BRUSSELS REGULATORY BRIEF: APRIL 2022

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European and UK Regulatory Newsletter

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ANTITRUST AND COMPETITION

The Commission and the German Competition Authority conducted surprise inspections in Germany for suspected abuse of a dominant position in the natural gas sector.

On 29 March 2022, the Commission and the German Competition Authority jointly conducted unannounced inspections also known as “dawn raids” at the German offices of several companies active in the supply, transmission, and storage of natural gas (Companies). Even though the names of the Companies have not been disclosed, press reports indicate that a major Russian state-owned gas firm and its distribution subsidiary are among the Companies subject to inspection.

The Commission is concerned that the Companies, confronted with an increasing demand for gas, may have intentionally restricted the supply of gas, thereby leading to an increase in natural gas prices. Thus, the Commission intends to ascertain whether the Companies have abused their dominant position in breach of Article 102 of the Treaty on the Functioning of the European Union.

Under EU competition law, it is not illegal for a company to hold dominant market position, but the company must refrain from engaging in anticompetitive conduct aimed at maintaining or increasing such position in the market (such as, for instance, by imposing excessive prices, discriminatory conditions on trading partners, predatory pricing, or exclusive purchasing obligations etc.), as this would damage market competition within the EU internal market.

Dawn raids are typically the first step in antitrust investigations and are carried out at the premises of companies suspected of involvement in anti-competitive conduct. Dawn raids place considerable pressure on multiple areas of a business at once, and can be very stressful due to the broad scope of the Commission's powers of inspection. The inspectors can enter business and domestic premises; examine books and business records; make copies of documents and emails; seal premises, hardware, and records; and require oral explanations. The Commission is also entitled to search laptops, mobile phones, and other devices and to retain storage media and data until the end of the inspection.

The European Union's interest in monitoring the gas market as a consequence of Russia's invasion of Ukraine may have played a role in triggering the Commission's investigation. However, this is unlikely to be the only reason. Already last year the Commission sent a request for information to several gas providers - including the abovementioned Russian state-owned gas firm - concerning the functioning of the gas market and the recurrence of price hikes. The fact that the Commission carried out the dawn raid does not mean that the Companies are guilty of anti-competitive behaviour nor does it prejudge the outcome of the investigation itself. It remains to be seen whether the investigation will result in the opening of formal proceedings against the Companies.

DIGITAL AFFAIRS

Agreement on Digital Markets Act

On 24 March, negotiators from the Council of the European Union and the European Parliament reached a provisional political agreement on the Digital Markets Act (DMA). The DMA sets new EU rules which will impose certain obligations on large online platforms acting as “gatekeepers”, as well as ban specific practices. Under the DMA, gatekeepers will for example be obliged to ensure that users have the right to unsubscribe, give sellers access to their marketing or advertising performance data on the platform, or inform the Commission of their acquisitions. At the same time, gatekeepers will be prohibited from engaging in self-preferencing, reusing private data collected during a service for the purposes of another service, or pre-installing certain software applications.

The deal to finalize the DMA was reached after agreeing on interoperability requirements for messaging services (interoperability obligations for social networks will be assessed in the future) and on provisions providing a guarantee that combining personal data for targeted advertising will only be allowed with explicit consent and an option allowing users to freely choose their browser, virtual assistants, or search engines.

Following the political agreement, it is currently expected that the representatives of EU member states will approve the formal text of the DMA at the Competitiveness Council on 9–10 June and the European Parliament envisages a plenary vote on the DMA in July. According to the Commission's Executive Vice-President, Margrethe Vestager, the DMA might come into force in October 2022, with gatekeepers being required to meet the new obligations by February/March 2024.

ENVIRONMENTAL AFFAIRS

Green Deal: European Commission's Proposal to Modernise the Industrial Emissions Directive

These new proposed rules are part of the European Green Deal, and aim at guiding industrial investments necessary for Europe's transformation towards a zero-pollution, competitive, climate-neutral economy by 2050.

The Proposal builds on the overall approach of the existing Industrial Emissions Directive (the “Directive”), with a continued focus on pollution prevention and control based on the “best available techniques” permitting process, but it enhances the existing framework introducing a number of measures to boost its effectiveness.

Among others, the new rules will cover more relevant sources of emissions, extending the sectors covered by the Directive, including extractive industry installations (mines), giga-factories for electro-mobility batteries, larger-scale cattle farming, and additional pig and poultry farms. The new rules will also make permitting more effective, providing that member states' permitting authorities will be required to use tighter pollutant emission limit values when revising permits or setting new permit conditions, and increasing transparency and public participation in the permitting process.

As for next steps, the Proposal will now undergo the legislative procedure. Once adopted, it is foreseen that member states will have 18 months to transpose the Directive into national legislation.

ECONOMIC AND FINANCIAL AFFAIRS

Commission Consults on Digital Euro

On 5 April, the Commission launched atargeted consultation on a digital euro, which runs until 14 June 2022. This consultation complements the ECB's previouspublic consultation, which ran from October 2020 to January 2021.

Whereas the ECB's consultation investigated primarily citizens' expectations of desirable features of a digital euro with regard to, inter alia, privacy, and security of payments; the ability to pay across the euro area; elimination of extra costs; and offline usability, the key objective of the Commission's consultation is to develop a better understanding of stakeholders' views on the possible issuance of a digital euro. The consultation document notes that the applicable EU legislative frameworks, such as Directive (EU) 2015/2366 (the revised Payment Service Directive – PSD2), would need to be amended to adjust to a digital euro and potentially also to digital currencies issued by central banks of non-euro area EU member states. In this regard, the Commission is particularly interested to hear from industry specialists, payment service providers (e.g., credit institutions, and payment and e-money institutions), payment infrastructure providers, developers of payment solutions, merchants, merchant associations, consumer associations, retail payments regulators and supervisors, anti-money laundering (AML) supervisors, financial intelligence units, and other relevant experts or authorities.

The Commission seeks to collect information pertinent to: i) users' needs and expectations for a digital euro; ii) the digital euro's role for the European Union's retail payments and for the digital economy; iii) the possibility of making the digital euro available for retail use while continuing to safeguard the legal tender status of euro cash; iv) the impact of the digital euro on the financial sector and on financial stability; v) implications of AML and countering the financing of terrorism rules for intermediaries and estimation of compliance benefits and costs; vi) privacy and data protection for users of the digital euro; and vii) the use of the digital euro outside of the euro area. With respect to the possible introduction of the legal tender status of a digital euro, the Commission is currently preparing an initiative that aims to clarify the concept of legal tender of euro banknotes and coins in EU legislation.

TRADE

European Parliament Agrees on Draft Compromise Text for the Foreign Subsidies Instrument

The European Parliament's political groups reached a deal at the beginning of April on a draft compromise text regarding the Foreign Subsidies Instrument (the Regulation) proposed by the Commission in May 2021.

The Regulation was introduced by the Commission in order to tackle the potential market distortions and harm that foreign subsidies can cause within the European Single Market (Single Market), via measures such as fines or the prohibition of certain market behaviours. The proposal is also part of the updated EU industrial Strategy, adopted with the objective to promote a fair and competitive Single Market, setting the right conditions for the European industry to prosper.

In the European Parliament, the most controversial topic was the thresholds for when to investigate concentrations involving a financial contribution by a non-EU government. In the proposed Regulation by the Commission, foreign subsidies investigations would be triggered in concentrations where the EU turnover of the company to be acquired would be €500 million or more and the foreign financial contribution would be at least €50 million. The lead rapporteur on the file at the European Parliament, Christophe Hansen (EPP - Luxembourg) agreed with the thresholds set by the Commission, but other political groups fought for the thresholds to be lowered. The agreement finally reached foresees a 20% reduction of the figures.

Furthermore, Hansen introduced the idea of a “third country dialogue”. He proposed that the Commission shall first have a dialogue regarding the foreign subsidies with the third country involved and the impact it might cause in the Single Market, thus, opting for a softer way to deal with the situation, instead of just relying on fines or prohibitions. Hansen was unable to fully convince the other political groups and its proposal was thus softened in the compromise text.

The European Parliament also suggested some changes to the clause granting the Commission the power to adopt delegated acts amending the thresholds for notifications (Article 44(1)(a) of the Regulation). The regulation allows the Commission to review the thresholds after two years but the European Parliament suggested for the same to happen within two years.

The compromise text was unanimously approved by the Trade Committee on 25 April. On 4 May, the compromise text was subject to a plenary vote in the Parliament, which approved the latter with 627 votes in favor, 11 abstentions and 8 votes against. Now, the Commission, Council of the EU and Parliament will start high-level negotiations on 5 May. According to the lead rapporteur, it could be possible to seal the deal on the instrument among the institutions if the French Presidency of the Council of the EU is determined to do so.

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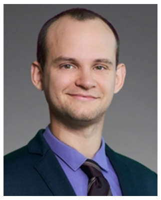

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