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In this issue:

Antitrust and Competition

The European Commission opens first formal investigation concerning excessive prices in the pharmaceutical sector

On May 15, 2017, the European Commission ("**Commission**") announced it had opened a formal investigation into a global pharmaceutical company for possible abuse of dominant position. The alleged conduct of the company, headquartered in South Africa, concerns its pricing practices for cancer medicines.

Article 102 of the Treaty on the Functioning of the European Union prohibits the abuse of dominant position and, in particular, directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions. In the European Union ("**EU**"), dominant companies are subject to a tougher standard than in other jurisdictions (e.g., the United States ("**U.S.**")) since they hold a special responsibility not to impair genuine undistorted competition.

The investigation of the company is based on its pricing practices for generic medicines, described as "life-saving" by the EU Competition Commissioner Margrethe Vestager ("**Competition Commissioner**"), used for treating cancer. According to the Commission, there is information that the company "has imposed very significant and unjustified price increases of up to several hundred percent, so-called 'price gouging.'" Furthermore, it will investigate allegations that the company has threatened to (or actually did) withdraw the medicines in some Member States ("**MS**").

The investigation follows the imposition in September 2016 of a €5 million fine on the same company by the Italian Competition Authority ("**ICA**"). The ICA found that the company had obtained an increase in its prices of between 300 and 1500 percent in negotiations with the Italian Medicines Agency, which included threats to cease supply of four cancer drugs in Italy.

The main concern stemming from the Commission's excessive pricing investigation is the possibility of the antitrust enforcement agency acting as an unofficial price regulator. The Competition Commissioner has, however, reportedly stated that it is trying to avoid such risk as it acknowledges this is not its role.

The case confirms the renewed interest of the Commission in so-called "exploitative abuses" by dominant companies and excessive prices in particular. Despite the general difficulty in assessing what level of price should be considered as excessive, the Competition Commissioner had previously indicated that such abuses were on the Commission's radar. This case marks the first investigation of the Commission into excessive pricing practices in the pharmaceutical industry and will cover the entire European Economic Area except for Italy where the conduct was already investigated by the ICA.

The European Commission imposes for the first time a €110 million fine for providing incorrect or misleading information during a merger review process

On May 18, 2017, the Commission announced it had fined 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.

As already reported (see our publication of February 2017), the Commission sent a Statement of Objections to the same company back in December 2016 and this decision confirms the breach of procedural obligations. Under the EU Merger Regulation ("**EUMR**"), such breaches may be sanctioned by a fine not exceeding 1% of the company's aggregate turnover in the last financial year.

During the merger proceedings, the company had denied the possibility of establishing reliable automated matching between the company's user accounts and the target's user accounts. However, two years later, the target updated its terms of service, which then allowed for a matching of its and the company's user accounts. According to the Commission's investigation, the ability to match users automatically already existed at the time of the acquisition when the company submitted the merger filing to the Commission.

The Commission imposed a fine of €110 million, which it considers to be a "proportionate and deterrent." This is the first time it has fined a company for providing misleading and false information in the context of a merger proceeding since the entry into force of the 2004 EUMR.

When deciding on the level of the fine, the Commission took into account the fact that the company had committed two infringements, as it had provided incorrect or misleading information both when providing notice of the transaction and when responding to the Commission's request for information. It also found that the company's breach was "at least negligent." The Commission also took into account the fact that the company cooperated with the investigation, which allowed the application of a lower fine.

According to the Commission, the information was only one element among other issues it considered when clearing the transaction in 2014. Accordingly, the Commission's clearance decision was not affected by the fine imposed.

This case is, nevertheless, a reminder for companies that they need to comply with all obligations during a merger notification process, as violations of the procedural obligations can result in substantial fines. Significantly, the Commission appears to be intensifying its scrutiny of such violations. This is demonstrated by the fact that another U.S. company may be investigated by the Commission for providing misleading information in the context of the merger review of its acquisition of a Danish manufacturer of wind-turbine blades.

International Trade

The CJEU recognizes EU exclusive competence on most part of international trade deals

The EUSFTA

On May 16, 2017, the Court of Justice of the EU ("**CJEU**") issued one of those rulings that may be considered "historical" insofar as it clarifies a controversial issue of "constitutional" dimensions within the EU: in the area of international trade, how much power did MS really lose in favor of the Commission with the approval of the Treaty of Lisbon? The CJEU has been called into this matter on the occasion of the EU-Singapore Free Trade Agreement ("**EUSFTA**"), using its clauses to fix and define what is and what is not "international trade" and, therefore, when the Commission can act alone and when it must act in accordance with MS.

The EU and Singapore concluded negotiations for a free trade agreement ("**FTA**") in October 2014. The EUSFTA is, therefore, one of the first "new generation" free trade agreements: it goes beyond the regular reduction of tariffs and non-tariff barriers to trade in goods and services, to include several other matters related to trade, but simply not classified as such, such as protection of intellectual property, investment, procurement, competition and sustainable development. For that purpose, the Commission included all those matters in the category of "trade" and negotiated them accordingly as the sole voice of the EU. However, the Council of the EU ("**Council**") and Governments of several MS held that certain parts of the EUSFTA fell within the shared competences between the EU and the MS, or even within the exclusive competences of the MS. The Commission hereupon asked the CJEU for an opinion on whether the EU has exclusive competence over the EUSFTA, or whether there were shared competences between the EU and the MS. In case of the latter, the agreement would need to be concluded by the EU and the MS together.

The Commission chose the EUSFTA to refer to the CJEU because of its similar structure to many other trade agreements the EU has in the pipeline. Including any future agreement on trade with the United Kingdom ("**UK**") after Brexit.

The CJEU ruling

On May 16, 2017, the CJEU ruled that, in "its current form," the EUSFTA is a mixed agreement, i.e., an agreement with competences shared between the EU and the MS and, thus, a few matters cannot be concluded by the EU alone. The decision follows an opinion issued in December 2016 by Advocate-General ("**AG**") Sharpston, who had also decided that the EUSFTA was a mixed agreement, although the CJEU defined the exclusive competences of the EU more broadly than the AG had done in her advisory opinion.

The ruling sets an important precedent for future EU trade deals. While the CJEU ruled that the EUSFTA is a mixed agreement, it also confirmed that a large number of the matters that had been challenged by MS and by the Council fall under EU exclusive competence. According to the CJEU, the only provisions that do not fall within the EU exclusive competences are those relating to non-direct foreign investment and to dispute settlement between investors and MS. As such, key areas of the "new generation" FTAs (e.g., transport, intellectual property rights, labor and environmental standards) remain EU exclusive competences.

With this very clear and detailed division between what requires MS consent and what does not, it will become easier for the EU to conclude an FTA by merely splitting it up in two separate agreements, one "mixed" and one "exclusive." With this method, the FTA will not need to be ratified by all national parliaments, which is a huge stumbling block, as illustrated by the ratification of the EU-Canada Comprehensive Economic Trade Agreement ("**CETA**"), which was blocked by the Belgian regional parliament of Wallonia and nearly caused the collapse of the trade deal. In other words: what happened with CETA will most probably never happen again.

What it means for Brexit

The CJEU's ruling could be considered either good or bad news for the UK in light of the trade agreement it will have to negotiate with the EU following Brexit.

If an FTA between the UK and EU was formulated in a way that sought to avoid investments provisions and investor-state dispute mechanisms, which are shared competences, the EU would not have to seek ratification of the trade deal by the national and regional parliaments of the MS.

In regards to those investment provisions, Britain could instead rely on alternative arrangements such as bilateral investments treaties, World Trade Organization panels or enter into a separate FTA with the EU. This ruling has opened the way for an FTA being ratified by a qualified majority vote of the EU MS, rendering establishing an FTA after Brexit perhaps easier than predicted.

On the other hand, some MS might see investment provisions as vital in the FTA, thereby requiring national and (in some countries, also regional) parliaments to approve the outcome. Indeed, it is possible that parliaments across the EU will want to influence the Brexit deal and potentially oppose the ratification of an FTA because they do not seek the implementation of some provisions. This would weaken the UK's negotiating position of a future trade agreement because it will have to take into account all 27 EU parliaments.

Therefore, it is now clearer that the timing (and the political risks) of the ratification process of any future trade deal between the UK and the EU will depend on whether Britain and the EU include investment-related clauses in it or not and, in that case, whether they can be agreed to separately or not.

Telecommunications, media and technology

The audiovisual media services Directive: upheld but only after unusual parliamentary procedures; final substance still in flux

The legislative proposal for a Directive on audiovisual media services presented by the Commission on May 25, 2016, is going through a very complex legislative process, characterized by hard oppositions, both in the European Parliament ("**Parliament**") and in the Council. In an unprecedented move, this strong political division has allowed some "testing" of a new procedural rule in Parliament intended to protect political minorities and reinforce the legitimacy of the Parliament's position when it negotiates with the Council.

The AVMS Directive reform has the aim of laying down rules reflecting new technological developments in the audiovisual market and to take into consideration new actors, such as video-sharing platforms and the

different habits of the public that increasingly turns to the online world. Perhaps one would expect that this should not be the topic for such a battle. But it was.

The procedure had been following the normal route: debates in Council on the one side and debates, amendments and votes in Parliament on the other, leading to a report by the Culture and Education Committee ("**CULT Committee**"), which would have been the basis of negotiation with the Council. But differences among the Members of the European Parliament ("**MEPs**") pushed the use of a new mechanism to try to prevent that a text voted on only by a Committee, could become the basis of a negotiation on behalf of the Parliament as such.

Those disagreements within the Parliament led to a group of 76 MEPs to trigger the new Rule 69C of the Parliament Rules of Procedure ("**RoP**"). This rule, recently introduced by a reform of the RoP, allows "Members or political group(s) reaching at least the medium threshold to request a committee decision to enter into negotiations be put to the vote." This translates into the possibility to force the submission of a report, already adopted by the responsible parliamentary committee (CULT Committee, in this case), on the amendments of all 751 MEPs before letting it go through the interinstitutional negotiations among the Parliament, the Council and the Commission (the so-called "trilogues").

Concretely, a number of MEPs from several political groups (ALDE, Liberal-Democrats; GUE/NGL, the Left, and the Eurosceptics of the ECR) reached the minimum threshold to request such a special plenary vote of the proposal that had already been approved by a majority of the CULT Committee. This vote took place on 18 May. Nevertheless, the Parliament backed the work of the CULT Committee, confirming the proposed text with a highly divided vote of 314 votes in favor, 266 against and 41 abstentions. The main division line was between those MEPs belonging to the same political groups that had supported the work of their colleagues in the CULT Committee: the European People's Party and the Socialists and Democrats. Paving the way for the negotiations after this symbolic vote, the Maltese Presidency of the Council pushed to finalize the Council's position for the negotiations to start in June.

Several matters remain open for discussion:

- Daily limits to advertising. To avoid viewers being spammed with a concentration of evening advertising, MEPs proposed that MS delineate a prime-time window of a maximum of four hours during which a 20% limit will apply. The Council instead suggested dividing the day into two parts: from 6am to 6pm and from 6pm to midnight. During each of these periods, the proportion of advertising should not surpass 20%.

- The terms of the obligation for video on demand services ("**VOD**") to promote European content in their catalogues. The Council proposes to request an offer of 20% European content in the service providers' catalogues. The Parliament supports a 30% quota.

- The terms of the financing obligation of European content by VOD providers. There is agreement regarding the right of MS with jurisdiction to impose such obligations, but the Council has gone even further, proposing that MS should be enabled to request financial contribution from both the service providers established in their respective territory and also from those established outside their territory that target their audiences.

- The scope of the reform. Should social media platforms that include the possibility of audiovisual sharing be included in the scope of the reviewed Directive? The answer from the Parliament is yes (and this was the main issue triggering the strong division between groups); it wants to apply to these platforms several obligations in the fields of advertising and hate speech.

An important group of MS fiercely opposes this approach; seven countries recently took a public stance defending the view that the new audiovisual rules should not regulate social media and platforms. The final Council position clarifies that "while the aim of the Directive is not to regulate social media services as such, social media services should be covered if the provision of programs and user-generated videos constitute an essential functionality of that service." In order to ensure clarity, the Commission should issue guidelines "on the practical application of certain aspects of the definition of a 'video-sharing platform service,' in particular with respect to the criterion of essential functionality."

Because of all these differences between the Council and the Parliament's positions, the trilogues, which are expected to start at the beginning of June, promise to be anything but open in terms of outcome.

Economic and financial affairs

European Commission proposes to simplify EU derivatives regime

On May 4, 2017, the European Commission ('Commission') published a legislative proposal to overhaul the European framework for derivatives. Building on feedback received via the call for evidence on the European regulatory framework for financial services, the Commission proposes to review the European Market Infrastructure Regulation (EMIR) to ensure the proportionality of reporting requirements.

While the legislative proposal streamlines requirements for all counterparties, it also provides specific measures for non-financial counterparties and small financial counterparties, which will only be required to report on their activities in specific asset classes when they reach a certain threshold. In addition, pensions funds could also benefit from a three-year temporary exemption from central clearing.

The Commission considers that streamlining reporting requirements will reduce administrative costs and the reporting burden for market participants without negatively affecting financial stability.

The legislative proposal will now go through the ordinary legislative procedure, requiring both the European Parliament and the Council of the European Union to agree on the text before it can become effective.

Together with the legislative proposal to amend EMIR, the Commission published a communication announcing another legislative initiative to be launched in June 2017 regarding the supervision of systemic central counterparties ('CCPs'), particularly important in the context of Brexit. The Commission indicated that it is considering options including strengthened supervision as well as location requirements.

Financial Stability Board reports on shadow banking growth

On 10 May 2017, the Financial Stability Board ('FSB') published its 2016 global shadow banking monitoring report. The report builds on the results of the sixth annual monitoring exercise, which has been conducted in 2015 across 28 jurisdictions, accounting for approximately 80% of global GDP.

According to the FSB, the shadow banking sector shows continuous growth. The report uses a so-called 'narrow measure', which focuses on non-bank credit intermediation that may lead to financial stability risks. Based on this narrow measure, the FSB estimates that the shadow banking sector represented $34 trillion in end-2015, which is 3.2% more than in 2014, and accounted for 13% of the total financial system.

The FSB especially draws attention to credit intermediation associated with collective investment vehicles, which increased by 10% over the past four years and represents 65% of shadow banking. Non-bank financial entities engaging in loan provision also represents a significant share of shadow banking activities.

Looking at the interconnectedness between shadow banking and banks, the FSB notes that banks' credit exposure to shadow banking continued to decline in 2015, even though they remain higher than the pre-crisis level.

Taxation

G7 commits to pursue international cooperation against tax crimes

Meeting in Bari, Italy, on 12 and 13 May 2017, Finance Ministers and Central Bank Governors of the G7 adopted a communiqué which underlines the importance of working towards inclusive growth and to deal with challenges brought by technological change. Participants committed to strengthen their cooperation to fight the financing of terrorism via enhanced information sharing and regular cooperation across national financial intelligence units. They also welcome the forthcoming signature of the OECD Multilateral Convention, planned fro 7 June 2017, to implement tax treaty related measures to prevent base erosion and profit shifting (BEPS). The communiqué notes participants' determination to implement fair and transparent tax systems.

Importantly, the G7 Finance Ministers and Central Bank Governors simultaneously adopted a declaration on the fight against tax crimes and other illicit financial flows. Participants indicate that they will continue to cooperate via enhanced exchange of information on tax crimes, beneficial ownership and illicit financial flows. They committed to 'fight corruption in all its forms' and to further engage in international cooperation to advance tax fairness.

Finally, G7 Finance Ministers and Central Bank Governors expressed strong support for the work conducted by the Financial Action Task Force ('FATF') to fight illicit financial flows and encouraged the ongoing efforts to strengthen the FATF's institutional basis, governance and capacity.

European Commission renews vows to push for tax reforms

Addressing the European Parliament on 4 May 2017, European Commissioner Pierre Moscovici, in charge of Economic and Financial Affairs, Taxation and Customs, reaffirmed the commitment of the Commission to advance corporate tax reforms.

In his comments, Pierre Moscovici outlined three priorities for tax reforms in 2017. First, he mentioned that the Commission will continue to advocate for progress on the proposals to establish a common corporate tax base (CCTB) and to then evolve towards a common consolidated corporate tax base (CCCTB). Second, Moscovici indicated that the list of non-cooperative jurisdictions for tax purposes should be completed by the Council by the end of 2017, providing the EU with a powerful common tool towards third countries. Third, Moscovici announced a legislative proposal on the role of intermediaries in tax evasion and money laundering. To be published in June 2017, the proposal will set criteria which, when they are met, will require intermediaries to disclose tax schemes to relevant authorities.

Moscovici called on the European Parliament to join the Commission in maintaining a political pressure to ensure that tax files progress in the Council of the EU. He underlined that fight tax fraud would contribute to both raising tax revenue across the EU and addressing the financing of crime and terrorism.

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