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ANTITRUST AND COMPETITION

French and German competition authorities publish joint study on potential competition concerns raised by the use of algorithms

On November 6, the French competition authority (*Autorité de la concurrence*) and the German competition authority (*Bundeskartellamt*) published a joint study on algorithms and competition. The study recognizes that algorithms are important tools for companies in order to capture, store, and monitor pricing information. While algorithmic pricing has clear efficiency advantages for companies as it can be cost-reducing, revenue-increasing, or both, the study notes that the use of algorithms could have anticompetitive effects by facilitating anticompetitive practices. This is particularly the case for dynamic price setting algorithms that enable the automatic adjustment of prices.

The study lists three scenarios where algorithms may be used in an anticompetitive way.

- First, algorithms may be used as a tool to support or facilitate the implementation, monitoring, enforcement of price-fixing, or retail price maintenance strategies. In this scenario, algorithms could be used by manufactures to intervene on the discount stores that undercut their pricing.
- Second, algorithms may be designed by third-party providers to render pricing coordination among competitors more effective and stable. Typically, pricing coordination collapses as competitors would start cheating each other by deviating from the agreed inflated prices. Algorithms can easily spot such cheating and ultimately remove incentives to deviate from the agreed price levels.
- Third, the parallel use of individual algorithms can facilitate pricing coordination, including tacitly. Companies may be deemed to coordinate their pricing strategies depending on how their algorithms are designed to operate.

The study also describes the potential types of evidence that could be used by competition authorities to establish a competition law infringement. In light of the decisional practice of the Commission and EU national competition authorities, the study concludes that the current legal framework is sufficiently equipped to deal with competition issues stemming from the use of algorithms.

European Commission opens formal investigation against two French retailers for suspected collusion

On November 4, the Commission launched a formal antitrust investigation against two French retailers, Casino Guichard-Perrachon (known as "Casino") and Les Mousquetaires (known as "Intermarché") for a suspected breach of EU rules prohibiting cartels under Article 101 of the Treaty on the Functioning of the EU.

In November 2014, Casino and Intermarché, considered as two of the largest retail companies operating in the French grocery market, formed a joint venture for the joint procurement alliance of their branded products, INCA.

A preliminary investigation into possible collusion between retailers through purchasing alliances was carried out by the Commission in February 2017 and May 2019, and included unannounced inspections at the premises of the companies in question.

The purpose of the formal proceedings is to establish whether Casino and Intermarché have gone beyond the stated purpose of their alliance for joint procurement, thereby engaging in a prohibited cartel. In particular, the Commission's investigation focuses on two aspects of competition: the development of their shop networks and their pricing policy towards consumers. While purchasing alliances usually aim at the creation of purchasing power leading to lower prices and better quality of products or services for consumers, they can also raise competition concerns, notably collusion between retailers on their sales activities.

This investigation was opened at the Commission's own initiative and is part of larger strategy and efforts to ensure that grocery retail is beneficial for consumers. Indeed, in this case, the proceedings were initiated based on Article 11(6) of the Antitrust Regulation (Council Regulation No. 1/2003) and Article 2(1) of its implementing Regulation (Commission Regulation No. 773/2004). According to these provisions, opening of a formal investigation by the Commission relieves the competition authorities of EU countries of their competence to conduct parallel proceedings, in order to avoid incompatible decisions.

ECONOMIC AND FINANCIAL AFFAIRS

Regulators focus on crypto-assets

Valdis Dombrovskis, Executive Vice President in charge of financial services in the next Commission, recently noted that "*Europe needs a common approach on crypto-assets, such as Libra. I intend to propose new legislation on this*." While there has been a fair amount of work already conducted at the EU level on crypto, Dombrovski's statement puts cryptocurrency legislation in the incoming Commission's to-do list.

Crypto-assets and particularly global stablecoins like Libra have attracted increased regulatory attention lately. In this respect, the Financial Stability Board indicated that global stablecoins could pose regulatory challenges if not submitted to regulatory scrutiny, while acknowledging their potential use as a means of cross-border payment.

Benoît Cœuré, Member of the Executive Board of the European Central Bank ("ECB"), stated that as long as regulatory standards are met, there is no institutional intention either from the ECB or the Commission to outright ban stablecoins.

Addressing regulatory gaps in stablecoins is also a G7 priority, with the G7 Working Group on stablecoins issuing a report on the main challenges posed to both regulators and stablecoins developers. The report underlines the failure of the current payments system while stressing the inefficiencies of cross-border retail payments. It also distinguishes among three types of digital payment coins: i) the first wave of crypto-assets of which Bitcoin is the most known; ii) stablecoins; and iii) global stablecoins, sponsored by large tech or financial firms. Whereas all three categories pose various regulatory challenges as regards legal certainty, tax compliance, governance, anti-money laundering, and countering the financing of terrorism (AML/CFT) compliance, global stablecoins are seen as the ones representing the biggest threat to monetary policy if widely used as a store of value.

INDUSTRIAL POLICY

Experts: Put Technology at the Centre of Future EU Industrial Policy

On November 5, the Commission published a report from its Strategic Forum for Important Projects of European Common Interest, outlining the EU's key priorities for a "future-ready" European industry. The Strategic Forum is a high-level expert group made up of business and trade associations, as well as academic institutions and public bodies. Together, these experts were tasked by the Commission to analyze Europe's industrial landscape, and to identify areas of priority for the future of European industry. In their report, the expert group identifies six priority areas and provides recommendations for action. These areas are: (i) clean, connected, and autonomous vehicles; (ii) smart health; (iii) low CO_2 emissions industry; (iv) hydrogen technologies and systems; (v) industrial internet of things; and (vi) cybersecurity.

The experts identified the abovementioned priorities because of the need for coordinated, transnational efforts to support Europe's industry in these areas. For all sectors, the expert group came up with "cross-cutting" recommendations to be followed.

- First, they recommend coordinating investment at the EU level, by pooling resources from private and public sources.
- Second, they suggest the creation of "enabling policies," which would provide a more favorable regulatory framework for the development of new technologies, such as the deepening of the EU's single market.
- Third, they urge EU countries to provide support for research and development, for example, by developing infrastructure and supporting public-private partnerships.
- Lastly, they suggest setting up a governance process to follow technological and industrial changes, in order to monitor Europe's progress on the abovementioned sectors.

These planned efforts aim at mapping and developing the skills Europe needs to compete with other strong tech jurisdictions like China and the United States. Indeed, the expert group calls on all European stakeholders to "*join forces*" to stay "*at the forefront of the technological revolutions that will drive [Europe's] competitiveness and economic development*." This call echoes a commitment from the new Commission of Mrs von der Leyen to "update" Europe's industrial policy.

INSTITUTIONAL AFFAIRS

European Commission confirmed

On November 14, the long awaited second act of the Commissioner's confirmation process finally took place. Three European countries - Hungary, France, and Romania - had to nominate new candidates because the European Parliament previously rejected their initial nominees. Hungarian Olivér Várhelyi was picked as Commissioner-designate for Neighborhood and Enlargement, Romanian Adina-Ioana Vălean as Commissioner-designate for Transport, and French Thierry Breton as Commissioner-designate for the Internal Market.

The three Commissioners-designate faced several hours of confirmation hearings in front of the respective European Parliament's Committees. Commissioner-designate Vălean stressed in her opening speech that transport policy will be a core element of the new Commission's European Green Deal initiative. She added that to reach the goal of creating a climate-neutral economy by 2050, CO2 emissions from transport need a 90 percent reduction. To achieve this ambitious goal, it will be necessary to start incentivizing better consumer choices and low-emission practices, improving efficiency across the whole transport system, and increasing the uptake of clean vehicles and alternative fuels.

Thierry Breton underlined his readiness to contribute to climate neutrality. The Green Deal industrial dimension should encompass reorientation towards the circular economy or transition towards zero emission mobility. Besides that, Breton also committed to address national protectionism in EU countries, which could lead to the further fragmentation of the European market. Breton also appeared to be an advocate of building Europe's sovereignty, especially in areas of strategic importance such as defense, space, and key technologies such as 5G and quantum. Breton suggested he might propose clear rules that protect the rights and freedoms of Europeans while providing legal certainty for European companies. Areas of focus will include artificial intelligence, data, cybersecurity, and the role of platforms.

While both Breton and Vălean managed to secure the support of the respective European Parliament's Committees already on November 14, Hungarian nominee Olivér Várhelyi won approval only on November 18, upon submitting additional written answers to the European Parliament. Following the confirmation of the three Commissioners-designate, on November 27, the European Parliament approved the college of commissioners as a whole with 461 votes in favor and 157 votes against. The Commission is expected to take office on December 1.

INTERNATIONAL TRADE, CUSTOMS, AND EXTERNAL RELATIONS

EU launches International Public Procurement Database

Other than providing transparency for EU companies about important procurement markets outside of the EU, the Commission's new International Public Procurement Database aims at giving a competitive advantage to the EU by strengthening its position in trade negotiations and by improving the implementation of existing market access commitments by third countries.

The database, the most exhaustive of its kind, provides detailed data on around 40 million government contracts. The nine countries covered by the database are Australia, Brazil, Canada, China, India, Indonesia, New Zealand, Thailand, and the United States.

The global procurement market is worth trillions of euros--its total aggregated value estimated at around 15 percent of global GDP--and provides great business opportunities for EU companies. EU companies, however, are often confronted with barriers in the process of adjudication of government contracts, such as discrimination and lack of transparency. It is to face this challenge that the European Commission launched the International Public Procurement Initiative (IPPI) in 2017, which ran until 2019, culminating with the creation of the international public procurement database.

A similar initiative to the Commission's database is the World Bank's Global Public Procurement Database (GPPD), which is currently under implementation. The GPPD aims also at promoting public procurement through innovation and transparency at global level. It will remain to be seen whether these initiatives will make a difference for EU and non-EU companies.

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