

BRUSSELS REGULATORY BRIEF: DECEMBER

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THE DECEMBER ISSUE OF THE BRUSSELS REGULATORY BRIEF INCLUDES THE FOLLOWING TOPICS:

TRADE

EU moves to bolster free movement of goods through extended mutual recognition

On 22 November 2018, the Austrian presidency of the Council reached a political agreement with the European Parliament on measures which will facilitate the circulation of goods across the European Union.

ANTITRUST AND COMPETITION

Advocate General Wahl issues an Opinion on the application of the principle of "ne bis in idem" (double jeopardy) in competition law proceedings

According to Advocate General Nils Wahl's Opinion of 29 November 2018 in case C-617/17, the principle of ne bis in idem is not applicable in a case where a national competition authority has imposed, in a single decision, a fine on an undertaking for anticompetitive conduct on the basis of a concurrent application of national and EU competition rules.

ECONOMIC AND FINANCIAL AFFAIRS

European Commission seeks to strengthen the international role of the Euro

The key aim of the Commission's effort is to "make the euro a source of economic protection and empowerment", and to ensure the euro constitutes a strong alternative to other currencies.

France and Germany to change the scope of the digital services tax

The EU finance ministers gathered for the Ecofin Council meeting on 4 December to discuss, and originally also to find a compromise on, the European Commission proposal for a digital services tax ("DST").

TRADE

EU moves to bolster free movement of goods through extended mutual recognition

On 22 November 2018, the Austrian presidency of the Council reached a political agreement with the European Parliament on measures which will facilitate the circulation of goods across the European Union. The new rules improve and expand the application of the mutual recognition principle, an essential component of the EU's Single Market. This political agreement between the two co-legislators must now be formally adopted by the European Parliament and the Council. The new rules will be applied twelve months after the entry into force of the regulation.

The basic feature of the Single Market is that goods, people, services and capital circulate freely within EU borders. The goal of the Single Market is for a product manufactured or commercialised (e.g. legally imported) for the first time in the EU through a Member State, to be able to be marketed, namely resold, in other EU Member States. In trading terms the EU becomes one territory without internal borders in a way that stimulates competition and trade, improves efficiency, raises quality, and helps cut prices.

This borderless trade space is grounded in two essential legal mechanisms: in some areas, through the harmonisation of the diverse Member States' regulations which could have an impact in the sale of goods across countries; that creates common EU legal requirements governing a specific area or sector (such as trade, transport, chemical components or medical devices), which are made mandatory in a set of EU legislative instruments (such as Directives and Regulations), establishing rules that will be applicable everywhere in the Union. Alternatively, when such harmonization is not possible or not convenient the mutual recognition principle applies: according to this principle, a Member State may not prohibit the entry and marketing on its territory of products which have previously lawfully entered or been marketed in another Member State, even where those products were manufactured in accordance with national regulations or standards different from those to which domestic products are subject. The only exceptions to this principle are restrictions justified on defined and narrowly interpreted grounds of a legitimate public interest, which must be proportionate to the pursued objectives.

However, this mutual recognition principle does not always work in practice as it should. And when there is no harmonization, some companies may be in fact compelled to apply different national rules, for the sake of efficiency and to save time and avoid paperwork and red tape. This new EU legislative steps taken last month by the European Council and the European Parliament seek to make sure that the existing legislative framework will be improved so as to allow businesses to rely sufficiently on the principle of mutual recognition when they enter new markets in other EU countries. The draft Regulation aspires to clarify the scope of mutual recognition in order to increase legal certainty for businesses and national authorities; introduces a mutual recognition declaration which demonstrates that the goods in question have already been lawfully marketed in an EU country; establishes a problem-solving mechanism that will provide practical solutions in case of disputes regarding the compatibility of an administrative decision denying or restricting market access; and finally, ameliorates administrative cooperation through Product Contact Points and reinforced recourse to IT technology that will enhance the exchange of information and trust among national authorities.

ANTITRUST AND COMPETITION

Advocate General Wahl issues an Opinion that the principle of "ne bis in idem" (double jeopardy) is not applicable in a case where a national competition authority has imposed, in a single decision, a fine on an undertaking for anticompetitive conduct on the basis of a concurrent application of national and EU competition rules

According to Advocate General Nils Wahl's Opinion of 29 November 2018 in case C-617/17, the principle of *ne bis in idem* is not applicable in a case where a national competition authority has imposed, in a single decision, a fine on an undertaking for anticompetitive conduct on the basis of a concurrent application of national and EU competition rules.

In this case, the Polish Competition Authority found that a Polish insurance company had abused its dominant position between 2001 and 2007 by taking measures preventing competition on the Polish insurance market. Furthermore, such conduct could have had negative effects on foreign insurers' opportunities to access the Polish market. Considering that the insurance company's conduct had affected the national market and trade between EU Member States, it imposed a fine on the basis of both national and EU competition law.

The insurance company unsuccessfully contested the Polish Competition Authority's decision and brought an appeal before the Polish Supreme Court which, in turn, referred the case to the Court of Justice of the European Union. The referring court sought to establish whether, in light of the *ne bis in idem* principle, a national competition authority is prevented from imposing a fine on an undertaking for anticompetitive conduct, in one single decision, on the basis of national and EU competition law.

In his opinion, AG Wahl recalled that the *ne bis in idem* principle is a cornerstone in any legal system based on the rule of law. It indeed aims at ensuring that an offender cannot be sanctioned more than once for the same offense. As a result, this principle shall apply if there is a repetition of proceedings (i.e. the "*bis*" component) concerning the same anticompetitive conduct (i.e. the "*idem*" component).

AG Wahl reviewed whether there were two different proceedings and found that the "*bis*" component was missing. Indeed, the Polish Competition Authority took a single decision imposing a single fine composed of two parts on the basis of national and EU competition law.

AG Wahl also reviewed whether the same offense was sanctioned twice and found that the "*idem*" component was missing. In competition law, the Court has consistently found that the *ne bis in idem* principle requires a three-fold criterion where the facts, the offender and the legal interest to be protected shall be the same. This is in contrast with the application of the principle in all other areas of EU law whereby only the facts and the offender must be the same. AG Wahl argued that the application of the principle should be uniform in all areas of EU law. Consequently, relying on a two-fold criterion involving the identity of facts and offender, without requiring the identity of legal interests to be protected, shall ensure effective protection of competition in the EU and additional

legal certainty for undertakings.

ECONOMIC AND FINANCIAL AFFAIRS

European Commission seeks to strengthen the international role of the Euro

On 5 December 2018, the European Commission published a communication "Towards a stronger international role of the euro" accompanied by a recommendation on the international role of the euro in the field of energy. The communication will be followed by a series of consultations, which will be evaluated in summer 2019 in view of identifying possible follow-up actions. The key aim of this Commission's effort is to "make the euro a source of economic protection and empowerment", and to ensure the euro constitutes a strong alternative to other currencies.

According to the Commission, the potential for the euro to reinforce its global position is currently supported by ongoing initiatives to complete the Economic and Monetary Union ("EMU"), including the Banking and Capital Markets Union projects ("BU" and "CMU"). The Commission highlights the present international window of opportunity to boost the use of the euro in the context of the emerging economic powers, technological innovation as well as the unilateral U.S. sanctions on Iran. Besides the promotion of the role of the euro in key strategic sectors, as included in the recommendation, the Commission underlines the importance of measures that will help strengthen European financial markets, including an EU framework for a reliable interest rate benchmark, an integrated EU instant payments system as well as strengthened liquidity and resilience of European derivatives markets. None of these measures are entirely new, but progress on them can contribute to a stronger euro. As a concrete example, the Commission argues that this could be achieved by broadening the scope of derivative contracts covered by the clearing obligation and ensuring broad availability of euro-denominated derivative markets and European market infrastructures.

Furthermore, in January 2019, the Commission intends to launch a targeted consultation to gather insights on the potential obstacles and incentives with respect to euro liquidity in the foreign exchange markets. The specific focus will be on market marking by the euro area banks and the so called degree of triangulation, whereby one currency is converted to another indirectly by means of a third currency, usually the U.S. dollar. Regarding other sectors, the Commission intends to consult stakeholders on the market potential for a broader use of euro-denominated transactions in the areas of oil, refined products and gas. The raw material and food commodities sectors will also be looked at to identify ways of increasing trading in euro.

France and Germany to change the scope of the digital services tax

The EU finance ministers gathered for the Ecofin Council meeting on 4 December to discuss, and originally also to find a compromise on, the European Commission proposal for a digital services tax ("DST"). The intention of the Austrian Presidency of the Council to reach a general approach on its compromise text failed to materialize due to continued opposition by a number of EU Member States, and ensuing Franco-German joint declaration

suggesting to drastically amend the scope of the proposal.

France and Germany proposed to narrow down the tax base of the DST to cover online advertisement only, thereby leaving out the originally proposed data collection and intermediation platforms. Their declaration is based on the expectation that a global solution will be found at the OECD level by 2020, which would render specific EU rules unnecessary. France and Germany would like to see the EU DST enter into force as of January 2021 only in case the OECD fails to deliver. In such scenario, however, the declaration reads that the Member States can decide to broaden the scope of the tax at national level to cover other services.

The relevant Council expert group is now expected to redraft the text of the proposal in line with the Franco-German declaration, with the stated aim to adopt the Directive by March 2019. Despite the EU finance ministers' commitment to work constructively to achieve progress, it is unclear at this stage whether an agreement can be found by March 2019.

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