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ANTITRUST AND COMPETITION

The French Competition Authority (FCA) Fined a Watchmaker for Obstruction of an Antitrust Investigation

On 9 July 2021, the FCA fined a watchmaker for failing to respond to a request for information (RFI) sent by the FCA in the context of an investigation launched by the Hellenic Competition Commission (HCC). The HCC investigation sought to ascertain whether certain watchmakers, wholesalers, and importers restricted the ability of retailers to set resale prices independently and prevented cross-border sales. As part of its investigation, the HCC requested assistance from the FCA by sending a RFI to a watchmaker headquartered in France.

In the European Union, the European Commission (the Commission) and EU member states' national competition authorities (NCA) work closely on enforcing the EU antitrust rules in the framework of the European Competition Network. EU Regulation 1/2003 provides for such cooperation framework. This framework allows the Commission and NCAs to share information on ongoing cases and to assist each other. For instance, one NCA can undertake unannounced inspections at the premises of a company (so-called “dawn raids”) or send RFIs to a company on behalf of the Commission or another NCA.

The FCA sent a RFI to the watchmaker on several occasions over five months without obtaining a response. During the proceedings before the FCA, the watchmaker argued that its lack of responsiveness was due to certain events, which have affected the organization of the company. The watchmaker notably mentioned restructuring and workforce reduction measures taken following a financial crisis in the sector. The FCA considered that such arguments could not justify a total absence of response.

Companies under investigation are subject to an obligation of active and forthright cooperation. This means that, when they receive a RFI, such companies must provide complete, accurate, and unaltered documents and must respond promptly to such a RFI. Repeatedly failing to respond to the FCA's requests constitutes an obstruction under French (or EU) competition rules. Under both EU and French competition rules, companies found guilty of obstructing an investigation can be fined up to 1 percent of their total turnover. In 2017, the FCA fined a German chemical distribution company €19 million for obstructing the investigation. This obstruction took various forms, ranging from the transmission of incomplete and imprecise information or provided after the set deadline to refusal to provide documents.

This decision reminds companies of the importance to comply with the antitrust authorities' RFI during an investigation to avoid unnecessary financial exposure and reputational damage in their relationship with the authorities.

Pricing and Online Sales Restrictions in the Context of a Selective Distribution System Attract Scrutiny in Italy

On 4 May 2021, the Italian Competition Authority (AGCM) opened an investigation against a provider of food supplements (the Company) to ascertain whether its qualitative conditions for its selective distribution system (SDS) are compliant with EU and Italian competition rules, i.e., Article 101 of the Treaty on the Functioning of the European Union and Article 2 of Italian Competition Act (Law n. 287 of 10 October 1990).

SDSs enable suppliers to restrict the number of distributors by applying selection criteria for admission as “authorized distributors.” In addition, the authorized distributors are restricted in their sales possibilities, as they are not allowed to sell to nonauthorized distributors, leaving them free to sell only to other authorized distributors and final customers. Producers of branded products often deploy selective distribution agreements to establish a system in which the products can be bought and resold only by authorized distributors and retailers. While selective distribution incentivizes reseller investments, it also protects the brand image and value, prevents quality issues and negative reviews, and increases sales across all channels.

The AGCM investigation in question originated from a complaint by a pharmacy, according to which the Company implemented a SDS but also imposed minimum resale prices to distribute its probiotic food supplements on a well-known online marketplace. The Company's executives even contacted the pharmacy requesting it to stop its pricing practice on the marketplace concerned, and when the pharmacy rejected the request, the Company terminated the supply contract.

Following the lodging of the complaint, the Italian competition watchdog sent an information request to the Company, which responded that it “had started to implement an SDS to guarantee a high standard for the probiotics' 30 capsules, to protect consumer health and investments made in research and development.” As part of its SDS, the Company reserved the right to sell to its “most trusted authorized resellers.” However, according to the AGCM, such a possibility had only been reserved for two resellers.

Under EU and Italian competition rules, the imposition of minimum or fixed resale prices is considered a “hardcore” restriction of competition, regardless of whether there is a SDS in place. Indeed, through price maintenance, a supplier can exercise influence over the market to maintain retail and wholesale prices unchanged instead of ensuring competition among the operators. In this respect, increasing scrutiny can be observed all over Europe concerning the general use of an SDS for both pro and anticompetitive purposes (e.g., through the imposition of resale prices), as revealed by a number of fines from €860,000 to €24 million imposed on companies producing high-quality clothing and accessories within SDSs.

This investigation—which the AGCM seeks to complete by 30 June 2022—is relevant for companies doing or seeking to do business in Italy through SDSs. Companies should be mindful of the importance of designing their SDSs in a manner that maximizes the benefits of a closed network (and hence stronger brand positioning) without breaching competition rules.

DIGITAL AFFAIRS

European Parliament Published Draft Reports on the Commission's Digital Regulation Proposals

Recent weeks brought new developments in the legislative procedures on the European Union's upcoming digital regulation, as rapporteurs in the European Parliament's Internal Market and Consumer Protection Committee (IMCO) published their draft reports.

On 28 May 2021, Rapporteur Christel Schaldemose (Socialists & Democrats Group, Denmark), published her draft report on the Digital Services Act (DSA). While endorsing the Commission's proposal overall, she suggested several amendments to ensure a level playing field in the digital single market.

First of all, the rapporteur advocates for more significant obligations to be imposed on online marketplaces in order to tackle the issue of illegal products and services online. To ensure that “what is illegal offline should be illegal online,” Schaldemose suggests reducing the scope of the liability exemption and extending the obligation of the traceability of traders to all intermediary services. On removal of illegal content, Schaldemose stresses the need to act rapidly and recommends that when it comes to illegal content posing a greater threat to society or significant damage to the individual, the timelines should be shorter. The rapporteur also recommends that platforms should be able to suspend the users' account for a reasonable time when they have repeatedly provided illegal content.

To enhance user's rights, the rapporteur wants to expand certain DSA provisions also to small and medium-sized enterprises. Moreover, to tackle targeted advertising, Schaldemose proposes to set off targeted advertising by default and to enable consumers to easily opt out. Finally, the rapporteur also suggests to implement a greater monitoring of algorithms, to increase the powers of the Digital Service Coordinator, and to replace the Commission's proposed “possibility” to act by an obligation to act, in case of a violation of the DSA.

On 1 June 2021, Rapporteur Andreas Schwab (European People's Party Group, Germany) published his draft report on the Digital Markets Act (DMA). He welcomed the proposal, stressing the need for a new regulatory framework, since competition law enforcement is not sufficient to tackle an online platform's significant impact in the digital single market.

Member of the European Parliament Schwab calls for a significant change in the designation of gatekeepers under Article 3(2) of the DMA proposal, advocating for a focus only on the largest online platforms. To this end, the rapporteur suggests to increase the quantitative threshold and add a new requirement that the platforms provide not just one but two core platform services. With respect to prohibitions imposed on gatekeepers, Schwab would like to extend the anti-circumvention provision to any behavior that would have the same objective or effect as the prohibited practices of Articles 5 and 6 of the DMA proposal.

To strengthen the efficiency of the market investigations for the designation of gatekeepers, Schwab suggests that the Commission should be able to request support from national authorities. To ensure consistency in the enforcement of the DMA, the rapporteur proposes to create a High Level Group of Digital Regulators, composed of representatives from both the Commission and competition authorities of all the member states. This new entity would be in charge of coordinating between the Commission and the member states, as well as monitoring the compliance with the DMA.

Both draft reports were subject to a first discussion in IMCO on 21 June 2021. The discussion was followed by a public hearing.

The Commission Publishes a Preliminary Report on Its Sector Inquiry Into Consumer Internet of Things (IoT)

On 9 June 2021, the Commission published a preliminary report setting out the key initial findings of its competition inquiry into the sector of IoT for consumer-related products and services in the European Union (Sector Inquiry). The Sector Inquiry was launched on 16 July 2020 as part of the Commission's digital strategy, and it aims at gaining a better understanding of the consumer IoT sector, future trends, and potential competition issues.

The Sector Inquiry preliminary findings are based on feedback provided by stakeholders active in the consumer IoT sector, including manufacturers of smart home and wearable devices, providers of voice assistants and consumer IoT services, and standard-setting and industry organizations of relevance to consumer IoT.

The Sector Inquiry preliminary findings indicate that an increasing number of devices and services are becoming “smart,” and users are able to access a progressively wider range of interconnected devices and services. In relation to the main features of competition in the consumer IoT sector, respondents identified quality and brand reputation as the main parameters of competition. The majority of respondents also indicated the cost of technology investments and the competitive situation as the main barriers to entry or expansion in the sector. A large number of respondents stressed that the main obstacle to the development of new products and services is the inability to effectively compete with the leading players.

The preliminary report described practices that could potentially have a negative impact on competition, innovation, and consumer choice in the sector. These concerns relate to interoperability, standardization, data, pre-installation, default settings and prominence, exclusivity, concurrency and tying, disintermediation, and contractual issues. In particular, respondents raised concerns as to the lack of interoperability in the consumer IoT sector due to technology fragmentation, lack of common standards, and the prevalence of proprietary technology, as well as the control over interoperability and integration processes by a few providers of voice assistants and operating systems. Respondents also raised concerns in relation to the extensive access to and accumulation of data by voice assistant providers, which can provide advantages in relation to market position improvement of their products and can allow them to leverage into adjacent markets.

The preliminary report is now subject to a public consultation until 1 September 2021. The Commission aims to publish the final report on the consumer IoT Sector Inquiry in the first half of 2022. The information gathered in the context of the Sector Inquiry will provide guidance to the Commission's future regulatory and enforcement activity. The findings of this Sector Inquiry will also contribute to the ongoing legislative debate on the Commission's proposal for the DMA.

EU Companies Are Given New Tools for Overseas Data Transfers

On 4 June, almost a year after the “Schrems II” ruling that annulled the EU-U.S. Privacy Shield (Privacy Shield), the Commission published the new standard contractual clauses (SCCs), designed to provide legal clarity for companies engaging in transatlantic data transfers.

The EU-U.S. Data Protection Umbrella Agreement (one of two instruments negotiated to protect EU citizens' data, together with the Privacy Shield), which concluded in December 2016, introduced high-privacy safeguards for transatlantic law enforcement cooperation. It covered all personal data exchanged between the European Union and the United States for the purpose of prevention, detection, investigation, and prosecution of criminal offenses, including terrorism. It also covered personal data transferred by private entities in the territory of one party to competent authorities of the other party.

In its judgment of 16 July 2020 (Case C-311/18), the Court of Justice of the European Union invalidated the adequacy decision, making the Privacy Shield no longer a valid mechanism to transfer personal data from the European Union to the United States.

The decision, however, did not relieve participants in the Privacy Shield of their obligations under the EU-U.S. Privacy Shield Framework, since companies were still accountable for their privacy commitments, such as reporting data breaches, and personal data transfers outside the European Union are not to happen when an adequate level of protection cannot be guaranteed. European companies have been waiting for more legal certainty after the court's decision, which stated companies must assess the surveillance laws of the country that will receive the data and include additional safeguards in the clauses, if necessary.

Due to their standardization, covering a broad range of transfer scenarios, instead of separate sets of clauses, the new SCCs provide companies with an easy-to-implement template that allows them to meet data protection requirements. The SCCs provide an overview of the different steps companies have to take to comply with the Schrems II judgment as well as examples of possible “supplementary measures” that companies may take if necessary.

Justice Commissioner Didier Reynders stated that it provides “more safety and legal certainty to companies for data transfers.” Reynders added that the clauses “will significantly help companies” meet the requirements of the European Union's General Data Protection Regulation (GDPR) and the Schrems II judgment.

The Computer and Communications Industry Association stated that the SCCs “can help restore certainty for the many businesses that rely on secure international data transfers. This new instrument can help ensure that Europe remains connected to the rest of the global economy” and Amazon Web Services (AWS) stated that the clauses “bring welcome clarity and enable AWS customers to continue to transfer personal data outside of the European Economic Area in compliance with the GDPR.”

ECONOMIC AND FINANCIAL AFFAIRS

FSB Consults on Money Market Funds (MMFs) Reform

On 30 June 2021, the Financial Stability Board (FSB) launched a consultation laying out a set of policy proposals to strengthen the resilience of MMFs in order to prevent a repetition of the March 2020 financial market turmoil caused by the COVID-19 pdemic. In this regard, central banks stepped in to help the real economy and alleviated market stress through different channels, including implementing measures to provide targeted liquidity to MMFs.

In the consultation, the FSB sets forth multiple policy options to enhance MMFs' resilience. The FSB outlines each option's potential advantages and disadvantages, but it does not signal its preference for any particular option. Put simply, it makes it clear that one single policy option from those mentioned below will not be able to address all MMFs' vulnerabilities in a particular jurisdiction. Accordingly, it recommends that regulators should consider a combination of the options put forward in the consultation to address the vulnerabilities prevalent in their jurisdiction. These options include:

Investors Charged for Their Redemption

The FSB suggests that MMFs should charge investors for the cost of their early and large-scale redemption moves, especially at times when liquidity is particularly costly.

Minimum Balance at Risk and a Capital Buffer to Absorb Losses

Under the minimum balance at risk proposal, investors would not be allowed to withdraw all of their money in an instant and would have to leave a small fraction behind. The FSB also recommends as an alternative to require MMFs to maintain a capital buffer to cover material losses from rare, predefined events, such as a material loss to the fund occurring over a short period of time.

Removal of Ties Between Regulatory Thresholds and Imposition of Fees and Other Measures and Removal of the Stable Net Asset Value (NAV) to Reduce Threshold Effects

The imposition of fees and other measures would decouple the potential use of fees and other measures from regulatory thresholds in MMFs that currently have such a tie. Its primary objective is to reduce the likelihood of destabilizing redemptions by reducing the first-mover advantage related to weekly liquid assets thresholds and the overall focus on these thresholds. Removing the stable NAV and requiring funds to have a variable NAV can reduce investors' incentives to redeem when they believe that the underlying value of the assets in the fund's portfolio has fallen below the stable NAV and is at risk of falling below a threshold at which the fund must change its valuation approach and reprice its shares.

Limits on Eligible Assets and Additional Liquidity Requirements and Escalation Procedures to Reduce Liquidity Transformation

In regard to placing limits on eligible assets, this option would make MMFs less dependent on liquidity conditions in the markets for the assets they hold, as well as reduce the first-mover advantage for redeeming investors. On the option of additional liquidity requirements and escalation procedures, the FSB underscores that it would lead to MMFs being more liquid on the asset side and provide more flexibility in terms of liquidity management tools.

In addition to the above-mentioned targeted measures, the FSB indicates that national supervisors could also consider two additional high-level policies to contribute to overall strengthened risk management of MMFs. These are: (i) stress testing to identify weaknesses within individual funds or the sector as a whole, and (ii) transparency requirements, which could include public disclosures and regulatory reporting to expose potential risks in MMFs.

Interested parties can provide comments until 16 August 2021. The FSB will issue its final report in October 2021.

The International Organization of Securities Commissions (IOSCO) Consults on Sustainability-Related Regulatory and Supervisory Expectations for Asset Managers

On 30 June 2021, the IOSCO published a consultation seeking input on a set of recommendations to improve sustainability-related practices, procedures, and disclosures in the asset management industry.

In this context, IOSCO recommends that regulators:

- Consider setting supervisory expectations for asset managers in respect of the: (i) development and implementation of practices, policies, and procedures relating to sustainability-related risks and opportunities; and (ii) related disclosures. In particular, it advises that the practices, policies, and procedures relating to sustainability-related risks and opportunities and their disclosure could cover: (i) governance matters around sustainability-related risks and opportunities; (ii) the asset managers' investment strategies and investment process, including, where relevant, the data and methodologies used; (iii) risk management; and (iv) metrics and targets used to assess and manage relevant sustainability-related risks and opportunities.

- Publish guidance to improve product-level disclosure in order to help investors better understand sustainability-related products and material sustainability-related risks for all products. This guidance could cover areas such as product authorization, sustainability-related labels and/or classification systems by sustainability-related products, disclosure about sustainability-related products' investment strategies, and periodic sustainability-related reporting.
- Put in place supervisory tools to ensure that asset managers and sustainability-related products are in compliance with regulatory requirements and enforcement tools to address any breaches of such requirements.
- Encourage industry participants to develop common sustainable finance-related terms and definitions to ensure consistency throughout the global asset management industry.
- Promote financial and investor education initiatives relating to sustainability.

Interested parties can submit comments until 15 August 2021.

The European Securities and Markets Authority (ESMA) Seeks Input on the Regulatory and Supervisory Challenges of Digital Finance Applications

On 25 May 2021, ESMA issued a call for evidence to gather relevant information on the regulatory approaches it should adopt concerning the role of BigTech in financial services.

This call for evidence follows the Commission's February 2021 request for advice on the topic in the context of the Digital Finance Package (i.e., a set of legislative proposals to regulate crypto-assets, digital operational resilience in financial services, and distributed ledger technology applications).

In Europe, there is currently no specific regulatory treatment for Big Tech operating in finance. In essence, their regulatory treatment depends on their specific business model. This means that they are subject to a combination of: (i) regulations specific to the financial services industry, applying to the types of services provided, such as banking, extending credit, or transmitting payments; and (ii) general laws and regulations that apply to financial and nonfinancial activities.

Against this backdrop, ESMA consults to collect information on:

- Changes in value chains for financial services (e.g., more fragmented value chains) as a result of increased reliance of financial firms on third parties (through, e.g., outsourcing, partnerships, cooperation agreements, or joint ventures) and the entrance of BigTech in financial services.
- The use of digital platforms in the European Union and the extent to which this phenomenon introduces new risks and creates regulatory and supervisory challenges. In this regard, ESMA notes that a more holistic approach to the regulation and supervision of these platforms and bundled services could be

relevant, considering the increased risk that they can pose, regarding, for example, interaction with consumers and consumer protection, conduct of business, money laundering, and operational risk.

- Whether large technology companies should be supervised specifically. ESMA explains that large technology companies active in various sectors and forming mixed-activity groups conducting both financial and nonfinancial activities increasingly enter the financial services sector, including through the establishment of their own subsidiaries for the provision of financial services.

Interested parties can provide their input until 1 August 2021. As for next steps, ESMA will consider the information received through this call for evidence when drafting its advice to the Commission, which it will have to jointly submit with the other two European supervisory authorities (i.e., the European Banking Authority and the European Insurance and Occupational Pensions Authority) by 31 January 2022.

European Parliament and Council of the European Union Reach Political Agreement on Public Country-by-Country Reporting (PCBCR)

On 1 June 2021, the co-legislators (i.e., European Parliament and Council of the European Union) reached a provisional agreement on the proposed directive on the disclosure of income tax information by certain undertakings and branches, the so-called PCBCR Directive.

The PCBCR Directive was first proposed in 2016, and its legislative progress was stalled for the last five years, as there was a disagreement regarding its legal status. Both the European Parliament and the Commission considered the PCBCR Directive as a tax transparency and disclosure reporting tool, which would not require unanimity voting in the Council of the European Union. On the other hand, many member states in the Council of the European Union disagreed, holding that PCBCR is a tax issue whose adoption requires unanimity voting, with the European Parliament only serving in a consulting role.

Against this backdrop, on 25 February 2021, the Portuguese Presidency of the Council reintroduced for discussion the PCBCR topic at the EU member states' internal market and industry ministers meeting. During the meeting, it was made clear that there was a new impetus to advance the PCBCR proposal taking into account the increasing need for tax transparency in light of the post COVID-19 recovery. As a result, at the meeting the EU member states' internal market and industry ministers signaled their support towards moving forward with the PCBCR proposal through a qualified majority (i.e., 55 percent of member states voted in favor, and these member states represent at least 65 percent of the total EU population). Following this development, the co-legislators entered into interinstitutional discussions, which resulted in an agreement on the final version of the PCBCR Directive.

On a general note, the key provisions of the PCBCR Directive as agreed by the co-legislators provides that multinational enterprises with a total consolidated revenue of more than €750 million in each of the last two consecutive financial years, whether headquartered in the European Union or outside:

- Should disclose publicly income tax information in each member state, as well as in each third country that is either on the EU tax haven blacklist or spends two consecutive years on the EU gray list. This information will have to be made available on the Internet, using a common EU template and in a machine-readable format.

- Will be able to avoid publishing certain information due to commercial sensitivity for a period of five years (the so-called safeguard clause).

As for next steps, the Council of the European Union and the European Parliament will have to officially adopt the PCBCR Directive compromise agreement. The European Parliament Plenary is expected to vote on that after the summer recess. Following the vote in the European Parliament Plenary, the PCBCR Directive will be published in the *Official Journal of the European Union*, which will trigger the obligation for member states to transpose it into national law within 18 months.

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