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ANTITRUST AND COMPETITION

The Failing Firm Defense in the Face of the COVID-19 Outbreak

As the COVID-19 pandemic causes commercial and financial difficulties, an increasing number of transactions may involve companies in financial difficulty. This may lead to more transactions where antitrust authorities come under pressure to approve acquisitions that would ensure the survival of those companies. In the context of transactions involving distressed targets, the "failing firm defense" (FFD) is often raised but is rarely successful in practice. The rationale of the FFD is that the deterioration of the competitive structure of the market that follows the merger is not caused by the transaction but by the prevailing economic conditions affecting the target.

The European Commission (Commission) relies on three criteria in order to assess whether an FFD is likely to succeed: (i) the failing firm would in the near future be forced to exit the market due to financial difficulties if it is not taken over by another company; (ii) there is no less anticompetitive alternative than the proposed merger; and (iii) in the absence of the proposed merger, the assets of the failing firm would inevitably exit the market.

As an example, in 2013, the Commission cleared the acquisition of a Greek air carrier by another Greek air carrier, taking into account the FFD. In particular, the Commission upheld the argument that the continuous Greek recession had put the company under financial difficulties and that the air carrier to be acquired was likely to exit the market in any event. The Commission's market investigation revealed that there were no operators interested in acquiring the acquired carrier's assets in the event the company would leave the market. Furthermore, the acquired carrier's market shares on the relevant air routes would, in any event, accrue to the acquiring carrier since the parties were already in a quasi-duopoly situation, and entry by a third operator was considered to be unlikely in the foreseeable future.

The standard of proof that the parties must meet for a successful FFD is very high, and the Commission's economic analysis is necessarily complex. To date, the Commission has accepted the FFD in three cases only.

Although there have been calls for the Commission (and other antitrust authorities) to relax their approach to the FFD, it is very unlikely that the Commission will lower its legal standards for the FFD in the context of the COVID-19 outbreak. The Commission made it clear in the context of the 2008 crisis that the proposition that a more lenient FFD test should be applied in times of recession must be rejected just as much as the proposition that a tougher test should be applied in good times.

Similarly, in April 2020, Commission's Executive Vice-President and Competition Commissioner Margrethe Vestager excluded a more permissive approach and warned that the crisis "*shouldn't be a shield to allow mergers that would hurt consumers and hold back the recovery*." Significantly, her comments followed guidance issued by the UK Competition and Markets Authority (CMA), which had recently approved a transaction on FFD grounds but shortly after reiterated its framework and stated that "*[t]he Coronavirus (COVID-19) pandemic has not brought about any relaxation of the standards by which mergers are assessed or the CMA's investigational standards*."

However, even where an FFD argument is unlikely to succeed, companies may instead want to rely on the availability of a broader set of "counterfactual" arguments regarding the competitive landscape and market position of the merging parties in the absence of the transaction. For instance, the Commission's decisional practice indicates that transactions can be cleared where the alternative counterfactual scenario clearly demonstrates that the exit of the target's assets from the market would be more harmful to competition than allowing the transaction to proceed. This kind of arguments may be expected to play a more pronounced role in the aftermath of COVID-19 where merging parties can demonstrate significant and long-lasting changes in market conditions.

DIGITAL ECONOMY

A New "Gatekeeper" Law for Tech Giants?

Margrethe Vestager, the EU's antitrust and digital policy chief, has called into question whether current competition rules are "fit for purpose" in tackling online markets. Due to fast innovation and network effects, these markets can become anticompetitive very fast, she claimed, before warning Big Tech businesses that in the future, they may face an order to open up access to their data sets. The theory is that opening access to data sets would allow smaller rivals better chances to enter the market. These issues may be addressed in the much-awaited proposal for an EU Digital Services Act. The Commission is set to soon publish two consultation documents that will inform the drafting of the rules.

The first consultation will propose a new "gatekeeper" law, which would set out new obligations on large online platform operators. The new regulation would put "clear-cut prohibitions and obligations on those who may qualify as digital gatekeepers." The law would build on existing legislation, in particular the Platform to Businesses (P2B) Regulation that was adopted last year and which will start to be applied in July 2020. The latter governs the relationship between businesses and digital platforms and is largely designed to ensure predictability and transparency. Vestager has made the point numerous times that special responsibilities should be put on "gatekeepers," i.e., online marketplaces that have achieved such a strong position in the distribution chain that they have become de facto regulators.

In a nutshell, a new gatekeeper law would mean that digital "gatekeepers" could face scrutiny over their use of combined data sets, rolling out digital IDs, and hoarding data. This could mean that Big Tech businesses will have to "separate clearly" their roles as the owner and the user of a platform.

The second consultation is due to address a new "competition tipping tool." The tool is aimed at identifying structural problems in emerging markets, giving authorities the ability to intervene before they have "tipped" to a certain company. Market tipping refers to the situation where one company obtains high "monopoly" profits and market share, creating an anticompetitive environment for other firms.

According to the Commission, the proposal for a Digital Services Act continues to be planned for publication later this year, although a slight delay to the first quarter of 2021 is possible.

Ten EU Member States Make Recommendations on the Digital Services Act

On 13 May 2020, the EU countries forming the "Digital 9+" (Belgium, Czechia, Denmark, Estonia, Finland, Ireland, Luxembourg, Netherlands, Poland, and Sweden) published their contribution to the debate on the review of regulatory framework for the provision of online services in the EU.

The Digital 9+ countries noted that the current legal environment is obsolete, as it is largely based on the E-Commerce Directive, which was adopted 20 years ago. To address the new challenges, based on new digital business models, services, and technologies, the upcoming Digital Services Act should provide an improved regulatory framework for the digital economy. The review should be evidence-based and benefit from stakeholders' points of view. While the core principles of the E-Commerce Directive (e.g., the country of origin principle, exemption from liability for the stored content, and no general obligation to monitor information) should be maintained, they should be also modernized in a targeted manner.

The crucial adaptation should be around the introduction of a notice-and-action mechanism framework across the EU. The framework should encompass measures proportionate to the nature and impact of the harm committed, enable swift and effective removal of the clearly illegal content, and ensure appropriate balance between the interests of those reporting illegal content and those posting content, making it possible to file a counter notice. The mechanism should provide intermediaries with an appropriate level of legal certainty while at the same time guarantee online users' rights to freedom of expression and information.

Besides the notice-and-action mechanism, Digital 9+ countries also welcomed the Commission's reflection on the effectiveness of the application of the current competition rules, for example, in relation to antitrust remedies. Here, they put their emphasis on evidence-based solutions.

European Parliament's Committees Published Three Draft Reports on the Digital Services Act

The initial views of the European Parliament on the Digital Services Act started to crystalize in late April, as three Draft Reports with recommendations to the Commission were published.

The Commission outlined its general strategy towards digital regulation in its Communication on "*Shaping Europe's digital future*," where it committed to strengthen the responsibility of online platforms, reinforce the oversight over platforms' content policies, and review options for an ex ante regulation for "gate-keeping" platforms. The initial position of the European Parliament started to emerge only recently.

In late April, the European Parliament published three Draft Reports with recommendations to the Commission on Digital Services Act (DSA):

- Internal Market and Consumer Protection Committee's Draft Report focused on improving the functioning of the Single Market – Rapporteur: Alex Agius Saliba (IMCO Report);
- Civil Liberties, Justice and Home Affairs' Draft Report on issues concerning fundamental rights - Rapporteur: Kris Peeters (LIBE Report); and

- Committee on Legal Affairs' Draft Report on adapting commercial and civil law rules for commercial entities operating online - Rapporteur: Tiemo Wölken (JURI Report).

The IMCO Report proposes to build the DSA upon the rules currently applicable to online platforms, namely the E-Commerce Directive and the Platform-to-Business Regulation. A comprehensive revision of the E-Commerce Directive would aim to address the liability of an intermediary (e.g., clear due diligence transparency and information obligations, as well as procedures and measures related to the removal of illegal content online).

With regard to platform regulation, the IMCO Report suggests that the DSA should ensure that the systemic role of specific online platforms will not endanger the internal market by unfairly excluding innovative new entrants. Large platforms with significant network effects that are able to act as de facto online gatekeepers should have special responsibilities. In particular, the IMCO Report suggests setting up an ex ante mechanism to prevent unfair market behavior by systemic platforms. Such mechanism should allow regulatory authorities to impose remedies on these companies in order to address market failures without the establishment of a breach of regulatory rules.

The LIBE Report calls for addressing illegal content online with the same rigor as offline content, without disproportionate restrictions on the freedom of expression. With regard to the revision of the E-Commerce Directive, it recommends keeping the prohibition of a general monitoring obligation, limited liability for content, and the internal market clause in order to avoid unnecessary regulatory burdens. At the same time, it proposes to introduce legal obligations for digital service providers' accountability for content moderation, as well as proactive measures to address the appearance of illegal content on their services. Finally, the LIBE Report also stresses that illegal content should not only be taken down, but also followed up by law enforcement and the judiciary.

The JURI Report takes the view that the DSA should render the principle of “notice-and-action” effective and workable by laying down a clear procedural framework for notice-and-action procedures which allow for effective judicial redress. The framework, which should be also enshrined in the terms and conditions of content hosting platform, shall be without prejudice to liability exemption rules under the E-Commerce Directive. Namely, the DSA must not contain any provisions that force or otherwise lead content hosting platforms to employ automated precontrol of content or other automated ex ante content moderation tools.
In order to monitor and ensure legal compliance, the JURI Report suggests creating a new European agency with the power to impose fines on those content-hosting platforms breaching standards in their content management practices. Content-hosting platforms should also regularly transmit transparency reports to the agency. The JURI Report also recommends adopting measures to curtail the collection of data collected for building targeted advertisement profiles and to give users an appropriate degree of control over the content curation algorithms.

The Draft Reports are now subject to further amendments and will be finalized in the coming months. The European Parliament's adoption of the DSA Reports is currently scheduled for fall 2020.

ECONOMIC AND FINANCIAL AFFAIRS

European Supervisory Authorities Consult on Draft Investor Environmental, Social, and Governance Disclosure Standards

On 23 April 2020, the European Supervisory Authorities (ESA) (i.e., the European Banking Authority, the European Insurance and Occupational Pensions Authority, and the European Securities and Markets Authority (ESMA), issued a consultation seeking input on the content, methodology, and presentation of environmental, social and governance (ESG) disclosures standards for financial market participants, advisers, and products. The consultation follows ESMA's recent report on enforcement and corporate reporting underlying that almost all issuers in its sample (77 percent) provided sufficient description of their policy for addressing environmental matters.

The ESAs were mandated by the EU Regulation on sustainability-related disclosures in the financial services sector (SFDR) to develop these standards. The SFDR aims to achieve more transparency on how financial market participants and advisers consider sustainability risks (so-called ESG considerations) in their investment decision-making process and how these decisions affect sustainability factors (adverse impact).

The SFDR covers a wide range of financial products and financial market participants, including, inter alia, pan-European pension products, AIFMs, UCITs management companies, investment firms authorized under MiFID II providing portfolio management or investment advice and VC funds. For this reason, the ESAs highlight that its broad scope coupled with the absence of harmonized EU rules on sustainability-related disclosures indicate that diverging measures will continue to be adopted by EU Member States.

In this context, the overall objective of the regulatory standards is to ensure that financial market participants and financial advisers disclose necessary information on the adverse impacts of investment decisions and financial advice to enable end investors to make informed investment decisions. The adoption of the regulatory standards is expected by 31 December 2020. Most of the SFDR's provisions shall apply from 10 March 2021, while the disclosure requirements for financial products will apply as from 1 January 2022.

Stakeholders are invited to provide input on the consultation until 1 September 2020.

The draft standards include:

- The publication of a statement on an entity's website on the due-diligence policy in respect of the adverse impact of investment decisions on sustainability factors and a mandatory reporting template for the website statement considering the principal adverse impact of investment decisions on sustainability factors. The draft standards indicate where and how this information should be published on the website including a two-page summary and the financial product's alignment with the “do not significantly harm” (DNSH) principle.
- Periodic reporting depending on the specific product legislation, including a granular list of items to be added in the reporting, focusing on the success of the product's sustainable investment objective and its compliance with the DNSH principle.
- Precontractual disclosures on how a product with environmental or social characteristics meets them and if an index has been designated as a reference benchmark, and whether and how that index is consistent with those characteristics. In case there is a designated index, additional precontractual information will be needed on how that index is aligned with the sustainable investment objective.

Details of the presentation and content of the information are to be disclosed in relation to the DNSH principle, including a mandatory template for adverse impact reporting and indicators setting out “significant harm”.

Financial Stability Board Report to the G20 on COVID-19 International Policy Response

On 15 April 2020, the Financial Stability Board (FSB) issued a report to the G20 Finance Ministers and Central Bank Governors on International Cooperation and Coordination to address the financial stability implications from COVID-19. The report follows a letter by FSB Chair Randal K. Quarles, which points out the twin challenge the global financial system is facing in light of COVID-19: a dramatically increased need for credit throughout the global economy and marked uncertainty about the value of a wide range of assets.

The report provides an overview of the financial stability implications related to COVID-19 and outlines the policy actions taken by FSB member jurisdictions. It notes that the FSB is monitoring the financial system's resilience and in particular, the ability of: (i) financial institutions and markets to channel funds to the real economy; (ii) market participants to obtain U.S.-dollar funding, particularly in emerging markets; (iii) financial intermediaries to manage liquidity risk; and (iv) market participants and financial market infrastructures, including central counterparties, to manage evolving counterparty risks. The report acknowledges that despite the current market volatility, the global financial system is more resilient as a result of the G20 regulatory reforms of the past years.

In this context, it underscores that the financial sector's rapid and coordinated COVID-19 response to support the real economy, maintain financial stability, and minimize the risk of market fragmentation revolves around five principles. In a Communiqué and Action Plan published on the same day, the G20 Finance Ministers and Central Bank Governors expressed their support for the principles and committed to follow them. The principles include:

- Monitoring and sharing information on a timely basis to assess and address financial stability risks from COVID-19;
- The recognition and use of the flexibility built into existing financial standards to support the COVID-19 response;
- Opportunities to temporarily reduce operational burdens on firms and authorities such as delaying implementation deadlines, reprioritizing timetables for initiatives in other policy areas, or providing flexibility in technical compliance rules;
- Acting consistently with international standards, and not roll back reforms or compromise the underlying objectives of existing international standards; and
- Coordinating on the future timely unwinding of the temporary measures taken.

The report also describes how the FSB is supporting international cooperation and coordination on the COVID-19 response by sharing information among financial authorities, conducting financial stability risk assessments, and assisting its members with coordinating on their responses to policy issues. In terms of next steps, the FSB stresses that even in view of COVID-19, it is important not to lose sight of what will be needed to promote a financial system that supports a strong recovery, including taking forward initiatives on nonbank financial intermediation, supporting a smooth transition away from LIBOR, harnessing the benefits of technological innovation, and promoting efficient and resilient cross-border payments.

INTERNATIONAL TRADE, CUSTOMS, AND EXTERNAL RELATIONS

EU Trade Defense Report: Restoring the Level Playing Field for European Producers

On 30 April 2020, the Commission issued its 38th Annual Report highlighting key information regarding the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities, as well as the trade defense activity of third countries targeting the EU in 2019.

In its report, the Directorate General for Trade underlines in particular the following activities:

Continued high level of EU trade defense activity: In 2019, the Commission increased its activity compared to 2018 by launching more investigations, imposing new measures, and by reviewing the existing ones.The highest number of EU trade defense measures concerns imports from third countries such as China, Russia, India, and the U.S.

Increase in the number of EU jobs protected by defense measures: Dumped or subsidized imports affect EU companies, putting at risk the viability of EU businesses, and therefore of EU jobs. By restoring nonharmful conditions of trade, trade defense measures contribute to protecting jobs in EU companies. The measures imposed in 2019 increased the number of jobs benefitting from the EU trade defense by 23,000, bringing the total number of EU jobs protected to 343,000.

Sustained effectiveness of EU trade defense measures in reducing unfair imports: An average 80% reduction of harmful imports allows EU producers to maintain their activity and to preserve the diversity of sources of supply.

Resolute action to protect the EU steel market and recourse to new safeguard measures: Steel products were subject to the highest share of measures in force targeting the EU in 2019. In order to protect the fragile economic condition of EU steel producers and a further sharp increase of imports, the Commission adopted definitive safeguard measures for a range of steel products of all origins. In addition to the safeguard measures on steel products, the Commission also put in place safeguard measures for indica rice from Cambodia and Myanmar. These are the first safeguard measures set off by the EU in a long time.

Strong defense of EU exporters targeted in foreign trade defense investigations: In 2019, measures taken by other countries against imports from the EU amounted to 175, and such a high level is expected to be maintained. The Commission continues to intervene regularly in the vast majority of foreign investigations targeting EU exports. In two notable cases regarding antisubsidy measures imposed by the U.S. on table olives from Spain and the measures on frozen fries, the Commission initiated trade dispute settlement before the World Trade Organization.

INSTITUTIONAL AFFAIRS

The Independence of the European Central Bank and the Authority of the Court of Justice of the European Union Called Into Question by the German Federal Constitutional Court

On 5 May 2020, Germany's Federal Constitutional Court, the Bundesverfassungsgericht (BVG), issued a decision on the legality of the European Central Bank's (ECB) Public Sector Purchase Programme (PSPP). The PSPP was launched to stabilize the economy of the Eurozone (i.e., the economic region formed by the EU member countries that have adopted the euro) following the 2008 financial crisis. Since its adoption in 2015, it has allowed the ECB to purchase almost EUR 3 trillion of debt on secondary markets issued by all Eurozone countries. The BVG decision contradicts a 2018 judgment of the Court of Justice of the European Union (CJEU), which upheld the validity of the ECB decision to pursue the PSPP.

While the BVG dismissed the plaintiff's argument that the practice amounts to monetary financing, which is illegal under the EU treaties, it accepted the claim that the 2018 CJEU decision failed to demonstrate the fulfilment of the principle of proportionality. This is set by Article 5(1) and (4) of the Treaty on the EU and provides that the EU institutions can only pursue actions they can demonstrate are justified and necessary. According to the BVG reasoning, in pursuing the PSPP, the ECB focused exclusively on keeping inflation under control and failed to consider its social and economic impact. Accordingly, its action lacked sufficient consideration to proportionality and, with that, the ECB exceeded its powers.

The BVG ruled that the Bundesbank (the German federal central bank) cannot participate in, execute, or operationalize ultra vires acts and hence cannot continue its participation in the PSPP unless a proportionality assessment, demonstrating an adequate justification for the PSPP, is provided within three months by the ECB. A Bundesbank withdrawal from the PSPP would probably force the ECB to halt the program altogether, with critical consequences for the euro.

The BVG judgment risks jeopardizing the legitimacy of the CJEU and the primacy of EU law over national law. It represents a dangerous precedent for other countries to disregard the CJEU rulings when they disagree with them and, therefore, undermines the unity and certainty of the EU legal order. Furthermore, it challenges the independence of the ECB, which decides on the conditions for the exercise of its mandate under the exclusive supervision of the CJEU.

The deadlock raises the question of how the EU can manage the situation while preventing further damages to its institutions and disruptions of the already precarious EU member states' relations. All of the options considered so far to overcome the stand-off seem to come with drawbacks.

In particular, Ursula Von der Leyen, the President of the Commission, envisaged the opening of an infringement procedure against Germany. This option, however, is likely to cause an escalation of tension among the EU, Germany, and other EU Member States and may undermine the authority of the CJEU.

At the same time, ignoring the BVG ruling could lead to the withdrawal of the Bundesbank from the PSPP, endangering the existence of the euro. Furthermore, considering that the BVG has been deemed Germany's most-trusted institution for decades, any attempt by Brussels to challenge its authority could trigger German hostility against the EU.

On the other hand, if the ECB were to meet the BVG demand to provide a detailed analysis to prove the necessity of the PSPP, this could open the door to future illegitimate national intrusions in the ECB's policies.
Observers suggest that an alternative to solve the institutional impasse might be found in an intervention of the Bundesbank submitting the analysis in place of the ECB. However, this option does not seem viable since the Bundesbank voted against the PSPP when it was approved by the ECB's governing council in 2015 and such a change may undermine its credibility.

While the potential options discussed seem to all have distinct shortcomings, the August 5, 2020 deadline fixed by the BVG is approaching and a solution will need to be found before then.

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