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The European Antitrust Agenda: Brussels Weighs Interim Measures Overhaul; Chemicals Sector Braces for Damages Suits

Welcome to *The European Antitrust Agenda,* brought to you by Europe Executive Editor Javier Espinoza and Senior Correspondents Charley Connor, Lydia O'Neal, Barbara Pianese, Joanna Sopinska and Catherine Stupp. This week, we look at the latest proposals to revise the European Commission's antitrust framework, as well as a first step in a litany of cartel damages cases that experts say could harm the chemicals sector.

Interim measures under review. The European Commission appears prepared to overhaul its procedure for imposing interim measures after receiving widespread support during its consultation on revising the bloc's antitrust framework, known as Regulation 1/2003. Respondents generally rejected lowering the legal test to impose interim orders but said they'd be open to making them more feasible through measures such as providing for a formal right to request them, introducing timelines and establishing specialized internal EC teams to oversee them, according to a summary of 65 responses published on Thursday.

Sources said the EC is keen to make it easier to impose interim measures, as they're rarely used given the high legal bar for imposition. Though 23 respondents were in favor of keeping the current legal test, the agency noted that nine supported a lower bar, for example by removing the need to establish a prima facie infringement or allowing the EC to impose interim orders based on "immediate" rather than "irreparable" harm to competition.

Most corporate respondents were against the EC being able to order companies under investigation to preserve evidence. But many law firm respondents supported the idea, noting that preservation orders could be less intrusive than dawn raids provided they're "designed in a concrete and proportionate way, limited in time and kept under review while the investigation progresses."

Support was more widespread for remote inspections, whereby the EC would digitally review documents from afar rather than conducting a full in-person inspection at a company's headquarters. Most respondents said this would be cheaper than a dawn raid or even a search-term-based request for information, though they warned about data and privacy concerns and the implication for companies' rights of defense.

Most were also in favor of keeping the current system of coordination between the EC and national competition authorities, which allows the latter to enforce stricter antitrust rules in their respective countries. Responses were mixed on whether to abandon a provision that obliges the EC to issue a formal decision every time it rejects an antitrust complaint – something EC officials have been keen

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to get rid of from a resourcing perspective. Some instead floated the option of submitting shorter, informal complaints and then moving ahead once the agency has indicated it would be interested in a case.

Chemicals damages battle looms. An Amsterdam court will in the coming months take the first big steps for a slew of lawsuits from chemical giants – including BASF (ETR: BAS), Shell (LON: SHEL), TotalEnergies (EPA: TTE), Exxon (XOM) and BP (LON: BP) – seeking billions in damages from several of their customers. If approved by courts in the Netherlands and Germany, the damages could put those customers out of business and harm Europe's fragile chemicals sector, according to industry experts.

The cases also raise questions about the effectiveness of the EU's damages rules and incentives for wrongdoers to apply for leniency, as the defendants did, at a time when EU officials have said they're struggling to detect cartels via participants who come clean or otherwise cooperate in exchange for lower penalties.

In an unusual 2020 cartel decision, the commission found that Clariant (SWX: CLN), Celanese (CE), Orbia (BMV: ORBIA) and Westlake (WLK) colluded to lower purchase prices for ethylene, a petrochemical used in plastics, detergents and other consumer products and collectively fined them €260 million. Most cartel cases target agreements to raise prices or restrict supply. And, some argue, the cartelists' victims didn't seem particularly worse off.

"Everyone in the industry was astonished," said Paul Hodges, a longtime industry consultant. For the chemical giants pushed by the cartel to sell the ethylene at lower prices, he said, "business profitability wasn't great but it was there."

"The thinking at the time was the sellers are not going to go for damages because they would destroy the customer," he added.

This comes as EU leaders and executives are warning that the bloc's chemical champions – a core foundation of the region's economy – are in crisis.

In March, the Amsterdam District Court is scheduled to hold a hearing in a suit against the ethylene buyers brought by Shell, which is seeking over €1 billion from them, though timing could shift. A decision is due later this year in another case in the same court, brought by a foundation backed by Repsol. It doesn't end there: More than half a dozen similar suits are in their early stages in Amsterdam and other jurisdictions.

Shell and Repsol didn't respond to requests for comment.

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What Else Is Happening

Getty/Shutterstock interim report. The CMA's phase 2 panel has provisionally concluded that Getty Images' (GETY) $3.7 billion acquisition of Shutterstock (SSTK) would significantly lessen competition in the supply of editorial content in the UK, but has dropped earlier concerns about the global supply of stock content after. The companies said they "do not believe the analysis or interim conclusions reflect the composition of the UK market, the level of regional competition within it or the alternatives available to customers" but will keep engaging with the authority. They have until March 5 to indicate if they'll submit remedies.

Qualcomm class action collapse. UK consumer association Which? has revealed it's pulling its collective action seeking £480 million ($650 million) from Qualcomm (QCOM) after a five-week trial in the UK's Competition Appeal Tribunal, conceding that its arguments about the chipmaker's licensing practices for standard-essential patents would fail on an abuse of dominance analysis.

Retailers nab card case win. The UK Competition Appeal Tribunal ruled last week that Visa (V) and Mastercard (MA) failed to prove that merchants have been passing the card giants' fees on to consumers, with narrow exceptions, paving the way for the retailers to receive damages. The court ruled last year that many of the card companies' fees breach EU and UK competition law. A Visa spokesperson said the company "will consider all available options with its legal team." Mastercard didn't respond to a request for comment.

EU investigates Shein. The European Commission opened a probe into the e-commerce platform over suspected violations of the Digital Services Act. The investigation focuses on Shein's allegedly addictive design, the lack of transparency in its recommender system and the sale of illegal items, including childlike sex dolls.

In Their Own Words

The European Commission's work enforcing its online platform regulation has become not only contentious, but very hard in today's climate of intense political scrutiny, Prabhat Agarwal, a senior official overseeing the Digital Services Act, said at a conference last week.

The DSA is a prominent issue in the fractious relationship between the EU and the Trump administration. Officials, and the companies they regulate, are watching their backs, Agarwal said. Companies used to attend open workshops on the DSA but now ask for closed-door meetings. "Our

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work is more hard than we had anticipated, more difficult and more adversarial than we thought before," he said.

Ribera's Weekly Calendar

To view European Commissioner for Competition Teresa Ribera's schedule for the week, click here.

Personnel News

Gurr permanency. The UK government has provisionally selected CMA Interim Chair and former Amazon UK Manager Doug Gurr to formally lead the enforcer for the next five years, subject to a parliamentary confirmation hearing.

Events

February 25 at 3pm CET: Former EU tech commissioner Thierry Breton and representatives from NGOs will speak in the European Parliament's IMCO committee. Breton and the NGO staff were sanctioned with U.S. travel bans over their work on the Digital Services Act and platform regulation.

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