all pieces of information that are material to the investigation. The scope of the investigation is set out in the Decision authorising the inspection, which is presented to the investigated party upon arrival at its premises. Documents to which LPP is attached cannot be taken from the premises when it is not possible to assess on-site whether these documents enjoy such privileged status. The Commission will apply its "sealed envelope procedure" in these cases.[8] The documents will then be examined at the Commission's premises in the presence of a company representative and, possibly, be added to the file (*i.e.*, under the process of "continued inspection").
- In carrying out inspections, the Commission relies on its own internal forensic IT team. It also uses forensic software, which is used to restore deleted data. The Commission reviews digital data on a central review interaction platform, which facilitates search queries made with respect to the data set. For the conduct of the search, the Commission relies primarily on keywords. Those keywords are not shared with the firms being investigated. The Commission also examines data irrespective of the storage medium in which it is stored. This includes personal electronic devices such as phones (but only insofar as they contain data "related to the business").
- As regards firms' procedural rights, they may bring an action for annulment against the Decision which authorises the inspection. However, this action does not have a suspensory effect. Alleged infringements of procedural rights that allegedly occur during the inspection, on the other hand, can only be challenged alongside the final Decision which authorises the inspection. Where the investigation is closed without a Decision having been adopted, the investigated company can bring an extra-contractual liability claim against the Commission.
- Another essential procedural right relates to access to the file. After the Commission sends out a Statement of Objections, the addressee is entitled to obtain full access to the Commission's file against it. The right to access to the file does not extend to internal documents of the Commission (this constitutes an absolute exception to the rule), nor does it necessarily relate to business

secrets of other undertakings (where a balancing exercise has to be conducted against the business secret owner's interests).

Comment: With this paper, the Commission provides some useful background on the procedures it follows during on-site inspections (commonly referred to as "dawn raids"). Although this investigative tool has been in place for a while, the seizure of digital documents – which make up the largest part of business communications today – presents new challenges. This phenomenon makes it increasingly necessary to have a number of IT experts on-site. The Commission may often risk being accused of conducting so-called "fishing expeditions" in those cases where the search terms it uses are not sufficiently precise. On the other hand, as regards legal advisers who are present during the inspection, the Commission's access to a myriad of digital documents stored in the Cloud also presents its challenges, as finding the balance between protecting a client's rights and not obstructing the Commission's information-gathering exercise is often difficult.

4. Investigative powers embodied in Requests for Information

There is a general trend in European competition law enforcement that requires companies to provide increasing volumes of data for the purposes of the Commission's analysis. In its paper on its investigative powers, the Commission summarises its own best practices regarding Requests for Information ('RFI') as well as the relevant case-law of the European courts having an impact on this issue. These investigative powers relate both to the EU Merger Regulation and the general Procedural Regulation 1/2003, which covers behavioural issues such as cartel investigations and allegations of abusive behaviour.

- When investigating an alleged infringement of Article 101 and 102 TFEU, the Commission can carry out inspections, conduct interviews, and issue RFIs. In the context of merger control, the Commission can also request information through RFIs. This is an essential fact-finding tool, providing the Commission with the possibility to gather information quickly. RFIs can be addressed to the parties, as well as to third parties such as customers, competitors or trade associations. RFIs cannot be sent to persons to answer in their individual capacities.
- RFIs can be issued in the form of a simple request, which means that there is no legal obligation to respond.^[9] However, if a company chooses to reply, it must provide correct and complete information (providing wrong or incomplete information may result in fines). Alternatively, the Commission can adopt a Decision which embodies the RFI, thereby rendering the RFI legally binding upon the addressee. In this situation, the addressee must reply.
- In each case, however, protection is offered to individuals against self-incrimination (but this right against self-incrimination does *not* extend to documents in the possession of the addressee).^[10] The Commission can also impose periodic penalty payments in order to secure compliance with the request.^[11] Both kinds of requests must set forth the legal basis for, and the purpose of, the request. In general, all information gathered can only be used for the purpose for which it was sought.

- In the case of non-compliance with an RFI (where implemented by a Decision) within the prescribed timeframe or, in the case of the provision of false or misleading information (by simple RFI as well as by Decision), the Commission may impose a fine not exceeding 1% of the total turnover of the addressee's corporate group generated in the preceding business year.^[12]
- Where false or misleading information has been provided as part of a Phase I clearance, the Commission can revoke that Decision. Where there has been a failure to provide requested information, it can result in a "stop the clock" situation for the proceedings until the company complies fully with the request.

Comment: This paper is arguably the least contentious of the Commission's positions, given that most of the subject-matter is well understood by firms and their legal advisors. However, the Commission's submission, while presenting a welcome refresher on aspects of its RFI practice, does very little to explain how the Commission intends to use RFIs in the future. Over time, RFIs have developed from relatively simple requests to answer specific questions to instruments that are used to extract vast amounts of data, including entire sets of internal business communications in both cartel and merger proceedings.

II. Substantive issues

When addressing key emerging issues in the substantive review, the Commission addressed four (4) key issues, namely:

- excessive pricing in pharmaceutical markets;
- personalised pricing in the digital era;
- the suspensory effects of merger notifications and "gun-jumping" practices; and
- quality considerations in the zero-price economy.

1. Excessive pricing in pharmaceutical markets

The actionability of excessive pricing allegations continues to be a controversial topic in European competition law. In its paper on the topic to the OECD, the Commission explains its powers of intervention in cases where dominant firms charge excessive prices to their customers, and considers the EU case-law on the subject and precedents developed by NCAs. In doing so, the Commission presents its views on the economic challenges presented by pharmaceutical markets. It justifies its recent investigative activity in the sector, setting out the types of economic indicators which will generally prompt the Commission to act. The key themes which emerge are as follows:

- Article 102(a) TFEU prohibits dominant firms from abusing their market power by "*imposing unfair purchase or selling prices or other unfair trading conditions*". The Commission reiterates that because excessive prices directly harm consumers, they are a phenomenon that should be addressed by Competition Authorities. The Commission notes, however, that the charging of

high prices is something that generally can be left to market forces to address, as they are often a signal for other companies to enter the market.

- Under EU case-law, prices are excessive when they have "*no reasonable relation to the economic value of the product*". This test is fulfilled if the profit margin (difference between cost and price) is excessive. If the latter is the case, the price must also be "*unfair in itself or when compared to competing products*".
- More recently, the Court of Justice accepted that a comparison could be made with prices of similar products or services in other Member States, insofar as the criteria for the selection are objective in character, appropriate and verifiable. If the comparison between the price of the dominant firm and the price of the compared product reflect an appreciable difference, this normally indicates an abuse of a dominant position. The dominant firm can defend itself by demonstrating that the price is not in fact unfair but actually reflects a level of innovation or supports the investment necessary to develop the product.
- Recent price spikes in off-patent pharmaceuticals have meant that the issue of excessive pricing has been put back on the enforcement agenda of Competition Authorities. Some of these markets' features render them particularly susceptible to excessive pricing. One of these features is the low elasticity of demand following price rises, which means that price rises have very little effect on the amount of goods being purchased. Accordingly, firms can raise prices and do not have to fear that their products will no longer be bought. This is because neither patients taking the medication in question nor doctors prescribing it have to bear the cost of the medication. Another feature is the bargaining position of health care institutions, which is reduced because of the relatively limited choice of products and public pressure to have these products made available.
- The Commission also looks at the affected phases of the relevant pharmaceutical products' lifecycle. There are, generally, three phases: the first phase requires significant R&D, which can take up to ten years and which involves considerable costs and risk; the second phase involves all regulatory approvals being obtained for the product to be sold (this is also the point at which the medication usually enjoys patent protection from generic drugs); and once the IP rights expire, the product enters into the third and final phase, the off-patent phase.
- It is in the off-patent phase where normally one would expect to witness generics producers entering the market. Indeed, price falls of up to 90% can be realized in this period. However, in some cases, there is no market entry from generics, and prices remain high or even rise above the previous level. It is in these latter instances where the Commission and other Competition Authorities should be prepared to investigate high prices.
- Between 2016 and 2018, NCAs in the UK^[13], Italy^[14] and Denmark^[15] have held that pharmaceutical companies had charged excessive prices in particular circumstances. All of these Decisions are the subject of appeals.

- In 2017, the Commission opened its own investigation into the allegedly excessive pricing of life-saving cancer medicines by Aspen Pharma.[16]

Comment: When the Commission comments on contentions topics such as excessive pricing, one must listen carefully – especially since the Commission opened its own case against *Aspen Pharma* in 2017. Yet, in its contribution to the OECD, the Commission is justifiably cautious in expressing its policy priorities. As regards the indicators which justify Competition Authorities becoming more active, the Commission sides with AG Wahl's Opinion in the recent *AKKA / LAA Case*[17], where he states that only very specific market conditions justify an infringement action.

In terms of the legal test to determine whether a certain pricing policy is excessive, the Commission largely reiterates its previous case-law on the matter and provides very little insight into how it envisages to interpret the legal tests proposed by the Court of Justice. It therefore remains to be seen whether, following its recent renaissance, the offence of excessive pricing will continue to stay on the enforcement agenda indefinitely. What will endure, however, is the considerable uncertainty as to whether a particular price is "excessive" within the meaning of Article 102 TFEU.

Another issue which the Commission identifies is whether the current enforcement activity will continue to focus exclusively on the pharmaceutical sector, given that sector's particular characteristics. In light of the Commission's focus in its paper on the particular features of the markets for life-saving pharmaceuticals, it should come as no surprise that this may well be the case in practice. It would also be unfortunate, for example, if certain over-zealous NCAs were to apply the rationale for intervention against excessive pricing in relation to luxury products, where the relationship between production cost and retail price is largely irrelevant (or even attractive) in the eyes of the consumer.

2. Personalised pricing in the digital era

The Commission has conducted a preliminary analysis of the growth in online personal pricing, which relates to the charging of individual prices based on particular customers' willingness or ability to pay. Against the backdrop of large technology companies collecting large volumes of personal data, the paper explains the economics of personal pricing and concludes that the phenomenon is currently minimal. In its submission, the Commission also discusses which laws might apply to personal pricing, concluding as follows:

- In the offline world, personal pricing is a common phenomenon. In the online world, the availability of personal data now also allows the seller to draw conclusions as to a customer's willingness to pay, and hence to price their goods and services accordingly.
- Personal pricing differs from dynamic pricing (which is based on the effects of supply and demand) and personalised ranking (which refers to personalised offers).
- Price discrimination already takes place with respect to large groups of customers (*e.g.*, different pricing strategies in different Member States of the EU). The novelty with digital markets is that the use of personal data allows online sellers to sort customers into much smaller groups, thereby facilitating the more effective exploitation of each group's willingness to pay.

- The Commission notes that three conditions must be fulfilled in order for this to be able to occur: (1) the ability to sort consumers into groups; (2) the market power of the seller (otherwise customers will turn to competitors who offer the goods at a cheaper price); and (3) customers must not be involved in the resale of products on a significant scale.
- While perfect personal pricing can be seen to be efficient (similar to a "perfect competition model"), it does not increase individual consumer welfare; as some customers will be paying more than they otherwise would need to pay. Consumers may then be able to spend less on other products. Also, where output is limited, sellers will typically seek to maximise their income, namely, by not selling at low prices. Finally, it is even possible that low-income customers will actually be charged more because they are higher-risk consumers.
- Personal pricing is, however, said to render any tendency toward (tacit) collusion (*e.g.*, through reliance on algorithms) less likely because it generates many different prices and therefore dilutes market transparency.
- In its assessment of a number of studies, the Commission concluded that personal pricing is still very limited (according to one study, it was found to be prevalent in only 6% of situations). However, it is said to be more likely to prevail with regard to services such as airline and booking websites than with the sale of products such as TVs and shoes.
- From a competition law perspective, Article 102 TFEU could apply to provide the rationale for the abuse of market power in two ways: (1) personal pricing could constitute "discrimination"; or (2) could lead to "excessive prices". However, it is open to question whether these theories of harm could easily be applied in the absence of particular supporting circumstances.
- Other areas of law possibly relevant to personal pricing include EU consumer protection law and EU data protection law.

Comment: Given the prevalence of personal data, it may come as a surprise that personal pricing is a commercial practice that is not used more widely, especially given that one would expect online sellers to exploit customers' interest in their products and services more noticeably. It is obvious, for instance, that data of the customer reviewing a product or service repeatedly online can lead to anticipated incremental price increases. However, arguably such strategy works only with products where prices fluctuate (*e.g.*, airplane tickets, transportation apps such as Uber), as there is no fixed price that consumers can use as a benchmark for value.

From a competition law point of view, personalised pricing may not constitute an area of great concern. For example, the charging of personalised prices renders collusive behaviour difficult to sustain – which is clearly pro-competitive. Similarly, establishing an abuse of market power may prove to be a difficult task. Price discrimination, namely, the sale of the same product to different buyers at different prices, only infringes competition law where that discrimination has an anti-competitive effect on competition and where the price difference is not objectively justified (*e.g.*, by differences in costs or different patterns of demand). It needs to be considered, therefore, how far the justification of different demand patterns cannot also apply to personalised pricing. If in the medium term one reaches the

conclusion that personal pricing is problematic, consideration could be given to drawing a distinction according to which the practice is permissible for non-dominant undertakings and (potentially) problematic for dominant firms.

Perhaps the answer to the dilemma expressed in the relation to Article 102 TFEU lies in whether or not a dominant firm has introduced appropriate "transparency" measures in order to ensure that consumers are not misled or trapped into making irrational economic decisions because of circumstances beyond their control. Such price warnings are commonplace in sector-specific regulatory requirements. It would therefore not be stretching unduly a number of provisions under national competition rules which already contain significant consumer protection mechanisms as the basis for intervention for personalized pricing where there is a lack of transparency of the essential terms of trade; this would seem to be a logical extension of the concept of 'unfair' in Article 102 TFEU.

3. The suspensory effects of merger notifications and gun-jumping practices

The recent fine of EUR 124.5 million which the Commission imposed on the merging parties in the *Altice/PT Portugal* merger for violating the EU merger "standstill" obligation is the latest chapter in the development of a competition law standard with which to review so-called "gun-jumping actions" (*i.e.*, commercial actions which circumvent the suspensory effect of a pending merger clearance decision by proceeding to enact the modified merger transaction in practice).[18] In its gun-jumping paper, the Commission provides a concise overview of relevant case-law, emphasising that:

- To secure the effectiveness of the EU Merger Control regime and to facilitate the enforcement of a possible prohibition Decision, the EUMR confers upon the Commission the power to impose on companies fines of up to 10% of their annual turnover when they fail to notify a transaction or to implement the transaction before the Commission has declared it to be compatible with the common market.
- Where an already implemented transaction is later prohibited, the Commission can order the parties to unwind the merger. In order to investigate whether there has been a violation of the requirement to notify the transaction and not to close before clearance, the Commission can issue Requests for Information and can carry out on-site inspections.
- The Commission sanctioned a breach of the "standstill" obligation and issued a fine of EUR 20 million in *Electrabel's* acquisition of *Compagnie Nationale du Rhone*[19], finding that Electrabel had acquired decisive influence over the target before notification had occurred. The Commission's Decision was upheld by both the General Court and the Court of Justice.
- In *Marine Harvest/Morpol*[20], the Commission held that, despite a minority shareholding of 48.5%, *de facto* control had been acquired before notification due to the acquirer's past attendance rate at shareholders meetings. Only after Marine Harvest had made a public bid for the remaining shares did it notify the transaction, which ultimately received conditional approval. A fine of EUR 20 million was imposed, which was upheld by the General Court[21], while a further appeal to the Court of Justice is pending.

- In the acquisition of PT Portugal by Altice, gun-jumping resulted in a significantly higher fine of EUR 124.5 million being imposed. The contracts foresaw far-reaching veto rights for the acquirer that were in excess of those necessary to protect the value of the target business. Altice also exercised these rights, and the parties exchanged commercially sensitive information without appropriate safeguards in place (such as the establishment of a clean team). An appeal is pending before the EU Courts against the Commission's Decision.

Comment: The EC's submission illustrates how recent practice has given weight to the "standstill" obligation in recent years. Record fines such as the one imposed on Altice have brought the obligation not to implement a merger before clearance is obtained on most firms' radar. In addition, the case precedents bring greater legal certainty to an area that is still in its relative infancy. For example, this year's ruling of the Court of Justice in the *Ernst & Young* Case made it clear that the suspension obligation is limited to actions that directly cause a change of control over the target company, whereas the Commission had consistently argued in its administrative practice in favour of a much wider understanding of the prohibition on gun-jumping.[22] The Ruling in *Ernst & Young*, while welcomed by practitioners, signals a sharp shift in emphasis when compared to existing Commission practice and recent national precedents. Seen in this light, it is to be hoped that the *Ernst & Young* Judgment is applied fully by the Commission in its administrative precedents which will follow. The Commission's failure to accord due weight to that Judgment, while at the same time reverting to an emphasis on its prior practice, would leave some practitioners uncomfortable.[23]

4. Quality considerations in the zero-price economy

EU competition rules apply both to services for which a price is charged and to those services provided free of charge, especially those over the Internet. However, as most of the analytical frameworks traditionally used in competition analysis rely on price or output as primary competition parameters, the fact that today an increasing number of services are offered free of charge requires Competition Authorities to take due account of non-price parameters such as quality, choice, innovation and even privacy. Traditional tests therefore have to be adapted in order to reflect the realities of the "zero-price" economy. In its paper, the Commission presents its views on how the "zero-price" economy affects issues such as market definition, competitive assessment and the appraisal of defences based on efficiencies. The Commission's key positions are as follows:

- A fundamental analytical element of any competitive analysis is the process of market definition, by which markets are primarily defined by the price elasticity of demand. Under this traditional analysis, one asks whether customers would switch from product A to product B in the case of a non-transitory price increase of 5-10% (small but significant non-transitory increase in price, "SSNIP").
- However, given that price is not a suitable parameter for comparison in a "zero-price" economy, the Commission proposes to use a modified version of this test, which asks whether customers would switch from service A to service B in case there was a "small but significant non-transitory decrease in quality" ("SSNDQ"). This standard has already been applied in the Commission's recent *Google Android* Case.[24] For the next stage of the analysis – the calculation of market

shares – the Commission proposes to resort to the shares of transaction volumes or to shares measured by number of users (taking into account the existence of multi-homing and the number of dormant users).

- For its substantive assessment, the Commission suggests focusing on harm to quality. In the online advertising-supported sector, harm to quality does not only mean a loss of quality in the service itself but also relates to the additional costs that the consumer must bear in order to use the service; it could be the case, for example, that content becomes more difficult to access due to screen space being captured by advertising (which means that the consumer has to scroll more, to close the advertising, or to wait until reviewing the content).
- It may also become more difficult to distinguish between advertisements and actual "content", as is the case with "native" advertising or the content affected by "influencers" (*i.e.*, influential users of social media that are paid to advertise certain products to their follower base). Furthermore, some consumers may value the degree and means by which data is collected as a parameter of quality. It is therefore worth considering not only how much data firms collect but how this data is protected. Online advertising also creates costs for consumers due to increased data traffic and battery usage. It is worth remembering, however, that harm to quality can be offset or outweighed under a successful efficiency defence.
- The Commission has previously undertaken quality assessments in the context of "zero-price" services.[25] In all instances, it has been the reduction of consumer choice that has led the Commission to conclude that the conduct in question had an exclusionary effect, resulting in each case in less innovation and less competition in relation to quality.
- In the field of merger control, the Commission has already considered "zero-price" environments, most notably in Microsoft's acquisitions of Yahoo Search Business, Skype, Nokia and LinkedIn, as well as in Facebook's acquisition of WhatsApp.[26] In those cases, the Commission analysed possible negative effects on innovation, data protection and privacy which might stem from the notified transaction. In terms of efficiencies, the Commission found that the merging parties sometimes struggle to quantify non-price efficiencies, often relying on the achievement of economies of scale to justify their acquisitions.[27]

Comment: After a number of "field tests", such as the application of the "SSNDQ test" in cases involving tech companies, the Commission now provides a helpful if embryonic overview of its approach to the application of some of the necessary analytical steps. This is helpful for firms to better understand the Commission's analysis and focal points of interest when investigating mergers or when conducting infringement proceedings. It remains to be seen, however, whether most of the suggestions which the Commission makes to its analytical framework will be considered appropriate by the European Courts.

III. Conclusion

The Commission papers presented at the OECD's Competition Forum are useful contributions to a number of legal topics, providing insights into the Commission's current thinking and valuable guidance

to the competition community. As regards the papers on procedural issues, three of them relate to the process of information-gathering. Due to the ever-growing amount of digital communications and collection of personal data, the need for this focus appears clear. The two papers on the Commission's investigate powers show Competition Authorities' growing need to have access to and be able to evaluate large amounts of data in order to fulfil their mandates. Both investigative tools, in the form of dawn raids and RFIs, have to be applied and adapted in light of the challenges posed by current technological developments. In turn, shaping the contours of LPP continues to be an extremely important issue. The answer to the question of which types of communication benefit from LPP needs to be kept under review, as the increasing amount of digitally stored communications means that there are more and more documents that may contain privileged content. The paper on EU-wide regional cooperation reminds us that infringements under EU competition rules are seldom limited to a single jurisdiction and that, therefore, a system needs to be in place that guarantees both that Competition Authorities can address anti-competitive conduct effectively and that firms are incentivized to self-report such behaviour.

Two of the four substantive papers adopt a similar focus. Both the submission on personalized pricing and quality considerations in a "zero-price" economy consider topics that are driven by the collection of data on consumer behaviour, provided in return for free-of-charge online services. It is noteworthy in this regard that personalized pricing may be an issue that can be addressed more from a consumer policy and fairness perspective, rather than on the basis of competition law alone. While personalized pricing has not raised significant issues thus far, by contrast "zero-price" services already raise critical questions about fundamental competition issues such as market definition. Given the Commission's first experience in cases concerning high-tech companies, the Commission has taken up this latter challenge to develop its thinking in a way that preserves its effectiveness in the Internet world. The contribution on price hikes in pharmaceutical markets reminds us that the issue of excessive prices will remain on the agenda, irrespective of the intrinsic difficulties in determining which prices are "unfair" or "excessive". The paper on gun-jumping goes hand in hand with heightened interest in enforcement activities that can have huge financial repercussions on companies.

[1] The OECD's yearly Global Competition Forum is one of the largest conferences for and by competition officials. Over 100 Competition Authorities, international organisations and invited experts worldwide participate in the Forum each year. Participation is by invitation only and restricted to officials from Competition Authorities, government agencies and international/regional organisations.

[2] Case 155/79 – *AM & S v Commission*.

[3] The umbrella term used in EU legal parlance for any form of recognised entity with legal personality is "undertaking" (which can even be an individual).

[4] DG Competition's Hearing Officer, whose post was introduced to enhance impartiality and objectivity in competition proceedings, is responsible for organizing and conducting oral hearings and acting as an independent arbiter when a dispute about the effective exercise of procedural rights between parties and DG Competition arises. The Hearing Officer intervenes only when a dispute cannot be

resolved by the parties and DG Competition. The Hearing Officer also decides on applications to be heard by third parties in the proceedings.

[5] Case COMP/E-1/39.612 – *Perindopril (Servier)*.

[6] For the *ECN+ Directive* Proposal, refer to <http://ec.europa.eu/competition/antitrust/nca.html>.

[7] The principle is enshrined in Article 6 of the new *ECN+ Directive* Proposal. The provision is intended to empower Member States' Competition Authorities to be more effective enforcers. The Proposal aims to ensure that, when applying EU antitrust rules, all National Competition Authorities have the appropriate enforcement tools available. To that end, the Proposal provides for minimum guarantees and standards. Refer to <http://ec.europa.eu/competition/antitrust/nca.html>.

[8] This consists of seizing relevant documents without inspecting them right away.

[9] Article 11 of EUMR.

[10] Article 6 of the European Convention on Human Rights gives citizens the right to a fair trial. There is no explicit reference to self-incrimination. However, the European Court of Human Rights has interpreted this to include the right to remain silent and the privilege against self-incrimination.

[11] Article 14 of EUMR.

[12] *Ibid.* For example, the Commission recently fined an undertaking EUR 110 million for providing false or misleading information in a merger control procedure; see Case M.8228 – *Facebook/WhatsApp*.

[13] Competition and Markets Authority, Case CE/9742-13 Unfair pricing in respect of the supply of phenytoin sodium capsules in the UK (7 December 2016).

[14] Decision A480 of the Autorità Garante della Concorrenza e del Mercato of 29 September 2016

[15] Decision of the Konkurrence- og Forbrugerstyrelsen of 31 January 2018.

[16] See press release at http://europa.eu/rapid/press-release_IP-17-1323_en.htm.

[17] Opinion in Case C-177/16.

[18] Case M.7993 – *Altice/PT Portugal*.

[19] Case M.4994 – *Electrabel/Compagnie Nationale du Rhône*.

[20] Case M.7184 – *Marine Harvest/Morpol*.

[21] Case C-10/18 P – *Marine Harvest ASA vs the European Commission*.

- [22] Case C-633/16 – *Ernst & Young*.
- [23] See Caspary, Tobias and Flandrin, Julie, *Ernst & Young: First Guidance on Gun-jumping at EU Level*, ECLR 9(8), 2018.
- [24] Case AT.40099 – *Google Android* (not yet published).
- [25] See abuse cases regarding Microsoft's Media Player/Internet Explorer (Case COMP/C-3/37.792 – *Microsoft*) as well as Google Shopping (Case AT.39740 – Google Search [Shopping]) and Google Android.
- [26] Cases M.5727 – *Microsoft/Yahoo! Search Business*; M.6281 – *Microsoft/Skype*; M.7047 – *Microsoft/Nokia*; M.8124 – *Microsoft/LinkedIn*.
- [27] See Case M.5727 – *Microsoft/Yahoo! Search Business*.



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