# BRUSSELS REGULATORY BRIEF: JULY

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## ANTITRUST AND COMPETITION

### New antitrust investigations launched following the publication by the European Commission of the final report on the e-commerce sector inquiry

On 10 May 2017, the European Commission ("**Commission**") published its final report ("**Report**") concluding a wide-ranging two-year long inquiry into e-commerce ("**Inquiry**"). During the Inquiry – which was conceived as part of the Commission's strategy to create a Digital Single Market in the European Union ("**EU**") – the Commission gathered evidence from nearly 1,900 companies operating in e-commerce of consumer goods and digital content in Europe and reviewed around 8,000 distribution and license contracts in order to assess the scope of potential contractual barriers erected by companies to trade across Member States in the EU.

The Report offers key insights into areas that the Commission considers to be problematic. The Commission had already hinted about enforcement actions to be expected with regard to vertical restraints and online sales in the EU. In February, it opened three investigations into producers of consumer electronics, the distribution of video games and hotel room pricing. These investigations concern alleged retail price fixing, geo-blocking practices pursuant to which consumers are prevented from purchasing content from another country, and discrimination on the basis of customer's location.

Less than a month after the publication of the Report, the Commission launched a new investigation into the distribution practices of a clothing company and again on 14 June 2017, it announced the launching of three additional investigations. As far as the distribution practices of the clothing company are concerned, the Commission will assess whether authorized retailers have been unduly restricted from selling online to consumers or other authorized retailers in other Member States. In addition, the Commission will also scrutinize suspected restrictions of wholesalers' freedom to sell to authorized retailers in other Member States.
The last three investigations concern the practices of three companies which license rights for merchandising products (i.e. clothes, shoes, phone accessories, bags, toys etc., on which an image or text is applied during the manufacturing process). The Commission will investigate alleged restrictions to licensees' ability to sell licensed merchandise cross-border and online.

The Commission has now seven open investigations either linked or launched further to the publication of the Report. These investigations send a clear message to all companies active in Europe that enforcement into distribution practices and e-commerce will remain a priority in the agenda of the regulators in the EU and that appropriate steps should be adopted to ensure compliance of their distribution practices with EU competition rules.

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### Commission approves French and German aid to significant industrial project on the basis of its EU State aid rules on the funding of research, development and innovation activities in the EU

On 19 June 2017, the Commission announced it had approved public support measures by France and Germany for the development of an innovative heavy helicopter.

The Commission found that the measures were in line with EU State aid rules. These rules generally prohibit any form of advantage (e.g. financial support, better terms and conditions) conferred on a selective basis to companies by national public authorities. The regime, which is specific to the EU, provides for a prior notification of such intervention to the Commission. Its approval is usually necessary before the aid measure is implemented.

In an effort to boost investments and innovation in the EU, the Commission adopted in 2014 new rules regarding public support for research, development and innovation. The new regime widened the scope of measures that do not require prior notification to the Commission and updated the rules for the assessment of the measures that need a prior notification. Under these rules, companies can allocate higher budgets to R&D projects and carry out a more ambitious range of research activities. At the same time, the public money invested in line with these rules supplements and does not replace ("crowd out") private investment in R&D. As a result, by increasing (rather than replacing) private investment, new and otherwise unrealized innovative projects can be carried out in Europe.

The Commission found that the EUR 377 million total aid would "*significantly contribute to research and innovation in the EU without unduly distorting competition in the Single Market*". The public support, which will take the form of repayable advances granted over a period of eight years, is, according to the Commission, "*likely to continue to stimulate further investment in a market that is expected to grow in the next decade, and where competitors continue to invest in order to bring new products to the market*". It also considered that, due to the ambitious R&D project and the magnitude of the initial investment necessary to start the project, absent the public support, self-financing of the project would be unlikely.

## TRANSPORT AND DATA

### The digital revolution of passenger information – two pertinent examples

In our increasingly digitalized society, new questions keep on arising as to the extent and depth of personal information gathered. In recent months, two pertinent examples regarding digitalized gathering of passenger data have arisen, which, while having some similarities in material and technical terms, are different in purpose and have therefore led to very different political outcomes.

Some months ago, in the wave of reactions to the terrorist attacks in Brussels, the Belgian Government proposed the extension of the passenger name record ("**PNR**") data currently collected for air travel to trains, coaches and ferries.

As it is known, the EU adopted in 2016 a Directive on the use of passenger name record data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime ("**PNR Directive**"). The aim of the PNR Directive was to harmonize national laws by setting up an EU system to collect flight passenger data, including contact details, travel dates and travel itinerary, ticket information, baggage information and payment

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information. Consequently, air carriers must provide Member States' authorities with the PNR data for extra-EU flights (i.e. flights entering or departing from the EU).

The PNR scheme allows proactive systematic checks on large sets of data regarding all passengers. But even if that raised concerns, as it meant in fact screening millions of non-suspect people, it was finally approved by the European Parliament ("**EP**").

But Belgium's proposal to expand the PNR scheme to land and sea-based transport generated a very strong reaction across Europe. The Belgian Parliament had approved a national PNR scheme, requiring operators of bus, train and boat to track who is traveling where and send it to a national database. But of course, that would be ineffective as the system includes only Belgian passenger data. Still, the call for all other Member States to participate in the system generated a very negative reaction, in particular from the countries with direct train connections with Belgium. And this, because it was perceived that the compulsory identification of all train and inter-city bus passengers in similar terms as what happens in planes would have huge costs, and reduce train travelling, as it would also impose new anticipation purchasing requirements.

Interestingly, in an entirely different policy context than the PNR scheme, the Council of the EU ("**Council**") and the EP reached an informal agreement on 14 June 2017 on new rules to digitalize the registration of sea transportation passengers (something originally also included in the failed Belgian proposal). But here the purpose is not personal identification for the prevention of terrorism; the declared goal is to make the exact number of passengers and other information immediately available for search and rescue services in the event of an accident. As the situation is now, precious time may be lost because the ship passengers' data are only available through the shipping company's contact person, who is not always immediately reachable. Under the new requirements, the ship passengers' data will be sent to the relevant authority in digital form within 15 minutes of the ship's departure. As such, the information will be directly accessible for the search and rescue center. The ship passengers' data are not that different from those included in the PNR scheme: name, date of birth, gender, nationality, and – if the passenger so wishes – the need for special assistance in an emergency.

Indeed, different realities and policy objectives leading to a different result. But at the end of the day, the two schemes will be dealing with very similar personal data, even if – in principle – they are collected and preserved by different authorities.

## ECONOMIC AND FINANCIAL AFFAIRS

### Commission proposes to strengthen central counterparties supervision

On 13 June 2017, the Commission published a legislative proposal to amend the European Market Infrastructure Regulation ("**EMIR**") with regard to the supervision of central counterparties ("**CCPs**").

The Commission underlines the role of CCPs in maintaining financial stability and mitigating financial stress in the post-crisis regulatory framework. Considering that CCPs are now also potential sources of macro-prudential risks, the Commission considers that they should be subject to a stronger supervisory regime. The perspective of Brexit reinforces the need to review the supervisory framework for CCPs, as most European CCPs are currently located in the United Kingdom ("**UK**") and clear the majority of euro denominated derivatives' transactions.

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The proposal to amend EMIR introduces a new supervisory mechanism – called the CCP Executive Session – which is to be established within the European Securities and Markets Authority ("**ESMA**"). Importantly, the proposal lays the ground for enhanced European supervision over third country CCPs, particularly those considered to be systemically important for the EU. Moreover, ESMA can, in agreement with the relevant central bank, identify certain CCPs of "**substantial systemic significance**" for the EU financial system. In that case, the Commission could decide that the CCP has to be established in the EU and apply for the relevant EU authorization in order to provide its clearing services in the EU.

The proposal put forward by the Commission will be examined via the ordinary legislative procedure, under which the EP and the Council have to agree on the final text.

## Commission sets new objectives with the Capital Markets Union mid-term review

On 8 June 2017, the Commission published the mid-term review of the Capital Markets Union ("**CMU**") Action Plan, which was published in September 2015. Going further than a stock-taking exercise, the mid-term review sets out dozens of actions planed by the Commission to accelerate the development of European capital markets.

The Commission reaffirms the importance of CMU in the context of Brexit. As most capital markets activities are currently located in the UK, the Commission emphasizes the urgent need to strengthen capital markets where they exist in the EU27 but also to develop them where they do not exist. In addition, the mid-term review sheds light on the Commission's commitment to harness the potential benefits of FinTech and to encourage and support sustainable finance.

Looking forward, the review emphasizes three upcoming legislative proposals, namely (i) the Pan-European Personal Pension Product, to be published at the end of June 2017; (ii) a proposal on cross-border securities ownership, expected during the last quarter 2017; and (iii) a proposal for a European framework for covered bonds to be published in the first quarter 2018.

Other forthcoming key initiatives include a recommendation on private placement building (fourth quarter 2017), a communication setting a roadmap to remove barriers to post-trade infrastructure building (fourth quarter 2017), a communication on corporate bond markets building (fourth quarter 2017), as well as a code of conduct on withholding tax procedures (by end 2017).

Reviewing achievements, the Commission underlines that 20 out of the 33 initiatives announced in the initial action plan are currently in progress or completed. It announces 38 other initiatives, to be launched by 2019. They include, for example, reviewing the prudential treatment of investment firms and assessing the case for an EU license and passport for FinTech.

## Fast tracking of IFRS 9 transitional arrangements

IFRS 9 is an international standard promulgated by the International Accounting Standards Board (IASB) that addresses the accounting for financial instruments. It is expected that it will significantly increase banks' loan loss provisioning and thus put pressure on banks' regulatory capital levels.

During the last Ecofin meeting on 16 June 2017, Finance Ministers of the EU agreed on their common position regarding amendments to the Capital Requirements Regulation ("**CRR**") to provide for transitional arrangements

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for the implementation of IFRS 9. They also agreed that these transitional provisions should be fast tracked from the core of the CRR review, in order to make sure that they are in place for the entry into force of IFRS 9 in January 2018.

The proposal aims at mitigating the potential negative impact of IFRS 9 on banks in terms of regulatory capital. Thus, the proposal suggests a five-year phase-in period. During this period, banks would be allowed to include a reducing proportion of IFRS 9's excepted credit losses to their common equity tier 1 capital.

The EP, which is co-legislator on this file, is also progressing with its work. The rapporteur Peter Simon (S&D, DE) published its draft report, which was considered by the ECON Committee on 20 June 2017. Most Members of the EP welcomed the choice of a dynamic approach, in which the phase-in factor is adjusted every year.

## TAXATION

### Commission proposes new transparency rules for tax intermediaries

On 21 June 2017, the Commission published a legislative proposal to address the role of intermediaries in tax avoidance, tax evasion and money laundering. The proposed Council Directive would amend the existing directive on automatic exchange of information in the field of taxation.

The proposal sets out provisions to increase access by competent authorities to tax schemes information. The objective is to allow for a quick and accurate response at an early stage and to enable Member States to better protect their tax revenues. Inspired by Action 12 of the OECD's Base Erosion and Profit Shifting ("**BEPS**") project, the proposal requires intermediaries to disclose tax planning arrangements that meet certain criteria. This disclosure is to be made to national tax authorities, which will in turn have to automatically exchange this information with their counterparts.

Only cross-border tax arrangements fall within the scope of the proposal. Rather than defining what can constitute an aggressive tax planning arrangement, the proposal lists elements providing a strong indication of tax avoidance or evasion. These elements are referred to as "**hallmarks**" and any arrangement featuring one of these hallmarks is to be disclosed to tax authorities. Hallmarks include for example the involvement of a low tax jurisdiction or of a jurisdiction with insufficient anti-money laundering requirements, links between the intermediary's fee and the amount of tax advantage or the non-compliance with international transfer pricing guidelines.

The proposal covers all key intermediaries, including in-house tax consultants and lawyers. In cases where the obligation to disclose cannot be enforced upon an intermediary due to legal professional privilege or because the intermediary does not have a presence in the EU, then the burden of disclosure is shifted to the taxpayers benefiting from the arrangement.

## TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

### The European Court of Justice rules Pirate Bay infringes copyright even if it does not directly offer copyright protected work

On 14 June 2017, the Court of Justice of the European Union ("**CJEU**") gave its judgment in regards to questions

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submitted by the Hoge Raad der Nederlanden, the Dutch Supreme Court. The matter presented to the CJEU concerned a dispute between Stichting Brein, a Dutch copyright industry body and two Internet Service Providers ("**ISPs**"), Ziggo and XS4ALL Internet. The Dutch Supreme Court requested a preliminary ruling to determine whether it should grant a court order to request the ISPs to block access to the online sharing platform, The Pirate Bay ("**TPB**").

More precisely, the Hoge Raad was seeking guidance of the interpretation of article 3(1) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society ("**Directive**"). This Directive grants copyright holders the exclusive right to control any "**communication to the public of their works**", with full knowledge that it was providing access to works protected by copyright. The CJEU found that TPB was liable for copyright infringement, by way of its online platform which allows users to search for and share copyright protected works, uploaded to the internet by others.

This case is of particular importance due to the unique nature of TPB. Indeed, the website is an online sharing platform, which does not host infringing files nor does it provide links to them. Instead, it provides an indexing platform on which users are allowed to share torrents to directly download mostly copyright-protected works onto their computers. On this basis, the site argued it was not directly creating the torrents but merely hosting them, thereby rendering it protected under "**safe harbour**" provisions (rules that protect platforms like YouTube from liability when copyrighted works are uploaded to its site).

The CJEU disputed the arguments due to several factors. The Court accepted that the copyright-protected works are put on the platform by users themselves, not by TPB, but the platform did play a critical and essential role in making the works available to the public, through its management of the website. On top of indexing the torrent files, the operators have created categories, along with a search engine, "**based on the type of works, their genre or their popularity**". Moreover, the operators update the torrent files by making sure the defective ones are removed from the platform.

In regards to the question as to whether there had been "**communication to the public**", the Court confirmed that the works had been communicated to the millions of users of TPB and through downloads of the torrent files by the Dutch ISPs' subscribers.

Furthermore, it is clear that TPB is aware that the platform is spreading copyright-infringement works through blog articles and forums which transpires their aim to make those works available to users and encourage their illegal downloading.

Finally, proof of profit-making due to the presence of advertisements on the website confirms that the operators of TPB had knowledge of their infringing activities.

This judgment follows the ruling of the High Court of the United Kingdom, in 2012, where several ISPs had been obliged to block access to TPB, due to similar findings of infringement of the copyrights of music labels.

The CJEU ground-breaking ruling opens the path and sets a precedent for a high number of actions across Europe whereby other right holder's organisations could request blocking the access to TPB and potentially any other similar online sharing platforms.However, this new judgment does not seem to stop TPB from operating. The moderator of the online sharing platform affirms that the site will keep adapting and will keep overcoming any

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new issues; something it has been doing for a long time now, whilst continuing to serve the needs of its millions of users.

***Position in the US***

Although this judgment has set an important precedent throughout the EU, by strengthening the position of copyright holders who wish to hold online sharing platforms accountable, it is debatable whether this will have any impact in the US. Under federal law, in order to prove copyright infringement, it must be shown that the copyright-protected material was used illegally. However, TPB is only an online sharing platform and the torrent links are uploaded by users themselves. As a mere host, TPB seems to remain safe under US copyright law.

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