BRUSSELS REGULATORY BRIEF: JANUARY

Date: 25 January 2018

European Regulatory / UK Regulatory Newsletter

By: Philip Torbøl, Francesco Carloni, Giovanni Campi, Alessandro Di Mario, Sara Aparicio Hill, Ignasi Guardans

ANTITRUST AND COMPETITION

The European Commission sends Statement of Objections to the largest beer brewer for an alleged abuse of dominant position on the Belgian beer market.

The beer supplier is the world's biggest brewer and holds a very strong position on the Belgian beer market. Its most popular beer brands in Belgium are also sold in the Dutch and French markets. The European Commission's investigation has revealed that the company's beer brands are sold at a cheaper price in the Netherlands and France, due to the significant competition it faces in these markets.

In its Statement of Objections (used by the Commission to initiate proceedings against companies for antitrust breaches), the Commission has identified the company to be dominant in the Belgian beer market. According to the Commission, it abused its dominance by preventing supermarkets and wholesalers from buying its beer brands at lower prices in the Netherlands and France, with the aim of ensuring that these beers are not imported into Belgium.

The Commission's concerns relate to several practices that have been in place since 2009. The packaging of beer cans that are sold in the Netherlands and France has been modified so as to hinder their entry to the Belgian market. The company also has limited Dutch retailers' access to key products and promotions, with the aim of preventing less expensive beer from being brought into Belgium.

In the Commission's view, these actions breach Article 102 of the Treaty on the Functioning of the European Union, which prohibits abuse of dominance. In the EU, dominant companies are subject to a tougher standard than in other jurisdictions since they hold a special responsibility not to impair genuine undistorted competition. As usual and required by Regulation 1/2003, the conclusions included in the Statement of Objections are without prejudice to a final decision of the Commission.

Airline consolidation in Europe to attract the European Commission's scrutiny

On 21 December 2017, the European Commission announced it had conditionally authorized the acquisition by the largest German airline of a subsidiary of the second largest airline in Germany, after the latter filed for insolvency in August 2017.

The initial scope of the proposed transaction included the acquisition of a leisure air carrier, a regional air carrier

©2005-2020 K&L Gates LLP. All Rights Reserved.

and other aircraft, crew and slots. However, in order to secure the Commission's clearance, the airline had to submit two sets of commitments before the Commission was satisfied that they would comprehensively address the competition concerns raised by the transaction.

One of the key remedial solutions put forward by the airline was to substantially reduce the scope of the transaction as initially notified. In particular, the airline decided to abandon the acquisition of the leisure air carrier. This possibility was already contemplated in the sale and purchase agreement, pursuant to which the airline was enabled to modify the transaction perimeter. Concerning the transaction in its modified scope, the Commission still considered that it raised competition concerns at Düsseldorf airport because of the number of slots the airline would hold at this airport, post-transaction. It was, however, satisfied with the airline's commitments to reduce the number of the acquired slots.

An interesting element in this case was the fact that, before the proposed transaction was notified to the Commission, the airline sought the Commission's derogation from the suspension obligation, pursuant to which reportable transactions in the European Union cannot be closed or implemented before they have been notified and cleared by the Commission.

However, under the EU merger rules, the Commission may, on the basis of a reasoned request, grant a derogation from the suspension obligation. Typically, the Commission takes into account the effects of the suspension on one or more companies concerned by the transaction or on a third party and the threat to competition posed by the transaction.

The airline relied on this exception in order to be able to implement a number of measures (e.g. financially support the air carrier to prevent that its lessors could repossess its aircraft and sell them to third parties, securing the continuity of operations to avoid the grounding of the air carrier's aircraft) before notifying and obtaining the Commission's merger clearance. The Commission's derogation was granted on the basis of a number of strict conditions among which the obligation for the airline to notify the transaction to the Commission within a tight deadline.

TRANSPORT SERVICES

Uber may face stricter regulation by Member States after EU's highest court rules it is a transport service - Judgment in Case C-434/15, *Asociación Profesional Elite Taxi v. Uber Systems Spain SL*

In 2014, a professional taxi drivers' association based in Barcelona brought an action before the local Commercial Court. The association requested the court to declare that Uber's practices in Spain constitute misleading trade practices. The claimant pointed that neither Uber Systems Spain nor the non-professional drivers providing transport services via the application, were granted licenses for providing taxi services.

The Barcelona court referred the matter to the Court of Justice of the EU ("**CJEU**") for a preliminary ruling, asking the CJEU to clarify whether that kind of services provided by Uber using non professional drivers (which are

©2005-2020 K&L Gates LLP. All Rights Reserved.

different from other Uber options where drivers do have a license similar to car-rental chauffeurs) can be classified as transport services, information society services or both.

On 20 December 2017, the CJEU ruled that Uber should be considered as a transport company.

The CJEU affirmed that an intermediation service that enables the transfer, by means of a smartphone application, of information concerning the booking of a transport service between the passenger and a non-professional driver could be classified as an *"information society service (…) normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services."*

However, the CJEU found that the service provided by Uber does not simply constitute an intermediation service. The CJEU highlighted that in situations where passengers are transported by non-professional drivers using their own vehicles, the provider of that intermediation service simultaneously offers urban transport services. The CJEU further took into account Uber's decisive influence over the conditions under which that service is provided by such drivers, such as the imposition of a maximum fare, as well as the company's control over drivers' conduct. On the basis of these elements, the CJEU concluded that the intermediation service in question forms an integral part of an overall service whose main component is a transport service.

As a result of the CJEU's ruling, Uber may be subject to stricter national regulation and licensing in the 28 EU Member States as a taxi operator. Furthermore, Uber's service must be excluded from the scope of the freedom to provide services in general as well as from the directive on services in the internal market and the directive on electronic commerce. Consequently, it is for the Member States to determine the conditions under which such services are to be provided in conformity with the Lisbon treaty.

Uber maintained that the CJEU's ruling has a limited impact on its activity as in the last years it has adapted its services, the cheapest one challenged in Barcelona is rarely in use any more (private drivers in their own cars without any license at all) and already operates under transport law of most Member States. However, CJEU's finding that Uber exercises "*decisive influence*" over the conditions under which drivers provide their services, may have an impact beyond the strict terms of the ruling itself: it may question Uber drivers' self-employment status, as such influence suggests that Uber drivers are in fact workers entitled to the national minimum wage or sick pay and that they may also be taxed on an employment basis. Consequently, Uber drivers' worker status may imply that fares will increase. It remains to be seen to what extent the CJEU's ruling may have impact on other digital platform providers and innovative business models challenging the status quo which may also be forced to be classified as traditional companies.

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

Member States agreed on a common position on free flow of non personal data

The Estonian presidency of the Council of the European Union, in a final effort of its six-month stint, led Member States to adopt a common position on the proposed Regulation on a framework for the free flow of non-personal data in the EU.

The proposal was issued by the Commission in September 2017 with the main objective of improving the mobility of non-personal data across borders in the EU, by preventing Member States from imposing localization restrictions and making it easier for professional users of data to switch data service providers and to port data

©2005-2020 K&L Gates LLP. All Rights Reserved.

across the EU. Along with the General Data Protection Regulation, which provides for the free movement of personal data, the Regulation constitutes the EU approach to the movement of data across Member States.

According to one of the support studies of the proposal, taking away data location restrictions in the EU is expected to generate an additional growth of up to 4% GDP by 2020. This is certainly important for the data-driven economy (cloud computing, automate work, business analytics services, market research) but it is not circumscribed to tech companies. It has an impact to the whole services' area, making it easier for businesses to do daily transactions and access, store or process high-priority data by means of a data service provided in a different Member State.

The internal logic of the Regulation is simple: the EU will protect the flow of data within its borders and restrict limitations to it; but in exchange, cross-border requests for information on those data produced by foreign (EU) authorities are also made much easier.

Since national governments, often driven by privacy, law enforcement or protectionist concerns, have an inclination to restrict the cross-border movement of data, there was a lot of expectation on the examination of the proposal within the Council of the EU. Surprisingly, the model proposed has been essentially accepted: the debate went rather smoothly and the Member States reached an agreement just three months after the initial bill had been presented.

The position agreed embraces the main principle of the Commission proposal: Member States will only be able to impose data localization requirements when these are justified on grounds of public security. And this cannot be a free interpreted concept: they must notify their data localization measures to the Commission and all existing national rules that are not in compliance with the principle of free flow of non-personal data must be repealed. In addition, the Council of the EU proposes changes on the mechanisms for determining liability, a clarification on mixed data and opposes the establishment of a committee to assist the Commission in the adoption of implementing acts.

Within the European Parliament, the examination of the proposal has been postponed by a dispute of two Committees over the responsibility on the file. The rapporteur has not yet released the draft report which would need to be discussed and approved in the committee before starting negotiations with the Council of the EU.

ECONOMIC AND FINANCIAL AFFAIRS

European Commission proposes new prudential regime for investment firms

On 20 December 2017, the European Commission proposed a review of the prudential rules for investment firms by amending the Regulation on capital requirements ("CRR") and the Directive on the prudential supervision of investment firms ("CRD"). Apart from CRD/ CRR, the review concerns also certain provisions of the Markets in Financial Instruments Directive and Regulation ("MiFID2/MiFIR").

The aim of the revision is to ensure a more proportionate application of prudential requirements for investment firms. It is considered that the existing prudential framework has not fully catered for the business models of investment firms, which do not engage in lending activities and are therefore less exposed to credit and liquidity risks. Under the Commission's proposals, the majority of EU investment firms, except for the largest, systemic ones, would no longer be subject to these rules.

©2005-2020 K&L Gates LLP. All Rights Reserved.

Based on the recommendations of the European Banking Authority ("EBA"), the Commission proposes prudential requirements differentiated by three classes according to firms' size, nature and complexity. Only the largest firms, with assets over EUR 30 billion (Class 1) would remain under the prudential regime of the current CRR/CRD and would be treated and supervised as significant credit institutions. This implies that their operations in Member States participating in the Banking Union would be directly supervised by the European Central Bank's Single Supervisory Mechanism ("SSM").

For larger firms (Class 2), further defined by specific thresholds, the rules introduce a new way of measuring their risks and provide for lighter governance and remuneration arrangements. The capital requirements for the least risky investment firms (Class 3) will be set in a simpler way, yet flexible enough to cater for various business models. These firms would not be subject to any additional requirements on corporate governance or remuneration. Any firm that is deemed to hold clients' funds however would not fall under this category.

The regulation entails transition provisions allowing firms to build up the new required amounts of initial capital in a period of 5 years. As regards non-EU firms, the proposal adjusts the equivalence test of the prudential treatment and supervisory convergence of the jurisdiction where they are established. These would be subject to a more detailed and granular assessment by the European Commission.

EU legislators reached compromise agreement on new anti-money laundering rules

In December 2017, the Council of European Union, the European Parliament and the European Commission reached a political compromise on the revision of the EU anti-money laundering and terrorist financing Directive ("AMLD5").

Following the final endorsement by the European Parliament and the Council, the revised Directive will boost transparency and prevent the large-scale concealment of funds. Under the new rules, information on beneficial owners of companies will become publicly accessible in interconnected national registers. However, access to information on the ultimate owners of trusts and similar legal arrangements will be granted only if a legitimate interest can be proved. Information on trusts owning a company not incorporated in the EU will be accessible upon a written request. EU Member States can, however, decide to grant even a broader access to the registers. National tax authorities already have direct access to the beneficial ownership information of companies, trusts as well as companies' customer due diligence records under the rules on administrative cooperation applicable as of 2018.

Another important change concerns the virtual currency exchange platforms and wallet providers, which will be obliged to conduct customer due diligence checks. Anonymity will be also fought as regards the use of prepaid cards, by lowering the threshold for the customer identification from EUR 250 to EUR 150.

Moreover, Member States' Financial Intelligence Units ("FIUs") will be able to identify account holders by accessing information in centralized bank and payment account registers. Under the Directive, financial flows from risky third countries will also be subject to additional due diligence measures. Problematic countries will be identified by the European Commission on the basis of a list by the Financial Action Task Force ("FATF").

FOOD, DRUGS, MEDICAL DEVICES AND COSMETICS

©2005-2020 K&L Gates LLP. All Rights Reserved.

European Commission publishes draft rules on country of origin/place of provenance indications for primary ingredients

The European Commission continues to develop the harmonised food labelling rules, which entered into force in 2014 (the "**FIC**"). On 4 January 2018, the European Commission published a Draft Implementing Regulation on the provision of voluntary indication of origin or place of provenance of foods (the "**Draft Implementing Regulation**"). The Draft Implementing Regulation is open for consultation until the 1 February 2018. If it is enacted in its current form, it will apply from 1 April 2019.

The FIC requires that when the place of origin or place of provenance of a whole product is provided on the product's label, and yet the origin or place of provenance of its primary ingredient is different, information must also be given about the origin or place of provenance of that primary ingredient. The Draft Implementing Regulation develops the application of this requirement.

The Draft Implementing Regulation seeks to ensure any information regarding the origin or place of provenance of the primary ingredient is not misleading to the consumer by (i) providing references to specific geographical areas ("**EU**", "**non-EU**" or "**EU** and **non-EU**"; Member States or third countries; or regions or any other geographical area within Member States/third countries, amongst other examples); or the option to inform consumers by using the following or similar statement: *"(name of the primary ingredient) does not originate from (the country of origin or the place of provenance of the food)".*

The Draft Implementing Regulation also lays down labelling presentation requirements for the country of origin or the place of provenance indications for primary ingredients, such as font size for any indications provided in words; and for any indications given in a non-scriptural form, a requirement that they shall appear in the same field of vision as the indication of the country of origin or the place of provenance of the food.

The Draft Implementing Regulation applies to all products for which an origin or place of provenance is provided, but which have a primary ingredient from a different origin or place of provenance. It does not apply to whole products that do not provide the information regarding origin or place of provenance, and in these cases it will not be necessary to provide the information regarding the origin or place of provenance of the primary ingredient.

©2005-2020 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS

PHILIP TORBØL
PARTNER
BRUSSELS
+32.(0)2.336.1903
PHILIP.TORBOL@KLGATES.COM

FRANCESCO CARLONI
PARTNER
BRUSSELS, MILAN
+32.(0)2.336.1908
FRANCESCO.CARLONI@KLGATES.COM

GIOVANNI CAMPI
GOVERNMENT AFFAIRS ADVISOR
BRUSSELS
+32.(0)2.336.1910
GIOVANNI.CAMPI@KLGATES.COM

ALESSANDRO DI MARIO
SENIOR ASSOCIATE
BRUSSELS, MILAN
+32.(0)2.336.1938
ALESSANDRO.DIMARIO@KLGATES.COM

©2005-2020 K&L Gates LLP. All Rights Reserved.