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ANTITRUST AND COMPETITION

The European Commission conditionally approves a transaction in the data security sector after in-depth review

On 11 December 2018, the European Commission announced it had conditionally cleared a transaction in the data security sector after in-depth review (so called Phase 2). Transactions notified to the Commission may be cleared after an initial, so called Phase 1 review, or be subject to a longer investigation (Phase 2), which can last 4-6 months and involves more extensive information gathering, including companies' internal documents, extensive economic data, more detailed questionnaires to market participants, and/or site visits. The vast majority of transactions notified with the Commission are cleared unconditionally at the end of Phase 1. In 2018, 12 transactions were subject to a Phase 2 investigation before the Commission and six were cleared with remedies (four were cleared unconditionally, whereas two transactions were withdrawn).The transaction concerns the acquisition by a French global group of an international digital security company. The proposed transaction, as initially notified to the Commission would result in a combination between the two largest manufacturers of general purpose hardware security modules ("HSMs", i.e. "*dedicated hardware appliances running on encryption software to generate, protect, and manage encryption keys used to protect data in a secure tamper-resistant module*") in the European Economic Area and globally.

Due to differences in hardware and software requirements, as well as in application, the Commission concluded that general purpose HSMs and payment HSMs are separate markets. However, it found competition concerns only with regard to the first one, where the transaction would result, in particular, in very high combined market shares. The competition concerns were addressed through commitments which provide for the divestment of the acquirer's global business in this market as a result of which the parties will no longer be overlapping with regard to general purpose HSMs.

As it is the case with Phase 2 cases, during the review process there was close cooperation between the Commission and competition authorities in other jurisdictions, in particular the US Department of Justice.

The European Commission fines a clothing company and issues guidance on cooperation during antitrust procedures

On 17 December 2018, the Commission announced it had imposed a fine of approximately EUR 40 million on a clothing company. The Commission had initiated the investigation into the distribution agreements and practices of the company following the conclusion of its e-commerce sector inquiry in May 2017.

The Commission found that the company infringed Article 101 of the Treaty on the Functioning of the European Union which prohibits agreements that prevent, restrict or distort competition. The company had in place a selective distribution system, which allows companies in the EU to limit the resellers of their products to those selected on the basis of quality and objective criteria. However, such a system does not allow suppliers to impose restrictions on their authorized resellers regarding sales to end-users or to other authorized resellers.

The Commission investigation revealed that the company's authorized retailers were restricted in their ability to use the company's brand names and trademarks for online search advertising, to sell online without the supplier's prior specific authorization, which was not related to specified quality criteria, to effect sales outside their allocated territories, to cross-sell among authorized wholesalers and retailers, and to independently fix the resale price.

In setting the level of the fine, the Commission took into account, in particular, the fact that the company cooperated during the investigation and ultimately awarded a 50% reduction of its fine. This cooperation included an acknowledgement of the infringement (prior to the Commission's statement of objections), the provision of evidence with significant added value, and the waiving of certain procedural rights. Interestingly, as part of its cooperation efforts, it is the company that made the Commission aware of one of the infringements, relating to the restriction of online search advertising.

Following this case, the Commission has issued guidance on the framework for cooperation by companies during antitrust procedures and the reward for such cooperation, even though it cautions that an assessment on a case-by-case basis would need to be done. In particular, the framework relates to: "*situations where companies are willing to acknowledge their liability for an infringement (including the facts and their legal qualification). Companies can in addition choose to cooperate by voluntarily providing or clarifying evidence or by helping in the design and implementation of remedies*." By referring to the example of the specific cooperation in this case and to previous experiences, this provides helpful guidance for companies about the potential benefits in cooperating during antitrust investigations conducted by the Commission outside the specific cases of cartel investigations.

Publication of EU Directive 2019/1 reinforcing enforcement powers of National Competition Authorities (NCAs)

Directive (EU) 2019/1 seeks to ensure that national competition authorities ("NCAs") have the necessary guarantees of independence, resources, enforcement and fining powers in order to apply Articles 101 and 102 TFEU in an effective manner. The aim is to ensure that competition in the internal market is not distorted and to avoid that national law might put consumers and undertakings at a disadvantage. Member States shall transpose the provisions of the Directive into national law by 4 February 2021 and shall immediately inform the Commission of their national implementing measures.

Provisions regarding access to file by parties and the use of information are of particular interest. It is indeed provided that NCAs, including their officials and personnel, shall not disclose information acquired on the basis of their powers. Also, access to leniency statements or settlement submissions shall only be granted to the relevant parties. The information from these leniency statements or settlement submissions may be used only in proceedings directly related to the access request and where necessary to exercise the parties' right of defense before national courts.

Furthermore, NCAs shall have the necessary manpower, sufficient monetary resources and independence of spending. Accordingly, Member States shall ensure that NCAs will be able to perform unannounced inspections, both in the undertaking's premises and in other premises, to summon undertakings' representatives for interviews and to apply interim measures. Member States should further ensure that NCAs are able to, on their own or in non-criminal judicial proceedings, to impose effective, proportionate and dissuasive fines. These fines should take into account in their calculation both the gravity and the duration of the infringement. The maximum amount of fines should not be less than 10% of the total worldwide turnover of the undertakings concerned.

As regards leniency programs, the Directive compels EU Member States to have in place programs enabling all undertakings to disclose their participation in secret cartels to seek immunity from fines or a reduction of fines for undertakings not qualifying for immunity. Undertakings wishing to apply for immunity shall be granted a place in the queue at their request.

Mutual assistance and cooperation between NCAs is also at the core of the provisions of the Directive. In fact, requests for the notification of preliminary objections and for enforcement of decisions shall be executed by means of a “uniform instrument” accompanied by a copy of the act. It is also specified that limitation periods shall be suspended or interrupted for the duration of enforcement proceedings before NCAs or the Commission.

TRANSPORT

Implementing the new European drone legislation: what will change?

Recent incidents at some British airports have increased the pressure for clarification about the regulatory framework of drones across Europe. Unmanned aircraft -drones- is a fast-developing sector of aviation, with great potential for producing new jobs and growth. The term “unmanned aircraft” includes very large aircraft similar in size and complexity to manned aircraft, but also very small consumer electronics aircraft. Especially smaller drones are increasingly being used in the European Union, but under a fragmented regulatory framework. National safety rules across the EU differ significantly and several key safeguards are not addressed in a coherent way.

The regulatory framework in the EU is not finalized. In December 2015, the European Commission proposed to create an EU-wide framework for drones as part of its Aviation Strategy. This framework became reality with the entry into force, on 17 September 2018, of the new European Aviation Safety Agency ("EASA") Basic Regulation which creates a new field of competences for the Commission to regulate all unmanned aircraft systems ("UAS") regardless of mass. The Regulation also allows the establishment, following a risk - based approach, of technical rules and standards for drones and drone operations; finally, it mandates that more detailed rules on drones will be set by the Commission with the help from EASA and consultations with the Member States during the course of the first trimester of 2019.

The objective of the Regulation is to define measures to mitigate the drones' operational risk, by setting up technical requirements for the competency of the remote pilot and providing for a risk assessment to be conducted by the UAS operator before the start of the operation. Two implementing acts are proposed and will follow different adoption procedures, as defined by the Regulation: (i) a delegated act that defines the conditions for making UAS available on the market and the conditions for UAS operations conducted by a third-country operator; and (ii) an implementing rule that defines the conditions to operate UAS as well as the general criteria for open, specific and certified categories of drones, which registrations are necessary and what to registrate.

The new European legislation is expected to boost the drone industry by bringing an overarching structure and uniformity to the current fractured legislative landscape; it would also provide flexibility to Member States mainly by allowing them to create zones within their territories where the use of UAS would be prohibited, limited or, in contrast, facilitated; finally, the new rules would increase the level of safety of UAS operations and create an EU market that will allow cross-border operations.

The Commission predicts that by 2035 the European drone sector will directly employ more than 100,000 people and have an economic impact exceeding €10 billion per year, mainly in services. As mentioned, the legislation arrives at a time where increased drone air traffic attracts authority attention and after incidents forcing the shut down of the air space areas and airports as a precaution. Not only in Britain: Amsterdam Schiphol has had around 50 near-accidents every year since 2015 due to drone proliferation.

On 28 November 2018, after a large Conference on the matter, the Commission together with the EU national authorities and industry stakeholders adopted the "Drones Amsterdam Declaration". It was a good exercise of realism: the good progress made so far in establishing a common European drone services market was welcomed. But the European institutions and industry called upon themselves urging them to continue their work in fields as important as standards, implementing regulation and developing R&D. The pressure for action is there.

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

The EU co-legislators start joint discussions on the Platform-to-Business proposal

Both the European Parliament and the Council of the EU have finalized their respective positions regarding the draft Regulation *on promoting fairness and transparency for business users of online intermediation services*. As a consequence, on 13 December and 28 January the co-legislators met to jointly discuss the proposal.

The proposal has been informally called Platform to Business ("P2B") Regulation due to its declared aim to govern commercial relations between online platforms intermediaries (e.g. e-commerce market places, application stores, certain social media), search engines and their EU business users that offer services/goods to consumers.

As proposed, the draft rules would introduce new obligations regarding: (i) transparency of terms and conditions; (ii) transparency on the termination or suspension of the platforms' services to a business user; (iii) the parameters determining the ranking of goods and services listed in the platform, as well as any differentiated treatment benefitting goods or services offered directly or indirectly by the platform itself; iv) the platforms' policy governing access of data collected from consumers.

Moreover, the proposal would require platform intermediaries to create an internal complaint-handling mechanism and bear -in any case- at least half of the total cost of mediation procedures to resolve disputes with their business users.

The position of the Council is very similar to the original proposal. Among the few recommendations, the EU Member States would introduce effective sanctions at national level and exempt platforms to bear at least half of the total cost of mediation.

The other EU co-legislator, the Parliament, proposes several changes to the original proposal, many of which are not addressed in the Council's mandate. The legislative report of the Internal Market and Consumer protection Committee suggests including in the scope of the new rules ancillary operating systems that are closely linked to an online intermediation service. Moreover, it proposes developing a black list of unfair commercial practices and keeps requiring intermediation platforms to bear the half of the total cost of mediation, except when their professional users do not act in good faith.

Given the differences between the co-legislators' position, it will be interesting to see how receptive Member States will be to the new measures proposed by the Parliament.

ECONOMIC AND FINANCIAL AFFAIRS

EU authorities progress with their efforts to make finance sustainable

In May 2018, the European Commission proposed a package of measures designed to build a financial system that supports sustainable growth by pushing for more transparency and integrating environmental, social and governance (“ESG”) considerations in the legal requirements of the financial market participants. While these measures seem to be primarily targeted at the financial sector, their implications are likely to be substantial also for non-financial actors and corporate issuers.

The Council of the EU and the European Parliament (“co-legislators”) have now finalized their respective positions on two of the new proposals, making their adoption likely in the current legislative term. Both, the European Parliament's report as well as the Council's negotiating mandate, broaden the scope of the proposal on investors' ESG disclosures by proposing to cover credit institutions. December 2018 saw progress also on the proposal to establish new categories of low-carbon and positive-carbon benchmarks. An ambitious Parliament's report rebranded these into climate transition and Paris-aligned benchmarks and called on all providers to market at least one of such benchmarks by 2022. Under the Council's mandate, not only those marketed as green, but all benchmarks might eventually be subjected to the ESG disclosure requirements after 2021.

Progress has been slower on the other major pending file establishing an EU taxonomy of environmentally sustainable activities, where the adoption of the Parliament's position in plenary is foreseen only for March 2019. The Technical Expert Group (“TEG”) set up by the Commission to provide advice on the technical aspects of the proposals, is meanwhile seeking stakeholders' feedback on its taxonomy pack. Comments on the first batch of activities that would be considered to significantly contribute to climate change mitigation can be sent until 22 February. Furthermore, the TEG also finalized its report on climate-related disclosures, designed to assist companies with compliance under the Non-Financial Reporting Directive (“NFRD”). Comments on the report can be submitted by 1 February and will feed into a review of the non-binding guidelines on non-financial disclosure complementing the NFRD.

The EU supervisory authorities have also been active in the framework of the sustainable finance agenda. The European Securities and Markets Authority (“ESMA”) launched consultations on its draft advice setting out ways to integrate sustainability considerations in the in the areas of of securities trading, investment funds and credit rating agencies. The deadline for comments on the proposed credit rating guidelines is 19 March, and the feedback period for the securities and funds consultations runs until 19 February. The European Insurance and Occupational Pensions Authority (EIOPA) issued a call for evidence to collect information on ESG considerations in the prudential assessment of assets and liabilities for insurers and (re)insurers. Open until 8 March, the call for evidence will feed into a draft opinion expected to be submitted to the Commission in fall 2019.

European Commission proposes removing Member State's veto in tax matters

On 15 January 2019, the European Commission unveiled its roadmap for a gradual removal of the unanimity requirement in decision-making by the Council of the EU in taxation matters. Tax measures must currently be adopted unanimously by the EU Member States, leaving only a consultative role to the European Parliament. This reflects the fact that the EU has only limited competence in tax policy, which is still largely in the hands of the EU member States.

The Commission's Communication “Towards a more efficient and democratic decision making in EU tax policy” proposes a step-by-step introduction of qualified majority voting ("QMV"), to help unlock and prevent an impasse on tax files in the Council. QMV, a method already used in the Council for around 80% of EU legislation, would enable 16 Member States, representing at least 65% of the total EU population, to pass tax legislation.

Following the failed attempts to limit unanimity in the context of past EU Treaty changes, the Commission does not propose to rewrite the rules, but suggests the use the so-called "passerelle" clauses. The Treaty on European Union ("TEU") provides for a general passerelle clause, which allows the adoption of measures currently subject to unanimity, by QMV, either with a consultation or co-decision of the European Parliament. Another option is a specific passerelle clause under the Treaty on the Functioning of the European Union ("TFEU"), used for measures in the environmental field. In both cases, however, Member States would have to be unanimously in favor of such change, which means facing the same problem the passerelle clauses would be used to remove in the first place.

The Commission proposes a four step process, with the most contentious taxation questions to be addressed by 2025. The first step would leave Member States' taxing right untouched and provide for QMV only with respect to actions designed to fight tax fraud and avoidance, including administrative cooperation and anti-BEPS measures. In the second step, measures of a fiscal nature related to climate change, public health or transport would also see their voting simplified. The third step concerns VAT and excise duties, while the fourth and last step proposes broadening the QMV to wider single market issues, such as the common consolidated corporate tax base ("CCCTB") or digital taxation.

The Commission has invited the EU Heads of State and Government to endorse the roadmap and decide on the use of the general passerelle clause for the first and second steps as soon as possible. As a next step, they would have to seek consent of the national as well as the European Parliament. National legislators would have 6 months to express their objections, which are likely to appear, as already signaled by some Member States. EU leaders are further invited to consider the third and fourth step by 2025. This goes far beyond e.g. the adoption of the interim solution to digital taxation challenges envisaged already for 2021.

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