

2016: The year in preview

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Every new year ushers in a fresh set of antitrust faces and cases. This year will be no different. As we have for the past several years, the reporting staff at *Global Competition Review* have profiled 10 antitrust topics, cases and people we think will drive the conversation in the antitrust world over the next 12 months.

How accurate have we been in the past? Checking in with last year's list, we predicted Europe would send a statement of objections to Google by the middle of the year – that happened in April. We shined a spotlight on health-care and antitrust issues, and indeed those remained in focus throughout 2016, primarily through a wave of global pharma deals and a series of US challenges to hospital mergers. And, most notably, we predicted the wave of global mega-deals – and subsequent antitrust enforcement actions – would continue, and has it ever.

Now, it's time for a fresh set of predictions for 2016 – starting with a mega-merger wave that appears poised to occupy the attention of the antitrust world for at least another year, but could be partially stymied by enforcers' fears that divestitures cannot fix the competition flaws in such deals.

Damming the merger wave

by *Pallavi Guniganti*

In the last week of the 2015 Congressional session, representative Derek

Kilmer of Washington state introduced a bill to address what he considered to be a mistake made by the US Federal Trade Commission.

His working-class district had been roiled in recent months by the potential unemployment of scores of grocery employees. They had worked for a Safeway or Albertsons store until those supermarkets were sold to Haggen in an FTC-ordered divestiture to remedy competition concerns about the *Albertsons/Safeway* merger. As part of the standard divestiture agreement, the new Haggen employees were barred from being employed by Albertsons or Safeway for a year, to ensure the new competitor was not undercut by losing experienced workers.

But soon after, Haggen went bankrupt and closed most of those stores, and even if Albertsons bought them back, the employees could not go back to work there due to the divestiture agreement. The FTC hastily agreed to a waiver of that part of the contract, but Kilmer did not want any workers to face such uncertainty in the future. His “Freedom for Workers to Seek Opportunity Act” would prohibit employers from entering into not-to-compete covenants with any grocery store employees – even though such agreements are standard in divestitures approved by the US antitrust agencies.

The legislation may be a long shot, but it signals just how deeply the FTC’s decision in the *Albertsons/Safeway* tie-up has touched communities that otherwise rarely think about the bureau of competition. Several West Coast media outlets have published criticism of the commission’s handling of the deal. *The Herald* in Everett, Washington, scolded, “This year’s events should also provide some lessons and second thoughts for how such mergers and the requirements meant to protect consumers are handled. If it wants to serve the interests of consumers, the FTC ought to look more closely at

prospective buyers when it requires such sales to ensure they can manage their new acquisitions and offer the competition the agency desires to promote.”

The commission certainly has plenty of scope to apply such lessons. In addition to three hospital mergers, it is suing to block the *Staples/Office Depot* deal despite a proffered US\$1.25 billion divestiture, and is considering the massive retail tie-up of Walgreens and Rite Aid. Its sister agency, the Department of Justice’s antitrust division, has even more mergers under review for which the companies are proposing divestitures to solve competition problems: *Halliburton/Baker Hughes*, *Anthem/Cigna*, *Aetna/Humana*, *Dow/DuPont*, *AB InBev/SABMiller*, *Western Digital/SanDisk* and *Charter/Time Warner Cable*.

Haggen is not the only recent divestiture buyer approved by the FTC who has gone bankrupt and sold assets back to the original owner; some of the Advantage Rent-a-Car locations Hertz was required to sell in 2012 as a condition of acquiring Dollar Thrifty came back into its hands less than two years later.

Mayer Brown partner Bill Stallings, with 17 years at the antitrust division under his belt, says he can think of no prior instances when a divestiture buyer has sold assets back to the merging companies. The two failed remedies are likely to affect consideration of other deals, he says. “I can see the agencies being more hesitant and demanding more assurances for divestiture. It’s going to make the agencies much more likely to challenge rather than attempting a remedy,” which will make counselling clients on mergers more challenging.

The problem of finding a solid divestiture buyer who can replace the lost competition is not specific to selling goods or service at a retail location, as

in the grocery or car-rental businesses, Stallings says, but affects “any area where it’s somewhat complex to run a business”, which requires “not just capable management but truly the incentive and ability to be an effective competitor.” Increasingly concentrated industries can leave the antitrust agencies unable to find a divestiture buyer with the requisite experience whose acquisition of the assets would not create a new competition problem.

Foreseeing whether another business – particularly one without experience in the relevant product or geographic market – can handle the new assets is incredibly difficult. “There are plenty of times the agencies reject potential buyers that most people never hear about,” Stallings says.

Steve Weissman, who returned to Baker Botts at the end of 2015 after two years at the FTC’s bureau of competition, insists that, while the Hertz and Albertsons cases “were obviously not great things for the agency in terms of remedies”, they do not specifically influence the decision to accept a proposed divestiture. “Folks were aware and tried to get to the bottom and learn from the mistake,” he says of his colleagues at the commission. “But those were anomalies. Most fixes work.”

He notes that a prior supermarket merger, the Schnucks deal approved by the FTC in 1995, had a poorly implemented divestiture that “was frankly a real blow to the agency. It actually affected the agency’s policy going forward of requiring up front buyers.” Schnucks had allowed the stores that it had agreed to divest to become damaged and less valuable, which Weissman says shaped the agency’s view that a would-be merger must have a divestiture buyer ready to take over immediately.

“Certain aspects of divestitures didn’t go well. That’s why the study the FTC

is doing hopefully will help in the next year,” Weissman says. The FTC’s study of its past divestitures, begun late in 2015, will be very valuable for both agencies “to learn about what works and doesn’t work”.

But in the meantime, companies and their counsel probably should expect some scepticism at the DoJ and FTC toward divestiture offers that promise to replace all the competition lost by allowing two rivals to merge.

The rise of IP enforcement in Asia

by Tom Webb

The past year was an interesting one for Asian antitrust enforcers, as they moved boldly into the ever-contentious and economics-heavy realm of intellectual property that so often intersects with their remit.

The headline case dropped right at the beginning of the year: Chipmaker Qualcomm suffered a US\$975 million fine from China’s National Development and Reform Commission over the royalties it charged for licences to its standard-essential patents. Enforcers sparked other cases across the continent – including Indian investigations into potential abuse of dominance committed by Ericsson linked to allegedly discriminatory royalty rates.

Now, as intellectual property increasingly drives economic growth throughout Asia, antitrust enforcement intended to insure patent owners wield their market power fairly is set to rise.

In China, at the very least, there will almost certainly be more IP-related antitrust cases in 2016, says Fangda partner Michael Han.

“My prediction for 2016 is that antitrust agencies in China will continue to take IP-related enforcement actions,” Han says. While he isn’t sure whether we’ll see another record-setting case like Qualcomm, “NDRC officials have indicated on various occasions that IP-related antitrust violations will continue to be their enforcement priority.”

It’s no surprise that China, and other enforcers, have moved into the IP space, says Adrian Emch at Hogan Lovells in Beijing. A decent chunk of the world’s technology industry has components manufactured across Asia. Citing China, Korea and Taiwan, he says: “It wouldn’t be surprising to see those enforcers, and others, continue to take a serious interest in IP.”

And it’s no stretch to say that these enforcers will seek to bring more cases with an intellectual property flavour this year. After all, at least four major agencies (China’s NDRC and State Administration for Industry and Commerce, and the Fair Trade Commissions of Japan and Korea) set about reforming their intellectual property enforcement guidelines last year; if they’ve shown enough interest in the area to re-examine their procedures, they will be expected to put those new guidelines to use.

There are other signs that IP and antitrust enforcement may be on the rise, according to Koren Wong-Ervin, director of the Global Antitrust Institute at George Mason University, and a former intellectual property and antitrust counsel in the international affairs office of the US Federal Trade Commission.

In the past few years, Asian enforcers have generally “jumped right into the most complex areas, particularly matters involving IP”, she says. “From what I’ve heard from foreign agencies, when they’ve asked for training from the GAI and others, they’ve asked for training in IP and tech, because they

really want to be at the forefront.”

The classically intellectual-property rich technology and pharmaceutical industries, then, would do well to take heed of enforcers across Asia in the coming year. And they should remember that some authorities take a harder line on what they consider to constitute abuse of dominance or unfair competition: Wong-Ervin notes that the four agencies with new guidelines have suggested they will impose antitrust sanctions on SEP holders when they seek injunctive relief.

“I do think that in many of these guidelines, there is an ambiguity about where the burden [of proof] is – or the burden seems to be on patent-holders,” she said. “That could have a real chilling effect on innovation and on incentives to engage in licensing and standardisation.”

Apple, Amazon and Vestager

by Tom Madge-Wyld

As a competition discipline, state aid is no longer secondary to cartel and abuse of dominance violations. At least, not as far as the European Commission is concerned.

EU Competition Commissioner Margrethe Vestager has made it clear that state aid remains one of her priorities for 2016, and tax recovery cases against Apple and Amazon top her agenda. Both investigations made headlines across Europe last year and Vestager is expected to finalise decisions in 2016.

After ordering the recovery of between €20 and €30 million in underpaid tax from Fiat and Starbucks in October, Vestager vowed that the commission

would not stop there.

Observers suggest those decisions represented the tip of a larger iceberg, setting reliable foundations for the enforcer to build its cases against Apple, Amazon and others – this time with much higher recovery figures.

An answer on the Apple investigation is anticipated early this year, perhaps as soon as February, although those close to Vestager remain tight-lipped about the current status of that and other investigations.

Caseworkers at the commission have reportedly confirmed to lawyers in Brussels that Apple remains the prized scalp.

If, as expected, an order is issued against the US tech giant, the recovery figure could run into billions of euros, covering 10 years of underpaid taxes and topping the commission's record tax recovery order of €1.3 billion in the EDF case.

Apple said in a statement to shareholders last March that such a recovery order could be “material” – a term ordinarily defined by US securities rules as 5 per cent of a company's average pre-tax earnings from the past three years. Analysts in the financial press say this could exceed €2.3 billion.

Observers also expect the commission to make a decision on Amazon in 2016. One lawyer, who spoke to *GCR* on the condition of anonymity, said the Amazon investigation would likely lead to a recovery, but a conclusion to the McDonald's case may not occur until 2017.

“The McDonald's investigation is breaking new ground by moving away from a pure transfer pricing theory of harm into more questionable legal theory,” the source said. “Its timing could depend on whether the commission ties it

to other rumoured investigations from the pile of 300 tax rulings Vestager said were on her table.”

Already this year the commission has ordered Belgium to recover €700 million in underpaid taxes from 35 multinational companies. Ulrich Soltész at Gleiss Lutz in Brussels said he expected more state aid tax cases to follow, although it is unlikely that Vestager will open a huge number in 2016.

“Vestager said recently that she wouldn’t check every tax bill of every company,” he said. “Companies are growing nervous, but I wouldn’t think that more than five to 10 other cases will be decided this year. The commission wants to establish clear precedents and set out firm principles, which then would have to be applied by the national tax authorities.”

From the outside looking in, the commission seems to think that both the McDonald’s and Apple cases are relatively straightforward and also that the Irish tax rulings constitute a relatively clear breach of state aid rules, he said.

“I think we will see something on Apple,” Soltész explained. “The commission has prepared the ground with the Fiat and Starbucks cases and most observers expect there to be a significant recovery.”

Natura Gracia at Linklaters in London agrees, suggesting that the commission probably focused first on the smaller Fiat and Starbucks tax rulings, in order to gauge reaction.

“This suggests to me that the commission is leaning towards recovery decisions in other cases,” she said. “I think similar decisions against Apple and Amazon are likely.”

Another lawyer who spoke on the condition of anonymity, viewed the prospects of a recovery order in the Apple case with more scepticism.

“Apple is less clear cut,” the lawyer said. “The postponement of the original decision likely indicates the complexity of the case.”

Antitrust and the US presidential elections

by *Pallavi Guniganti*

The US is immersed in one of the most colourful presidential elections of recent years, with leading candidates including an outspoken real estate billionaire and a self-described socialist. In all the debates and campaign advertisements, competition law has been largely absent. But two senators vying for the Republican nomination have a history with antitrust.

Ted Cruz – who, at the time of writing, is the candidate most favoured by likely caucus-goers in Iowa – directed the US Federal Trade Commission’s policy office from July 2001 to January 2003. In that role, he worked alongside William Kovacic and Maureen Ohlhausen – both of whom went on to become commissioners – on major advocacy projects such as the task force on state action doctrine. He argued in multiple fora against regulations in a variety of areas, ranging from attorney advertising to below-cost petrol prices, that he said would lead to less competition and ultimately harm consumers. But Cruz also opposed state and federal legislation that would alter antitrust law, such as an exemption for physicians to bargain collectively with insurance plans, where it would allow the private sector to act more collusively.

One of Cruz’s rivals, Rand Paul, has sought far more radical changes during his five years as a senator. In 2012, and again in 2013, he proposed the

“Anti-Trust Freedom Act” that would bar enforcing federal antitrust law against “any voluntary economic coordination, cooperation, agreement, or other association, compact, contract, or covenant entered into by or between any individual or group of individuals.” No member of Congress would co-sponsor the legislation, and it prompted the American Antitrust Institute to question 2012 Republican presidential candidate Mitt Romney on whether he too supported legalising cartels and mergers to monopoly.

The non-partisan but pro-enforcement institute praised then-candidate Barack Obama’s 2008 statement, wherein he pledged to “reinvigorate antitrust enforcement” and “step up review of merger activity”. Current Democratic front runner Hillary Clinton has promised to go further by hiring “aggressive regulators who will conduct in-depth industry research to better understand the link between market consolidation and stagnating incomes”.

William Stallings joined Mayer Brown last year after 17 years in the Department of Justice’s antitrust division, and forecasts that mergers, especially in the agricultural market, will draw politicians’ attention during the 2016 campaign. He says Obama clearly did boost antitrust enforcement, though monopolisation cases have remained “few and far between. The burdens of proof are so high for the government that not that many cases are brought.”

One difference between Bush and Obama was emphasised by former Jones Day partner Joe Sims in defending Electrolux’s acquisition of General Electric’s appliance division, which he said would be no more anticompetitive than the *Whirlpool/Maytag* deal permitted by the prior administration. In nearly 40 years of private practice after serving as head of the antitrust division in the Carter administration, he has gone to litigation only three times, he said. “Two of those times were in the last two years. So

I think it's obvious that antitrust division today is a more aggressive organisation than it has been in the past.”

The antitrust division also may be prone to greater contrasts between presidents – for example, the Clinton-era pursuit of Microsoft for monopolisation, versus the Bush DoJ dropping an effort to break up the company – because it is part of the administration rather than being an independent agency. The FTC is a bipartisan body that, by law, can have no more than three commissioners of the same party.

Baker Botts partner Steve Weissman, who recently served as the FTC's deputy director for competition, says differences in antitrust enforcement between presidential administrations are marginal. “There's more continuity than change,” he says. Though Weissman concedes that the agencies under Barack Obama “ramped up” enforcement relative to the level of the George W Bush administration, he said it was “not so noticeable or marked that you would say whoever becomes the president is going to make a big change in enforcement policy.” He dates the last major shift to Ronald Reagan's “shutdown” of antitrust.

Undeniably, competition enforcement is a rare spot of bipartisanship in the increasingly divided American political landscape. Republican state attorneys general during the Obama Administration have joined the antitrust division and FTC in various investigations and lawsuits, even while otherwise disparaging the executive branch. But it remains to be seen whether the antitrust establishment's norms – of which Sherman Act section 2 cases are unwinnable, or of what conduct constitutes collusion – will survive a President Bernie Sanders or Donald Trump.

Google: are we there yet?

by *Tom Webb*

After half a decade of legal wrangling and not one, not two, but three failed settlement attempts, could 2016 finally be the year that the European Commission's probe into Google's alleged abuse of dominance in the online search market comes to an end?

The matter has come to a point where Google and DG Comp are at loggerheads. Proceedings had stagnated under former commissioner Joaquín Almunia, who had failed to bring the case to a close – despite coming tantalisingly close to an amicable settlement.

The EU's current competition commissioner, Margrethe Vestager, gave the case a jolt in 2015 by issuing a statement of objections in April. In late summer 2015, Google sent a formal response – which remains confidential – and publicly slammed the charges, chastising them as “wrong as a matter of fact, law and economics”.

With both sides having drawn their lines in the sand, observers say we could well see an end to the case in 2016. It remains possible that the investigation could drag on even longer, but that seems unlikely to Damien Geradin at EDGE Legal in Brussels, who is not involved in the case.

“Without being privy to the case, I would think that something's going to happen in 2016,” he says. “I think the commission would lose its credibility without providing an outcome this year... that's almost unthinkable.”

He says it is “almost certain” that something will, finally, happen to conclude the case.

“The question, of course, is what will happen,” he says.

There are three possible outcomes at this stage. The commission could reach a full prohibition decision, most likely imposing a fine and remedies to correct what it believes are competitive restraints caused by Google's alleged discrimination between itself and rival online shopping comparison websites in its search results.

Alternatively, the parties could reach a settlement and resolve the case with commitments; or the commission could decide to drop the case altogether.

Gerardin says that third outcome – a totally dropped case – is also very unlikely.

“The commission would lose face by having spent so many resources and so much time investigating this thing, to get to no outcome; I would exclude this possibility,” he says.

Clifford Chance partner Thomas Vinje, who represents the FairSearch Europe coalition of organisations – which is one of the complainants in the investigation – has a “pretty strong impression” that the case is heading towards a decision, rather than commitments.

“I would be pretty surprised not to see a final adverse decision in the existing search case within the first half of this year,” he says. “I would also be really rather surprised to see much scope for a settlement.”

If Vinje and Gerardin are correct, that still doesn't signal the end of the road. There is a good chance that Google would choose to appeal against any decision, and extend the fight for another good few years – but it's more than likely that 2016 will, at least, see the end of the commission's procedure.

Taking the single market online

by *Sonya Lalli*

This year, the European Commission is set to publish an initial report on its e-commerce sector inquiry – which is part and parcel of its strategy to create an EU digital single market. Commissioner Margrethe Vestager formally launched the inquiry in May 2015 and tagged geo-blocking as a key concern, but observers question how exactly the commission plans to improve access to digital goods and services across the continent.

“The sector inquiry is examining a hodgepodge of disparate market sectors whose only commonality is e-commerce,” said Stephen Mavroghenis, a partner at Shearman & Sterling in Brussels. Questioning how the commission would be able to draw the different strands of the inquiry together into a coherent conclusion, he said, “Do you treat Netflix the same as a shoemaker selling products online?”

“It’s an ambitious inquiry and it’s difficult to see at this stage what intelligible conclusions they could reach, other than that territorial barriers exist,” Mavroghenis said.

When the inquiry was announced, the commission said it hoped to ensure consistency in the application of competition law throughout the EU’s e-commerce sector – a possible reaction to member states’ varied treatment of the Online Hotel Booking case.

While a number of EU countries accepted Expedia’s and Booking.com’s commitments regarding pricing clauses, Germany’s Federal Cartel Office took a tougher stance, banning most favoured nation clauses altogether – a ruling Booking.com plans to appeal.

The case created uncertainty in the law given the different approaches adopted by national competition authorities, and the preliminary report is likely to influence the approach of existing and future investigations, Mavroghenis said.

Historically, as a matter of prosecutorial priority, the commission had taken on the view that vertical restraint enforcement should be dealt with by member states, and this not only created inconsistency of findings between the various member states but also enforcement by the member states was uneven, he said.

“The inconsistency will continue unless the vertical restraints block exemption and guidelines are updated, regardless of what the sector inquiry says,” he said.

Christian Ahlborn, a partner at Linklaters in London, called the Hollywood Studios case a classic example reflecting what the e-commerce inquiry is looking at: “To what extent are there absolute territorial protections which manufacturers or distributors use to exploit differences in market conditions across different member states?”

The commission hit broadcaster Sky UK and six US film studios with statements of objections last July, challenging licensing agreements that constrained Sky’s ability to sell pay-TV services to customers outside the UK and Ireland.

Ahlborn said the commission’s inquiry also ties into the political agenda of “Brexit” – a potential “British Exit” from the EU that will be decided in a referendum in mid-2016.

“Cameron has asked for digital portability across the single market, which is

one of the reforms the commission has proposed on the copyright side of its digital strategy,” he said. “It is a question of whether this can be delivered in time for the UK’s referendum.”

“If so, Cameron would be able to point to the reform as a tangible benefit of staying party to the EU, and I think the commission is trying to do their bit to help deliver that message,” Ahlborn said.

Spanish elections and the CMNC

by Mark Briggs

Spain entered a new era in December when its general election brought an end to the duopoly that has dominated Spanish politics since the country transitioned to democracy after the death of General Francisco Franco in 1975.

But, with no clear winner at the polls, the result ushered in months of uncertainty as politicians attempt to form a stable government. The incumbent Popular Party is in negotiations to form the next government. If they are unable to cobble together a working coalition, the Socialists, the country’s second-largest party, will be given an opportunity to do so. If no government is formed before 20 February, two months after the vote, a new election will be held.

One of the subjects on the negotiating table will be the future of Spain’s competition authority, the National Commission for Markets and Competition. In the short term, new authority board members will need to be nominated and approved by parliament this year, including Maria Ortiz from the competition chamber.

But with Spain's political parties deeply divided on how to kick-start its ailing economy, the future of the authority, and not just its board members, looks far from clear.

The Popular Party, who three years ago introduced the current system of competition and regulatory authorities working under one umbrella, would not be expected to make wholesale changes to the structure of the authority. The Socialists, however, want to spin off the competition authority from the other regulators to give it more independence. The centre-right Cuidanos party want to break the link between nominees to the board and political parties, but are willing to leave the structure of the authority in place.

The left-wing populist party, Podemos, want the authority to have more independence from government, but have not been clear about how they would achieve this.

With weeks of negotiation and horse trading ahead, what all this means for the authority is "hard to predict" says Andrew Ward, a partner at Cuatrecasas Gonçalves Pereira in Madrid. The authority has been largely unpopular among the competition bar, particularly compared to its very active predecessor, the CNC.

"The major issue on the table is the potential split of the CNMC. But it is very difficult to say what is going to happen," Ward says.

Pedro Callol, a partner at Callol Coca and Asociados, thinks it is only a matter of time before the unpopular amalgamation of competition and regulatory authorities is reversed, regardless of the final result in the election.

“I would not be surprised if in the next few years the authority is restructured again,” he said. “The competition authority will become separate, but it remains to be seen what will happen to the regulators.”

Rafael Allendesalazar, a partner at Martínez Lage Allendesalazar & Brokelmann Abogados in Madrid, doesn't expect to see any immediate developments in the short term, but argues that might not be such a bad thing.

“We can't change things everyday,” Allendesalazar says. “Practitioners and market players need stability. We've seen improvement [at the authority] and we should support that improvement.”

Ringling in 2016, with remedies

by *Sonya Lalli*

Over one year after Margrethe Vestager's appointment as Europe's competition commissioner, the question on how a Vestager commission will respond to major telecom consolidations has yet to be answered.

Alec Burnside, a partner at Cadwalader, Wickersham & Taft in Brussels, said that, since taking over, Vestager has diverged in practice on whether to accept remedy proposals for would-be telecom tie-ups.

Critics of the latest wave of European telecoms tie-ups praise Vestager's perceived departure as a welcome change. Former competition commissioner Joaquín Almunia was often criticised for his willingness to accept telecom remedy proposals that did not pass muster – from Germany's *Telefónica/E-Plus*, to *Three/O2* in Austria, which were both four-to-three deals. Almunia also took flak for waving through Hutchison 3G's takeover of

Telefónica Ireland with conditions, a tie-up of the country's then second and fourth-largest mobile network operators.

Vestager seems more determined than Almunia, Burnside said. Pointing to the failed four-to-three Danish deal between TeliaSonera and Telenor last September, he said it was abandoned "presumably on the strength of the commission's messages that were passed in the course of the dialogue on remedies".

"I can see no reason to think there will be a softening in position towards telecom deals from the commission, so [merging parties] will need to have serious remedy proposals," Burnside said. "Going forward, the ticket price on telecom remedies just got more expensive."

Not all agree. Another source familiar with the sector said it was likely to be "business as usual" at the commission, calling the failed Danish deal an anomaly.

"*TeliaSonera/Telenor* fell through because the merging parties would have created an effective duopoly, and they were simply unprepared to engage seriously with the commission on remedies," the source said.

The upcoming year was going to be "exceptionally busy" for mobile consolidation, the source said, and the industry will have its eyes on telecom deals under review to see if Vestager has really hardened the attitude of the European Commission.

Probably the biggest telecom deal in the commission's pipeline is Hutchinson 3G's £10.25 billion (€13.5 billion) acquisition of Telefónica's O2 business, a four-to-three merger that would create the UK's largest mobile network operator. Late in 2015, the commission opened an in-depth

investigation of the deal, and rejected the UK Competition and Markets Authority's request to take over the case.

In 2016, the interesting question in this case will be how the commission deals with network-sharing agreements in place in the UK, the source said, pointing to network-share deals between telecom companies Three and EE, and O2 and Vodafone.

But the UK's telecom sector is more competitive and likely to be orthodox territory for analysis, and the commission is more likely to follow its previous precedents set when approving deals in Germany, Ireland and Austria.

Indeed, how the commission handles *Hutchinson/O2* could firmly signal whether Vestager's tenure will follow in Almunia's footsteps, or whether the commission will take a tougher stance in telecoms in 2016.

Soft harmonisation, tougher enforcement fines

by Tom Madge-Wyld

In the run up to the holiday season, Margrethe Vestager gave a speech calling for greater coherence between national competition authorities, together with better enforcement.

Kick-starting an old debate on soft-harmonisation, Vestager warned that divergent powers governing how enforcers impose fines may need to be corrected by new legislation, in order to ensure that national authorities are empowered and willing to impose appropriate financial penalties for competition law violations.

Although a directive is unlikely to be adopted in 2016, the issue is expected

to gain traction as the year progresses and observers suggest this will likely influence how national enforcers behave, long before any legislation is implemented compelling them to do so.

This would closely mirror what occurred before the EU damages directive was adopted in 2014, according to Bernd Meyring at Linklaters in Brussels.

“Long before the directive, national judges started changing their practices and such claims became more common,” he said. “I can see something similar happening again in this instance. Enforcers may begin interpreting their powers more broadly and the courts might encourage them to do so, as they feel the direction of the wind change.”

The amount of fines is clearly an area in which there could be more uniformity among national enforcers, and the harmonisation discussion could ultimately compel those authorities to begin issuing steeper penalties that are more closely aligned to those sought by the commission, he said.

“It is difficult to measure, but I certainly wouldn’t underestimate this type of effect,” he said. “It may well encourage an upward curve in the size of fines imposed across a number of member states.”

There is still a big discrepancy between fines imposed by some member states and the double-digit million-euro penalties that have become routine for the commission, Meyring said.

Many national enforcers are unable or unwilling to impose fines above 10 per cent of a company’s annual turnover in that country, observers say. This discrepancy can represent a real problem for companies who face cartel liability in multiple member states.

Other discrepancies relating to rights of defence, leniency applications and collection of evidence are also being considered during a consultation on the effectiveness of the European Competition Network, which is due to conclude in February. After this, a green or white paper will likely follow, with a host of national enforcers paying close attention to any recommendations those papers may contain.

Skaidrīte Ābrama, the chair of the Competition Council of Latvia, said a young competition authority like hers needs greater rights, on a par with those enjoyed by other member states, in order to adequately confront domestic competition infringements.

“Competition rules require equal enforcement... regardless of the country in which they are applied,” she said. “Without strong support from the commission, the Competition Council of Latvia will continue to operate as a subordinate institution.”

Tibor Menyhart, chairman of Slovakia’s Antimonopoly Office, agreed that the steps taken by the commission are necessary.

“Differences in enforcement powers could lead to ineffective enforcement of EU competition rules,” he said.

Big data, big questions, big year

by Mark Briggs

Disruptive technology never fails to catch a regulator’s eye; big data is no different. But practitioners are divided about when and where competition concerns arise from this new resource.

With national authority investigations ongoing and a potential EU decision in the Google search case expected before the year is out, 2016 could be a big year for big data. The question, which has been the subject of much debate around world, is: What theories of harm arise from the collection, storage and analysis of data?

Miranda Cole, a partner at Covington & Burling in Brussels, says, from a competition point of view, what matters is the replicability of the data sets: “Data should be viewed in the same way we view intellectual property rights – as an input. The threshold question should be: Is it indispensable, can it be replicated?”

Where sets are unique, there may be an argument for authorities to insist on access for market rivals. But Cole is sceptical about how many data sets truly fall into that category.

“We need to be careful we don’t say every single data set is unique and, therefore, indispensable, such that everyone should have access. We need a thorough analysis, assessing whether it is unique. Is it really not replicable?” Cole says.

With the uncertainty comes caution from authorities, including the European Commission.

“It has become one of those touchstones. There seems to be a view in some quarters that all you need to say is ‘big data’ and the commission gets concerned. I don’t think this is true, and nor should it be,” Cole says.

One case where big data is of concern to the commission is the Google search case. “Google are front and centre of this question,” says Thomas Vinje, a partner at Clifford Chance in Brussels and counsel to FairSearch, a

complainant in the EU investigation of Google's search practices.

"The key question is the consequence of scale and the dominance this may yield," Vinje says.

Put simply, the more people use a search engine, the more accurate and relevant the search results become. This is particularly important for specialist or personal searches, known as tail end searches.

"For most users their tail queries mean a lot to them," Vinje says. "The quality of a search engine's responses to their tail queries will factor heavily in how they assess its quality."

The sheer scale of data Google has access to grants it a dominant position in the market. Vinje said Bing, which has only 2 per cent of the market share of European searches, "just doesn't have enough user query data to learn what people are really after for many tail queries".

France and Germany are currently running a joint inquiry into the relevance of big data for competition law. Last week, the US Federal Trade Commission released a report on big data. It praised its potential, but warned companies against using the resource to exclude consumers from markets.

While questions over its usage and value will continue to vex competition authority staffers throughout the year, Vinje expects to see the same questions asked this time next year.

"My prediction is a year from now we will not have made much progress in thinking about the antitrust issues related to big data. The same sorts of issues are going to be kicked around in a year's time," Vinje says.

Cole hopes to see a little more clarity, but is not expecting precedent-setting cases.

“I think we will see some cases that further develop the approach to the analysis of the competitive effects of data sets. As a result, we may well get further clarity on the issue over the next 12 months,” Cole says.

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