K&L GATES

BRUSSELS REGULATORY BRIEF

NOVEMBER 2016

In this issue:

Antitrust and competition 1

International trade 2

Telecommunications, media and technology 3

Economic and financial affairs.........4

K&L Gates LLP. Global legal counsel across five continents. For more information, visit www.klgates.com.

Antitrust and competition

EU Merger control review: has the European Commission become more interventionist?

The European Commission (“**Commission**”) has recently published statistics concerning the European Union (“**EU**”) merger control review process. Typically, the Commission examines larger mergers with an EU dimension, meaning that the merging firms’ level of sales must reach certain turnover thresholds globally and in the EU to trigger the filing obligation. While the vast majority of transactions are not problematic from a merger control perspective and are unconditionally cleared by the Commission, it is interesting to note whether certain enforcement trends can be discerned.

	2015	2016*
Number of notified cases	337	276
Phase I with remedies	13	12
Phase II with remedies	7	5
Prohibition	0	1
Withdrawn	2	1

* Until October 2016

This translates into intervention rates of approximately 6.5% and 6.9%, respectively, for these two years which does not suggest a significant increase in the Commission’s interventionism.

As far as the Commission’s substantive assessment is concerned, it is interesting to note that the Commission has reviewed transactions mainly on the basis of the unilateral effects on price. A theory of harm based on unilateral effects focuses on the extent of the loss of competition between the merging parties as a result of the transaction. Typically, the merger assessment will look into elements such as the structure of the market and its functioning before the transaction, how close competitors the merging parties are, elimination of an important competitive constraint, the role of third parties, dominance, qualitative evidence and economic techniques. Unilateral effects were scrutinized in 95% of intervention cases in the past two years. In addition to unilateral effects, the Commission can review possible coordinated effects stemming from the transaction. Coordinated effects may give rise to coordination concerns as a result of transparency in concentrated markets. The Commission investigated coordinated effects in 3 cases only (on top of unilateral effects) during the past two years.

Finally, concerning the merger review process, a significant trend is that internal documents and data have become more and more important.

This poses a number of challenges to the merging parties who should ensure that internal documents are reviewed by external counsel before any production (also to ensure that privilege is not involuntarily waived). Also, transactions have become increasingly global and subject to review by a number of jurisdictions. This has led to more international cooperation between the Commission and its key counterparts globally such as the United States, Canada, Brazil, China, Australia etc. This is something that the merging parties have to carefully consider when they negotiate and finalize their transaction timeline.

Strengthening of national competition authorities' enforcement powers against cartels and abuses of dominant position

The Commission is considering granting national competition authorities ("**NCAs**") additional powers in order to effectively enforce EU competition rules.

Thanks to Regulation 1/2003, NCAs and national courts were given the possibility to participate in the prosecution of cartels and abuses of dominant position (Articles 101 and 102 of the Treaty on the Functioning of the European Union ("**TFEU**"), respectively). However, Regulation 1/2003 did not fully address the scope of the tools necessary for the effective application of EU competition rules and it appears that some NCAs are experiencing difficulties when enforcing Articles 101 and 102 TFEU, for example when collecting digitally stored evidence or imposing effective fines.

The Commission launched a public consultation in November 2015 regarding the strengthening of the NCAs' enforcement powers. The Commission sought the views of stakeholders on a number of issues: the tools that NCAs need in order to timely detect and sanction violations of EU competition rules, effective national leniency programs, independence of NCAs, as well as resources and staff needed.

In September 2016, the EU Competition Commissioner Margrethe Vestager indicated that there was *"a strong case for new EU rules as part of the answer."* She also noted that *"each authority has its own national traditions. So the best type of legislation may be a directive, not a regulation."* Contrary to EU regulations which are directly binding on Member States' legal systems, a directive is a softer legislative tool which requires transposition at national level.

The Commission is currently conducting an impact assessment on whether to strengthen NCAs' enforcement powers. Should such assessment reveal that legislative action is necessary, a Commission's proposal could be expected early next year. A recently published Commission's roadmap for 2017 also confirms that *"[p]roposals will be made to further empower National Competition Authorities to be more effective enforcers of rules that guarantee a competitive environment in the Single Market."*

International trade

Lessons from the EU, Canada trade agreement

Not a 'done deal' yet

The Comprehensive Economic and Trade Agreement ("**CETA**") between the EU and Canada had to jump through quite some hoops before finally being signed on Sunday 30 October 2016.

It is clear that the Transatlantic Trade and Investment Partnership ("**TTIP**") between the EU and the U.S. is facing increased resistance, at first from activists across the continent, but now also from several EU Member States. In addition, on the U.S.'s side, Trump's victory means TTIP's survival is now in Trump's hands and it will be up to the new American administration to decide whether they want to continue the free trade negotiations.

CETA however, after 7 years of diplomatic negotiations and intended to remove all tariffs on industrial products and to introduce a substantial liberalisation of trade in agricultural products and procurement contracts, seemed in the clear and to be reaching the finish line. After having overcome the hurdle in Germany's Social Democrats party, the path seemed open for EU Member States to approve CETA, and for EU ministers to sign it at a planned EU-Canada Summit on Thursday 27 October 2016.

It was therefore a surprising turn of events when the Walloon region of Belgium suddenly vetoed the trade deal, only days before the Canadian Prime Minister's planned visit. Paul Magnette, Wallonia's minister-president who led

the opposition to the agreement, argued that Wallonia was worried about exposing its agricultural sector to competition from Canadian farmers and he also raised objections to a proposed court system for settling disputes between foreign investors and governments, providing U.S. companies with a platform to sue European governments. After days of talks and negotiations, a four-page compromise was reached, thus finally enabling the EU and Canada to sign the landmark trade deal with a few days delay.

But CETA is not out of the woods yet. Although the trade deal is expected to enter into force on a provisional basis in the beginning of next year after ratification by the European Parliament, 38 national and regional parliaments will still need to approve it before it receives its final approval. As such, in theory, CETA can again be vetoed at this point, by Wallonia or any other national parliament (or even regional, only in Belgium's particular case). However, even if technically so, this is most highly improbable since it is the governments who are based on parliament majorities that have committed to the deal. Therefore, any negative vote would be almost as a motion against that country's government. An exception could be the Netherlands, where activists have already gathered almost two-thirds of the signatures required to initiate a referendum on CETA once the Dutch parliament ratifies it. If voters reject the bill and turnout tops 30%, the Dutch government would require the consent of parliament to proceed and it would have to offer concessions or amendments to the bill to reflect the popular vote.

Member States to be involved in Brexit talks too?

The CETA ‘saga’ is an indication of how difficult the trade negotiations could be with the United Kingdom (“**UK**”), following ‘Brexit’. The UK will need to meet the concerns of all EU countries, since Member States seem no longer reluctant to put their foot down and veto an agreement in order to obtain what they want.

Some clarity from the ECJ?

The European Court of Justice (“**ECJ**”) may partly change the situation, in its ruling on a similar trade deal with Singapore (expected in the course of next spring) on whether that deal falls within the ‘exclusive competence’ of the EU or rather is a ‘mixed competence agreement’, thus needing approval in national and regional governments.

Telecommunications, media and technology

An update of EU audiovisual rules focusing on online platforms

On 25 May 2016 the Commission presented a legislative proposal to amend the Directive on the audiovisual media services. The revision intends to provide rules fitting the new technological developments in the audiovisual market, taking into consideration the new players, such as the video-sharing platforms, and the different consumer habits, which are progressively turning to the online world.

The proposal retains the so-called ‘country of origin principle’, which consents broadcasters and on-demand service providers to only abide by the rules of the country where they are established in, instead of 28 different national legislations. Its functioning will be facilitated by a simplification of the rules that allow Member States to identify who has jurisdiction over a certain provider and by the provision of a unique procedure to derogate to the country of origin principle.

The text proposes more flexibility regarding the allocation of advertisement troughout the day. In fact, broadcasters will still need to comply with the overall limit of 20% of advertisementbetween 7am and 11pm, but instead of 20% per hour, they will be able to decide with more flexibility how to allocate it throughout the day.

The Commission also suggests an alignment between TV broadcasters and on-demand service providers concerning their obligation to protect minors from harmful content, to be achieved through the provision of a softer protection by the former and an increased protection by the latter.

In the same direction, the Commission proposes new obligations for video-sharing platforms that organise and tag a large quantity of videos. These will be required to protect minors from harmful content, such as violence and pornography, and all citizens from incitement to hatred through the provision of tools for users to flag dangerous content or verify users’age.

Finally, in relation to broadcasters’ investments in European content, the proposal keeps the existing rules for TV broadcasters, while it requireson demand services to ensure at least 20% share of European content in their

catalogues. Moreover, Member States may ask on-demand services available in their territory to contribute financially to European works.

Copyright rules fitting the digital era?

On September 2016, the Commission presented the Copyright reform, a legislative 'Package', consisting of measures of different nature, to adapt the legal framework for copyright to digital and cross-border uses of protected content, to new actors and business models. That modernization focuses on three specific areas: online access to content in the EU, a review of copyright exceptions in the digital and cross-border environment, and reinforcing the functioning of the copyright-related marketplace.

In relation to the first area, the Commission proposed for the online environment what is already in place for cable and satellite communications in Europe: the country-of-origin principle and mandatory use of collective management. By extending the former, broadcasters will need to clear the rights only once, in the country from which they retransmit. While, thanks to the use of collective management, operators, who offer packages of channels, instead of negotiating individually with each right holder, will be able to get the licenses from collective management organizations representing right holders. Moreover, to boost video-on-demand offerings in Europe, the Commission calls Member States to set up negotiation bodies to help reach licensing agreements.

Concerning copyright exceptions, the proposed Directive turns into a mandatory pan-European exception the one permitting educational establishments to use materials to illustrate teaching through digital tools and in online courses across borders, subject to the conditions that such use is conducted on *"the premises of an educational establishment or through a secure electronic network" and* that it is supplemented with the indication of the source. Specific exceptions are created for text and data mining activities for the purposes of scientific research and for cultural heritage institutions to preserve works digitally. However, the Commission decided not to regulate at the European level the 'panorama exception', permitting Member States to lay down exceptions or limitations to copyright concerning the use of works made to be located permanently in public places.

With the intention to reduce the so-called 'value-gap', namely the weak position of right holders before online platforms distributing and exploiting their works, the Commission imposes new obligations on online service providers that store and give access to a large amount of works uploaded by their users. Particularly, they are required to conclude agreements with right holders in order to use their works and to adopt measures, such as the use of content recognition technologies, to avoid unlawful content. Furthermore, to ensure fair remunerations, the Directive obliges Member States to impose a transparency obligation on the contractual party of creators, which consists in the responsibility to inform them on the exploitation of their work, the revenues generated and the due remuneration.

Finally, the proposal introduces a new related right for publishers: press publications will be legally recognized as right holders, thus they will be in a better position to negotiate the use of their content with online services using or enabling access to it. The Commission proposes a related right, to be granted by Member States to publishers for a term of 20 years, for the online uses of news publications. Moreover, the license or transfer of a right by an author to a publisher will be considered a sufficient legal basis for Member States to provide publisher wit the right to *"claim a share of the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right."*

The proposed Directive is subject to the ordinary legislative procedure and its final result will be probably quite different from the original Commission proposal.

Economic and financial affairs

Commission unveils common consolidated corporate tax base (CCCTB) proposal

In October, the Commission continued its drive to reform EU tax policy by publishing a legislative proposal for a common consolidated corporate tax base ("**CCCTB**"). The initiative aims at harmonizing EU rules for the calculation of taxable corporate profits in order to simplify corporate tax codes and limit tax avoidance practices.

The high-profile proposal was relaunched on 25 October 2016 after a similar piece of legislation from 2011 was vetoed by several EU member states in the Council. In order to prevent the replay of such a scenario, the Commission decided to adopt a different approach with the new CCCTB proposal. This new approach foresees breaking the proposal down into two separate legislative acts - a directive on a common corporate tax base will first be agreed by the Council, after which the member states should focus on the second directive on the consolidation element of the CCCTB. Other changes include the compulsory use of the CCCTB by large multinationals with a turnover above €750 million, an allowance for equity issuance aimed at tackling the debt-equity tax bias and deductions for R&D expenditure.

Although the political environment, dominated by tax avoidance/evasion scandals, appears to be more conducive to the adoption of the proposal than in previous years, difficult negotiations in the Council are to be expected. Since the CCCTB proposal is anchored in the policy area of taxation, EU member states will have to agree on it unanimously. The European Parliament, a strong proponent of tax reform in the EU institutional framework, will only play a consultative role.

EU margin rules for non-centrally cleared derivatives finally adopted

An internationally agreed reform on the posting of initial margin for derivative contracts which are not subject to central clearing was set to take effect in the main jurisdictions around the world on 1 September 2016. However, the regulatory technical standards ("**RTS**") implementing these rules in the EU have been delayed, causing the EU to miss the international deadline. Other jurisdictions like Australia, Hong Kong and Singapore have also announced delays.

Difficulties became apparent when the Commission announced on 9 June that it would delay the adoption of the RTS, originally proposed by the European Supervisory Authorities ("**ESAs**") already on 8 March. This prompted an official letter from the ESAs expressing concern about the situation and pointing out the uncertainty and cross-border issues that a delay would cause. The Commission finally endorsed an amended RTS on 28 July, with a crucial modification removing concentration limits on initial margins for pension scheme arrangements. This subsequently led the ESAs to issue a non-binding opinion expressing criticism towards the version of the rules proposed by the Commission.

In the end, the Commission decided to ignore the ESA opinion and finally adopted its version of the rules on 4 October. In order to speed up their entry into force, the European Parliament waived its 3-month scrutiny period of the rules on 26 October. A similar and widely expected non-objection decision of the Council will now enable an early entry into force of the RTS.

Commission work programme for 2017 - priorities in financial services and tax

On 25 October, the Commission presented its 2017 work programme outlining key initiatives and priority actions for the upcoming year. In the financial services area, the focus is in particular on the Capital Markets Union (CMU). Several initiatives are to be launched within its framework next year, including a proposal on an EU Personal Pension Product, a comprehensive strategy on sustainable finance, an action plan on retail financial services and a mid-term review of the CMU action plan. In addition, two already tabled CMU proposals - the securitisation and the prospectus regulations - are highlighted along with the European Deposit Insurance Scheme as pending initiatives which the Commission considers as priorities in 2017.

The 2017 work programme also includes upcoming targeted revisions of the Capital Requirement Regulation/Directive, the Bank Recovery and Resolution Directive and the European Market Infrastructure Regulation. The implementation of the total loss-absorbing capacity (TLAC) standard into EU law will also be brought forward, as well as follow-up actions to the Call for Evidence on the cumulative impact of financial legislation.

The work programme is far less exhaustive with regards to tax policy. Aside from the already tabled CCCTB initiative and a confirmation that the EU blacklist of non-cooperative tax jurisdictions (tax havens) is expected to be completed in 2017, the work programme only lists the implementation of upcoming BEPS measures and a potential proposal increasing the oversight of promoters and enablers of aggressive tax planning schemes.

Authors:

Philip Torbøl

Philip.Torbol@klgates.com

P +32.(0)2.336.1903

Ignasi Guardans

Ignasi.Guardans@klgates.com

P +32.(0)2.336.1949

Francesco Carloni

Francesco.Carloni@klgates.com

P +32.(0)2.336.1908

Giovanni Campi

Giovanni.Campi@klgates.com

P +32.(0)2.336.1910

Alessandro Di Mario

Alessandro.DiMario@klgates.com

P +32.(0)2.336.1938

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai
Fort Worth Frankfurt Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Munich Newark New York
Orange County Palo Alto Paris Perth Pittsburgh Portland Raleigh Research Triangle Park San Francisco São Paulo Seattle
Seoul Shanghai Singapore Sydney Taipei Tokyo Warsaw Washington, D.C. Wilmington

K&L Gates comprises approximately 2,000 lawyers globally who practice in fully integrated offices located on five continents. The firm represents leading multinational corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit www.klgates.com.

This publication 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.

© 2016 K&L Gates LLP. All Rights Reserved