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ANTITRUST AND COMPETITION

European Commission to consult on exemption regime for vertical agreements

The European Commission has indicated it will launch a wide-ranging public consultation on the Vertical Block Exemption Regulation ("VBER") and its Guidelines in the first quarter of 2019. This public consultation will define the future legal landscape applicable to supply and distribution agreements in the EU.

The 2010 VBER exempts vertical agreements from EU antitrust rules. Vertical agreements are those "entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services".

In particular, it provides for a safe harbor if the parties' market shares do not exceed 30% and the agreements do not contain any of the hardcore restrictions set out in the VBER (e.g. resale price maintenance, customer and market allocation). When supply and distribution agreements satisfy these conditions, they benefit from the block exemption provided by the VBER. Antitrust block exemptions provide important legal certainty for companies whose practices fall within their scope as they contribute to more clarity and predictability for companies who need to assess the legality of their distribution practices.

In May 2017, the Commission concluded a sector inquiry into e-commerce which looked into companies' practices regarding consumer goods and digital content. With respect to the impact of the Commission's findings on the review of the VBER, the Commission noted in its Final Report that: "[t]he VBER expires in May 2022, and the results of the e-commerce sector inquiry confirm that there is no need to anticipate its review. The large amount of data and related information gathered in the course of the e-commerce sector inquiry and any guidance that results from follow-up enforcement action will however serve as an input for that future review process." Indeed, in the context of its sector inquiry, the Commission has initiated a number of investigations into vertical restraints imposed by companies in a variety of sectors and has recently concluded some of these investigations, imposing fines on four consumer electronics manufacturers for fixing online resale prices. These investigations, coupled with the recent ruling of the Court of Justice of the EU on online marketplaces restrictions, will be at the heart of the debate on the review of the VBER.

As the VBER is set to expire in 2022, the Commission will invite all interested stakeholders (e.g., companies, consultancies, trade associations, consumers) to express their views on the current regime and therefore contribute to the debate and the shaping of the rules which govern restrictions to the resale of products in the EU.

Smart card chips cartel: the Court of Justice sets aside the fine imposed on Infineon

In its judgment of 26 September 2018, the Court of Justice reminded the principle that EU courts are bound to examine all complaints based on issues of fact and law which seek to show that the amount of the fine is not proportionate to the gravity or the duration of the infringement. In addition, the factors to be taken into account for the assessment of the fine include the number and intensity of the anticompetitive infringements.

In this case, the European Commission issued a decision on 3 September 2014, imposed fines totaling approximately EUR 138 million on several companies for having coordinated, from 2003 to 2005, their pricing policy in the smart card chip sector in the European Economic Area. According to the Commission's findings, the five companies involved colluded through a network of bilateral contacts during which they discussed and exchanged sensitive commercial information on pricing, customers, contract negotiations, production capacity or capacity utilization and their future market conduct. Infineon obtained a 20% reduction because its participation was limited to arrangements with two other participants and was therefore fined EUR 82.784.000.

In an appeal filed with the Court of Justice against the General Court's judgment of 15 December 2016 which dismissed the recourses, Infineon notably complained that the General Court reviewed only five of the eleven allegedly illegal bilateral contacts found by the Commission. As the recourse disputed all those contacts, this amounted, in Infineon's view, to an incomplete judicial review of the decision, leading to an insufficient review of the fine.

Since Infineon had initially disputed each of the eleven bilateral contacts and contested the calculation of the fine, the Court found that it had in effect requested a complete review of its actual participation in the infringement and the precise extent thereof. The Court of Justice also ruled that, although the General Court is not required to rely on the exact number of bilateral contacts for the purpose of assessing the gravity of the infringement and setting the fine, this element may constitute a relevant factor among others.

Therefore, according to the Court of Justice, the General Court failed to exercise its full jurisdiction by not responding to the argument that the Commission infringed the principle of proportionality by setting the amount of the fine without taking into account the limited number of bilateral contacts in which Infineon participated. Furthermore, the General Court only confirmed five of the eleven bilateral contacts found by the Commission, leaving open the question of whether the Commission had also established the existence of the others. As a result, the Court of Justice decided to refer back the case to the General Court to assess the proportionality of the fine in relation to the number of bilateral contacts, if necessary by examining whether the Commission established the other six bilateral contacts.

ECONOMIC AND FINANCIAL AFFAIRS

European Parliament proposes to align all financial benchmarks with the Paris Agreement climate change commitments

The European Parliament's Economic and Monetary Affairs Committee ("ECON") published its draft report on the European Commission's proposal for a Regulation on low carbon benchmarks and positive carbon impact benchmarks. The proposal amends the existing Benchmarks Regulation ("BMR") and is part of a broader package of new rules designed to integrate environmental, social and governance ("ESG") considerations in the provision of finance. The aim is to drive the participation of the financial sector in the transition to a low-carbon and sustainable economy.

The draft position of the European Parliament was prepared by UK member Neena Gill (S&D), who argues that the long-term risks and opportunities associated with climate change are not properly reflected in the current market valuations and benchmarks. While Gill welcomes the existing index providers' efforts to capture climate considerations, she warns that some of such industry-led indices are prone to green washing and merely leave out the heaviest polluting industries.

In this context, Gill welcomes the Commission's proposal as a first step towards minimum standards harmonizing the methodology applicable to sustainable benchmarks. However, in order to fulfill the objectives of the Paris Agreement, Gill argues the Parliament must strive for a significantly higher degree of ambition, in line with its own-initiative report on sustainable finance.

Acknowledging that all ESG elements are equally important, Gill proposes to first focus on the "E", i.e. the environmental impact of the benchmarks, since its measurement is currently the most developed. It is suggested that all benchmark statements describe their climate impact in a standardized way. Furthermore, Gill recommends inserting a requirement obliging all providers to align their benchmarks with the Paris Agreement by 2022 according to a standardized methodology. The report also calls for future coherence of the benchmarks rules with the taxonomy that will be developed under a separate Regulation on a framework to facilitate sustainable investment.

The report also includes an amendment, requesting the Commission to investigate the competiveness of the benchmarks sector and, if necessary, introduce measures designed to increase it. The Commission would also be empowered to adopt criteria to ensure that providers' fees are transparent and based on actual costs.

The draft report is scheduled for a vote in the ECON Committee in the beginning of December 2018. After the Parliament and the Council of the EU finalize their positions, they will negotiate the final text of the Regulation in the trilogues together with the Commission.

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

Tech companies could face harsh fines unless they quickly remove terrorist content

On 12 September 2018, during his last State of the Union speech, the President of the European Commission Jean-Claude Juncker announced a new draft Regulation aiming at preventing the dissemination of terrorist content online.

The proposal entails several new obligations for tech companies offering their services in the Union, who allow their customers to store content and make it available to third parties. The key provision of the text, the so-called one-hour rule, would request such companies to get terrorist content off their services within one hour following a removal order from national competent authorities or Union bodies. In case of “systematic failure” to comply, fines could go up to 4% of the liable company's global annual turnover.

Moreover, the proposal provides the first EU-wide legal definition of terrorist content as material: (a) inciting or advocating, including by glorifying, the commission of terrorist offences; (b) encouraging the contribution to terrorist offences; (c) promoting the activities of a terrorist group; (d) instructing on methods or techniques for the purpose of committing terrorist offences.

Besides the main obligation, service providers will also be required to inform the content provider about the removal, implement complaint mechanisms for removals and put in place measures to promptly assess the content referred by authorities. Service providers established outside the EU should also designate a legal or natural person as their representative in the Union for ensuring compliance with the rules. Finally, the Commission also introduces a “duty of vigilance” upon service providers to take proactive measures - such as the use of automated detection tools - to better protect their users from exposure to terrorist content.

The scope of the proposed rules could easily be extended to every company of whatever size that allows users to post content on its website (e.g. any company hosting a forum or a blog). For this reason, Internet service providers already took a vocal stance against the draft Regulation and declared that the proposal would hand over to internet intermediaries the responsibility of Member States to identify terrorist content while at the same time guaranteeing freedom of speech.

The Commission is giving greater prominence to counter-terrorism measures and formally called on the European Parliament and Council of the EU - as the EU co-legislators - to agree on their position in the coming months. It remains to be seen whether both institutions will now show strong political commitment to move forward on this issue in accordance with the Commission line.

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