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March 2021



Competitive edge

Keeping you up to date on Competition & EU law developments in Europe and beyond

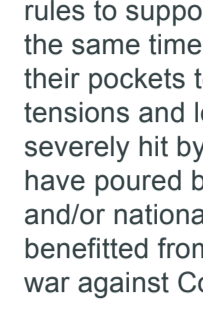
Dear readers,

Welcome to the March edition of *Competitive Edge*.

Find out why Amazon is suing the European Commission, why Covid-19 related State aid is under scrutiny in Europe, what changes in legal privilege are taking place in France, and much more. We hope you will enjoy this edition.

Best wishes,
The Editorial Committee

In focus



Jose Rivas
Partner
Brussels
Contact

Amazon questions the EU system for allocation of cases within the ECN

In April 2019, the Italian competition authority ("AGCM") launched an investigation regarding Amazon's utilization of its "Buy Box" tool, due to the potential preferential treatment of Amazon's own retail offers concerning the use of this tool. Last November, the European Commission announced that it had sent a Statement of Objections to Amazon for an alleged abuse of dominant position regarding its "Buy Box", by stating that the AGCM is examining "partially similar concerns".

Amazon has now decided to sue the European Commission before the EU General Court for allowing the AGCM investigation to continue in parallel with the EEA investigation. [Read more](#)

Updates from our jurisdictions

EU

Covid-19 State aid under review for the first time

The State Aid Temporary Framework (the "Temporary Framework") has enabled Member States to use the full flexibility foreseen under State aid rules to support their economy in the context of the Covid-19 pandemic. At the same time, the enhanced ability of Member States to reach deep into their pockets to protect their national economy was bound to create tensions and lead to legal actions. This is notably the case in sectors severely hit by the pandemic such as the aviation sector. Member States have poured billions of euros into helping their national air transport market and/or national air carriers during the pandemic. Ryanair, who has not benefited from any of these measures so far, has openly declared a legal war against Covid-19 state aid received by rival airlines across the EU.

By the end of February, the General Court of the European Union handed down two relevant judgments in the context of an action for annulment brought by Ryanair against two decisions of the European Commission ("EC") approving a French and a Swedish State aid scheme under the Temporary Framework. It is for the first time that Covid-19 State aid measures are subject to the legal scrutiny of the European Courts. [Read more](#)

For more information contact [Jose Rivas](#) and [Ana Manzanque](#).

The EU considers allowing collective bargaining for gig workers

Over the past years, the EU institutions have shown quite some attention to the position of workers in the so-called gig or peer economy, despite the limited legislative authority of the EU in the area of social policy. The current EU Commission made the protection of gig economy workers a key point of its social agenda in 2019. Read about one of the latest legislative initiatives, which now focuses on removing impediments to collective bargaining for gig workers, resulting from competition law rules. [Read more](#)

For more information contact [Baptist Vleeshouwers](#) and [Pieter De Koster](#)

Australia

ACCC releases list of compliance and enforcement priorities for 2021

On 23 February 2021, the Australian Competition and Consumer Commission ("ACCC") released its compliance and enforcement priorities for 2021. These priorities provide guidance to industries and businesses regarding those areas which will be a key focus for the ACCC's enforcement activities in the coming year.

A number of the ACCC's compliance and enforcement priorities for 2021 reflect a refocusing of priorities that the ACCC had committed to prior to the outbreak of the COVID-19 pandemic in 2020, at which point it was forced to adapt and respond to a number of other, more pressing challenges. Some of the ACCC's other priorities are aimed at addressing some of the broader competition and consumer protection issues that have been caused, or exacerbated by, the COVID-19 pandemic.

This article provides a brief overview of the ACCC's key compliance and enforcement priorities for 2021. [Read more](#)

For more information contact [Thomas Jones](#).

China



Anti-monopoly Commission of the State Council releases Anti-monopoly Guidelines for Platform Economy

On February 7, 2021, the Anti-monopoly Commission of the State Council released its Anti-monopoly Guidelines on Platform Economy, which became effective on the same day, February 7, 2021.

The Guidelines require anti-monopoly law enforcement authorities to adhere to the following basic principles in their anti-monopoly supervision and administration in the field of platform economy:

- Protect fair market competition
- Regulate in a lawful, scientific and efficient manner
- Stimulate innovation and creativity
- Safeguard the legitimate interests of all parties.

[Read more](#)

This update was provided by our partner [Allbright Law Offices China](#).

Czech Republic

New rules on leniency and settlement procedure discussed in Czech Parliament

Leniency programme and settlement procedures are commonly used by the Czech Office for the Protection of Competition ("Office"), for example, in the recent decision where the Office sanctioned a bid rigging agreement on projecting high-speed rails concluded by SUDOP PRAHA a. s. and Výzkumný Ústav Železniční, a. s. The leniency programme was used as a "soft law" by the Office since 2001. As for the settlement procedure, it began being applied in the Office's practice in 2008 without any legislative basis. Both concepts were explicitly incorporated into the Czech law in 2012. Currently, the Czech parliament is discussing a bill implementing the EU Directive 2019/1 and amending these concepts. [Read more](#)

For more information contact [Vojtech Chloupek](#).

Denmark

Public contracting authorities are obliged to exclude tender constellations which are considered to be in breach of competition law

The Danish Complaints Board for Public Procurement ("Board of Appeal") has in a recent decision established that public contracting authorities are obliged to carry out an effective control of whether bidders participating in a consortium infringe Article 101 TFEU or article 6 in the Danish Competition Act.

If the investigation shows that the agreement on which the tender is based infringes competition law, the contracting authority will be obliged to reject the bid.

The Board of Appeal found that this obligation persists irrespective of whether the contracting authority has chosen to apply the relevant voluntary exclusion ground in the Danish Public Procurement Act which is identical to Article 57(4)(d) in the Public Procurement Directive. [Read more](#)

For more information contact [Morten Nissen](#).

Finland

A single, continuous cartel found to have taken place on the Finnish EPS market

On 3 March 2021, the Market Court agreed with the submission of the Finnish Competition and Consumer Authority ("FCCA"), that three manufacturers of expanded polystyrene ("EPS"), a building insulation material, had engaged in a national price fixing cartel lasting one and a half years. The Market Court found that the infringement was a single, continuous infringement even though there was evidence of only two meetings a year apart and one phone call having taken place. [Read more](#)

For more information contact [Päivi Tammieläho](#).

France

French Supreme Court extends legal privilege to all attorney-client correspondence relating to rights of defence

On 20 January 2021, the criminal chamber of the French Supreme Court held that in the context of a dawn raid carried out by a competition authority, all attorney-client correspondence relating to the right of defence is protected and therefore exempt from seizure. Contrary to what previous decisions in this area might have suggested, this protection is not limited to attorney-client correspondence relating to the competition issues being investigated. [Read more](#)

For more information contact [Thomas Oster](#).

Germany

Dispatch of newspapers and magazines - Deutsche Post AG exits rebate system

The Deutsche Post AG ("DPAG") has cancelled its until recently practiced discount system in relation to its dispatch services provided to newspaper and magazine publishers. The DPAG's decision to stop discounting the dispatch services occurred after the German Federal Cartel Office initiated an antitrust proceeding in 2016 due to an alleged abuse of a market dominant position under German competition law. The FCO, in particular, raised competition concerns that DPAG's customers had been bound to DPAG by way of the inadmissible rebate system which impeded the access of DPAG's competitors to the customers' dispatch volumes. [Read more](#)

For more information contact [Marcio da Silva Lima](#).

Italy

Copyright and related rights - AGCM opened an investigation on an alleged anti-competitive agreement in the Italian audio-visual market

On 2 February 2021, the Italian National Competition Authority ("AGCM") opened an investigation against the Italian Society for Authors and Publishers ("SIAE") - organisation responsible for the collective management of copyright in Italy - and various trade associations with a view to ascertain the existence of an anti-competitive agreement restricting competition in the market for the distribution of compensation for private copying ("CPC") in the audio-visual sector.

According to the AGCM, the undertakings concerned may have entered into a single and complex cartel aimed at restricting the copyright for the collection and distribution of fair compensation - granted to copyright holders on intellectual works in view of the use made of these works for non-professional purposes - thus hindering the entry of new collecting societies in the market, as well as the freedom of those entitled to choose the entity to be entrusted with the management of the CPC. [Read more](#)

For more information contact [Federico Marini Balestra](#).

Poland

UOKiK blocks acquisition of media group

Following more than a one-year phase II investigation, in January 2021, the Polish Competition Authority ("UOKiK") announced that it blocked the acquisition of Eurozet by Agora.

Based on the market survey, UOKiK concluded that the creation of a strong radio group would cause irreversible market distortions leading to a restriction of competition. One of the most important grounds, based on which UOKiK blocked the acquisition, is its view that the concentration would create a "quasi-duopoly" of Agora and RMF. UOKiK states that the combined shares of Agora, Eurozet, and RMF (the parties' largest competitor) could reach 70% in some local markets.

Agora strongly disagrees with UOKiK's decision and has appealed to the Consumer and Competition Court. Agora states that the market structure will not be significantly changed due to the concentration, and thereafter Agora will still have approx. 10% lower market share than RMF. [Read more](#)

For more information contact [Piotr Dynowski](#).

Spain

Google avoids antitrust fine in Spain

The Spanish competition authority ("CNMC") has agreed to put an end to the infringement proceedings brought against Google and El Tenedor in November 2018 for an alleged conduct related to Google's search engine and Google Maps' online restaurant reservation system prohibited by Articles 1 and 2 of the Spanish Competition Act.

The CNMC has refused to impose fines on these two companies since no anticompetitive behaviour has been proven to be committed. [Read more](#)

For more information contact [Candela Sotés](#).

The Netherlands

Amsterdam Court of Appeal accepts jurisdiction in damages claim concerning abuse of dominance case on the Greek beer market

On 16 February 2021, the Amsterdam Court of Appeal (Court of Appeal) reversed a judgment of the Amsterdam District Court (District Court) in which the District Court declined jurisdiction over the damages claim brought by the (Abeonian) Thrace Brewery S.A. (MTB) against Athenian Brewery S.A. (AB) which is a Greek subsidiary of Heineken N.V. (Heineken).

The damages case follows on a decision by the Greek competition authority in 2014 fining AB for abuse of its dominant position on the Greek beer market by foreclosing competitors from their distribution and supply channels. The Greek competition authority stated in its decision that Heineken's conduct was not assessed in the context of this investigation.

This is a noteworthy judgment, as the Court of Appeal applies a (very) low threshold for accepting jurisdiction by Dutch courts in competition law damages claims. [Read more](#)

For more information contact [Piet-Hein Eijssen](#).

The UK

Meerkat Manipulation - CMA publishes full infringement decision on the wide MFN clauses by Compare The Market Price Comparison Website

Having fined Compare The Market ("CTM") £17.9 million for imposing wide "most favoured nation" ("MFN") clauses in its agreement with wide insurance companies, on 9 February 2021 the Competition and Markets Authority ("CMA") released the non-confidential version of its infringement decision. The decision is welcome guidance for businesses and legal practitioners on how to assess these elusive restrictions and to navigate the complex legal landscape which has developed around them. It is also an example of the CMA seeking to carve out its role as a leading competition authority on the international stage post Brexit.

Our article provides a brief description of wide MFN clauses, summarises the CMA's decision and comments on the potential impact of this decision for these types of clauses. [Read more](#)

For more information please contact [Peter Willis](#) and [Saskia King](#).

UK CMA & EU Commission seeking views from stakeholders on the new VBER

The current Vertical Agreement Block Exemption Regulation (VBER) and its accompanying guidelines provide the framework of competition law regulation for suppliers and distributors across the EU. It is due to expire in May 2022.

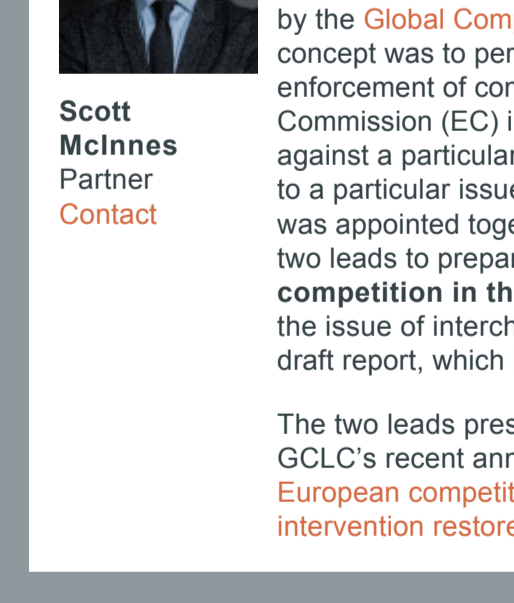
Both the UK's CMA and the EU Commission have launched public consultations to collect stakeholders' views on what the new regulations should look like. This gives companies and trade bodies impacted by the rules a chance to have their voices heard on areas which need addressing, such as the legality of marketplace bans beyond selective distribution networks, more guidance on MFNs and how vertical relationships have evolved in respect of online platforms. [Read more](#)

For more information please contact [Ariane Le Strat](#)

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Webinars & Events



Green Advertising: current challenges and future outlook

Webinar

Thursday 25 March, 10:00 - 11:00 CET

Join Competition associate [Ariane Le Strat](#) and other experts in this webinar that will cover the Do's and Don'ts of Green Advertising. *Green advertising* - an umbrella term for any advertising, claim or other communication related to sustainability, renewable resources, recycling, so called ocean plastics, carbon footprints or similar - is ever-increasing importance in today's world.

Consumers are paying attention to the environment and unsurprisingly, many products are advertised with various green claims in an effort to win the consumer's favour. However, the use of such claims is highly regulated and a lack of compliance can lead to the removal of non-compliant products from the shelves.

In our webinar, we will:

- Give an outlook on European initiatives on green advertising
- Showcase the current legal situation in selected European countries
- Give practical guidance on opposing non-compliant uses by competitors
- Highlight actions of the UK CMA as well as ongoing litigation in France.

Read more about the webinar and see the speakers [here](#).

RSVP at this [link](#).

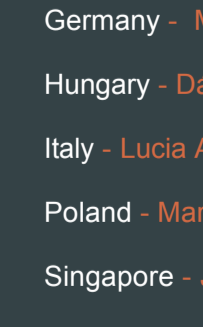
Bird & Bird news



Contribution to Italian handbook *Diritto Antitrust*

Partner [Federico Marini Balestra](#) contributed a chapter to the recently published book *Diritto Antitrust* on the elements of the abuse of dominant position in the new treatise. The chapter was edited by Prof. Antonio Catricalà, former chairman of the Italian Competition Authority. The book provides practical guidance on all issues of EU and Italian antitrust law and features a preface by Prof. Mario Monti, former EU Commissioner for competition.

[Read more here.](#)



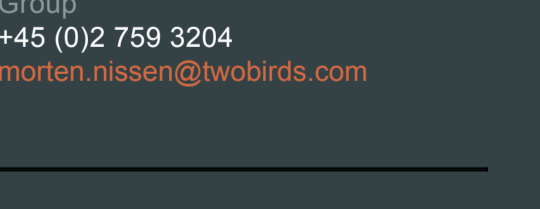
Scott McInnes
Partner
Contact

Competition, Finance & Financial Regulation, Partner presents report at Global Competition Law Centre event

[Scott McInnes](#) recently took part in an initiative organised by the [Global Competition Law Centre \(GCLC\)](#). The event was to perform an ex post analysis of the enforcement of competition law by the European Commission (EC) in a given sector (e.g. pharmaceuticals), against a particular company (e.g. Microsoft) or in relation to a particular issue (e.g. buyer power in mergers). Scott was appointed together with an economist as one of the two leads to prepare a **report on the enforcement of competition in the payments sector**. They focused on the issue of interchange fees and produced a 50-page draft report, which is available [here](#).

The two leads presented their draft report during the GCLC's recent annual conference: **Ex post assessment of European competition enforcement: Did agency intervention restore competition in the market?**.

Bird & Bird compliance tools submitted for Concurrence's Antitrust Compliance Awards



The independent antitrust publisher [Concurrence](#) has launched an Antitrust Compliance Awards initiative to promote competition law compliance and to contribute to antitrust advocacy.

The awards will select the most innovative antitrust compliance initiatives in the following categories:

- Agency Award: Best Antitrust Compliance Initiatives
- Academic Award: Best Antitrust Compliance Initiatives
- Corporation Award: Best Antitrust Compliance Initiatives
- Law Firm Award: Best Antitrust Compliance Initiatives
- Legal Tech Award: Best Antitrust Compliance Initiatives
- Grand Jury Award
- Special Award
- Readers Award

Read more about the Antitrust Compliance Awards initiative [here](#).

Vote for Bird & Bird's Antitrust Compliance toolkit submission [here](#).

Click [here](#) to read previous editions of this newsletter.

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