

AUGUST 2017

In this issue:

Antitrust and Competition1

- *The European Commission alleges breaches of merger procedural rules in three cases*
- *The Commission fines a leading IT company with a record EUR 2.42 billion fine for abuse of dominance*

International Agreements and Trade2

- *EU and Japan reach agreement on FTA*
- *Court of Justice of the EU: the EU-Canada Agreement on the Transfer of Passenger Name Record May not Be Concluded in its Current Form*

Economic and financial affairs5

- *European Commission proposes to create a Pan-European personal pension product*
- *High Level Expert Group on sustainable finance publishes interim report*

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Antitrust and Competition

The European Commission alleges breaches of merger procedural rules in three cases

On 6 July 2017, the European Commission ("**Commission**") announced it had opened three investigations against companies which have allegedly breached the European Union ("**EU**") merger procedural rules.

Two of the cases concern the provision of incorrect or misleading information. During the EU merger review, merging companies must provide complete and correct information when responding to information requests or completing the Form CO (the notification form). In two of the cases under investigation the companies failed to inform the Commission about research and development projects which could have an impact on the substantive assessment of the transactions.

The third one relates to the premature implementation of a reportable merger before obtaining clearance from the Commission. The EU is a mandatory and suspensive jurisdiction. This means that the merging parties cannot implement a transaction before it has been notified to the Commission and before it has been approved by it (i.e. the "standstill" obligation). In this case, the Commission considers that a Japanese company failed to comply with the standstill obligation and "jumped the gun" by putting into effect an acquisition through a so-called "warehousing" two-step transaction structure.

These cases follow a recent Commission decision imposing a fine of EUR 110 million on a U.S. company active in social networking, consumer communications and online non-search advertising services for providing incorrect or misleading information during the merger review process related to its acquisition of a consumer communications services provider in 2014 (see [here](#) our publication of June 2017). Also, the Commission is currently investigating a multinational telecommunications company for allegedly implementing its acquisition of a telecommunications operator before the operation was notified to or approved by the Commission.

According to the Commission, these new investigations will focus only on the violation of the standstill obligation and on the procedural breaches occurred during the merger review of the transactions. As a result, the Commission's findings in these investigations will not impact its initial clearance decisions.

However, the companies involved risk substantial fines if the Commission's allegations are confirmed. Under the EU Merger Regulation ("**EUR**"), companies providing incorrect or misleading information during the merger review can be fined up to 1% of their annual worldwide turnover in the last financial year. With regard to violation of the standstill obligation, the implementation of a reportable transaction without notification and prior approval from the Commission can lead to a fine of up to 10% of the company's annual worldwide turnover in the last financial year.

The three cases are yet another stark reminder for companies that they need to carefully comply with the procedural obligations in the framework of the EUMR. This was recently echoed by the EU Competition Commissioner Margrethe Vestager who considered that these investigations “send an important signal”. The Commission considers both the “standstill” obligation and the need to avoid incorrect or misleading information to be key enforcement priorities and it will not hesitate to intervene and impose significant fines in case of breach.

The Commission fines a leading IT company with a record EUR 2.42 billion fine for abuse of dominance

On 27 June 2017, the Commission announced it had concluded one of its investigations against a leading IT company (“**Company**”) with the imposition of a record fine for abusing its dominant position. This is the biggest fine the Commission has ever imposed on a single company in an antitrust case, exceeding the EUR 1.06 billion fine handed down against a leading chipmaker in 2009 (which, after being upheld by the General Court, is currently under appeal before the EU Court of Justice).

In the present case, the Commission first concluded that the Company held a dominant position in general internet search markets. This was based on the fact that the Company had consistently held a market share higher than 90% in most European Economic Area (“**EEA**”) countries whilst at the same time the barriers to entry were high.

EU competition rules do not prohibit dominance in itself. However, a company having a dominant position is under a “*special responsibility not to allow its conduct to impair genuine undistorted competition*”. Therefore, Article 102 of the Treaty on the Functioning of the EU (“**TFEU**”) prohibits companies from abusing their dominant position.

In this case, the Commission found that the Company’s conduct was illegal. According to the Commission, the Company had put in place a strategy ensuring a much higher visibility to its comparison shopping service compared to rival ones. In particular, it displayed the results from its comparison shopping service at or near the top of search results in its search engine. At the same time, other comparison shopping services were demoted and appeared further in search results. The EU Competition Commissioner Margrethe Vestager said that: “*[the Company]’s strategy for its comparison shopping service wasn’t just about attracting customers. It wasn’t just about making its product better than those of its rivals. Instead, [the Company] has abused its market dominance as a search engine [...]*”.

The Company has recently confirmed the Commission that it will comply with its decision to treat shopping services fairly in its search results within the Commission deadline (i.e. by the end of September). This case poses substantial challenges to the Company as it impacts its business model and is not the only case against that Company. The Commission is still investigating two other cases in which it allegedly abused its dominant position. One of these investigations involves the Company’s mobile operating system. This case could potentially be the most damaging for the Company, as it is the system used in most smartphones.

International Agreements and Trade

EU and Japan reach agreement on FTA

On 6 July 2017, the European Union (“**EU**”) and Japan agreed in principle on a future bilateral trade agreement (“**Economic Partnership Agreement**”). Negotiations started in 2013 and are not concluded yet, but both sides have promised to iron out the details within months. The political agreement reached, as well as its timing (a day before the beginning of a G20 Summit), is mainly symbolic, sending out a signal to other world leaders that both the EU and Japan stand for “open and fair trade”.

According to the European Commission (“**Commission**”), the Economic Partnership Agreement follows the highest standards of labor, environmental and consumer protection and has a dedicated chapter on sustainable development. It is also the first trade agreement ever to include a specific commitment to the Paris climate agreement.

What's in the deal?

Put in simple terms, the core of the Economic Partnership Agreement aims to increase the flow of European food to Japan and of Japanese cars to Europe.

As such, the Agreement scraps duties on many cheeses, such as Gouda and Cheddar, as well as on wine exports. It further allows the EU to increase its beef exports to Japan substantially, while on pork there is duty-free trade in processed meat and almost duty-free trade for fresh meat. In addition, it ensures the IP protection in Japan of more than 200 high-quality European agricultural products (so called Geographical Indications).

On the Japanese side, car makers get better access to the EU market: the tariffs on Japanese cars exported to the EU will be eliminated within seven years. There will also be an instantaneous tariff elimination for 92% of Japanese car components.

Furthermore, the Agreement opens up services markets, in particular financial services, e-commerce, telecommunications and transport. It also facilitates EU companies' access to the large procurement markets of Japan, and removes hurdles to procurement in the economically important railway sector at national level, which could benefit EU train makers such as Siemens and Alstom. The Agreement reflects the delicate balance of interests that has been behind the negotiations all along, and does its best to protect such a sensitive economic sector of the EU as the automotive industry, and a few others, with transition periods before markets are opened. Indeed, for some even this transition period may be considered too short.

What's not in the deal?

The Economic Partnership Agreement does not regulate data flows. However, EU Commission President Juncker and Japan's Prime Minister Abe agreed to add a 'review clause' to revisit the topic at a later stage.

Instead, an 'adequacy decision' will complement the Economic Partnership Agreement. Such an adequacy decision will be a data transfer deal, similar to the existing EU-US Privacy Shield Agreement. The Commission would deliver it by early 2018. As such, the review clause is in fact a safeguard for the Japanese and an instrument of pressure for the Commission to deliver the "adequacy decision", as Japan could revoke or review the trade deal in case data flows between the two blocks are not properly authorized by the Commission.

Another thorny topic, and thus excluded from the Agreement, is investment protection, and in particular investment dispute resolution. Both sides cannot agree on the form of dispute resolution to be included in the trade agreement: Japan wants to stick to the old system, while the EU is trying to introduce a new system staffed by public as opposed to private sector officials. In fact, it is to be recalled that following a recent decision of the Court of Justice of the EU, which underlined the role of National Parliaments in investment related matters, Commission Vice President Katainen has even suggested dropping investment from all major trade deals in an effort to ease their ratification.

What does it mean for Brexit?

Several commentators from the United Kingdom ("UK") have stated that the latest EU-Japan trade deal would be easy to use as a template by the UK for a similar agreement. This stems from the position of the UK Department of International Trade to replicate "all existing EU free-trade agreements" by maintaining the same trading terms it has currently with third countries. Especially since the UK government maintains that leaving the bloc would make it easier to conclude free trade agreements ("FTAs"), without the straining red tape imposed by Brussels.

By striking this FTA with Japan, President Tusk was keen on sending a message to the UK, by showing how the "EU is more and more engaged globally" and how leaving the customs union would be damaging on the UK economy. Indeed, this particular deal benefits the UK in numerous ways, especially in regards to the car industry, with several Japanese manufacturing plants currently in its territory (Nissan, Toyota and Honda). However, if the UK was to leave the customs union, as currently planned, British manufacturers would find it hard to benefit from

reduced tariffs, as numerous manufacturers rely on components produced in the EU territory, which would render compliance with the rules of origin difficult.

Furthermore, it has to be noted that Japan made big compromises in order to reach a FTA with the EU. It is unlikely that Japan will want to replicate the FTA agreement, especially for its key industries, with the UK, a smaller economy.

What's next?

Based on the Agreement in principle, the remaining technical issues will be resolved by negotiators from both the EU and Japan, in order to conclude a final text of the agreement by the end of the year. Then, the Commission will submit it for the approval of EU Member States and the European Parliament.

Court of Justice of the EU: the EU-Canada Agreement on the Transfer of Passenger Name Record May not Be Concluded in its Current Form

In 2014, the European Parliament asked the Court of Justice of the European Union (“**CJEU**”) whether an agreement on the transfer of processing of Passenger Name Record data (“**PNR agreement**”) between the European Union (“**EU**”) and Canada was compatible with certain provisions of the EU treaties. In particular, article 16 of the Treaty on the Functioning of the EU (in regards to data protection inquiries) and articles 7, 8 and 52(1) of the Charter of Fundamental Rights of the EU.

The CJEU held, on 26 July, that the PNR Agreement is not compatible with EU privacy and personal data protection law, fundamental EU rights, which means that the agreement cannot be concluded in its current form. Although technically speaking this has no legal impact on the current transfer of PNR data with the United States (“**US**”), the Court’s decision has opened ways for its potential challenges and, in policy terms, is forcing its revision.

The PNR agreement

The agreement would enable, by way of an automated and systematic process, the transfer of PNR data of all air passengers to the competent Canadian authority: the Canada Border Services Agency (“**CBSA**”). In turn, the CBSA would retain the PNR data for a maximum period of five years and even transfer the data to other authorities and authorities from third countries.

The PNR data would include a complete travel itinerary, travel habits, relationships between two or more individuals, information about the person’s health and financial situation; it could go so far as to provide sensitive data (information revealing “racial or ethnic origin, political opinion, religious or philosophical beliefs, trade union membership or a person’s health or sex life”) of air passengers booking flights between Canada and the EU. In addition, due to the fact that the information would be analyzed by automated means, according to pre-established models and criteria, some additional private information could be provided and retained for a lengthy period.

The CJEU recognized that the transfer, use and retention of PNR data constituted an “interference with the fundamental rights to respect for private life” and to the protection of personal data, thereby breaching fundamental EU rights.

The CJEU considered whether those interferences could be justified in light of the objective of the PNR agreement. Indeed, the agreement has dual objectives: i) to ensure public security by means of transfer of PNR data to Canada; and ii) the use of that data within the framework of the fight against terrorist offences and serious transnational crime. The CJEU concluded that the transfer, use and retention of the sensitive information cited above were incompatible with fundamental EU rights due to the too broad categories of PNR data listed for collection, the absence of guarantee that the collection of such data will only be used to fight terrorism or transnational crime, the 5-year retention period and a lack of precise and clear justification for the transfer of PNR data to Canada or other authorities.

A revised agreement

In order for the PNR agreement to be compatible with the fundamental EU rights, the court set out a list of “standards” that the agreement should meet:

- i) Determine in a more clear and precise manner certain of the PNR data to be transferred;
- ii) Provide that the models and criteria used for the automated processing of PNR data will be specific, reliable and non-discriminatory;
- iii) Provide that the databases used will be limited to those used by Canada in relation to the fight against terrorism and serious transnational crime;
- iv) Provide that PNR data may be disclosed by the Canadian authorities to the government authorities of a non-EU country only if there is an agreement between the EU and that country equivalent to the envisaged agreement/decision of the European Commission in that field;
- v) Provide for a right to individual notification for air passengers in the event of use of PNR data concerning them during their stay in Canada and after their departure from that country, and in the event of disclosure of that data to other authorities or to individuals;
- vi) Guarantee that the oversight of the rules relating to the protection of air passengers with regard to the processing of their PNR data is carried out by an independent supervisory authority.

What happens next?

Following this opinion a new deal will have to be negotiated with the Canadian authorities to comply with fundamental EU laws and rights as interpreted by the CJEU.

In addition, the EU rapporteur of the PNR agreement highlighted the direct connection between the content of this opinion and other even less restrictive PNR agreements previously concluded in 2012 (with Australia and with the the US), leading to calls for their suspension.

Economic and financial affairs

European Commission proposes to create a Pan-European personal pension product

On 29 June 2017, the European Commission (“**Commission**”) published a [legislative proposal](#) for a regulation to create a pan-European personal pension product (“**PEPP**”). The objective of the proposed PEPP is to boost long-term investment and to provide answers to the challenge of aging population in the EU.

Under the proposed regulation, the PEPP would be a voluntary scheme to gather retirement savings, to be used as a complement to public and private occupational pension systems. While it constitutes a step forward in the harmonisation of European pensions frameworks, the PEPP proposal leaves many elements to national laws. For example, the determination of minimum and maximum payments, the conditions for cashing out in case of hardship, and the retirement age would be left for Member States to define.

The proposal introduces harmonised rules on the composition and marketing of PEPP to ensure that it can be distributed across EU Member States. It sets strong information requirements and proposes that savers will be able to switch providers at a capped cost every five years. The PEPP would also be portable across borders within the EU.

The PEPP proposal will now undergo the ordinary legislative procedure, which requires that the European Parliament and the Council of the EU agree on a common text.

High Level Expert Group on sustainable finance publishes interim report

On 13 July 2017, the European Commission's High Level Expert Group ("HLEG") on sustainable finance published its [interim report](#), providing preliminary recommendations to boost the development of sustainable finance in the EU.

The report discusses challenges and opportunities that the EU faces in relation to sustainable finance. It identifies two key objectives for Europe's financial system. The first objective is to strengthen financial stability and asset pricing, by improving the assessment and management of long-term material risks and intangible factors of value creation, including those related to environmental, social and governance ("ESG") issues. The second objective is to improve the contribution of the financial sector to sustainable and inclusive growth, in particular through the financing of long-term needs such as innovation and infrastructure, and by accelerating the shift to a low carbon and resource-efficient economy.

The interim report includes some preliminary policy recommendations, such as designing a classification system for sustainable assets, establishing a European standard and label for green bonds, and requiring better disclosure from financial institutions and companies on how sustainability is factored into decision-making. The Commission indicates that it will start assessing the recommendations made in the interim report and provide input ahead of the publication of the final report, which is due at the end of 2017.

In addition, the Commission launched, during a public hearing on sustainable finance on 18 July 2017, a [public consultation](#) to gather stakeholders' feedback on the proposals made by the HLEG. Comments can be submitted until 20 September 2017.

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