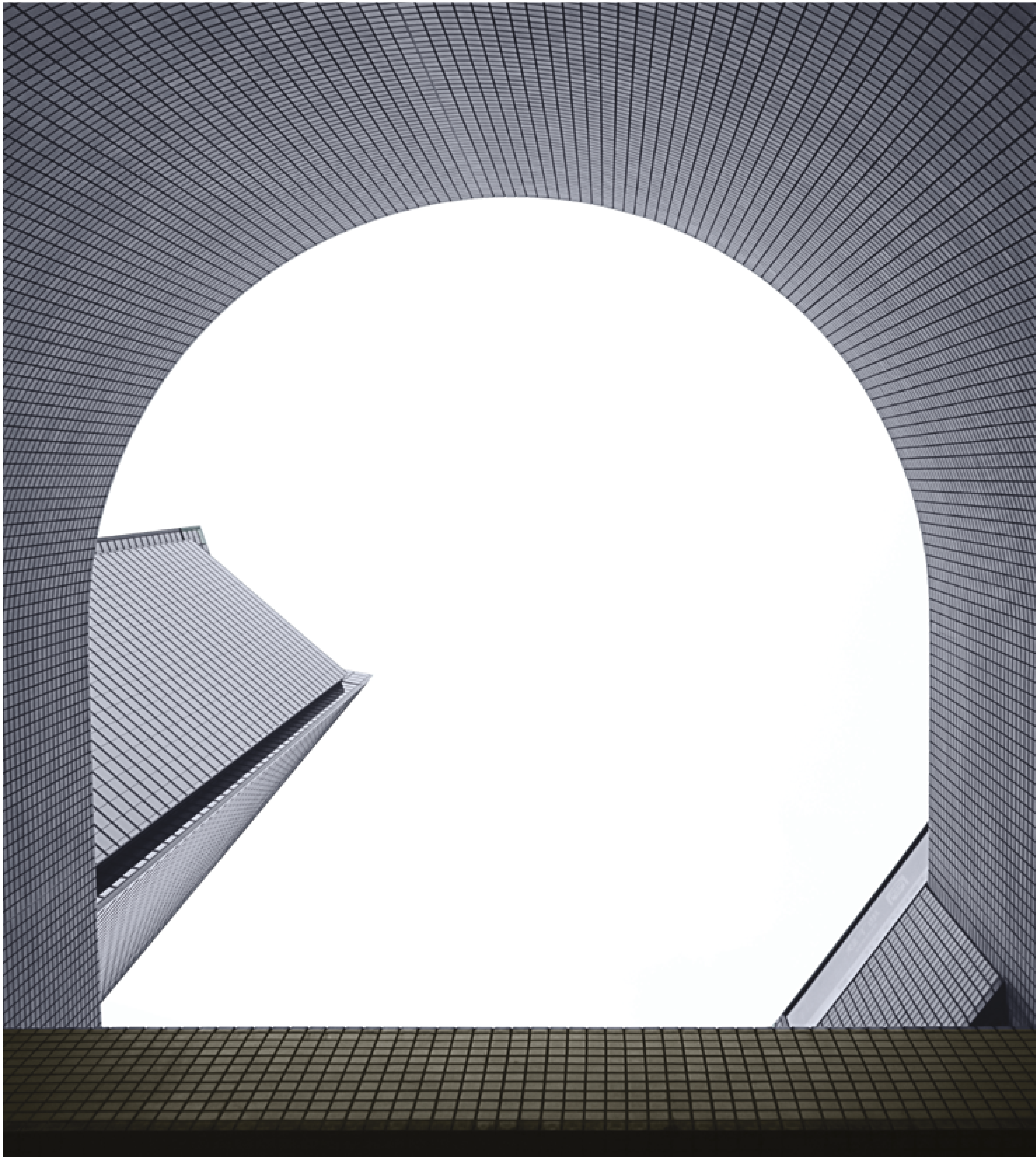
ZEPOS & YANNOPOULOS

May 2019 to October 2020

EU Competition Law flashback

On the occasion of the 4th Annual Competition Law Conference organized by Nomiki Bibliothiki



Below, we provide a digest of the major developments and trends in the application of EU antitrust, merger control and State aid rules for the period between the 3rd and the present (4th) NB Annual competition law Conference. Our selection focuses on EU level developments and as such, it does not look into either updates from NCAs or developments relating to damages actions. None of the items reported here should be construed as legal advice on any specific facts or circumstances.

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A. Policy

European Commission seeks to obtain market investigation powers in the form of a "New Competition Tool"

On 2 June 2020, the European Commission announced the launch of a public consultation and published an Inception Impact Assessment on an envisaged "New Competition Tool", which would effectively amount to the Commission acquiring market investigation powers, akin to the ones already held by competition authorities in certain national jurisdictions (e.g. UK and Greece). The initiative, which is being pursued in parallel to the Commission's "Digital Services Act" package, seems to be motivated by a perceived gap in the Commission's toolkit, in terms of tackling competitive distortions that fly under the radar of the existing rules, specifically as relates to unilateral conduct and merger control. Notably, the proposal by the Commission entails four possible options with regard to the scope of the New Competition Tool, along the dimensions of: (i) dominance-based v. market-structure-based; and (ii) horizontally applicable across all markets v. focused on markets with purportedly acute structural problems, such as digital or digitally enabled markets. The Commission's advocacy regarding the New Competition Tool seems to suggest a preference for the "market structure" model (whether horizontally or targeting digital markets in particular), which would allow the Commission to investigate allegedly abusive unilateral conduct by non-dominant undertakings, or even revisit previously cleared mergers due to their perceived *ex post* effects on market structure. Stakeholders have expressed mixed views on the necessity and proportionality of such an instrument, and have highlighted key issues that need to be well thought out, e.g. defence rights. The official timeline envisions the publication of a draft Regulation by Q4 2020, a noticeably speedy pace for EU legislative standards, indicating the priority which the Commission places on this issue.

European Commission seeks to enact *ex ante* regulation targeting digital platforms as part of its Digital Services Act package

On 2 June 2020, simultaneously with the launch of the legislative process for the New Competition Tool, the European Commission announced a public consultation and published an Inception Impact Assessment on a "Digital Services Act", a legislative package that encompasses two main work strands: (i) the revision of the 2000 E-Commerce Directive; and (ii) the establishment of an EU regulatory framework aimed at maintaining a level playing field in digital markets. The latter part is of particular interest for EU competition law enforcement. While two of the options put forth by the Commission regarding the form of this regulatory intervention focus on increased transparency and information-giving requirements for providers of online services, the third option proposes a new *ex ante* regulatory framework for large online platforms acting as "gatekeepers". According to the Commission's Inception Impact Assessment, this new framework would establish clear obligations for such digital platforms (e.g. mandating interoperability and data portability) and would restrict or outright prohibit certain practices (so-called "blacklisted" practices, e.g. intra-platform self-preferencing). The exact scope of the practices which will be singled out for *ex ante* treatment, which is yet to be determined, is a matter of great interest (e.g. whether data-related practices such as those identified as anticompetitive by the Bundeskartellamt in the Facebook case will be captured). As with the New Competition Tool, the official timeline of the Commission envisions the publication of a draft Regulation on this *ex ante* regulatory instrument in Q4 2020.

European Commission reviews its approach to market definition

On 26 June 2020 the European Commission published a public consultation regarding the

revision of the Market Definition Notice used in EU competition law, inviting stakeholders from the public and private sector (including, undertakings and consumer associations, national competition authorities and government bodies, academia, as well as legal and economic practitioners) to submit their views and contribute to the Commission's evaluation of the Notice to assess whether it requires updating. The Commission acknowledges that, as the current Market Definition Notice dates from 1997, it might not address all pertinent questions that may arise today when defining the relevant product and geographic market, especially in markets heavily affected by exponential technological evolution and digitalisation. Respondents are invited to submit their views until 9 October 2020 and the Commission aims to publish the results of the evaluation within 2021.

European Commission issues guidelines to protect European critical assets from foreign investment

On 25 March 2020, the European Commission issued Guidance concerning foreign direct investment and free movement of capital from third countries, and the protection of Europe's strategic assets, ahead of the application of Regulation (EU) 2019/452 (the "FDI Screening Regulation") in October 2020. The Guidance is addressed to Member States, setting out what they can do in advance of the entry into force of the FDI Screening Regulation. The Guidance seeks to anticipate to some extent the way that the FDI Screening Regulation will apply in practice, recalling its scope and explaining the role of FDI screening in the case of a public health emergency. More importantly, the Commission calls for increased investment screening by EU Member States, as well as actions to protect European companies and aid the economic recovery of the EU as a whole. The Commission's broader concerns seem to centre on the economic vulnerability or the undervaluation of certain companies, which could result in the sell-off of infrastructure that is either critical during the ongoing healthcare crisis, or essential for the post-crisis recovery.

Foreign subsidies under the European Commission's radar

On June 17, 2020, the European Commission published a White Paper on the regulation of foreign subsidies, aiming to fortify the level playing field within the Single Market by dealing with the distortive effects caused by foreign subsidies. The White Paper, a long-awaited and well-received initiative, proposes a number of solutions and three tools called "Modules", each tackling three distinctive issues which the Commission has identified as affected by foreign subsidies. These Modules comprise the following:

- an *ex post* control mechanism for foreign subsidies distorting the EU internal market generally;
- an *ex ante* control process for foreign subsidies facilitating EU acquisitions; and
- an *ex ante* control mechanism for foreign subsidies distorting EU public procurement procedures.

The White Paper proposes the establishment of a new notification process, which will in theory move in parallel with the notification processes associated with the EU Merger Control Regulation and the EU FDI Screening Regulation. Fines as well as remedies could be imposed, limiting participation in all sectors of the internal market, including prohibitions on businesses from making subsidised acquisitions and participating in public procurement procedures in the EU. The deadline for stakeholders to submit their views on the White Paper to the Commission expired on 23 September 2020. The feedback received will now inform the Commission's next moves in deciding whether such a tool is actually needed, and if yes, what exact form it will assume.

European Commission may allow more State Aid to boost green projects

On 22 September 2020, EU Competition Commissioner Margrethe Vestager said that EU governments may be allowed to grant more State aid to projects that help the bloc achieve its climate goals, calling such an incentive a "green bonus". In contrast, polluting factories or power plants may be rebuffed when seeking State aid. Commissioner Vestager invoked state-funded building projects that use recycled materials as an example that might qualify for a "green bonus". This development underscores the Commission's efforts to cut greenhouse gas emissions by at least 55% by 2030. Reportedly, the Commission plans to kick off a consultation in the coming weeks on how competition rules and sustainability policies work together, culminating in a conference early next year. This effort follows relevant initiatives by the Dutch and Greek competition authorities, which have already launched (in July and September respectively) their own efforts to navigate the cross-over between competition policy and environmental sustainability.

European Commission launches sector inquiry on the Internet of Things (IoT)

On 16 July 2020, the European Commission launched an antitrust sector inquiry into the market for Internet of Things (IoT) for consumer-related products and services in the EU. The Commission's inquiry will focus on such products and services that are connected to a network and can be controlled at a distance, for example via a voice assistant or mobile device (e.g. smart home appliances, wearable devices). The inquiry's launch has been motivated by concerns the Commission has expressed with regard to the strong network effects and economies of scale present in IoT markets, which can lead to the fast emergence of dominant players and quickly lead to the relevant market "tipping" in favour of such players. According to the Commission, IoT products and services such as "voice assistants" (e.g. Amazon's Alexa, Apple's Siri) and "wearables" (e.g. smartwatches) may have a "gatekeeper" role in markets for digital services more broadly (i.e. they hold elevated market power over strategic bottlenecks), and has expressed concerns on how they use that role. The Commission sees

preliminary indications of such phenomena manifesting in the form of restrictions on data access and interoperability, as well as self-preferencing and practices linked to the use of proprietary standards.

UK exits EU – competition law implications

On 31 January 2020, the UK formally exited the European Union, following the conclusion of a Withdrawal Agreement between the two. A transition period is in force from 1 February 2020 to 31 December 2020 (subject to extension), during which EU competition law (and EU law in general) will continue to apply in the UK, meaning that the country continues to be subject to the control of the Commission and the EU courts for this period. On 28 January 2020, the UK Competition and Markets Authority (CMA) published guidance, aiming to explain the somewhat complex web of arrangements applicable during the transition period, towards the end of that period, and after it ends the key features of which are the following: (i) In antitrust enforcement, the Commission will retain competence to complete antitrust investigations that cover alleged anticompetitive effects in the UK, as long as the investigation was initiated before the end of the transition period. After the transition period has expired, Articles 101 and 102 TFEU will continue to apply for anticompetitive conduct by UK undertakings producing effects in the EU, though the Commission will no longer be competent to conduct investigative acts in the UK. The CMA will have concurrent antitrust competence, meaning that the two jurisdictions will be able to conduct parallel investigations into the same conduct. Also, after the transition period the Commission will still be able to monitor and enforce commitments and remedies undertaken before the end of the transition period with respect to Article 101 and 102 infringement findings (subject to agreement handing over those responsibilities to the UK authorities). (ii) With regard to merger control, the Commission continues to function as a "one-stop-shop" for mergers formally notified (i.e. "on the clock") by the end of 2020, even in cases where this means the decision will be issued after the end of the transition period. For deals not "on the clock" by December 2020, jurisdiction to review UK aspects of the deal will revert to the CMA, while EU aspects will remain with the Commission. As with antitrust enforcement, in cases assumed by the Commission before the end of the transition period, the Commission will also be competent for remedies and commitments, unless otherwise agreed with the CMA. After the transition period, the two jurisdictions will function as separate merger control regimes, so that parallel filings will be possible. (iii) Finally, regarding State aid, during the transition period the Commission retains jurisdiction to review State aid notifications with regard to aid granted by the UK authorities. The situation after that will very much depend on the terms of any future economic cooperation agreement between the UK and the EU.

B. Antitrust

Vertical Block Exemption Regulation set for a digitalisation update

On 8 September 2020, the European Commission published its Staff Working Document in the context of the evaluation of Regulation (EU) No 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices ("Vertical Block Exemption Regulation" or "VBER"). The European Commission has been reviewing the VBER since 2018, as it is set to expire on 31 May 2022. The evaluation phase of the review process, which has comprised a public consultation, consultations with national competition authorities of EU Member States, a stakeholder workshop and external expert evaluation studies, culminated in the publication of the Commission's Staff Working

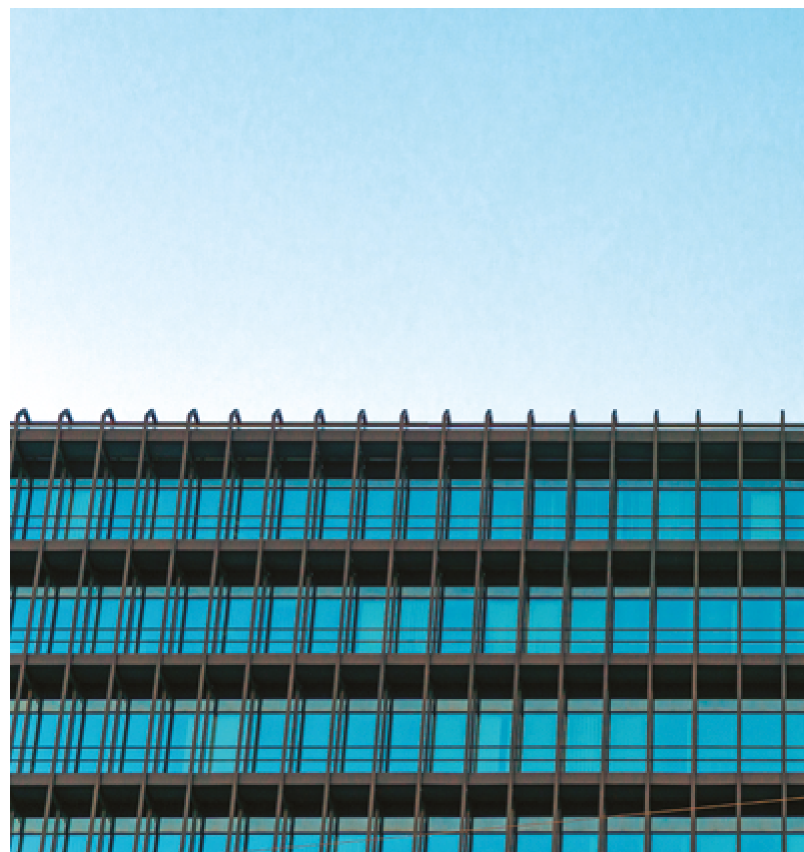
Document, summarising the findings from all of the above procedural steps, and setting the template based on which the Commission will subsequently propose – in the impact assessment phase – whether to prolong the VBER, and – if yes – what revisions should be made to both the VBER and the accompanying Guidelines on Vertical Restraints ("Vertical Guidelines"). The key takeaways from the Staff Working Document seem to be that the VBER – as expected – will be prolonged, and both the Regulation and the Vertical Guidelines will see amendments mainly in terms of updating the rules for the digital era (the current VBER dates back to 2010, before the rise to prominence of e-commerce and global digital platforms). Issues such as selective distribution and online sales restrictions are projected to receive heightened attention in the Commission's revision of the VBER and the Vertical Guidelines.

European Commission opens investigations into Apple's App Store and Apple Pay practices

The tech giant has recently fallen under the scrutiny of the European Commission in two investigations formally launched on 16 June 2020. The first investigation looks into the App Store and seeks to identify whether Apple is distorting competition for music streaming and distribution of e-books and audiobooks. The investigation follows up on separate complaints by Spotify and by an e-book/audiobook distributor on the impact of the App Store rules on competition in music streaming and e-books/audiobooks. The Commission will investigate in particular two restrictions imposed by Apple in its agreements: (i) the imposition of a 30% commission on all purchases taking place through Apple's own proprietary in-app purchase system "IAP" for the distribution of paid digital content; and (ii) restrictions on the ability of developers to inform users of alternative purchasing possibilities. The second investigation aims to assess whether Apple's conduct in connection to Apple Pay impermissibly limits competition within the EEA. The Commission is concerned that Apple's terms, conditions, and other measures relating to the integration of Apple Pay for the purchase of goods and services on merchant apps and websites on iOS/iPadOS devices may distort competition and reduce choice and innovation.

European Commission looks into the issue of collective bargaining for the self-employed

On 30 June 2020, the European Commission announced that it has launched a process to ensure that the EU competition rules do not stand in the way of collective bargaining for the self-employed. Even though collective bargaining with employees falls outside the scope of EU competition rules, concerns arise when attempts are made to extend collective bargaining to groups of professionals who, at least formally, are not employees, such as the self-employed. As a result, the Commission's initiative aims to provide self-employed workers with the necessary clarity in order to negotiate collectively and improve their working conditions. According to EU competition law, such professionals are considered "undertakings" and agreements they enter into (such as collective bargaining) may therefore be captured by the EU competition rules. Inasmuch as self-employed activities vary, the Commission is asking for feedback from stakeholders from



the public and private sector (including national competition authorities and government bodies, academia, as well as legal and economic practitioners, trade unions, and employers organisations) so as to comprehend the scope of the self-employed who need to participate in collective bargaining and to set out the initial options for future actions. The Commission will next launch a public consultation and publish an inception impact assessment setting out some initial options for future action.

Important developments for the treatment of pay-for-delay agreements

On 30 January 2020, the Court of Justice of the EU rendered its preliminary ruling in Case C-307/18 – *Generics (UK) and Others v CMA (Paroxetine)*. The case originated in a preliminary reference made by the UK Competition Appeal Tribunal (CAT) relating to an appeal against a decision of the UK Competition and Markets Authority (CMA) regarding the supply of paroxetine. In its ruling, the Court acknowledged that a dispute between an originator and a generics manufacturer constitutes evidence that they are potential competitors. It also confirmed that an agreement in settlement of a patent dispute in the pharmaceutical sector may constitute a restriction of competition "by object" or "by effect", as well as an abuse of a dominant position in breach of competition law. The ruling also confirmed the General Court's earlier rulings in *Lundbeck and Servier*, in which it had held that pay-for-delay agreements (in these cases) constituted a restriction "by object".

In line with the above, on 4 June 2020, Advocate General Kokott delivered her Opinion in Case C-591/16 P, *Lundbeck v Commission*. AG Kokkott applied a broad interpretation of the notion of potential competition, agreeing with the General Court's previous finding that Lundbeck and the generic drug manufacturers were at least potential competitors despite Lundbeck's valid patents that prevented generics from entering the market. AG Kokkott proposed that Lundbeck's appeal should be dismissed since the General Court did not err in ruling that pay-for-delay agreements struck between Lundbeck and various generics companies were restrictions of competition "by object", as the agreements went "*beyond the specific subject matter of their intellectual property rights*".

Aspen offers excessive-pricing commitments

On 14 July 2020 the European Commission started a market test inviting comments from interested parties on commitments offered by Aspen Pharmacare Holdings. The Commission had opened an investigation in May 2017 over concerns that Aspen had abused its dominant position in a range of national markets by charging excessive prices for critical medicines for the treatment of leukemia and other hematological cancers. To address these concerns, Aspen proposed: (i) to apply a price reduction across Europe for six cancer medicines by, on average, approximately 73%; (ii) to observe this reduction for ten years from October 2019 onwards and to guarantee the supply of these medicines for the next five years; and (iii) for an additional five-year period, either continuing to supply or making the marketing authorisations available to third-party suppliers.

Court of Justice confirms strict approach to "by object" infringements in *Budapest Bank* ruling

On 2 April 2020, the Court of Justice of the EU delivered its judgment in Budapest Bank on a reference for a preliminary ruling from Hungary's highest court relating to agreements on fixed multilateral interchange fees (MIFs). In this much-anticipated ruling, the Court of Justice further tightened and clarified the conditions for finding a restriction of competition to be "by object". Clarifying its previous case law on the matter (notably *Cartes Bancaires* and *Maxima Latvija*), the Court ruled that there is no shortcut for determining whether particular conduct can be held to have the object of restricting competition. In particular, the Court held that a competition authority should always carefully assess if the conduct examined reveals "*a sufficient degree of harm to competition*" before categorising it as a "by object" infringement. This is the case where there is sufficiently solid and reliable experience showing that this type of conduct is inherently anticompetitive. However, if a conduct has sufficient pro-competitive effects, the competition authority should resort to a full-fledged effects analysis to establish an antitrust infringement. The Court of Justice did not conclude on whether the MIF agreement under scrutiny entailed a restriction of competition "by object", but noted a number of elements that cast doubts on such a characterisation. Following this decision, it will be more of a challenge for competition authorities to qualify new or less "straightforward" conduct – such as complex MIF arrangements relating to multi-sided markets – as a "by object" infringement.

European Commission imposes interim measures on Broadcom

After almost two decades, on 16 October 2019 the European Commission "resuscitated" one of its most powerful enforcement tools, i.e. interim measures, in its investigation against Broadcom. According to the Commission, the dominant Broadcom had entered into agreements with six manufacturers of TV set-top boxes and modems which contained clauses obliging manufacturers to buy exclusively (or almost exclusively) from Broadcom, or making commercial advantages (e.g. rebates and other non-price related advantages such as early access to its technology) conditional on exclusive/near-exclusive purchasing. Hence, the Commission found that if Broadcom's abusive conduct were allowed to continue, it could lead to serious and irreparable harm to competition before the end of its full investigation into the company. The interim measures obliged Broadcom to cease to apply the anti-competitive clauses for three years and to inform the manufacturers of this. On April 2020, Broadcom sought to settle with the Commission, by offering to change contracts that may compel set-top box makers to use its chips. Broadcom proposed to stop offering incentives to customers which encouraged them to acquire more than 50% of their devices from the company. The Commission, having sought the public's feedback on the offered commitments from 30 April until 11 June 2020, is continuing the settlement discussions.

Amazon under the EU spotlight for its use of sensitive data from independent retailers selling on its marketplace

On 17 July 2019, the European Commission opened a formal investigation to examine whether Amazon's use of sensitive data from independent retailers selling on the platform infringes EU competition rules. Amazon's dual role, i.e. as a retailer selling on the platform and as the provider of the marketplace where other independent sellers sell products to consumers, allows it to have direct access to a pool of data related to consumers' and sellers' activity on its platform. The Commission's preliminary investigation showed that Amazon appears to be using these competitively sensitive data. As part of its in-depth investigation the Commission will look into the standard agreements between Amazon and marketplace sellers, the

role of data in the selection of the winners of the "Buy Box" and the impact of Amazon's potential use of competitively sensitive marketplace seller information on that selection. If proven, the practices investigated may breach Article 101 and Article 102 TFEU.

European Commission fines Qualcomm for predatory pricing

On 18 July 2019, the European Commission fined Qualcomm for abusing its market dominance through predatory pricing. The Commission found that between 2009 and 2011 Qualcomm sold its baseband chipsets below cost to two strategic customers in order to exclude from the market Icera, a new entrant and further entrench its dominance. The investigation, which opened in 2010 following a complaint lodged by Icera, revealed Qualcomm's internal documents which showed that Icera was identified internally as a "critical" threat to Qualcomm's 3G baseband chipset business. To address this threat, Qualcomm took what its internal documents described as "preventive actions." This decision should be a loud reminder for companies that internal documents play a decisive role in Commission proceedings, since the Commission has developed the means to analyse large amounts of internal documents in order to discover "smoking gun" evidence used as the cornerstone of its cases. The text which also includes some interesting post Intel analysis on rebates was made public on 20 July 2020.

European Commission's investigative powers in dawn raids clarified by Court of Justice

Recent judgements by Court of Justice of the EU provide important clarifications regarding the European Commission's powers and obligations when conducting dawn raids.

- On 30 January 2020, the Court of Justice handed down a judgment dismissing two appeals by České dráhy, a.s. against General Court judgments on two European Commission decisions of 2016 that ordered České dráhy, under Article 20(4) of Regulation 1/2003, to submit to unannounced inspections concerning suspected participation in anti-competitive conduct. In 2016 the Commission had conducted two inspections, one based on exclusionary conduct contrary to Article 102 TFEU and one based on suspected restrictions on sales of rolling stock contrary to Article 101 TFEU. On its appeals, České dráhy raised pleas relating, among others, to the duty to state reasons, the requirement for proportionality in inspection decisions, the conditions applicable to inspections under Article 102 TFEU and the limits to the Commission's powers to seize documents. The Court held that, where the Commission has sufficiently serious indications of a breach of competition rules, it cannot be required to weigh these against indications to the contrary at this stage of the procedure. The Court of Justice defended the Commission's powers in the preliminary investigative stages, refuting arguments pushing to increase the level of information provided by the Commission prior to an inspection.
- On 16 July 2020, the Court of Justice of the EU delivered a judgment dismissing the appeal by Nexans France and its parent company against the judgment of the General Court in the *Power Cables* cartel case. In 2014, the Commission dawn raided Nexans' premises, but due to the lack of time it completed the raid at its own offices. Nexans appealed the fining decision on a number of grounds, including that the Commission did not have the right to continue the investigation at its premises. The Court of Justice found that the Commission can copy data and assess their relevance to the investigation at its own premises, while safeguarding companies' rights of defence. Nevertheless, the Commission's choice to continue dawn raids at its premises is subject to limitations. The shift in premises must be justified, either to ensure the effectiveness of the inspection or to prevent of excessive interference in the activity of the investigated company.

European Commission prolongs the validity of block exemption for liner shipping consortia

On 24 March 2020, the European Commission published a final Regulation extending the EU Consortia Block Exemption Regulation (CBER) until 25 April 2024, without modification. This Regulation outlines the conditions under which liner shipping consortia can provide joint services without infringing EU antitrust rules that prohibit anticompetitive agreements between companies. Therefore, the CBER provides a "safe harbour" under EU competition law for vessel sharing arrangements that have a market share up to 30%. These agreements, however, cannot include price-fixing or market-sharing. The Commission's decision to extend the CBER comes as the result of an evaluation process which showed that despite evolutions in the market (increased consolidation, concentration, technological change, and increasing size of vessels) the CBER is still fit for purpose and delivers on its objectives.

Hello Kitty parent company fined for restricting cross-border sales

On 9 July 2019, the Commission fined Sanrio, a Japanese company that designs, produces and sells "Hello Kitty" products, EUR6.2 million for breaching Article 101 TFEU by imposing territorial restrictions on cross-border and online sales of merchandising products featuring Hello Kitty and other Sanrio-owned characters. Hello Kitty products are either sold directly or distributed in Europe through licensed distributors. Sanrio's distributorship agreements contained clauses that expressly restricted out-of-territory sales by the licensees. These restrictions were reinforced through indirect measures, such as regular audits and a refusal to renew contracts for licensees who did not comply with the policy. The Commission reduced Sanrio's fine by 40% for its cooperation. This was the second case in a series of decisions into merchandising agreements (see also infringement decisions for Nike, GUESS and Universal Studios), which were opened following the Commission's e-commerce sector inquiry and which combined the licensing of IPRs and distribution agreements.

European Commission fines NBCUniversal for restricting sales of film merchandise

On 30 January 2020, the European Commission fined NBCUniversal EUR14,3 million for restricting intellectual property licensees from selling licensed merchandise within the EEA to territories and customers beyond those allocated to them. The Commission found that for over six and a half years, NBCUniversal implemented a number of direct measures which restricted out-of-territory sales by licensees, sales beyond allocated customers or customer groups, and online sales and required licensees to pass these restrictions onto their customers. To ensure compliance with these restrictions, NBCUniversal implemented a series of measures. This investigation followed on from the Commission's sector inquiry into e-commerce markets and led to the third infringement decision for cross-border restrictions (see also Nike and Sanrio).

European Commission fines hotel group Meliá for restricting cross-border sales

On 21 February, 2020, the Commission fined hotel group Meliá EUR6.7 million for restricting cross-border sales through the terms of its hotel accommodation agreements with tour operators pursuant to which operators were forced to discriminate between EEA customers based on their country of residence. The decision reiterates the Commission's strict stance on any measures partitioning the EU Single Market, a frequently applied theory of harm in recent years. The Commission reduced Meliá's fine by 30% for cooperation, confirming once more its recent practice of rewarding cooperation in non-cartel cases.

European Commission publishes full Google Android decision

On 20 September 2020 the European Commission published its long-awaited 327-page explanation of its decision to fine Google €4.34 billion for illegal practices regarding Android mobile devices. The text provides a detailed analysis of some of the most interesting aspects of the decision, initially implied in the Commission's press release back in July 2018. One of them relates to the app store. According to the decision, there is a separate market for Android app stores, as Android end-users' are unable and/or unwilling to switch to iOS and, consequently, to an iPhone device. Undoubtedly, the case is still years away from its final judicial resolution, since, as expected, Google has already appealed the decision which might end up all the way to the European Court of Justice.

C. Merger Control

General Court annuls Commissions's prohibition of Hutchison 3G UK/ Telefónica UK, clarifies application of SIEC test to non-coordinated effects in oligopolistic markets

On 28 May 2020, the EU General Court issued a ruling annulling the European Commission's decision prohibiting the proposed acquisition of Telefónica UK by Hutchison 3G UK. The Commission had examined this transaction as a "four-to-three" merger and had blocked it in 2016, in line with its generally hard stance towards "four-to-three" mergers in the telecommunications sector (another such case being the proposed Telenor/TeliaSonera merger, whose notification was withdrawn following the Commission's opposition). In its prohibition decision, the Commission had also cited concerns regarding negative effects on the two network sharing agreements in the UK, as well as at the wholesale level, where the Commission considered that the merger would have reduced the number of mobile network operators willing to host other ("virtual") mobile operators on their networks. The Commission had rejected a range of remedies offered by the parties. In its decision, the General Court shed light on how the Commission should apply the "significant impediment to effective competition – SIEC" test with regard to non-coordinated effects. In applying the SIEC test, the General Court held that the Commission should be allowed to prohibit concentrations which may affect the competitive conditions on the market to an extent equivalent to creating or strengthening a dominant position, even without the latter actually taking place. This, according to the General Court, can happen when "non-coordinated" effects generate an elimination of important competitive constraints exerted on each other by the merging parties, and a reduction of competitive pressure on the remaining competitors. Importantly, the General Court notes that the latter element alone is not enough for the SIEC test to be met – otherwise, any merger in an oligopolistic market would be prohibited. Moving on, the General Court clarified that cases entailing uncertain theories of harm require a heightened standard of proof to be met by the Commission that lies somewhere in between the "balance of probabilities" and the "beyond all reasonable doubt" thresholds. Applying the above roadmap, the General Court annulled the Commission's decision on all grounds/theories of harm put forth by the latter. In terms of implications going forward, this decision indicates that, when the Commission pursues theories of harm based on non-coordinated effects in oligopolistic markets, the evidentiary burden it will have to discharge – and the concomitant information requests from the parties – will likely be significantly higher.

Court of Justice upholds Marine Harvest gun-jumping fine

On 4 March 2020 the Court of Justice of the EU delivered its judgement with which it dismissed Marine Harvest's appeal against the Commission's decision imposing two separate fines (EUR10 million each) for failure to notify a transaction under Article 4(1) EUMR and for implementing that transaction prior to clearance, in breach of the standstill obligation under Article 7(1) EUMR. The Court of Justice dismissed Marine Harvest's arguments against the imposition of two separate fines. In specific, it held that the principle of *ne bis in idem* (prevention of double jeopardy) could not apply where two fines were imposed in a single decision (rather than separate, sequential decisions). The judgement gives valuable guidance on the timing at which the parties to a series of transactions should notify the Commission and follows a global trend of strict enforcement of failure to file and gun-jumping rules.

European Commission fines Canon for gun jumping by way of a two-step warehousing structure

On 27 June 2019, the European Commission fined Canon EUR28 million for the pre-clearance implementation of its acquisition of Toshiba Medical Systems (TMSC) through the use of a two-step "warehousing" deal structure. In step one, Toshiba transferred 95% of the shares in TMSC in a SPV indirectly set up by Toshiba and Canon through a third-party law firm. Canon immediately paid the entire purchase price of EUR5.28 billion to Toshiba for a 5% stake in TMSC and an option to acquire the interim buyer's 95% stake. As a second step, Canon exercised its share purchase option, acquiring 100% of the shares in TMSC. The Commission found that both steps were part of one single concentration, where the first step was necessary for Canon to gain control over TMSC. It is evident that the Commission is empowered by the decision of the Court of Justice in EY/KPMG (2018) to find gun jumping infringements where the measures in question represent a 'direct functional link' with implementation of the concentration. The Commission's decision joins the verdict of other authorities since the Chinese and Japanese authorities gave their verdicts in 2017 and 2016 respectively whilst the U.S. Department of Justice settled gun jumping charges against Canon and Toshiba for US$ 2.5 million each earlier this year. A clear message has been sent that companies should exercise extreme caution in using these types of deal structures.

European Commission announces new approach to merger review referrals below thresholds

On 11 September 2020, Competition Commissioner Margrethe Vestager announced during the International Bar Association's 24th Annual Competition Conference, that the Commission intends to change its approach towards referrals to the EU from national competition authorities. Commissioner Vestager acknowledged that although the current, turnover-based thresholds set out in the EU Merger Regulation generally work well, turnover does not always adequately reflect a company's significance, particularly in innovative sectors. So far, the Commission has consistently discouraged NCAs from referring cases when they themselves did not have the power to review because national merger control thresholds were not met. The proposal announced by Commissioner Vestager aims to change this approach, allowing for a broader scope of cases – including those below national thresholds – to be referred to the Commission. The new policy will likely come into effect in mid-2021.

European Commission investigates the proposed acquisition of Fitbit by Google

On 15 June 2020, Google notified the Commission its intention to acquire Fitbit. A month later, it submitted commitments to address the Commission's concerns that the proposed trans-

action would further entrench Google's market position in the online advertising markets by increasing the already vast amount of data that Google could use for personalisation of the ads it serves and displays. The commitments proposed entailed the creation of a data silo, which is a virtual storage of data, where certain data collected through wearable devices, would have been kept separate from any other dataset within Google. However, the Commission considered the data to be insufficient to clearly dismiss its serious doubts as to the effects of the transaction. As a result, on 4 August 2020, the Commission opened an in-depth investigation to assess the effects of the proposed transaction and determine whether its initial competition concerns regarding the online advertising markets are confirmed.

European Commission waives commitments in Takeda/Shire

On 28 May 2020, the European Commission waived in their entirety the structural remedies that had been submitted by Takeda in 2018 to have its acquisition of Shire greenlit. The Commission's market investigation with regard to Takeda's waiver request revealed a number of permanent, significant and unforeseeable developments during the divestiture process, affecting the evolution of the competitive landscape in treatments for inflammatory bowed diseases ("IBD") and the development of Shire's pipeline drug "SHP 47". In particular, the Commission found that during the divestiture process: (i) competitors had developed new promising drugs with higher expected efficacy and safety than SHP 47; (ii) some studies on SHP 47 had yielded negative results; and (iii) the management of the divestment business had experienced unforeseeable difficulties in recruiting patients for the clinical trials of SHP 647. The cumulative effects of these developments implied significantly deteriorated market prospects for SHP 47, so that the Commission considered that the divestment of the relevant business was no longer necessary to ensure the transaction's compatibility with the internal market.

D. State aid

European Commission implements Temporary State aid Framework to tackle Covid-19 crisis

As part of its policy reaction to the Covid-19 pandemic, the European Commission has mobilised two instruments to assist Member States in dealing with the crisis: Article 107(2)(b) TFEU allowing for State aid to compensate damages caused by exceptional occurrences, and Article 107(3)(b) TFEU allowing for State aid to remedy a serious disturbance in the economy of a Member State. In the context of the second exemption, a new State aid Temporary Framework was adopted by the European Commission on 19 March 2020 and was amended on 3 April 2020 and 8 May 2020. The Temporary Framework, as amended, provides detailed guidance on the compatibility conditions for the following types of measures adopted in the context of the Covid-19 crisis: (i) direct grants, repayable advances or tax advantages; (ii) guarantees on loans; (iii) subsidised interest rates; (iv) short-term export credit insurance; (v) aid for Covid-19-related R&D; (vi) aid for the construction and upscaling of testing facilities; (vii) aid for the production of Covid-19-relevant products; (viii) aid in the form of (selective) tax deferrals and/or suspensions of social security contributions; (ix) aid in the form of (selective) wage subsidies for employees, (x) recapitalisation aid to non-financial companies in need; and (xi) subordinated debt measures to companies on favourable terms. The Commission has published templates for the notification of the respective measures. Aid may not be granted to undertakings that were already in difficulty (within the meaning of the Rescue and Restructuring Guidelines) on 31 December 2019, while aid granted by Member States under the Temporary Framework to undertakings via banks (as intermediaries) must benefit the undertakings directly and cannot have the objective of preserving or restoring the viability, liquidity or solvency of banks. Notably, the Temporary Framework has already generated some controversy regarding its alleged abuse by certain Member States to favour national champions. In the case of air carriers, Ryanair has already filed six appeals against Commission decisions approving aid to air-carriers.

The tax rulings saga continues: Fiat, Starbucks and Apple

On 24 September 2019, the General Court delivered its judgments in the first two individual tax ruling cases involving transfer pricing within multinationals, providing important guidance on the application of the arm's length principle in the context of State aid investigations concerning tax measures. The General Court overturned the European Commission's decision ordering the Netherlands to recover illegal State aid from Starbucks but rejected the appeal against the decision ordering Luxembourg to obtain reimbursement of unpaid taxes from Fiat. The Court's judgments find that the Commission is competent to verify, under State aid rules, whether an individual tax ruling granted an advantage to the concerned tax payer as compared to the 'normal' taxation system, using an 'arms-length principle', even if undefined in national law, as a 'tool' to screen whether a given tax measure is in line with market conditions.

In line with the Starbuck's annulment, on 15 July 2020, the General Court annulled the Commission's largest ever State aid recovery order which had found that Ireland had granted illegal State aid to two Irish-incorporated Apple group companies. The Court upheld several key elements underpinning the Commission's approach to determining whether the tax rulings conferred a selective advantage, but found fault with the Commission's application of these elements. In specific, the Court ruled that the Commission had not proven to the requisite standard that Ireland had granted any selective advantage to Apple. It is clear that the General Court is setting a high evidentiary standard for the Commission to meet and will now require

a granular analysis under the OECD's Transfer Pricing Guidelines.

European Commission opens consultation on revised EU Emission Trading Schemes State aid Guidelines

On 21 September 2020, the European Commission adopted revised EU Emission Trading System (ETS) State aid Guidelines in the context of the system for greenhouse gas emission allowance trading post-2021, which will enter into force from 1 January 2021. The revised Guidelines went through a public consultation process from 15 January to 10 March 2020. Following the pace set by the goal to achieve climate neutrality by 2050, the Commission is seeking to reduce "carbon leakage" – companies shifting production outside the EU, with less ambitious climate policies, leading to less economic activity in the EU and no reduction in greenhouse gas emissions globally. The revised Guidelines:

- focus on the 10 sectors and the 20 sub-sectors most at risk of carbon leakage such sectors with significant international trade exposure, sectors significantly impacted by energy costs, sectors with profit margins under pressure at international level etc;
- set a stable compensation rate of 75% (reduced from 85% at the beginning of the previous ETS trading period), and exclude compensation for non-efficient technologies, to maintain the companies' incentives for energy efficiency;
- render the compensation conditional to decarbonisation efforts by companies, such as conducting energy audits, implementing energy audit recommendations, facilitating an increase in sustainable and private investment etc.

European Commission recommends not granting financial support to companies with links to tax havens

On 14 July 2020, the European Commission recommended that Member States do not grant financial support to companies with links to countries that are on the EU's list of non-cooperative tax jurisdictions, currently comprising 12 jurisdictions which are mostly Pacific and Caribbean islands. . The same should also apply to companies convicted of serious financial crimes, including, among others, financial fraud, corruption, non-payment of tax and social security obligations. The recommendation comes as Member States have increased their State aid schemes in the context of the Commission's Temporary Framework, which allows them full flexibility to support companies into financial difficulty due to the coronavirus outbreak. The Commission's aim is to provide Member States with guidance o as to prevent the misuse of public funds and to strengthen safeguards against tax abuse throughout the EU, in line with EU laws.

European Commission prolongs EU State aid rules and adopts targeted adjustments to mitigate impact of coronavirus outbreak

On 2 July 2020, the European Commission announced that it decided to prolong several existing State aid rules which would have otherwise expired at the end of 2020, with the purpose of mitigating the impact of the coronavirus outbreak on companies. In view of providing predictability and legal certainty, whilst preparing for a possible future update of the State aid rules, the Commission decided the following prolongations:

- Prolonged for one year (until 2021): (i) Guidelines on regional State aid for 2014-2020 , (ii) Guidelines on State aid to promote risk finance investments, (iii) Guidelines on State aid for environmental protection and energy, (iv) Communication on the execution of

important projects of common European interest (IPCEI) and (v) Communication on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to short-term export-credit insurance (STEC)

- Prolonged for three years (until 2023): (i) General Block Exemption Regulation (GBER), (ii) De minimis Regulation and (iii) Guidelines on State aid for rescuing and restructuring non-financial undertakings in difficulty.

General Court annuls Commission Micula decision on State aid

On 18 June 2019, the General Court of the European Union handed down its long-awaited judgment in the Micula case ruling that Romania's payment of the €178 million award constituted illegal State aid. Romania, prior to its EU accession in 2005, implemented a pack of measures aiming to avoid future incompatibility with EU law. So as to avoid the risk of granting State aid, Romania withdrew various incentives it had offered to foreign investors. The removal of these incentives affected the Micula brothers', two investors of Swedish nationality, in the food production sector in Romania. As a result, the Micula brothers commenced ICSID arbitration proceedings under the Sweden-Romania BIT, which were successful as the tribunal awarded them €178m in compensation. The Commission later declared the ICSID award invalid, on the grounds that the compensation payment constituted State aid that was incompatible with EU law. The Micula brothers appealed the Commission's and the General Court ruled in their favour, finding that all relevant events had taken place before 1 January 2007, when Romania acceded to the EU. As such, the arbitral tribunal was not bound to apply EU law at the relevant time.

General Court finds Spanish ship finance scheme to be illegal State aid

By its renvoi judgement of 23 September 2020, the General Court upheld the 2013 European Commission decision which found that the Spanish tax lease scheme ("the STL system") allowing shipping companies to benefit from rebates of up to 30% on the price of vessels built by Spanish shipyards constituted illegal state aid. According to the Commission, the objective of the STL system was to grant tax advantages to economic interest groupings ('EIGs') (and the investors participating in them), which then passed on part of those benefits to the shipping companies that bought a new ship. The General Court's latest judgement responds to the annulment decision issued by the Court of Justice in 2018, setting aside the 2015 General Court judgement, which had disagreed with the Commission's by ruling that the benefit obtained by the investors of the EIGs was not selective. In its renvoi judgement, however, the General Court found that the benefit of the tax regime at issue was granted by the Spanish tax authorities in the context of a system of prior authorisation on the basis of vague criteria requiring an interpretation exercise for which no provision was made, giving the authorities a considerable scope for discretion. The existence of those discretionary aspects was such as to favour the beneficiaries over other taxpayers in a comparable factual and legal situation. On the basis of the above, the General Court found that the Commission had not erred in considering that the STL system was selective. After this long judicial battle, the Spanish state must now recover the aid granted.

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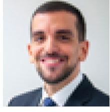
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