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Quick Links

Main article
Other developments
Merger control
Antitrust
State aid

CMA under pressure to investigate online advertising

In October 2018 the CEO of the Competition and Markets Authority (CMA) said that the CMA was "actively considering" launching an investigation into the digital advertising sector. Pressure on the CMA to do so mounted this month, with calls to that effect from both the Cairncross Review and the Digital, Culture, Media and Sport Committee's report into disinformation and "fake news".

The Cairncross Review

The Cairncross Review (the Review), published on 12 February 2019, considered amongst other things whether high-quality journalism can be sustained in the face of radical changes to news distribution and consumption brought about by the digital revolution.

The Review highlighted a number of concerns, including the fact that online platforms are increasingly users' gateway to the news, and account for the majority of online advertising revenue. In contrast, news publishers have been slow to grow their online advertising revenue, with subscription schemes having had limited success. These dynamics have led to an imbalance in the platform/publisher relationship.

The Review proposed a number of recommendations, including:

- A requirement that online platforms prescribe codes of conduct governing their relationships with news publishers, which would be subject to regulatory oversight;
- That the CMA conduct a market study into the online advertising market; and
- The introduction of regulatory supervision of online platforms' efforts in improving their users' news experience.

Speaking to the House of Commons on 12 February 2019, the Secretary of State for Digital, Culture, Media and Sport Jeremy Wright set out how the UK Government intends to respond to the Review's recommendations. Immediate actions included noting that he has written to the CMA in support of the proposed market study, and announcing a Government review of how online advertising is regulated. Wright also noted that the Government would give full consideration

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Main article
Other developments
Merger control
Antitrust
State aid

to the recommendations regarding new codes of conduct and increased regulatory oversight and supervision of online platforms.

DCMS Committee report on disinformation and "fake news"

On 18 February 2019 the Digital, Culture, Media and Sport Committee (DCMS Committee) published its **final report** on disinformation and "fake news" (the Report). The Report focused on disinformation, and covered individuals' rights over their privacy, how their political choices might be affected and influenced by information online, and malign interference in political elections.

Whilst the Report's concerns and recommendations are wide-ranging, it made a number of recommendations which echo those of the Cairncross Review:

- To ensure the accountability of tech companies for harmful or illegal content on their sites, they should be subject to a compulsory Code of Ethics. An independent regulator, funded by a levy on tech giants operating in the UK, should be responsible for monitoring compliance, with statutory powers to take action (including imposing fines) against those who breach the Code;
- The CMA should conduct a "comprehensive audit" of the market for advertising on social media and, in light of evidence received, investigate whether Facebook has been involved in anti-competitive practices; and
- The Information Commissioner's Office should investigate Facebook's practices, including its use of users' and users' friends' data.

Next steps

It remains to be seen whether and when the recommendations from these two reviews will be implemented. The CMA has already made clear that whether and when it opens an investigation into Facebook's practices depends on whether a Brexit deal is agreed.

In the meantime, tech companies can expect further measures affecting their sector in the near future. The UK Government is expected soon to publish a White Paper on online harms, and in Europe, the regulation on platform-to-business relationships (the subject of a previous **client briefing**) is expected to be adopted in the coming months. In addition, a panel appointed by Commissioner Vestager to report on the future challenges of digitisation for competition policy is due to report before the end of the month, and a UK Government-appointed panel looking at the UK's competition regime in the context of the digital economy is also expected to report its findings early this year.

Main article
Other developments
Merger control
Antitrust
State aid

Other developments

Merger control

European Commission alleges Telefónica Deutschland breached merger commitments

On 22 February 2019 the European Commission **announced** that it sent a Statement of Objections (SO) to Telefónica Deutschland in which it alleged the German telecommunications company breached commitments it submitted to secure clearance for its acquisition of E-Plus, the German mobile telecommunications business of Dutch telecommunications operator KPN. This is the first time the Commission has sent an SO to a company for breach of its commitments under the EU merger control rules.

The Commission **cleared** the proposed acquisition in July 2014 subject to full compliance with the commitments submitted by Telefónica, to ensure that new competitors would be able to enter the German mobile telecommunications market and to strengthen the position of existing competitors.

The SO relates to one part of Telefónica's commitments, in particular, to Telefónica's obligation to offer wholesale 4G services to all interested players at "*best prices under benchmark conditions*". The Commission's concern is that Telefónica may not have properly implemented this obligation by failing to include certain existing wholesale agreements in its benchmarking exercise, which would have otherwise benefited third parties from more advantageous 4G wholesale access conditions. As a result, Telefónica has allegedly reduced the ability of third parties to compete in the German mobile telecommunications market.

Telefónica has until 5 April 2019 to respond to the SO.

Antitrust

FCA issues its first fines since obtaining competition powers

On 21 February 2019 the Financial Conduct Authority (FCA) **issued** a decision finding that three asset management firms had breached competition law. This marks the FCA's first formal decision under its competition enforcement powers since they came into force in April 2015. Concurrently with the CMA, the FCA has powers to enforce EU and UK competition law in relation to the provision of financial services.

In its announcement, the FCA detailed its findings that asset management firms Hargreave Hale Ltd, Newton Investment Management Limited and River and Mercantile Asset Management LLP had bilaterally shared "*strategic information*" during one initial public offering (IPO) and one placing, shortly before the setting of the share prices. As a result, the firms knew each other's plans during the IPO or placing process, when, the FCA found, under normal market conditions they should have been in competition for shares. This could reduce the share price achieved by the IPO or placing, thereby raising the cost of equity capital for the issuing company.

Main article
Other developments
Merger control
Antitrust
State aid

Hargreave was fined £306,300 and RAMAM £108,600; Newton, however, escaped a fine, having cooperated with the FCA under the competition leniency programme. This development follows the FCA's recent **announcement** that it imposed a fine of £32,200 in proceedings under the Financial Services and Markets Act 2000 on a former Newton fund manager for his conduct in related events, including encouraging rival portfolio managers to cap their orders before an IPO was due to close.

State aid

General Court annuls decision finding Belgian tax exemptions constituted illegal State aid

On 14 February 2019 the General Court (GC) handed down its **judgment** on appeals challenging the European Commission's **decision** that a Belgian scheme of "excess profit tax exemptions" constituted illegal State aid.[1] The appellants (Belgium and one of the scheme's beneficiaries, Magnetrol International) principally argued that the Commission had exceeded its powers in relation to State aid by encroaching upon the exclusive tax jurisdiction of Belgium in the field of direct taxation, and erred in finding an aid scheme. Upholding the appeals, the GC annulled the Commission's decision, representing the Commission's first court defeat in relation to its recent string of decisions on Member State tax schemes.[2]

Regarding the Commission's jurisdiction, the GC noted that although direct taxation falls within the competence of the Member State, the State must nonetheless exercise its competence consistently with EU law. A measure by which public authorities grant certain undertakings advantageous tax treatment is capable of constituting State aid, and, since the Commission can exercise its powers to ensure compliance with State aid rules, it did not exceed its powers in the present case. The GC therefore dismissed this part of the appeal.

However, the GC found that the Commission had incorrectly considered that the Belgian tax scheme constituted an aid scheme within the meaning of the EU State aid rules. It found that the provisions identified by the Commission as the basis of the alleged aid scheme did not set out all the essential elements of the scheme, and so the implementation of those provisions – and therefore the grant of the alleged aid – necessarily depended on the adoption of further implementing measures, which precludes the existence of an aid scheme. The GC also found that further implementing measures would be necessary to define the beneficiaries of the tax scheme, rejecting the Commission's argument that such beneficiaries could be defined in a "*general and abstract manner*".[3] Furthermore, it found that the

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[1] Since 2005, Belgium has applied a system of exemptions for the excess profit of Belgian entities which form part of multinational corporate groups. Those entities could obtain an advance ruling from the Belgian tax authorities if they were able to demonstrate the existence of a new situation, such as a reorganisation leading to the centralisation or increase in activities in Belgium, or the creation of jobs and investments. In that context, profits regarded as being 'excess', in that they exceeded the profit that would have been made by comparable standalone entities operating in similar circumstances, were exempted from corporate income tax.

[2] Notably, previous decisions can be distinguished on the basis that they related to tax rulings in favour of individual companies (such as Apple, Amazon, Starbucks, and Engie) rather than general schemes, as is the case here.

[3] The GC also rejected the Commission's argument that the Belgian tax authorities adopted a "*systematic and consistent approach*" to exempting excess profit from tax, without further implementing measures being required.

Belgian tax authorities had a margin of discretion over all of the essential elements of the exemption system, allowing them to influence the amount and characteristics of the exemption, as well as the condition under which it was granted, which also precludes the existence of an aid scheme.

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