BRUSSELS REGULATORY BRIEF: MARCH 2018

Date: 7 March 2018

European Regulatory / UK Regulatory Newsletter

By: Francesco Carloni, Giovanni Campi, Sara Aparicio Hill, Katrin Hristova, Ignasi Guardans, Alessandro Di Mario, Philip Torbøl

ANTITRUST AND COMPETITION

Another transaction in the technology sector referred to the European Commission for its review

The European Commission ("Commission") is yet again set to review a transaction in the technology sector which does not meet the EU merger notification thresholds but that is likely to have cross-border effects in the EU. On 6 February 2018, the Commission announced it had accepted a request from seven European countries to assess the proposed acquisition of a UK developer and distributor of music recognition applications by a U.S.-based global technology company.

At EU level, a transaction must be notified to the Commission if the merging parties reach the turnover-based thresholds set in the EU Merger Regulation ("EUMR"). There are two alternative sets of thresholds. In particular, a transaction will be reportable to the Commission if the merging parties' combined global turnover is more than EUR 5 billion and each of at least two of the parties concerned has an EU-wide turnover of more than EUR 250 million in the last financial year. Transactions that do not meet the above-referenced thresholds will nevertheless be reportable to the Commission if: (i) the parties' combined aggregate global turnover is more than EUR 2.5 billion; (ii) in each of at least three Member States, the parties' combined aggregate turnover is more than EUR 100 million; (iii) in each of at least three Member States mentioned in point (ii), the aggregate turnover of each of at least two of the parties concerned is more than EUR 25 million; and (iv) the aggregate Union-wide turnover of each of at least two of the undertakings concerned is more than EUR 100 million. However, a transaction will not be reportable if each of the merging parties concerned achieves more than two-thirds of its EU-wide turnover in one and the same Member State.

The EU thresholds are purely jurisdictional in nature and apply irrespective of any substantive competition issues between the merging parties' activities. They can apply to transactions with little or no EU connection so long as the merging parties' level of sales exceeds the thresholds. At national level, even though certain Member States (e.g. Spain and Portugal) also rely on the merging parties' market shares to assert jurisdiction over a transaction, the merger filing thresholds are generally based on the level of sales of the merging parties in a given country.

However, even if a transaction does not meet the EU thresholds, it may still be reviewed by the Commission, thanks to the referral procedure set out by the EUMR. Under this procedure, one or more Member States may request the Commission to review the transaction as it affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States requesting the referral.

This is what happened in this case, as the transaction did not meet the EU merger filing thresholds but the merging parties' level of sales exceeded the national thresholds in Austria where it was initially notified. Austria then decided to submit a request for referral to the Commission. The request was joined by Iceland, Italy, France, Norway, Spain and Sweden. The Commission accepted the referral request since “it is the best placed authority to deal with the potential cross-border effects of the transaction”.

This is not the first case where a transaction in the technology sector ends up for review before the Commission as a result of the referral procedure. Back in 2014, this is how the Commission was able to examine the acquisition of a consumer communications services provider by a U.S. company offering a social networking platform. These cases add to the ongoing debate about whether the current EU thresholds based exclusively on the merging parties' level of sales are sufficient to ensure review of transactions that may fall short of the EU thresholds but that may have nevertheless a significant competitive impact in the EU. A possible solution could be to amend the EUMR so as to incorporate a complementary threshold based on the value of the transaction, i.e. a deal size threshold. A similar debate in Germany gave rise to a merger reform in 2017 that provided for the inclusion of the transaction value as one of the merger filing thresholds in addition to turnover-based thresholds. However, at EU level any reform of the EUMR would require the Member States' consensus which at this stage does not appear to be crystallized enough as to the existence of a perceived enforcement gap in the EUMR that would require the amendment of the thresholds.

TRADE

Screening of foreign direct investments in the EU

The European Parliament (“Parliament”) recently intensified its activity on the Commission's proposal for a Regulation establishing a framework for screening of foreign direct investments (“FDI”) into the EU (the “Proposal”). On 23 January 2018, the Parliament's Committee for International Trade held a hearing, including contributions from both stakeholders and experts on similar measures in other countries. Opening the hearing, EU Commissioner for Trade Cecilia Malmström stressed that the proposal aims at enhancing cooperation and coordination between Member States rather than harmonizing foreign investment screening.

At present, FDI screening is a decentralized process and is an exclusive responsibility of EU Member States. To date, no formal coordination among Member States and between the Commission and Member States has been introduced. According to a Commission's Communication “Welcoming Foreign Direct Investment while Protecting Essential Interests”, 12 Member States, including France and Germany, have adopted a legislative framework for FDI screening. EU Member States' screening mechanisms may significantly vary in their scopes of application. Furthermore, Member States have different concepts of “national security” and take diverging views whether economic security belongs to this concept. France has introduced review mechanisms for transactions made from EU-based investors in the field of defense and activities relating to dual-use goods and technologies. However, takeovers by investors from third countries are subject to review if the French target exercises activities related to the protection of public health and the integrity, security and continuity of operation of transport networks and services. The French legislation applies an extensive approach to the concept of “national security” and “public order” as it provides for screening mechanisms to activities beyond the defense and security sector. Similarly, under the Austrian Foreign Trade Act, energy supply, telecommunications and water supply belong to the field of public order and public safety. These approaches diverge from the practice of the Committee on Foreign Investment in the United States (“CFIUS”) which does not apply a sectorial prohibition and assesses transactions on a case-by-case basis.

The Proposal establishes a coordination mechanism between Member States and the Commission rather than introducing a unified review process. It provides that Member States may “maintain, amend or adopt mechanisms to screen foreign direct investments on the grounds of security or public order”. The Proposal grants the Commission the power to screen FDI that are “likely to affect projects or programs of Union interest on the grounds of security or public order” which involve a substantial amount or a significant share of funding by the European Union or which are subject to EU legislation on critical infrastructure, critical technologies or critical inputs. Under the Proposal, Member States authorities as well as the Commission will be empowered to consider the potential effects of investments by non-EU investors on critical infrastructure (including energy, transport, and communications); critical technologies (including artificial intelligence and cybersecurity) or access to sensitive information or the ability to control sensitive information. To be able to determine whether a FDI may affect a Member State's security or public order, the Commission and the other Member States should take into account relevant factors, including a transaction's effects on critical infrastructure and inputs which are essential for maintaining public order.

The Proposal further provides that Member States should set timeframes to adopt screening decisions. Member States will be requested to notify to the Commission their existing screening mechanisms 30 days after the entry into force of the proposed Regulation. After that, they should also notify any amendments to existing review mechanisms or any newly adopted mechanisms within 30 days. Member States who do not introduce screening mechanisms should provide the Commission with an annual report covering FDI on their territory.

Finally, the Proposal sets up a cooperation mechanism between Member States and the Commission. If a Member State considers that a FDI planned or completed in another Member State may affect its security or public order, it may provide comments to the Member State concerned and forward them to the Commission. Finally, Member States will have to appoint FDI screening contact points which will be in charge of all matters related to the implementation of the new framework.

The European Economic and Social Committee is expected to discuss an opinion on the matter: a public hearing took place at the end of February, and is followed by a vote on 18/19 April 2018. The vote at the Parliament's Committee for International Trade is scheduled for 17 May 2018.

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

Parliament and Council endorse the partial elimination of unjustified geo-blocking

The Plenary of the Parliament and the Council of the European Union (“Council”) confirmed the provisional agreement reached on the Geo-blocking Regulation (formally “Regulation preventing geo-blocking and other forms of discrimination based on customer's nationality, place of residence or place of establishment within the

EU market”). On 2 March 2018 the Regulation was published in the Official Journal of the EU and will apply from 3 December 2018.

The Regulation is part of the e-commerce package and addresses sales terms discrimination in the online access to goods, electronically supplied services and services provided in a specific physical location where it cannot be objectively justified (e.g. VAT obligations and legal requirements).

The final objective of the Regulation is to grant equal treatment to local customers and online buyers from another Member State. However, and contrary to what was proposed originally by the Commission, under the new rules, online traders are not obliged to deliver their products to the shoppers' country, nor to harmonize access conditions - including sale prices- across the EU. They are merely requested not to discriminate customers on the basis of their nationality, place of residence or place of temporary establishment in the EU when such customers have access to selling websites based in another Member State. Any access ban or any automatic redirection to another website without the consent of the consumer, or any discrimination on payment terms (regarding the use of credit cards from other EU countries, for example) will be prohibited.

In practical terms, this means that it will still be possible to have different websites (let's say website A and B) formatted and presented to the different audiences in EU country A and EU country B (in language, in tastes, in average sizes, in catalogue, etc. as well as in prices). But it will not be possible for the trader to prevent a customer from country A to access and purchase in the website B, and eventually to benefit from its better conditions or purchase something not available at home. At the same time, the trader is not forced to deliver a product purchased in the website A to country B: the trader may decide that it only delivers locally, in country A; or that free delivery does not apply if delivery must take place in country B.
After a very intensive debate, the Regulation will not apply to copyright protected content (e.g. download of music, e-books, online gaming and audio-visual content). However, a review clause requires the Commission to analyze the overall impact of the Regulation two years after its entry into force and assess the possible application of the rules to certain electronically supplied services which offer access to and use of copyrighted works.

Finally, agreements imposing passive sales_ftn1restrictions which circumvent the requirements set forth above will be automatically void. This provision will only apply from 23 March 2020 to any such clauses concluded before 2 March 2018.

Facebooks' profiling of non-Facebook members falls foul of Belgian data protection rules

The Belgian Courts have ruled against Facebook, in a decision that addresses the scope of user consent to place cookies and the use of profiling software, in particular for any users who are not registered as Facebook members.

One of the findings of the Belgian Courts was that Facebook also processes personal data of internet users who do not have a Facebook account, through social plug-ins and cookies. Whenever someone who is not a Facebook member visits a website of the facebook.com domain, including personal or company Facebook pages, Facebook would automatically place a cookie (called "datr" cookie) on that visitor's hard disk. The datr cookie contains information uniquely identifying an internet user's browser and remains on his/her hard disk for two years. Because of the combination of the datr cookies, the IP address and the website visited by the internet user, Facebook is able to monitor the surfing behaviour of the individual internet user. Facebook argued that the information it collects would only enable the identification of a computer and that this data is not personal data. The Belgian Courts disagreed and found these to be personal data.

The Belgian Courts have found that, despite the fact that Facebook provided an information banner regarding its use of cookies linking to a more detailed policy, Facebook did not provide enough information to these non registered users regarding the fact that it collects personal data about them, how the data is used, and how long the data is kept. In addition, Facebook did not have any legitimate grounds to collect and process this information. The Belgian Courts have ordered Facebook Inc., Facebook Ireland Limited and Facebook Belgium sprl, in respect of every internet user on Belgian territory who has not registered as a member of the social network, to cease registering via cookies and social plug-ins information regarding which internet websites they visit.

Facebook also questioned the competence of the Belgian Commission for the protection of privacy ("CPVP") and of the Belgian Courts. Facebook argued that it has to comply with Irish data protection law only (since Facebook Ireland is said to be the sole controller for the processing of data received through the Facebook platform, including data received through cookies and plug-ins on devices in other EU Member States) and that only Irish courts have jurisdiction to decide on this issue. The Belgian Courts found that Belgian data protection law was applicable and that Belgian courts have jurisdiction.

Facebook has stated that it will further appeal this decision.

It is worth noting that the whole case has been decided under current Belgian law, but the decision may have been different after the entry into force of the General Data Protection Regulation ("GDPR"), which includes new rules on the scope of the jurisdiction of national Data Protection Authorities ("DPAs"), and mechanisms in case of conflict. Under the GDPR new "one stop shop" mechanism, Facebook will be able to interact primarily with one Lead Supervisory Authority ("LSA") acting as the principal EU regulator responsible for enforcement of the GDPR in relation to cross border processing. In their case, they will be subject to the LSA in Ireland instead of having to deal with 27 different Member State DPAs. Facebook has recently announced they will be rolling out a new privacy centre globally that will make it much easier for people to manage their data, in order to comply with the upcoming GDPR requirements (it is not clear however how this would apply to any users who are not registered as Facebook members).

ECONOMIC AND FINANCIAL AFFAIRS

EU High-Level Expert Group recommends greening of financial policies

The EU High-Level Expert Group on Sustainable Finance ("HLEG") published its final report with recommendations to create an EU financial system that supports sustainable investments. In 2016, the Commission tasked 20 representatives from banking, insurance, asset management, stock exchanges, financial industry associations, international institutions, and civil society to prepare a comprehensive blueprint for reforms along the entire investment chain. The recommendations are part of the EU's work to build a Capital Markets Union ("CMU") and will serve as the basis for a Commission's Action Plan on Sustainable Finance that is expected in March 2018.

The final report calls for the establishment of a European sustainable finance taxonomy to ensure consistency and clarity on what constitutes a sustainable and green investment. Also, policymakers are encouraged to strengthen the environmental social and governance ("ESG") considerations in the fiduciary duty of investors. Under the recommendations, the roles and capabilities of the European Supervisory Authorities ("ESAs") should be broadened to promote sustainable finance as part of their mandates. The experts further proposed to develop official standards for green bonds and to establish a "Sustainable Infrastructure Europe" facility to expand the size and quality of the EU pipeline of sustainable assets. Finally, the report also calls for strengthened climate change risk reporting requirements.

Some of the final report's recommendations are already underway, as they were presented in the HLEG interim report of 13 July 2017. Moreover, the Commission has announced its intentions to undertake a regulatory fitness check of public reporting by companies, which will also incorporate emerging calls to broaden non-financial reporting with insights on companies' ESG impact.

European Parliament sets up a new special committee to look into tax evasion practices

The Parliament intends to establish a new special Committee on financial crimes, tax evasion and tax avoidance. The Committee, also referred to as "TAXE 3", is expected to be formally endorsed by the Parliament's plenary on 1 March. Its draft mandate was already agreed by the Parliament's Conference of Presidents on 8 February and foresees a 12 months-long investigation into harmful tax practices within the EU as well as third countries, with a particular focus on the UK's Crown Dependencies and Overseas Territories.

45 Members of the Parliament ("MEPs") will be monitoring the implementation of the recommendations delivered by the former special and inquiry committees TAXE 1, TAXE 2, and PANA, set up in response to Luxemburg leaks and Panama papers scandals. The Paradise Papers were published shortly before the PANA Committee issued its final recommendations, which resulted in calls by some MEPs to continue their work and even to establish a permanent investigative committee.

TAXE 3 will be responsible for the assessment of the listing process and the impact of the EU's blacklist of non-cooperative jurisdictions in tax matters. The mandate grants the Committee the power to access relevant documents for its work and to hold hearings, while specifically referring to the Code of Conduct Group for business taxation, considered to be the most secretive Working Group of the Council. Furthermore, the Committee will conduct an analysis of VAT fraud and look into evasion practices in digital taxation. For the first time, the Parliament will also investigate national schemes providing tax privileges for new residents or foreign income. The assessment of the Commission's process of listing high-risk third countries in the area of money laundering and the evaluation of the consequences of bilateral tax treaties also figure among the Committee's competence.

Notes:

[1] Sales in response to unsolicited requests from individual customers, usually generated by general advertising or promotion in the media or on the Internet, which reaches customers in other distributors' exclusive territories or customer groups.

KEY CONTACTS

FRANCESCO CARLONI
PARTNER

BRUSSELS, MILAN
+32.2.336.1908
FRANCESCO.CARLONI@KLGATES.COM

GIOVANNI CAMPI
GOVERNMENT AFFAIRS ADVISOR

BRUSSELS
+32.2.336.1910
GIOVANNI.CAMPI@KLGATES.COM

