

BRUSSELS REGULATORY BRIEF: APRIL 2020

Date: 1 May 2020

European Regulatory / UK Regulatory Newsletter

By: Mélanie Bruneau, Giovanni Campi, Francesco Carloni, Antoine de Rohan Chabot, Francesca Lai, Nicolas Hipp, Alessandro Di Mario, Miguel A. Caramello Alvarez, Philip Torbøl

ANTITRUST AND COMPETITION

The European Commission to Pursue its Existing Doctrine on the Application of Essential Facilities Theory to Dominant Digital Platforms

In the official statement issued by Executive Vice-President Margrethe Vestager on March 31, 2020, the Commission declared that it does not intend to change the application of its essential facilities doctrine to dominant digital platforms with respect to the treatment of “data” or “personal data” as an essential facility. This means that dominant digital platforms that collect “data” or “personal data” would not be bound by the essential facility doctrine.

The 'essential facility doctrine' states that a company found to be dominant may be required to share its assets (facility or infrastructure) with other companies if: (a) such asset is 'essential' (i.e., indispensable) for these companies to compete effectively in a downstream market; and (b) refusing access to these assets would eliminate effective competition on that market.

This March 31 statement comes in the context of the discussion initiated before the French Senate on January 29, 2019, by Olivier Guersent, the new director general of the Commission's DG Competition in Brussels, who raised the possibility of considering large digital platforms as essential facility and treating them as such.

Three members of European Parliament addressed a formal query to the Commission on February 3, 2020, to further continue this discussion. The questions that were raised concerned the possible adoption by DG Competition of a new approach consisting of applying the theory of essential facility to digital platforms in a dominant position thereby breaking with the current doctrine, according to which it is not possible to adopt a general approach by affirming that “data” or “personal data” in general constitute essential facilities. The Commission was also asked to indicate the threshold (regarding notably the number of users, the market share of the platform or the level of dependence on larger ecosystems) beyond which certain key functions, platforms, or applications would be considered as “essential facility” and should therefore provide third parties with fair, reasonable, and non-discriminatory access to data.

In its statement of March 31, 2020, the Commission confirmed its position that there can be no general approach of applying the so-called essential facility doctrine to dominant digital platforms just because such dominant companies collect “data” or “personal data”. Therefore, the Commission will continue to apply the relevant theory of harm and the corresponding substantive test based on a detailed case-by-case assessment, taking into account the specific circumstances of each case, having regard to the specific conduct at stake and its economic context.

ECONOMIC AND FINANCIAL AFFAIRS

The European Commission Consults on Renewed Sustainable Finance Strategy and IOSCO Establishes Sustainability Task Force

On April 8, 2020, the Commission published a [consultation](#) on its forthcoming Renewed Sustainable Finance Strategy. The consultation follows up on the Commission's Sustainable Finance Action Plan of March 2018 and aims to set out measures to channel financing towards sustainable investments. The consultation will inform the Commission on its proposals, currently scheduled for adoption in the second half of 2020.

Stakeholders can provide input until July 15, 2020.

The Renewed Sustainable Finance Strategy will mainly focus on three areas:

- Strengthening the foundations for sustainable investment by creating an enabling framework, with appropriate tools and structures aiming to support financial and nonfinancial companies in pursuing long-term development and sustainability-related challenges and opportunities;
- Increasing opportunities to have a positive impact on sustainability for citizens, financial institutions, and corporates. The Commission's objective is to maximize the impact of the EU frameworks and tools to incentivize green financing; and
- The full integration of climate and environmental risk into financial institutions and the financial system as a whole while ensuring that environmental and social risks will further contribute to the greening of finance.

The consultation includes over a [hundred detailed questions](#) covering various issues. In particular, the Commission seeks stakeholders input on the creation of public data space for companies' environmental, social and governance ("ESG") information and the development of common standards for sustainability-linked bonds, energy-efficient mortgages, and green loans. The consultation also addresses the application of the EU Green Bond Standard and green securitization. Notably, the Commission explores also politically difficult issues, including the development of the so-called "brown" taxonomy, under which environmentally harmful activities could be classified.

The mainstreaming of sustainable finance is also a key topic for global securities regulators. The IOSCO recently issued a [report](#) that highlights that there are three recurring issues addressed both by regulators and the financial services industry hampering the wide development of sustainable finance, namely:

- Multiple and diverse sustainability frameworks and standards whose diverse, high-level, and voluntary nature reduces the reliability and comparability of ESG related disclosures by financial market participants and financial advisers;
- Lack of common definitions of sustainable activities, which hinders the transparency and comparability of information, particularly for investors who seek to consider sustainability issues in their investment decisions; and
- Greenwashing and other investor protection challenges stemming from the multitude of voluntary frameworks, the risk of confusion for investors regarding existing terminologies and the lack of a uniform classification of sustainable activities.

To address these challenges, IOSCO decided to establish a Sustainability Task Force (“STF”) with a mandate to address transparency and promote investor protection. Concerning ESG disclosures, which the financial industry deem fundamental within the field of sustainable finance, the STF will identify and develop categories of disclosure, which are material for investors (“decision useful”) and which are capable of falling within the supervisory and regulatory competence of securities regulators. The report highlights the EU Taxonomy Regulation and the Chinese Green Bond Endorsed Project Catalogue as the two existing international taxonomy initiatives, which could embed sustainability in the financial system while promoting consistency and comparability.

The European Commission Launches Consultations on a New Digital Finance Strategy and on a Retail Payments Strategy for the EU

On April 3, 2020, the Commission published a [consultation](#) to gather stakeholder input on a new digital finance strategy that will promote a more competitive and innovative European financial sector. The consultation underscores that a digital finance strategy is critical in light of the COVID-19 outbreak given the heavy reliance of consumers on online financial products.

This consultation is the continuation of a regulatory process initiated by the European Commission's Fintech Action Plan and preceded by two consultations focusing on the [digital resilience of the financial sector](#) and [crypto-assets](#). The responses to all three consultations will feed into the Commission's new digital finance strategy, which is expected in Q3 2020.

The consultation outlines three main objectives:

- To ensure that the financial services regulatory framework is technology neutral and innovation-friendly, while maintaining a sufficiently cautious approach as regards consumer protection;
- To address barriers in the single market for digital finance providers. The consultation identifies the lack of consistency in the transposition, interpretation, and application of EU financial legislation, cumbersome licensing processes and insufficient funding as the main barriers new digital finance entrants face; and
- To explore how the financial sector can reap the benefits of data analytics and Artificial Intelligence. In this regard, the Commission is reflecting upon an open finance policy and the facilitation of digital access to public disclosures of financial and supervisory data.

On April 3, 2020, the Commission also launched a [public consultation](#) seeking input on the development of an integrated EU retail payments strategy. The consultation is to be read in conjunction with the digital finance consultation, which it complements, in an effort to promote an innovative payments sector while adequately regulating associated risks. The final strategy is expected to be published in Q3 2020.

The consultation has four main objectives:

- To develop affordable and transparent payments instruments, with pan-European reach and “same as domestic” customer experience. In this regard, the Commission is exploring how instant payments and digital identity solutions can contribute to the deployment of a pan-European payments scheme;
- To foster a competitive and innovative payments market. It seeks input on the competitiveness of the current payments regulatory framework provided by the Second Revised Payments Services Directive

and the E-Money Directive. Furthermore, it reflects on future payments solutions such as “programmable money,” which facilitates the execution of smart contracts;

- To ensure access to safe, efficient, and interoperable retail payments systems and other support infrastructures. The Commission is seeking feedback on the efficiency of direct and indirect access to payment systems providers (banks, e-money institutions, and payments institutions) to execute payment transactions; and
- To improve cross-border payments, including remittances. The consultation indicates that reducing the costs of cross-border payments would promote the international role of the euro.

The Commission highlights that a European payments solution can “facilitate payments in euro between the EU and other jurisdictions and reduce EU dependency on global players, such as international card schemes, issuers of global stablecoins and other big technology companies.”

Stakeholders can provide input to both consultations until June 26, 2020.

INTELLECTUAL PROPERTY

The Court of Justice Gave a Decision in a Trademark Dispute Concerning an E-Commerce Platform

On April 2, 2020, the Court of Justice of the European Union (“CJEU”) issued a judgment in a trademark dispute between an online marketplace operator and a distributor of trademark perfumes. The dispute originated because the online marketplace operator stored, on behalf of a third party, goods that infringed trademark rights of the perfume distributor. The online marketplace operator was not aware, however, of that trademark infringement and did not itself aim to offer these trademark infringing goods for sale or put them on the market.

The question of the online marketplace operator's potential liability under EU trademark law, therefore, turns on whether the operator, who is merely storing the goods, can be regarded as unlawfully 'using' the trademark.

The CJEU referred to its previous decision-making practice and noted that, as regards the operations of an e-commerce platform, the unlawful use of trademarks in offers for sale displayed on an online marketplace is made by the third-party sellers who are customers of the operator of that marketplace, and not by that operator itself.

Based on this reasoning, the CJEU concluded that, in order for the storage of goods bearing signs identical, or similar to trademarks to be classified as 'using' those signs, the storage-providing platform itself needs to pursue the aim of offering the goods or putting them on the market.

In the case at hand, the online marketplace operator did not offer the goods for sale. On the contrary, it was the third-party seller alone who intended to offer the goods or put them on the market. It follows that the online marketplace operator has not unlawfully used the trademark.

In its concluding remarks, the CJEU nevertheless also recalled that other provisions of EU law, in particular those on e-commerce and enforcement of intellectual property rights, allow legal proceedings to be potentially brought against an e-commerce intermediary who has enabled a third party to use a trademark unlawfully.

INTERNATIONAL TRADE, CUSTOMS, AND EXTERNAL RELATIONS

The Commission Provides Guidance to Member States on the Protection of EU's Critical Assets and Technologies from Acquisitions and Investments by Non-EU Companies in the Context of the COVID-19 Outbreak

On March 25, 2020, the Commission issued guidelines concerning foreign direct investment (“FDI”) and free movement of capital from non-EU countries (the “Guidelines”). The Guidelines provide helpful guidance to EU Member States to effectively protect “Europe's strategic assets” in light of the current COVID-19 crisis and its severe implications for the EU economy.

For many years, the Commission has been concerned by the lack of an adequate level of protection of EU's strategic assets and technologies from potential hostile takeovers and investments by non-EU companies. To that end, it has established a mechanism of cooperation and coordination of national screening procedures for new FDI (“FDI Screening Regulation”), which will enter into force on October 11, 2020.

The rationale behind the FDI Screening Regulation is to keep the EU open to foreign investment in strategic sectors (e.g., energy, transport, and communications) while granting each Member State the ability to block foreign investment that may represent a risk to their security or public order. This regime applies on top of normal merger control procedures and provides an additional tool to EU Member States to scrutinize transactions and investments in key sectors.

With the adoption of the Guidelines, the Commission seeks to further raise the importance of protecting critical assets that are essential for Europe's security, namely in healthcare-related industries, and to avoid a “sell-off of Europe's business and industrial actors, including small and medium-sized enterprises” to non-EU companies. The Guidelines also refer to “potential risk to strategic industries.” This suggests that the Guidelines are intended to apply well beyond the health-care sector.

In the Guidelines, the Commission calls on Member States to make full use of their domestic FDI screening mechanisms. In particular, the Guidelines stress the importance of protecting the healthcare and related sectors in light of the COVID-19 outbreak when reviewing FDIs.

The Commission also points out that only 14 Member States have FDI screening mechanisms in place and urges the remaining 13 to set up effective screening mechanisms. In that respect, certain Member States such as Italy or Germany have already begun to tighten the existing FDI screening rules. To the extent that FDI screening mechanisms have not already been adopted, the Commission invites the Member States to use all the other available options to protect critical assets. For instance, the Commission suggests that Member States could impose conditions on strategic investments to ensure continuity in the supply of medical products and devices or require compulsory licenses on patented medicines.

In addition to FDI screening mechanisms, the Guidelines refer to the possibility for Member States to make use of golden shares powers (i.e., special rights) to block or limit investments by non-EU companies in strategic companies.

The Guidelines will result in an increased scrutiny by national governments on acquisitions and investments involving strategic companies and assets. It remains to be seen whether the Commission will adopt additional measures to protect the EU's critical assets and technology in the context of the COVID-19 outbreak. In light of the above, both EU strategic companies and non-EU companies should carefully consider the impact of the

Guidelines on FDI and take into due account the political sensitivity of Member States when planning acquisitions in certain key sectors.

Commission Waives Customs Duties and VAT on the Import of Vital Medical Supplies from Third Countries

On April 3, 2020, the Commission approved the request from Member States and the UK to temporarily waive customs duties and VAT on the import of medical devices, and protective equipment. This marked a further step from the Commission to ensure medical equipment is available to Member States.

In this contest, according to the Commission, vital medical supplies include masks and protective equipment, as well as testing kits, ventilators, and other medical equipment. The duty relief will apply for a period of six months.

The measure at stake represented one of eight steps taken on trade policy in the context of the coronavirus crisis. Accordingly, on April 7, 2020, the EU notified to the World Trade Organization about its eight steps that were either new measures or guidance covering existing legislation. The measures were taken as an attempt to fulfill G20 commitments to provide full transparency of all policies that affect international trade. The other seven steps included measures in numerous fields of action that touch upon many aspects of international trade operations, such as:

- Border management, including Green Lanes to ensure availability of essential goods and services;
- Facilitation of air cargo operations;
- Human, animal and plant health, and animal welfare measures to contain risks linked to control system disruptions due to coronavirus;
- Public procurement guidance relating to emergency provisions in current legislation to allow for quicker purchasing of necessary goods; and
- Export authorization requirements to support the adequacy of supply and meet vital demand for personal protective equipment in the EU.

The measures came at a time of trade controversies between EU Member States as several were considering bans on exports of protective equipment in an attempt to avoid shortages at home, which would have been contrary to the EU's free movement of goods principle. In this regard, Health commissioner Stella Kyriakides called for "solidarity" among EU Member States, which led most national governments to abandon such bans and instead support the introduction of a general EU-wide export authorization scheme.

TRANSPORT

EU Ministers Agree on Electronic Freight Transport Information Rules

On April 7, 2020, the Council adopted new rules to digitalize freight transport information, which will make it easier for companies to provide information to public authorities in a digital form. The rules still need to be approved by the European Parliament before entering into force.

In an effort to make it easier for companies to provide public authorities with information relating to freight transport, the Commission proposed in 2018 a Regulation on electronic freight transport information. The

Regulation aims at providing companies across the EU with a uniform legal framework for the use of electronic freight transport information for all modes of transport.

The Regulation will create an obligation for competent authorities in EU Member States to accept information made available electronically on certified platforms, when companies are required to provide proof that they respect their regulatory obligations. Companies will still be able to provide authorities with information on paper if they choose to.

The new rules also obligate the Commission to adopt technical specifications within 30 months from the entry into force of the Regulation. The technical specifications will ensure interoperability between IT systems throughout the EU and will set common procedures for accessing and processing the provided information.

Freight information digitization is part of an EU effort to alleviate the administrative burden that businesses, transport operators, and public authorities experience as most of the paperwork is exchanged in paper format. The Regulation follows a 2017 Resolution from the European Parliament, which encouraged the use of digital technologies, including paperless and standardized documents. The new Regulation is timely as freight transport is expected to increase by 50 percent before 2050.

KEY CONTACTS



MÉLANIE BRUNEAU
PARTNER

BRUSSELS
+32.2.336.1940
MELANIE.BRUNEAU@KLGATES.COM



GIOVANNI CAMPI
GOVERNMENT AFFAIRS ADVISOR

BRUSSELS
+32.2.336.1910
GIOVANNI.CAMPI@KLGATES.COM



FRANCESCO CARLONI
PARTNER

BRUSSELS, MILAN
+32.2.336.1908
FRANCESCO.CARLONI@KLGATES.COM



ANTOINE DE ROHAN CHABOT
COUNSEL

BRUSSELS
+32.2.336.1941
ANTOINE.DEROHANCHABOT@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.