

BRUSSELS REGULATORY BRIEF: NOVEMBER 2022

Date: 22 November 2022

EU Policy and Regulatory Newsletter

By: Giovanni Campi, Nikolaos Peristerakis, Francesco Carloni, Antoine de Rohan Chabot, Petr Bartoš, Vittoriana Todisco, Miguel A. Caramello Alvarez, Joanna Kulewska, Philip Torbøl, Matilde Manzi, Stefano Prinzivalli Castelli

ANTITRUST AND COMPETITION

European Commission Launches a Public Consultation on the Draft Revised Market Definition Notice

On 8 November 2022, the European Commission launched a public consultation aimed at gathering interested parties' views on the draft revised Market Definition Notice.

The Market Definition Notice sets out the Commission's approach to market definition. Competition authorities define product and geographic markets to identify the competitive constraints that businesses face when offering their products and services, and to assess their relative strength. Market definition is therefore a critical step in antitrust cases.

The Market Definition Notice was adopted in 1997. The Commission launched its review process in April 2020 and published a staff working document in July 2021. While the basic principles of the Market Definition Notice "remain sound", the Commission considers that the Market Definition Notice "does not fully reflect developments in best practices in market definition."

Accordingly, the Commission proposes revisions to the Market Definition Notice to mainly codify its decisional practice and recent court judgments. In particular, the draft revised Market Definition Notice provides new or additional clarity on the key market definition issues by providing concrete examples. This concerns, for instance, the relevance of innovation and quality of services, the definition of technological and digital markets, as well as introducing new principles on innovation-intensive markets.

The public consultation confirms the Commission's determination to review and update the EU competition rules and it was anticipated in the Commission's communication of November 2021 "A competition policy fit for new challenges" where the Commission set out its agenda for future reforms of its competition policy. Key goals of that policy are to help achieve the green and digital objectives and recover from the crisis generated by COVID-19. In that respect, the Commission: (i) has recently reviewed and published the new Vertical Block Exemption Regulation and accompanying Guidelines on Vertical Restraints; (ii) is currently reviewing the Horizontal Block Exemption Regulation; and (iii) has launched a public consultation on the existing competition regulations concerning the antitrust enforcement and procedural rules.

Interested parties can submit their comments on the draft revised Market Definition Notice until 13 January 2023. While the full ramifications of the Public Consultation remain to be seen, the Commission will review and finalise

the draft revised Market Definition Notice with a view to having a new Market Definition Notice in place in Q3 2023.

State Aid: The European Commission Prolongs and Amends its Temporary Crisis Framework to Support the Economy Following Russia's Aggression against Ukraine

On 28 October 2022, the Commission adopted a second amendment to its State aid Temporary Crisis Framework (Amendment), adopted on 23 March 2022 and first amended on 20 July 2022, in order to address the evolving needs of EU member states to support the economy in the context of the continued Russian invasion of Ukraine. This Amendment is in line with the recent EU regulation on an emergency intervention to address high energy prices and the Commission's proposal on a new emergency regulation to address high gas prices in the European Union and ensure security of supply this winter. It should give EU member states more flexibility to set up support schemes tailored to the needs of their economy, while continuing to incentivise the green transition.

This Amendment prolongs all measures set out in the Temporary Crisis Framework until 31 December 2023, and increases the ceilings set out for limited amounts of aid up to the amount of €250,000 and €300,000 for companies active in the agriculture, fisheries and aquaculture sectors, and up to €2 million for companies active in all other sectors. This Amendment also introduces new measures aimed at supporting electricity demand reduction, as well as additional flexibility for liquidity support to energy utilities for their trading activities. In exceptional cases and subject to strict safeguards, EU member states may provide public guarantees exceeding 90% coverage, where they are provided as financial collateral to central counterparties or clearing members.

As regards aid measures concerning additional costs due to exceptionally severe increases in natural gas and electricity prices, when the overall aid per company exceeds €50 million, the Amendment provides that EU member states must include in their schemes a requirement that the beneficiary must submit to the granting authority, within one year from the moment of granting the aid, a plan that specifies how the beneficiary will reduce the carbon footprint of its energy consumption or how it will implement any of the requirements related to environmental protection or security of supply. This requirement applies from 1 January 2023.

Finally, this Amendment clarifies the criteria for the assessment of recapitalisation support measures. In particular, such solvency support would have to (i) be necessary, appropriate and proportionate; (ii) involve adequate remuneration of the EU member state; and (iii) be accompanied by appropriate measures to preserve effective competition, including a ban on dividend and bonus payments and acquisitions.

INTERNATIONAL TRADE/COMPETITION

The European Parliament Adopts Negotiating Mandate on the Anti-Coercion Trade Instrument

On 19 October 2022, the European Parliament's plenary adopted a negotiating position for inter-institutional negotiations with the Council of the EU (Council) and the Commission on the proposed anti-coercion instrument (Instrument), the so-called trilogue procedure.

The aim of the Instrument is to protect the European Union's strategic and economic interests against countries seeking to coerce the European Union or its member states by applying any form of measures (including failure to act) affecting trade or investment. The Instrument would allow the European Union to deploy adequate countermeasures, such as constraints on access to the EU markets for public procurement, capital or

authorisation of products. Adoption of the European Union's countermeasures should be a last resort option, applied only once other avenues, including direct negotiations, mediation and international adjudication, have been exhausted.

The European Parliament's International Trade Committee further extended the scope of the Commission's proposal by stipulating that the countermeasures should be effective in repairing the injury caused by the economic coercion. Members of the European Parliament also wanted to introduce procedural deadlines for the Commission's decision on whether an instance of coercion has been identified and for the adoption of countermeasures, and proposed that the Commission's chief trade enforcement officer is tasked with the overall responsibility for the functioning and implementation of the Instrument.

The Council adopted its negotiating position on the Instrument during its meeting on 16 November 2022. Consequently, negotiation between the Council and the European Parliament on the final wording of the Instrument might begin.

ECONOMIC AND FINANCIAL AFFAIRS

Corporate Sustainability Due Diligence Directive European Parliament draft Report Published

On 23 February 2022, the Commission adopted a proposal for a directive with the objective to enhance sustainable and responsible corporate behaviour and to protect human rights and environmental matters within companies' activities and corporate governance, the Corporate Sustainability Due Diligence Directive (CSDDD).

On 7 November, the European Parliament Member leading the work on the CSDDD, Lara Wolters (S&D, The Netherlands), published her draft report on the file. The draft report goes significantly beyond the Commission's proposal as regards scope of application and due diligence obligations.

In her report Wolter suggests setting the scope thresholds to more than 250 employees and €40 million turnover, meaning that companies above such threshold would be in the CSDDD scope. The Commission had proposed to set the thresholds at 500 employees and €150 million turnover for companies to be in scope.

One of the most controversial topics since the adoption of the text by the Commission has been whether due diligence obligations should affect the entire value chain of a company or just parts of it. Wolters suggests that they should apply to the entire value chain, all upstream and downstream activities and operations included.

Regarding the proposed concept of "established business relationship", Wolters' report recommends that the concept be deleted entirely, and advocates for a risk based approach instead. She suggests that companies should assess whether the business partner can reasonably be expected to carry out due diligence as provided in the legal text, taking into account factors such as the sector, context and level of risk of the business relationship.

The deadline for European Parliament amendments to the draft report has been set at 30 November. The European Parliament hopes to reach its negotiating position in the first half of 2023, so that trilogue negotiations with the Council and the Commission can start after that.

ENERGY

Emergency Energy Package

Amid the instability in global energy markets, the Commission has presented an emergency energy package that includes proposals for joint natural gas purchasing and a new liquefied natural gas (LNG) price benchmark to combat mounting energy prices (Proposed Regulation). The Proposed Regulation's joint purchasing mechanism aims to pool European countries and companies' collective buying power to lower gas prices on international markets, while the new LNG price benchmark aims to decouple the price of LNG imports from current indexes that are highly influenced by pipeline-delivered gas.

First unveiled in October, the Proposed Regulation's joint gas purchasing framework, as currently drafted, would include demand aggregation through the mandatory participation of nearly all sectors of the natural gas value chain, with the exception of companies consuming gas. Specifically, EU member states must require gas companies, which under the Proposed Regulations includes entities "carrying out at least one of the following functions: production, transmission, distribution, supply, purchase or storage of natural gas, including LNG", under their jurisdiction to pool demand of gas volumes equivalent to 15% of each member state's gas storage targets for the subsequent year. As written, the demand aggregation and joint gas purchasing programs would be possible on a voluntary basis for companies consuming natural gas. Above the mandatory 15%, participation in the demand aggregation program is voluntary for all industry participants. At this time, it is unclear whether the 15% level will have any consequential impact on natural gas storage volumes in a way that helps lower energy prices and ensure greater stability of European energy supplies.

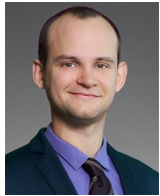
A company contracted by the Commission will gather offers from suppliers to meet the aggregated demand during a tender process, with the support of a joint purchasing information technology tool. Following the submission of offers, the companies participating in the demand aggregation will decide whether to purchase gas, and if so, they will be able to contract with the contracted suppliers individually or through a gas purchasing consortium that they will form with other participating companies. An ad-hoc steering board, made up of representatives from the Commission, member states, and the energy community contracting parties, will oversee the demand aggregation and joint purchasing process, as well as assist with the assessment of the security of the European Union's gas supply following the Proposed Regulation's implementation.

The Proposed Regulation also sets out a framework for a new price benchmark for LNG. As the European Union's LNG market is heavily influenced by supplies of pipeline gas, which are currently affected by exceptional external factors, the Commission has put into question whether the current price indexes serve as sufficient pricing proxies for LNG imports. Thus, the Commission's justification for the new LNG price benchmark is based on the purported inaccuracy of LNG import prices as determined by the Transfer Title Facility, a virtual market place located in the Netherlands that provides the leading European benchmark price for gas. Accordingly, the Proposed Regulation would task the European Union Agency for the Cooperation of Energy Regulators with creating a price assessment tool that will publish its first daily assessment no later than two weeks after the Proposed Regulation's entry into force, followed by the price benchmark for LNG imports. Data on LNG import transactions would be collected to establish the LNG price benchmark independent from physical pipeline indexes for gas. The Commission notes that the LNG price benchmark should be considered temporary, and antecedent to "more permanent arrangements to be proposed."

The Council must approve the Proposed Regulation for implementation, with EU energy ministers expected to agree to the emergency energy package on 24 November. The Commission aspires to have the joint purchasing

tool running no later than early spring 2023 and the new LNG price benchmark by 31 March 2023, with the Proposed Regulation to apply for a period of one year from its entry into force.

KEY CONTACTS



PETR BARTOŠ
SENIOR ASSOCIATE

BRUSSELS
+32.2.336.1922
PETR.BARTOS@KLGATES.COM



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



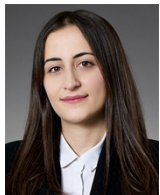
ANTOINE DE ROHAN CHABOT
COUNSEL

BRUSSELS
+32.2.336.1941
ANTOINE.DEROHANCHABOT@KLGATES.COM



NIKOLAOS PERISTERAKIS
PARTNER

BRUSSELS
+32.2.336.1934
NIKOLAOS.PERISTERAKIS@KLGATES.COM



VITTORIANA TODISCO
ASSOCIATE

BRUSSELS
+32.2.336.1905
VITTORIANA.TODISCO@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.