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ANTITRUST AND COMPETITION

Gun jumping attracts increased scrutiny by the European Commission

The European Commission continues its scrutiny against breaches of the procedural obligations in the framework of the EU merger control regime. On 24 April 2018, it announced that it had imposed a fine of EUR 124.5 million on a multinational cable and telecommunications company. The Commission found that the company had implemented its acquisition of a Portuguese telecommunications operator before the transaction was notified and approved by the regulator.

The EU is a suspensory merger control regime. This means that, once it is ascertained that the parties must notify a transaction to the Commission because it meets the EU merger notification thresholds, they must not implement it before obtaining clearance from the Commission (the so-called "standstill" obligation under the EU Merger Regulation). If companies "jump the gun", by either not notifying the transaction or implementing it before it is authorized, they risk a fine of up to 10% of their aggregated turnover in the last financial year. The seriousness of this breach is illustrated by the statement of the EU Competition Commissioner Margrethe Vestager who stressed that gun jumping: "*undermine[s] the effectiveness of our merger control system*".

In this case, the company did notify the proposed transaction to the Commission in February 2015 and the regulator approved it conditionally in April of the same year. However, subsequently the Commission notified the company of its suspicions that it had implemented the acquisition before it was cleared and in some instances even before it was notified for approval.

The Commission found, in particular, that the purchase agreement granted the acquirer veto rights over decisions concerning the target's ordinary business. In addition, the acquirer issued instructions regarding a marketing campaign and sought and received commercially sensitive information about the target outside of a confidentiality agreement. The Commission concluded that the breach by the acquirer was "at least, negligent".

The Competition Commissioner has stated in relation to this case that: "There's a difference between the day to day decisions a company makes, and the ones that really change the whole nature of the business. And if buyers want to be sure they don't jump the gun in a merger, they shouldn't have control over decisions in the ordinary course of business." This decision sends a stark reminder for companies to be particularly careful when drafting

the transactional documents and with their conduct prior to clearance of the transaction, as they may face significant fines in case of breach of the "standstill" obligation.

Competition authorities may use their own algorithms to detect collusive behavior

The question of algorithms and competition has become a subject of discussion of growing interest among academics, practitioners and antitrust enforcers in the past years.

Algorithms are commonly used by companies. They present a number of benefits, such as the possibility to process quickly large amounts of data and allow quicker adaptation to market conditions. The EU Competition Commissioner Margrethe Vestager has also stated: *"[…] I don't think competition enforcers need to be suspicious of everyone who uses an automated system for pricing."*

However, algorithms also raise a number of questions in relation to competition law. In particular, some of the concerns raised relate to the potential use of algorithms in order to implement collusive practices or make them more effective, the responsibility for collusion involving algorithms, and the adequacy of the current antitrust enforcers' toolbox to apprehend the possible anti-competitive scenarios involving algorithms.

In this respect, a note from June 2017 from the EU on algorithms and collusion, prepared for the Organization for Economic Cooperation and Development, explored the different potential issues from a competition law perspective of the use of algorithms. It discussed, in particular, the implications in both a vertical and horizontal context. These included the use of algorithms to monitor prices that competitors have previously agreed, the implementation of explicit collusion by means of algorithms and use of algorithms in order to engage in explicit or tacit collusion. There is also a concern that the use of price monitoring software may enable manufacturers to use pressure against retailers who do not respect the manufacturer's recommended prices, thus engaging in illegal resale price maintenance. In addition, automatic price monitoring and adjustment practices were noted as a growing phenomenon in a number of industries during the sector inquiry into e-commerce conducted by the European Commission between May 2015 and May 2017.

In this context, it appears that some competition authorities have themselves started using algorithms as a detection tool for collusive behavior.

Given the relative novelty of these issues and the challenges raised by algorithm-based conduct, the Commission and other competition authorities can be expected to continue exploring different enforcement tools in this regard and increase scrutiny on the use of algorithms by companies.

CONSUMER PROTECTION

The European Commission launches a revision of consumer protection rules

On 11 April 2018, the European Commission released the so-called "New Deal for Consumers" initiative with the aim of further developing EU consumer protection rules, which are already ranked among the strictest in the world.

The "package" (as the name goes when several independent legal texts are intended to be negotiated together) includes two legislative proposals: a Directive on better enforcement and modernization of EU consumer protection rules as well as a Directive on representative actions for the protection of the collective interests of consumers.

In terms of modernizing consumer rights, the Commission seeks to improve transparency over the main parameters determining the ranking of the results of users' queries. Marketplaces, comparison tools, app stores or search engines will be requested to make it clear when third parties pay to be included in the list of search results ("paid inclusion") or for receiving higher ranking ("paid placements"). Moreover, the new rules introduce a most important change with long term consequences for companies in the digital environment. Up to now, the very definition of consumer was essentially linked to the existence of a money payment made in exchange of goods or services. These changes will extend the concept of consumer, and with that the scope of the existing consumer protection rules, to users who receive digital services (e.g. cloud storage, webmail and social media) in exchange of access to their personal data, even when there is no currency payment at all.

The proposed changes also intend to harmonize Member States' penalties for "widespread infringements", defined as those harming consumer's interests across various Member States. In those cases, the maximum fine would be at least 4% of the infringing trader's turnover in the Member States concerned.

As regards representative actions, the Commission seeks to introduce a EU-wide collective redress mechanism against illegal practices affecting a large number of consumers. Under the proposal, only nonprofit "qualified entities" designated by Member States will be authorized to bring actions before courts or administrative authorities.

Those entities will be enabled to apply for a provisional or definitive injunction order to stop or prohibit a harmful practice; and subsequently to seek a redress order which can obligate the trader to provide consumers with compensation, repair, replacement, price reduction, contract termination or reimbursement. To make a clear distinction with the U.S. system, redress cannot have punitive effect and will be limited to the actual loss or damage suffered by the consumers.

The proposals will be now discussed within the European Parliament and the Council of the EU. National provisions transposing the new rules will become applicable two years after the entry into force of the Directives.

SECURITY UNION

The European Commission introduces stricter rules on the marketing and use of explosive precursors

On 17 April 2018, the European Commission published a proposal for a Regulation (the "Proposal") on the marketing and use of explosive precursors. The Proposal has for objective to address the use of home-made explosives in terrorist attacks in Europe over the recent years.

The Commission proposed to add new chemicals, such as nitric acid, hydrogen peroxide, sodium chlorate, potassium chlorate, and perchlorate, to the list of banned substances which could be used for the manufacture of home-made explosives. The Proposal applies both to substances obtained in brick-and-mortar shops as well as from online retailers or via online market platforms. The new framework will bring to an end the registration systems introduced by some Member States which allow "members of the general public" to register purchases of some restricted substances upon presentation of an ID card and which are considered as insufficient from a security point of view.

Moreover, under the Proposal, Member States may adopt a mandatory licensing system for the purchase of a limited number of restricted substances which could have a legitimate use. Member States will verify the legitimacy of license requests and conduct a pre-authorization security screening, including a criminal record check of individuals. Businesses will be imposed the obligation to report any suspicious transaction within 24 hours. A transaction is to be considered "suspicious" when aiming at acquiring regulated explosives precursors in quantities, combinations or concentrations uncommon for "legitimate" use, and also when the substance or mixture could seem to be intended for the illicit manufacture of explosives. Member States will have to ensure that the competent national bodies and agencies are granted the necessary investigative powers.

The Proposal also maintains the existing provisions that national authorities may impose effective and dissuasive penalties as well as the so called "safeguard clause" under which Member States may introduce further restrictions by lowering the concentration limits defined in Annex I to the Regulation. The Commission may request the Member State(s) concerned to withdraw such restrictions, if it finds such measures not to be justified. The Commission will regularly update guidelines to assist the chemical supply chains and national authorities upon consultation with a specialized committee of experts.

Member States will also provide training for law enforcement, first responders and customs authorities to recognize regulated explosives precursors substances and mixtures and to react in a timely and appropriate manner. At least twice a year, Member States will have to organize awareness-raising actions, adapted to the specifics of sectors and businesses using regulated explosives precursors.

The Proposal also provides that the Commission must carry out an evaluation of the new Regulation and report on the main findings six years after the date of application of the new Regulation.

TRANSPORT

Tourism Task Force - Public hearing on the impact of Brexit on tourism

On 25 April 2018, the European Parliament's Committee for Transport and Tourism organized a meeting with several guest speakers, mainly from the UK, to discuss the current and possible future effect of Brexit on the European and British tourism industries.

A number of issues emerged to be key priorities for the participants:

- Additional administrative burdens at airports and border delays should be avoided to ensure the free flow of tourists between the UK and EU27 countries and not to be of detriment to destinations' desirability;
- Maintaining the Single European Sky initiative is vital, both for tourists and tourism workers, in order to avoid the decrease of flights and the incline of prices;
- Health insurance should be coordinated, in order to prevent health assistance from becoming more expensive and troublesome;
- Free mobile data roaming should be preserved;
- A beneficial arrangement on the delicate subject of EU workers in the UK and vice versa must be found;
- The UK must keep its participation in the European Aviation Safety Agency.

Malcom Roughead, CEO of Visit Scotland, seems to believe that Scotland will be able protect its strategic partnerships with European operators.

There is still no clear data as to whether Brexit has hurt UK and EU tourism but, since 2016, a worrying sign has emerged from the Spanish region of Valencia, hit by a 31% decrease in British demand for real estate.

For the future, Thomas Jenkins, CEO of the European Tourism Association, foresees the opening of EU branches by British operators, while Nigel Morgan, Professor in the School of Management at Swansea University, advised not to base strategic planning on the short term depreciation of the pound.

In conclusion, all speakers voiced the industry's concern to maintain the status quo as much and for as long as possible.

ECONOMIC AND FINANCIAL AFFAIRS

European Commission unveiled its legislative package on sustainable finance

On 24 May 2018, the European Commission presented a package of measures designed to engage capital markets in the implementation of the 2015 Paris climate accord. The legislative measures, previously announced in the Commission's Action Plan on Financing Sustainable Growth issued in March, include three regulations, as well as amendments to existing rules under the Markets in Financial Instruments Directive ("MiFID II") and the Insurance Distribution Directive ("IDD"). The key elements of the new rules encompass a framework to establish a harmonized classification system ("taxonomy"), new sustainability requirements for investors' fiduciary duty,

disclosures and advice to clients, as well as a new category of a low carbon benchmark. The Commission welcomes feedback on the three regulations set out below until 20 July, 2018.

The Commission proposes to establish the conditions and the general framework to create a unified EU taxonomy identifying environmentally sustainable economic activities. To be deemed as environmentally sustainable, an activity would have to contribute to the six environmental objectives laid out in the proposal and comply with the technical screening criteria, which will be established by the Commission at a later stage on the basis of advice by a dedicated technical expert group. Notably, the process will be gradual, while the first set of criteria is envisaged to be adopted by 2019 year-end. The framework to be developed under the regulation could eventually serve as the basis for standards and labels for sustainable financial products.

Under the Commission's proposal for a regulation on investors' disclosure, fund firms will be required, among other things, to publish written policies on their websites on the integration of sustainability risks in investment decision-making processes. The extent of the expected impact of sustainability risks on the returns of a financial product, as well as sustainability considerations in the remuneration policies will also have to be disclosed. Through increased transparency, the proposal aims to tackle "greenwashing" practices, by which firms deceptively promote their products as environmentally friendly.

The Commission's amendments to MiFID II and IDD delegated rules would oblige investment firms and insurance distributors to actively question their customers about their sustainability requirements and preferences. Interested stakeholders can provide their comments on the proposed amendments until 21 June 2018.

Furthermore, the Commission is proposing to amend the benchmarks regulation, to create a new category of benchmarks comprising low-carbon and positive carbon impact benchmarks, which will provide investors with better information on the carbon footprint of their investments. The Commission leaves flexibility for benchmark providers, who will be free to provide a full spectrum of low-carbon benchmarks with a different degree of ambition with respect to meeting climate-related objectives.

As announced in the Action Plan on Financing Sustainable Growth, the Commission intends to roll out all the proposed actions by the second quarter of 2019.

IOSCO consultation on good practices to assist audit committees in supporting audit quality

On 24 April, the Board of the International Organization of Securities Commissions (IOSCO) published a consultation report on good practices for audit committees in supporting audit quality. The overall objective of the report is to assist audit committees of listed securities in promoting and supporting audit quality. Interested parties are invited to submit their views on the proposed best practices by 24 July 2018.

The Audit Committee is a subcommittee of the board of directors of a listed entity that oversees matters relevant to the integrity of the issuer's financial reporting and supports the quality of audit. The IOSCO consultation report

does not intend to establish the responsibilities of the entities' governance bodies, as these are regulated by the national laws of the jurisdictions. IOSCO however considers that effective audit committees can support audit quality in the interests of market confidence by ensuring the quality, accuracy, integrity, and comparability of issuers' disclosure.

IOSCO seeks stakeholders' feedback on the proposals for good practices for the audit committees in conducting various activities: (i) recommending the appointment of an auditor to shareholders; (ii) assessing potential and continuing auditors; (iii) setting audit fees; (iv) assessing auditor independence; (v) assessing audit quality.

Among other recommendations, IOSCO highlights that the quality of audit should be the main guiding principle in the appointment of an auditor rather than the fee reduction or opinion shopping. Furthermore, audit committees should consider the auditor's knowledge of the issuers business and industry as well as technical and specialist expertise. IOSCO encourages the committees to challenge the management's accounting treatments and estimates and where appropriate seek advice from third parties rather than from the auditor. Committees should also have policies in place establishing the evaluation process of the auditors' independence, including the auditor's team members.

Furthermore, in February 2018, IOSCO concluded a consultation on its proposal to reform the international audit standard-setting process aimed at enhancing its responsiveness to the public interest. The reform should also address concerns about the independence of the standard-setting process and the perceived strong influence of the audit profession. Following the scrutiny of stakeholders' comments, IOSCO intends to seek further feedback on its final proposals, transition plan and impact assessment of the suggested changes to the process.

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