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December 2020



Competitive edge

Special Edition - 2021 Outlook

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

Dear readers,

In the midst of a global pandemic, with so many changes in all aspects of our lives, 2021 promises to become another important year in the development of competition law.

Regulators have spent much of the last year evaluating and consulting on options to strengthen competition regimes going forward. We see an accelerating focus in 2021 on digital markets with significant policy developments globally, as well as increased enforcement against the large online platforms and tech ecosystems. The European Commission also announced its Green Deal earlier this year and competition policy is set to play a pivotal role in supporting sustainability goals, or at least preventing that competition rules present an obstacle. In 2021, both the competition and the State aid rules look set to be updated to specifically cater to the aims pursued by the Green Deal. Finally, new rules on Vertical Agreements will come and the outcome of the Commission's evaluation of its approach to horizontal co-operation agreements is fast approaching.

In this forward-looking edition of our competition newsletter we therefore consider how the enforcement tools are likely to be changing in 2021 and the potential impact this could have on the digital economy and beyond.

A big thank you to our editorial committee and to our London-based legal director, Anthony Rosen, for curating this edition. To our readers: we hope you enjoy this newsletter and we wish you all a safe and successful 2021!

Pauline Kuipers and Morten Nissen

Co-heads of Bird & Bird's Competition & EU group

2021 Outlook Key Trends in Competition & EU law

Competition compliance

More robust procedures can be expected in Commission investigations

In October 2020, the General Court of the European Union (GC) issued an important decision in the joined *Casino* cases which promises to ensure that competition investigations will be more robust and afford greater protection to companies' rights. Both the European Commission (EC) and companies can take much from the judgment in terms of strengthening their procedures and dawn raid processes. [Read more](#)

Links to the cases: [T-249/17](#); [T-254/17](#); [T-255/17](#).

For more information please contact [Federico Marini Balestra](#) or [Lucia Antonazzi](#)

Information exchange, pricing algorithms and innovation

The currently most discussed themes in competition law – digitalisation, sustainability and the COVID-19 pandemic – can be expected to have an impact on the restrictions and possibilities under competition law for companies to exchange information and cooperate on innovation. In this article, we provide an overview over which developments we expect for these areas in 2021. [Read more](#)

For more information contact [Morten Nissen](#) or [Alexander Bröchner](#)

Digital Platforms - let the games begin!

The threat of strengthened competition intervention and enforcement to address potential concerns in the Digital Economy is looming large as we look ahead to 2021. Regulators have called for strengthened powers to be able to ensure that markets characterised by large platforms with significant networks effects acting as “gatekeepers” remain fair and contestable for innovators, businesses and new entrants. Governments are responding and we can expect new powers to complement ex ante competition law and tougher merger control enforcement. Regulators will be emboldened to test them. The rules of the game are being set – game on! [Read more](#)

For more information contact [Anthony Rosen](#), [Thomas Jones](#) and [Sandra Seah](#)

Digital Services Act Webinar - join us today!

Bird & Bird invites you to join our Regulatory & Public Affairs team for a discussion of the highlights of the proposed Digital Services Act. The [free webinar](#) will take place today, 17 December from 10-10:45am (CET).

If you cannot attend the webinar or want to catch up on our first analysis of the DSA, please read our [Regulatory & Public Affairs Alert here](#). [Register >>](#)

Sustainability and competition law

Sustainability and the revision of EU competition rules are among the hottest topics for 2021. The importance of sustainability projects and developments is eminent. How competition law relates to sustainability initiatives may, however, be less obvious. It becomes clearer with the realisation that sustainability goals can only be achieved when companies – competitors – in the various sectors of the economy cooperate to establish industry-wide sustainability goals and put them into practice. Competition law is (sometimes) perceived to be a barrier for cooperation and progress towards a more sustainable economy.

This outlook for 2021 explores the current available leeway under competition law for sustainability initiatives and we make suggestions of how competition policy could and must adapt to the sustainability challenge. [Read more](#)

For more information please contact [Pauline Kuipers](#), [Piet-Hein Eijssen](#) and [Tialda Beetsma](#)

Supply and distribution and verticals

Online platforms and e-commerce have transformed the way in which manufacturers, suppliers and distributors sell their products both online and offline.

These changes were analysed by national competition authorities across the EU. This has led to a divergent approach towards the enforcement of vertical rules set out in the Vertical Block Exemption Regulation (VBER).

All this means that a review of the functioning of the current VBER is much needed ahead of the new VBER that will replace the current VBER that expires in 2022. Among the crucial changes expected by businesses are clear guidelines on dual distribution and dual pricing, retail price maintenance, agency contracts, and online marketplace restrictions. [Read more](#)

For more information please contact [Piotr Dynowski](#) and [Marcin Alberski](#)

Tougher merger control is on the horizon

Merger control has always been one of the most effective mechanisms to protect ex ante market competition. However, the rapid evolution of many sectors in recent years and the emergence of new market players, especially companies with a high technological value, require merger control mechanisms to be adapted to the new realities.

The European Commission has not remained indifferent to this issue and, as it has done lately with other antitrust rules, it is determined to analyse and, where necessary, update the merger control rules so that they remain effective in novel and specific situations. [Read more](#)

For more information contact [Patricia Liñán](#) and [Candela Sotés](#)

Competition damages and private enforcement

Increased clarity is expected to influence private enforcement actions in 2021

Follow-on damages claims are now an almost inevitable consequence of infringement decisions by the European Commission and national competition authorities, and preparing for possible claims is an ever more important element of the competition defence strategy, meriting consideration at an early stage of the process. This trend is set to continue into 2021, with most European Commission decisions expected to result in damages claims in at least one and often several Member States. Stand-alone claims have also now emerged into the mainstream as a viable and often preferred and swifter alternative to complaining to a competition authority. [Read more](#)

For more information contact [Peter Willis](#)

European industrial policy vs. European competition law: what’s the direction of travel?

The European Commission’s decision to block the [Siemens-Alstom](#) megamerger in February 2019 was heavily criticised by the French and German governments which claimed that it prevented the emergence of a European champion capable of competing with other global operators, in particular state-subsidised rivals, in the market for high speed trains and signalling.

This decision sparked a wider debate on whether European competition law should be revised in order to take into account economic sovereignty considerations. While the Commission has given assurances that it has heard the call for change, it seems that it is only prepared to consider adjustments to the current competition law framework rather than a radical change, pointing to other legal instruments than competition law to ensure a level playing field in the global economy. [Read more](#)

For more information contact [Thomas Oster](#)

State aid – Green Deal and Digitalization in a challenging year 2021

State aid rules are currently undergoing major changes since the European Commission is in a process of revising these rules in order to both enable state aid to assist companies with achieving the goals set out in the European Green Deal, and in order to accommodate the changes brought about by the implementation of the European Electronic Communications Code. [Read more](#)

For more information contact [Morten Nissen](#), [Francine Cunningham](#), and [Marcio da Silva Lima](#)

Will the EU “level the playing field” on foreign subsidies in 2021?

Great openness to foreign investment has come with opportunities for the EU economy but also with increased challenges, such as foreign subsidization. (Anti-)subsidy legislation helps preserve a level playing field in the internal market. However, recently, subsidies granted by non-EU authorities to undertakings established in the Union have been a growing concern in the European political debate – the argument being that foreign subsidies can distort the internal market and undermine the level playing field.

Against this background, the European Commission published a [white paper](#) in June 2020 in which it considers how the EU can respond to foreign subsidies. A first round of public consultations was held and the Commission is now expected to submit a legislative proposal in 2021, which will be accompanied by another round of consultations. [Read more](#)

For more information please contact [Hein Hobbelen](#), [Francine Cunningham](#) and [Kilian Hughebaert](#)

A few final words on Brexit (or not so final!)

As 31 December 2020 approaches the UK and EU competition authorities have both published guidance on the application of the competition rules at the end of the Brexit transition period. This also covers the treatment of ongoing cases and transfer of cases as between the UK and Brussels. [Read more](#)

For more information please contact [Anthony Rosen](#)

News & Webinars & Events



Global Competition Law Centre (GCLC) annual competition law conference

On Friday 29 January 2021, our Brussels partner Scott McInnes will co-present a report at the GCLC annual competition law conference. The report will provide an **ex post analysis of the enforcement by the European Commission of competition law in the payments sector**. During the same afternoon, a report on the Microsoft cases will also be presented.

The conference will continue on Friday 5 February with presentations of the reports on buyer power cases and pharmaceuticals. And on Friday 12 February with reports on cartels and on rebate cases.

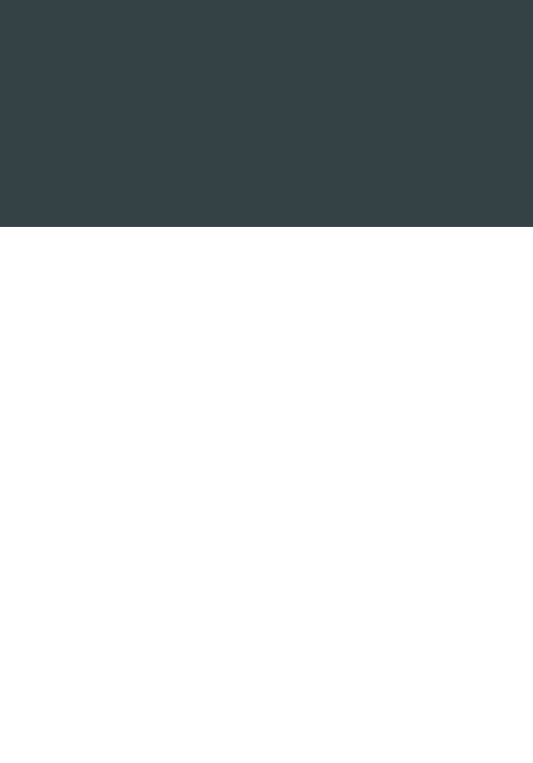
We will share more information on the program and links to register as soon as they are available.

Scott McInnes
Partner, Brussels
[Contact](#)

Dawn Raid Webinar series

A Cure for Nightmares

To those who were not able to attend our two-part 'regulatory dawn raid survival' webinar series, please find the recordings below.



In these webinars, our team of international experts, with extensive experience of investigations in the fields of **competition, financial services and data protection**, shared their top tips on avoiding the nightmares related to surprise investigations.

Webinar 1: Dealing with the regulators

Watch the [recording](#). Download the [presentation slides](#).

Additional resources:

- We invite you to see our [Competition eLearning page](#) for a variety of useful materials, including a brochure, eLearning demos, and links to our free Dawn Raid App and Dawn Raid Game.

Webinar 2: Managing employees and data during an investigation

Watch the [recording](#). Download the [presentation slides](#).

Additional resources:

- We invite you to watch a [recording](#) of a previous webinar when our Employment team provided a practical overview of issues to consider, as well as the key steps to include, in an internal investigation. This also covers multi-jurisdictional challenges and tips from some of our international offices when handling investigations in their locations.
- Please visit our [Forensic Services](#) webpage to find out how our new team assist clients during an investigation.

New eLearning programme on Dawn Raid investigations

Last month we launched our Dawn Raid investigations eLearning programme, which prepares your employees to adequately respond in the event of a surprise investigation by competition or regulatory authorities ('dawn raid').

The course is made up of seven **short, interactive modules of 5-10 minutes each**, which can be assigned to employees based on their role in the dawn raid.

Watch a 1-minute [introduction video](#) to the Dawn Raid investigations eLearning programme.

Click [here](#) to watch a demo of the Dawn Raid investigations eLearning.

Find out more about our eLearning courses [here](#).

Recent articles

Dutch regulator calls for tighter regulation of Big Techs in tighter market study

On 1 December 2020, the Dutch competition authority (ACM) published its long-awaited report on the role of major technology firms (Big Techs) in the payment market. The publication of the report was expected in the summer of 2020 but was delayed due to COVID-19. The study was first announced on 22 October 2019 by the ACM – following up on a request by the Dutch Ministry of Finance to investigate the impact of Big Techs in the Dutch payments market, in particular Amazon, Apple, Ant Group, Facebook, Google and Tencent. The full report is available [here](#), in Dutch only. A summary in English is available [here](#).

Read our brief summary of the report [here](#).

Pauline Kuipers
Co-head of Global Competition & EU group
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Dutch competition authority launches investigation into NFC antenna

Following an investigation into the role of major technology firms (Big techs) in the Dutch payment market (see our alert [here](#)), the ACM has announced a competition law investigation into payment apps' access to the Near-Field Communication (NFC) antenna. ACM's press release can be found [here](#).

[Read more](#)

Digital Platforms to be subject to a Digital Code in the UK to protect competition

The Government has decided to move ahead with the establishment of the Digital Markets Unit (DMU) and the adoption of an enforceable code of conduct to tackle digital markets (Digital Code). These measures are designed to support the establishment of a new pro-competitive regime for digital advertising, general search and social media markets which will allow swift enforcement action to address competition concerns. [Read more](#)

Anthony Rosen
Legal Director, London
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The CMA's gradual move towards a mandatory notification regime: no longer the case of it being easier to seek forgiveness than ask for permission

In recent years, the Competition and Markets Authority (CMA) has become noticeably more pro-active and interventionist in reviewing transactions. In 2019 more than 50% of mergers referred to Phase 2 were prohibited or abandoned. At Phase 2 in 2020, the CMA has already issued three prohibitions and another four transactions have been abandoned. Only one has been cleared. Despite the UK operating a voluntary notification regime, the CMA has available to it an extensive range of powers to intervene in transactions, which it is increasingly exercising, making the regime, in practice, one of mandatory notification. This article analyses two recent developments that will further confirm and reinforce this trend: the CMA's proposed revision to its jurisdictional guidance and the recent Competition Appeal Tribunal (CAT) decision in the Facebook/GIPHY merger. [Read more](#)

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