

## BRUSSELS REGULATORY BRIEF: SEPTEMBER 2019

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### INSTITUTIONAL DEVELOPMENTS

#### The new European Commission

Nearly two months after presenting her Political Guidelines for the next European Commission, Ursula von der Leyen, President-elect of the new Commission, on 10 September 2019 finally revealed the allocation of portfolios in her new Commission. The von der Leyen's Commission consists of 27 nominees (due to Brexit, the United Kingdom did not nominate any Commissioner).

The portfolio allocation deviated from the previous norm, as von der Leyen picked three Executive Vice Presidents charged with overseeing the three main overarching themes: (1) an ambitious climate agenda to make the European Union the first climate-neutral continent by 2050; (2) ensuring that the EU is ready to face technological challenges; and (3) an emphasis on a fair social market economy. Ursula von der Leyen also gave a very personal insight into her idea of the EU's path amid these global challenges, when she stated that this will be a 'Geopolitical Commission'.

#### 1. Frans Timmermans, First Executive Vice President

Frans Timmermans, current First Vice-President, has been appointed First Executive Vice President, entrusted with delivering the European Green Deal while being directly in charge of the Directorate General for Climate Action. The Dutchman shall also oversee climate-related works in the portfolios of transport, energy, health, agriculture and environment and oceans. The respective Commissioners for each of these areas have been told in their mission letters that as a rule, they will work under the guidance of the Executive Vice President to help achieve the European Green Deal.

The European Green Deal should become Europe's hallmark, aiming at fulfilling the EU's commitment to become the world's first climate-neutral continent. Timmermans shall set the strategic direction and chair the Commissioners' Group on the European Green Deal. We expect the European Green Deal should be presented in the first 100 days of the new Commission's mandate. Current initial goals focus on an emissions reduction

target of at least 50% by 2030; reviewing tax policies, including the work on the Carbon Border Tax and a review of the Energy Taxation Directive; and leading international negotiations to increase the emissions reduction targets of other major emitters by 2021.

In his confirmation hearing in front of the European Parliament, Timmermans, who will also chair the Commission's College in von der Leyen's absence, might face some opposition from Polish and Hungarian MEPs over a perception that their respective governments were targeted in the rule of law investigations headed by Timmermans. Another hurdle might be Timmermans' ability to convince new pro-green MEPs that his climate agenda is capable of delivering clear results.

## 2. Margrethe Vestager

The second Executive Vice President is the current Competition Commissioner Margrethe Vestager. She has been tasked with making sure that the EU is fit for the Digital Age. In addition to her new role as Executive Vice President for digital, she will also continue to serve as the Competition Commissioner.

This dual role of an enforcer and quasi-legislator makes her not just the most powerful regulator in Brussels, but also has raised questions regarding possible conflicts of interest for Vestager. This issue might be the subject of MEPs' questioning during her confirmation hearing. Vestager has asserted that she would not compromise her case-work by mixing it with legislative actions, because the cases need to be strong enough to stand up in European courts.

Vestager's unique position puts her at the forefront of setting the agenda for European digital regulation. The so-called "Brussels effect", setting-up of de facto global regulation standards, is therefore poised to make a grand return to the scene.

We also expect that Vestager will guide the work of Commissioner Sylvie Goulard, who is in charge of the EU Internal Market with special responsibility to promote digital industries, and collaborate with Didier Reynders, who was given oversight of the EU's privacy law.

## 3. Valdis Dombrovskis

Finally, the last Executive Vice President Valdis Dombrovskis is expected to manage an ambitious portfolio titled "An Economy that Works for People". Dombrovskis should coordinate the work on the action plan to implement the European Pillar of Social Rights, lead the work on strengthening the role of the euro and cooperate on devising a new long-term strategy for the EU's industrial future. Besides that, he is also expected to focus on completing the Banking Union as well as Capital Markets Union and develop strategies regarding FinTech, green financing and cryptocurrencies.

Dombrovskis also will guide the work of Trade Commissioner Phil Hogan, Economy Commissioner Paolo Gentiloni, Jobs Commissioner Nicolas Schmidt and Cohesion and Reforms Commissioner Elisa Ferreira.

Before the new Commission can take office, the Parliament will organise public hearings to assess the commissioners' suitability for the job. These public hearings are scheduled to be completed by 8 October, with the objective that the new Commissioners can take office at the end of the month.

## ANTITRUST AND COMPETITION

### European Court of Justice's Advocate General recommends extending damages claims against cartel participants

On 29 July 2019, Advocate General of the Court of Justice of the European Union (CJEU), Juliane Kokott, published her opinion on a reference for a preliminary ruling received from an Austrian court concerning the lift and escalators cartel of 2007. In particular, the court sought clarity about the possibility for non-market players that are victims of a cartel to claim damages against the cartel participants. Other than the direct victims of a cartel (e.g., customers or suppliers) to date it has been unclear whether other entities would be entitled to seek damages from the cartel participants.

In 2007, the European Commission fined four lifts and escalators manufacturers over EUR 990 million for having engaged in bid rigging, price fixing, allocation of projects to each other, market sharing and exchange of competitively sensitive information. That same year, the Austrian competition authority fined the participants in this cartel for infringements that fell outside the scope of the Commission's jurisdiction.

Following the 2007 decisions of the Commission and the Austrian competition authority, several damage claims against the lifts and escalators manufacturers were filed by a number of cartel victims with the Austrian courts. For instance, the Land of Upper Austria (Land) claimed that it had to lend more money for construction projects than it would have without the cartel. Indeed, the Land provides low-interest loans for social housing construction projects proportional to the production costs. Since these costs were higher because of higher lifts and escalators prices, the Land had to lend money that could have been used for other projects.

The Austrian Supreme Court sought clarity from the CJEU with respect to the scope of Article 101 of the Treaty on the Functioning of the European Union (TFEU), which prohibits anticompetitive agreements, including cartels. In particular, the court sought to clarify whether a complainant such as the Land of Upper Austria, who is not active as a supplier or customer of the relevant product and geographic market covered by the cartel, can seek compensation for loss stemming from the cartel participants' conduct.

In her non-binding opinion, the Advocate General noted that the full effectiveness of Article 101 TFEU would be put at risk if it were not open to any individual and entity to claim damages for loss caused by agreements prohibited by this provision. She then considered that all individuals and entities harmed by a cartel, including public lenders, are entitled to damage claims against infringers of the provisions of Article 101 TFEU, provided that there is a causal link between the harm suffered and the infringement in question.

The CJEU is expected to follow the Advocate General's opinion. Indeed, this opinion is in line with the current



CJEU case law that aims at broadening the scope of damages claims in the context of infringements of EU competition law to the benefit of cartel victims. Earlier this year, the CJEU issued a landmark judgement on that matter in which it held that parent companies could be found liable for their subsidiary's antitrust infringement if the parent company had dissolved the subsidiary but continued its economic activity. In 2014, the CJEU ruled that, where a cartel causes non-cartelist competitors to increase their prices (so-called umbrella pricing), the cartelists can also be held liable for losses caused by those price increases. This clearly suggests that the European courts tend to favor expanding the conditions that allow cartel victims to claim compensation for breaches of EU (and national equivalent) competition law rules.

## **Will competition rules serve the EU industrial strategy?**

Following the European Commission decision to block the Siemens-Alstom merger, the French and German governments, considering the merger necessary to create a "European Champion" capable to compete at the global scale, signed the "Manifesto for a European industrial policy fit for the 21st Century" (please see our previous article here).

The Manifesto calls, among other, for a revision of competition rules to take greater account of industrial policy considerations and facilitate large cross-border mergers. Recommended changes include: 1) increased consideration of state-control and subsidies for companies in the context of merger control; 2) an update of merger guidelines to address current and potential future global competition; and 3) a right of appeal of the Council of the EU to ultimately overrule Commission decisions.

The proposal to reform merger rules to take into account competition at a global level and strategic common European interest has been further renewed by both countries together with Poland in the paper "Modernizing EU Competition Policy".

Furthermore, President-elect of the Commission, Ursula Von der Leyen, unveiled the new College of Commissioners on 10 September, in the nomination letter addressed to Competition Commissioner Margrethe Vestager that competition will have an important role in the EU industrial strategy. The letter states as a priority that "competition policy and rules are fit for the modern economy, vigorously enforced and contribute to a strong European industry at home and in the world".

The antitrust community, however, remains skeptical about reforming the EU's merger control regime to integrate a political dimension, prohibiting or authorizing transactions on grounds other than competition.

In particular, Commissioner for Competition Margrethe Vestager already expressed reluctance on this, arguing that she will not let the position of France and Germany become law. She also took the view that because the proposed reform grants power to the Council to overrule merger decisions, there would be no judicial means for companies to challenge them.

Similarly, Sabine Weyand, Director General for Trade, expressed her opposition to the idea of reforming competition rules to forge European Champions and grant politicians a veto in merger cases, warning against the risk of potential abuse of market power.

## ECONOMIC AND FINANCIAL AFFAIRS

### **G7 push for a multilateral solution to the tax challenges of digitalization**

On 18 July 2019, following the meeting of the G7 Finance Ministers and Central Bank Governors' group, the Government of France issued a "Chair's Summary" of the discussions, which marked an important milestone in the process of exploring possible solutions to address the tax challenges arising from the digitalization of the economy.

The Chair's Summary reflects the G7 ministers' agreement to move forward with a two pillar approach to reform rules for taxing multinational businesses, as proposed by the G20/Organisation for Economic Co-operation and Development ("OECD") Inclusive Framework on Base Erosion and Profit Shifting Project ("BEPS"). In May 2019, the Inclusive Framework published its Programme of Work proposing a roadmap towards the revision of the existing profit allocation and nexus rules (Pillar 1) and developing a new global minimum tax rate (Pillar 2).

According to the G7 Chair's summary, the new tax rules should be administrable, simple and encompass a mandatory arbitration to prevent double taxation and ensure effective tax dispute resolution. Importantly, the ministers agreed that the new taxing rights "could be determined by reference to criteria reflecting the level of businesses' active participation in a customers' or users' jurisdiction, such as valuable intangibles or employment of a highly digitalized model". The Chair's summary further referenced the U.S. GILTI regime, as an example to ensure a minimum level of effective taxation under the second pillar.

The commitment to "modernize international taxation within the framework of the OECD" was then reiterated in the G7 Leaders' declaration published after their August meeting. According to Pascal Saint-Amans, Director of the OECD's Centre for Tax Policy and Administration, this "political push" helped to relaunch the discussions. Saint-Amans explained that countries first need to reach a consensus on one unified proposal under Pillar 1 that would form the basis for further negotiations. It is expected that the OECD Secretariat will outline its initial ideas on such a unified approach for the next meeting of G20 finance ministers on 17 October in Washington. The aim is to reach a political agreement in 2020, possibly as early as January, when the Inclusive Framework is scheduled to meet. Based on the preliminary results of an impact assessment, Saint-Amans ruled out any "massive shifts" of countries taxing rights. The publication of the final results of the impact assessment is not envisaged before the end of 2019.

The urgency to find a global solution among the 134 members of the Inclusive Framework has been reinforced by the adoption of unilateral measures, including the new 3% digital services tax in France, which soured its bilateral relations with the U.S. It appears that the enforcement of the French digital tax has been made conditional on the G20/OECD deal by President Macron, who promised to refund the affected companies the amount exceeding what they would have paid under the to-be agreed global levy. The new European Commission President-elect Ursula von der Leyen has committed to put in place a European measure if no international solution is found by the end of 2020.

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