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Antitrust and competition

EU shows flexibility in merger remedies

The European Commission (“**Commission**”) has shown some flexibility in the unconditional approval of the acquisition by a major high tech company of one of its competitors for USD 37 billion.

Although the Commission had concluded that the two companies’ products were largely complementary, it was concerned by the fact that the acquirer supplies intellectual property (“**IP**”) rights to the target and its rivals. According to the Commission, the acquirer could have had the incentive to withhold certain IP rights from the competitors of the target, post-transaction, thus extending the combined entity’s dominance in the market.

This issue arose late in the investigation. However, the Commission, rather than declaring the filing incomplete, allowed the acquirer to submit concessions and extended the initial probe by two additional weeks. As a result, the company could enter into agreements with the competitors of the target guaranteeing them access to the necessary IP on reasonable terms.

Consistent with similar past decisions, the decision of the Commission was technically unconditional because those agreements were not included in formal remedies.

This decision shows that the Commission is ready to allow companies to find creative solutions to address competition concerns under certain circumstances.

E-commerce still in the spotlight at EU and national level

EU and national authorities continue their review into the e-commerce sector. In the last weeks, the French and the German Competition Authorities have closely looked into the distribution policies of some of the main producers operating in their respective territories. As a consequence, they have ordered to those companies to eliminate any prohibition on the authorized resellers from selling products on some Internet sites and, in particular, on the online sales platform.

These decisions mainly concerned the sport-shoe and the car industries.

At the same time, the Commission is carrying on its sector inquiry into e-commerce. On 27 November 2015, the Commission sent out a new round of questionnaires to the manufacturers of branded goods (e.g. electronics, clothing and cosmetics). In particular, they are asked how they draft distribution policies and how these affect sales through retailers and online marketplaces. Similar questionnaires have already been sent to retailers, owners of digital content and Web platforms in previous rounds.

Manufacturers of branded goods have until 15 January 2016 to provide their feedback. The inquiry should be completed in 2017, while a preliminary report is expected for mid-2016. The inquiry can lead to the opening of investigations into individual companies.

Telecommunications, media and technology

The EU adopts new rules on roaming fees and net neutrality

On 27 October 2015, the European Parliament (“**EP**”) adopted the telecoms single market (“**Connected Continent**”) package in second reading following an agreement struck with the Council on 30 June 2015 and almost two years after the Commission put forward its proposal on this topic.

This legislative package contains provisions eliminating roaming charges by June 2017 and setting the first EU-wide net neutrality rules.

Roaming fees will indeed come to an end from 15 June 2016 onwards and consumers will then spend the same price for their calls, texts and data as they travel to other EU Member States. An intermediary period is foreseen as of April 2016 during which operators will only be allowed to require a small amount to domestic prices up to €0.05 per minute of call made, €0.02 per SMS sent, and €0.05 per MB of data.

Please also note that the Commission launched a public consultation on 27 October 2015 to gather stakeholders’ views on the technical measures related to the abolition of roaming charges in the EU.

This legislative package endorses for the first time the principle of net neutrality into EU law too. Under this principle, users should get access to the open Internet at any time and every business or citizen should be able to provide its services through a high-quality open Internet.

Consequently, all traffic will have to be treated equally and blocking or throttling content will become illegal as of the entry into force of the new rules.

These new rules will be completed by EU telecoms rules reform in 2016 as foreseen in the Digital Single Market (“**DSM**”) strategy issued on 6 May 2015.

Privacy, data protection and information management

A deal on the EU data protection reform within reach

The latest documents issued by the Council and negotiators suggest a political agreement on the EU data protection reform is close. Members of the European Parliament (“**MEPs**”) leading the negotiations with the Council have declared that a political agreement could be reached by the end of 2015 and that a formal decision might be adopted at the beginning of 2016.

As a reminder, the EU data protection reform is made up with the General Data Protection Regulation (“**GDPR**”) and the directive on the processing of data to prevent, investigate detect or prosecute criminal offences or enforce criminal penalties (“**Data Protection Directive**”). The GDPR is to replace the old 1995 patchwork of national data protection laws currently in place with a single set of EU-wide rules and make them fit for purpose in the current digital world. The EU data protection reform aims at making companies’ life easier when operating within the EU, while also upgrading citizen’s rights.

Eight three-way talks (commonly referred to as “**trilogues**”) on the GDPR between the EP, Council and Commission have taken place so far. It appears the negotiators went through the eleven chapters of the draft regulation except the one relating to implementing measures. The two last trilogues are scheduled for 10 and 15 December 2015.

On this occasion, negotiators should look into the Luxembourg Presidency’s suggested compromises on the more thorny issues, including further processing of data for purposes beyond that for which it was initially collected, data protection officers or even the right to be forgotten.

The EP is in favour of limiting the way data can be used for alternative measures and advocates mandatory data protection officers, while the Council wants to make further processing of data easier and believes companies should appoint data protection officers only on a voluntary basis.

Some leading MEPs have repeatedly made clear a failure by the negotiators to swiftly find an agreement could negatively impact ongoing talks on other pieces of legislation, including the Passenger Name Record (“**PNR**”) proposal and the Network and Information Security (“**NIS**”) Directive.

Economic and financial affairs

First steps in building a Capital Markets Union

A few months after the publication of its Action Plan on the Capital Markets Union (“**CMU**”), the European Commission put forward new elements to achieve its objective of deepening capital markets and creating a more competitive investment environment in the EU. Several public consultations are on-going, for example regarding covered bonds and venture capital funds. The Commission is also seeking comments from stakeholders on the overall regulatory framework for financial services in the EU. Through this call for evidence, the Commission wishes to identify overlaps, inconsistencies and gaps that obstruct the development of capital markets.

In addition to the securitisation proposals published at the end of September 2015, the Commission launched in early December 2015 a green paper on retail financial services which seeks to gather input from interested stakeholders. The objective is to improve the choice and quality of products so as to further open up the European market for retail financial services. A legislative proposal reviewing the Prospectus Directive has also been published on 30 November 2015, aiming at reducing prospectus cost and related burdens for SMEs and regular issuers.

A deposit insurance scheme to further complete the Banking Union

As a follow up to the Five Presidents’ report published in June 2015, and in the framework of the Banking Union, the European Commission proposed a European Deposit Insurance Scheme (“**EDIS**”). This deposit insurance scheme would be mandatory for Euro area Member States whose banks are covered by the Single Supervisory Mechanism (“**SSM**”), but also open to other Member States who want to join the Banking Union. EDIS is built on three steps.

The first step would focus on reinsurance until 2020. EDIS would provide support to national deposit guarantee schemes (“**DGS**”) only when they exhausted their own resources. According to the Commission, this first step will contribute to weakening the link between banks and their national sovereigns.

Then, from 2020 to 2024, EDIS would be able to contribute a share of the costs to reimburse bank depositors, even if national DGS have not exhausted their own funds. The degree of risk-sharing between national DGS and EDIS would gradually increase, starting with EDIS contributions at 20% in 2020.

The Commission’s proposal foresees a third and final step, from 2024 onward, which would lead EDIS to fully insure national DGS.

At the core of EDIS, the Commission proposes to create a European Deposit Insurance Fund (“**EDIF**”) that would be financed by bank contributions and adjusted for risk.

Adoption of TAXE Committee report and perspective for further developments

On 24 November 2015, the European Parliament adopted by a large majority the report of the European Parliament’s TAXE Committee, prepared by co-rapporteurs Elisa Ferreira (S&D, PT) and Micheal Theurer (ALDE, DE). However, political groups widely agree that further work on corporate taxation is needed in the European Parliament. Having organised a hearing of eleven multinational corporations on 16 November 2015, MEPs have been calling for more cooperation from companies questioned as well as from Member States and European Institutions. A recurring issue raised by MEPs is the access to documents regarding tax rulings, etc.

As the TAXE Committee’s mandate expired with the vote on its report, the European Parliament decided to set up a new special committee on corporate taxation. It is likely to have a similar composition as the TAXE Committee. The new Committee will focus its effort on the elaboration of a Common Consolidated Corporate Tax Base (“**CCCTB**”), based on a Commission’s proposal expected in 2016. The implementation of actions proposed by the OECD as part of its Base Erosion and Profit Shifting (“**BEPS**”) action plan will also be of interest for the new committee, especially as regards the scope of country-by-country reporting.

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