BRUSSELS REGULATORY BRIEF: JULY 2018

Date: 3 July 2018

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ANTITRUST AND COMPETITION

The Court of Justice of the EU brings clarity regarding gun-jumping

The European Commission and many other antitrust authorities operate 'suspensory' merger control regimes, which impose strict prohibitions on parties taking any steps which could be construed as premature implementation of their transaction. 'Suspensory' merger control regimes require the merging parties to notify any reportable transaction and secure approval by the competent antitrust authority before engaging in any form of integration ("gun-jumping"). Any involvement by a buyer in a target's business before a deal is cleared may result in heavy financial penalties (in the EU, up to 10% of the notifying party's global turnover in the last financial year). Recently, the Commission imposed a EUR 124.5 million fine on a multinational cable and telecommunications company (see our previous publication).

On 31 May 2018, the Court of Justice of the EU found that the termination of a cooperation agreement between an auditing and accountancy firm and an international network of independent auditing companies did not constitute gun-jumping in circumstances where the Danish Competition Council had established that: (i) the measure in question was irreversible (as the notice of termination could not be rescinded); (ii) the behavior was merger-specific as the terminating party would not have served the notice of termination absent the merger; and (iii) the notice of termination had an inherent potential for market effects before clearance of the proposed transaction.

The CJEU held that serving notice to terminate the cooperation agreement did not constitute gun-jumping under Article 7(1) of the EU Merger Regulation ("EUMR"). The CJEU clarified the benchmark for assessing whether a measure amounts to gun-jumping as follows: "*A concentration is only implemented by a transaction which, in whole or in part, in fact or in law, contributes to the change of control of the target undertaking*". The Court also considered that the occurrence of market effects (or the lack thereof) is not a suitable criterion, in and of itself, to determine whether a measure may constitute gun-jumping.

Although the assessment of gun-jumping requires a careful assessment on a case-by-case basis of the facts in every case, this judgment sheds some light on this grey area. According to the CJEU, there has to be a "contributing [factor] to the change of control" over the target. This test remains vague but appears to provide more freedom for the merging parties to take such pre-merger preparatory measures which are clearly unrelated to any change of control. In principle, pre-merger preparatory measures such as purely unilateral measures by the target taken with a view to the upcoming merger even if there are certain market effects would be defensible on the basis of this ruling. By contrast, it is clear that any measures which give the purchaser the ability to influence the target's operations before clearance will constitue gun-jumping (e.g. if the purchase agreement confers decision-making rights on the purchaser enabling it to influence the ordinary course of the target's business).

However, between these two ends of the spectrum, there are measures that are more difficult to categorize under the test established by the CJEU.

Accordingly, merging parties should be cautious when negotiating their transactional agreements and carefully assess pre-clearance business behavior. It is worth noting that also national antitrust authorities have been increasingly scrutinizing and sanctioning instances of gun-jumping. The UK Competition and Markets Authority announced it had imposed a GBP 100,000 penalty on a company for failing to comply with its order.

TRADE

The EU improves definition of the European Commission's role in Free Trade Agreements' negotiations

On 16 May 2017, the Court of Justice of the EU issued an Opinion on the division of competences between the Union and its Member States for the conclusion of the European Union and Singapore comprehensive Free Trade Agreement ("EUSFTA"). It was decided that the EU (represented by the European Commission) and the Member States have shared competence when negotiating Mixed Trade Agreements (see our previous publication). In practice, this means that certain aspects of any Mixed Trade Agreements would require an additional ratification by the Parliaments of all Member States, thereby adding a layer of complexity to the ratification process. This could also have an impact in the negotiation phase as well.

Since the CJEU's Opinion on the EUSFTA, the EU has undergone the process to implement these changes to clarify and define how the Commission and the EU Member States will share their authority in negotiating and approving Free Trade Agreements in the future. In a nutshell, trade negotiations will require two parallel processes: trade agreements, under the exclusive authority of the EU, and Member State Free Trade Agreements, limited to a closed and defined list of competences.

The Council of the EU at a meeting held on 22 May 2018 adopted an agreement on a proposal on the negotiation and conclusion of EU trade agreements . The Council addresses how to avoid the pitfalls of the division of competences between the EU and its Member States, and the need for doubling the negotiation and approval process at Member State level.

For instance, one of the most relevant areas excluded from EU-only trade agreements by the CJEU Opinion is non-direct foreign investment. A reduced negotiation scope could result in a loss of negotiation leverage for the EU and its Member States. In order to prevent this loss of leverage, the Council proposes that discussions regarding investment protection rules should take place at the earliest possible stage of the negotiations. EU-only investment agreements, where deemed necessary, should in principle be negotiated in parallel to non-direct foreign investment FTAs led by the Member States.

The Council has also highlighted that it will be crucial to involve and update the Parliaments of the Member States on the status of trade negotiations, to ensure these may progress smoothly and in parallel to EU-only investment agreements.

It remains to be seen whether the division of competences will indeed result in delays and loss of bargaining power for the EU and its Member States when negotiating future trade deals. Since the Council represents the heads of state of the Member States, it will play a crucial role in ensuring coordination and obtaining a consensus between the governments of the Member States during trade agreement negotiations. However, difficulties may nonetheless arise, given the EU has already witnessed how the influence of the Parliaments of Member States may negatively impact international trade deals.

Only time will say if these changes make it more difficult to negotiate trade agreements with the EU or if, on the contrary, this clarification of competences and better internal coordination among Trade Ministers helps the EU in ensuring effective trade negotiations and their faster ratification at national level.

The EU opposes USA's sanctions against Iran

In May 2018, the United States withdrew from the Iran nuclear deal reached in 2015 between Iran, China, Russia, the United Kingdom, the US, France, Germany and the EU, so called "Joint Comprehensive Plan of Action" ("JCPOA"), and decided to re-adopt restrictive measures against Iran. Following unanimous approval by EU heads of State or government at the EU leaders' summit in Sofia, Bulgaria, the European Commission took formal steps to respond to USA's renewed sanctions against Iran.

On 6 June 2018, the Commission adopted amendments to Council Regulation (EC) No 2271/96 which provides for measures limiting the effects of the extra-territorial application of legislation adopted by a third country (so called "Blocking Regulation"), and to the Annex hereto. The Commission implemented these amendments through a non-legislative act. The European Parliament and the Council of the EU, EU's two co-legislators, will have to present eventual objections to the measures proposed by the Commission within a two-month period of notification by the Commission of the measures. Before the expiry of that period, the Parliament and the Council may inform the Commission that they will not object. That period may be extended by four months at the initiative of the Parliament or of the Council.

The Blocking Regulation prohibits EU companies to comply with the extraterritorial effects of US sanctions and allows businesses to recover damages arising from such sanctions from the person causing them. The Annex hereto sets out the measures the effects of which the Blocking Regulation aims to limit. Moreover, the Blocking Regulation restricts the effect in the EU of any rulings by foreign courts founded on USA's sanctions and provides that judgments issued by US courts applying US laws referred to in the amended Annex are not enforceable before Member States' courts or the EU courts. The Blocking Regulation includes a mechanism providing for the possibility for companies to request an exemption from the Commission if they can demonstrate that compliance with this act would "seriously damage their interests" or the interests of the EU.

In addition, the Blocking Regulation provides that EU citizens and residents as well as EU-based companies operating activities covered by the US sanctions are entitled to claim damages caused by the application of the sanctions. Recovery may be claimed from "the natural or legal person or any other entity causing the damages or from any person acting on its behalf or intermediary." In practical terms, any natural person or company experiencing damages as a result of the application of the sanctions by other economic operators may be entitled to launch proceedings in damages and interest and claim the recovery of various costs, including legal costs. The wording of this provision remains unclear as it may suggest that damages claims may be brought against the US Government which would probably challenge any proceedings on grounds of sovereign immunity. It is noteworthy that the Blocking Regulation does not provide for recovery from a company incorporated in the EU in accordance of the laws of one of the Member States if a US-based company of which an EU-based company is a subsidiary, has caused a damage. In such scenario, an EU-based subsidiary would be regarded as a separate legal person incorporated in the EU and legally distinguished from its parent company. Recovery can take the form of seizure and sale of any EU-located assets of the company or entity in question, including shares held in a legal person incorporated within the EU.

The provisions of the Blocking Regulation apply to EU nationals, EU residents legally established for at least six months within 12 months prior to the date of the application of the Blocking Regulations and to any company incorporated in one of the Member States. It also applies to any person "in the territorial waters or air space" of the EU and in any "aircraft or on any vessel under the jurisdiction or control of a Member State, acting in a professional capacity". The Blocking Regulation only applies with regards to such persons when they engage in international trade and/or movement of capital and related activities between the EU and third countries. Furthermore, persons whose economic and/or financial interests are directly or indirectly affected by the US sanctions against Iran are imposed the obligation to inform the Commission within 30 days of the date on which they became aware that they are affected.

In May 2018, the Commission also undertook to remove obstacles for the European Investment Bank ("EIB") to facilitate EU companies' investments in Iran. As a result, the EIB would be able to grant loans to companies, mainly to small and medium-sized enterprises. The Commission took into account the risk for businesses that such loans may not be covered by EU-based banks in attempt to comply with US sanctions and to avoid negative consequences for their operations in the US. All relevant procedures will apply to individual financial operations.

The Commission further committed to pursue and strengthen EU's sectoral cooperation with Iran, including in the energy sector and with regard to small and medium-sized enterprises. Member States are encouraged to consider one-off bank transfers to Iran's Central Bank to facilitate the receipt by the Iran authorities of their oil-related revenues.

However, the Blocking Regulation does not remove all difficulties that may be faced by businesses. While the Blocking Regulation shields companies from fines imposed by the EU by compensating EU companies for any costs they have incurred as a result of US sanctions, it cannot protect companies against the effects of the sanctions, such as asset seizures or criminal charges in the US. EU companies would probably have to choose between being subject to fines in the United States for non-compliance with the sanctions against Iran or in the EU for compliance with the US sanctions.

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

The EU co-legislators aim at strengthening online intermediaries' liability

On 25 May 2018, the Committee of the EU Member States' permanent representatives ("COREPER") agreed the Council of the EU common position for the draft Directive on copyright in the Digital Single Market. Likewise, on 20 June 2018, the European Parliament's Committee on Legal Affairs ("JURI Committee") adopted its legislative report on the proposal. The Directive was issued by the European Commission in 2016 with the aim to modernize EU copyright rules while also preventing infringements for creative content shared on the Internet.

The proposal grants a new right to press publishers registered in the EU for monetizing the online use of their publications by providers of information society services. According to the Council position this protection would expire one year after the publication whereas the Parliament suggests five years, instead of twenty years as originally proposed by the Commission.

The most controversial point of the draft Directive is certainly the so-called "value gap" provision, which intends to ensure that right holders receive a fair remuneration for their creative work made public online by third parties. In this respect, the Council and Parliament positions entail a new obligation upon "online content sharing service providers" that store and give public access for profit-making purposes to copyrighted works uploaded by their users.

Those providers would have to promptly remove the content upon notification by right holders since they would not benefit anymore from the liability exemption for their users' copyright infringements. Alternatively, they would need an authorization by the right holders, including via licensing agreements, for making public the works. The obligation applies to all online content sharing services as defined by the texts, regardless of their size. Micro and small-sized enterprises would face milder penalties in case of breach of the rules.

This is an unprecedented change to the limited liability regime for online intermediaries implemented in 2000 by the E-Commerce Directive. As from the moment of its publication, the draft Copyright Directive triggered an intense debate over the neutral character of information service providers and the potential "censorship" of online content imposed by the value gap provision. Now that the co-legislators agreed their negotiating positions, the current liability regime is likely to be challenged also on other fronts, for instance by holding online intermediaries liable for illegal content uploaded in their websites.

The co-legislators are now ready to negotiate with the objective of reaching a joint text on the proposal. However, as evidence of the tensions behind the value gap provision, a number of Members of the Parliament are expected to trigger a Plenary vote on whether the Parliament should start those interinstitutional negotiation or re-amend the legislative report and refer it back to the JURI Committee.

ECONOMIC AND FINANCIAL AFFAIRS

European Commission tightens AIFM and UCITS asset segregation rules

On 29 May 2018, the European Commission proposed legislative changes to the safe-keeping duties of depositaries stipulated in the Commission Delegated Regulations under the Undertakings for the Collective Investment of Transferable Securities ("UCITS") regime and the Alternative Investment Fund Managers Directive ("AIFMD"). The objective of the proposed changes is to ensure uniform interpretation across the EU of the depositaries' obligations as regards safekeeping of their clients' assets. The Commission reasons that there has been divergence in the level of protection for financial instalments held in custody for AIFM and UCITS clients from the insolvency risks.

Among other changes, the amendments tighten the asset segregation rules for third-party financial firms ("custodians"), to which depositaries outsource the custody business. A custodian, typically a credit institution, holds the depositaries' securities to minimize the risk of their theft or loss and provides associated services, while the depositary remains responsible for the oversight of the assets. The Commission clarifies the use of the so-called omnibus accounts, which pool assets of multiple depositaries. With a view to increase investors' asset protection, the amendments stipulate that custodians must now hold the assets of various depositaries separately. Should the custodian be based outside the EU, the depositary is also required to receive legal opinion on the insolvency laws of the third country, assessing the protection provided through segregated accounts. Further clarifications concern, for example, the conditions for the frequency of reconciliation between the depositary's own financial instruments accounts, its internal records and those of the third-party custodian. This will depend on the frequency of trading by the depositary's clients.

Interested stakeholders can provide their feedback on the proposed amendments by 26 June 2018. Following the public consultation, the Commission will finalize its draft delegated regulations and submit them to the European Parliament and the Council of the EU ("co-legislators") for scrutiny. If no objection is raised by the co-legislators, the rules would become applicable 6 months after their publication in the Official Journal of the European Union.

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