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EU Policy and Regulatory Newsletter

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ANTITRUST AND COMPETITION

European Commission Prohibits US$1.7 Billion Merger in Online Travel Agency Sector

On 25 September 2023, the European Commission (Commission) prohibited, under Council Regulation (EC) No 139/2004 (EU Merger Regulation), a merger in the online travel agency sector. The Commission found that the acquisition would have strengthened a dominant position on the market for hotel online travel agencies in the European Economic Area (EEA).

The transaction concerned the acquisition of E-Traveli, a Swedish company being one of the main providers of flight online travel agency (OTA) services (Target) by a leading US hotel OTA (Buyer) (Proposed Transaction). OTAs provide intermediation services as they match demand and supply for travel services such as accommodation, flights, car rentals, and attractions. In the EEA only, OTAs handle transactions worth more than €100 billion annually. Out of this, hotel OTAs are worth about €40 billion annually, accounting for the largest and most profitable segment of the OTA sector.

In its in-depth review of the Proposed Transaction (Phase II), several stakeholders voiced concerns with the Commission that the transaction would strengthen the Buyer's dominant position in the hotel OTA market in the EEA, reduce competition, and increase prices for hotels, and, possibly, for consumers. In particular, the Commission found that:

- The Buyer is the dominant hotel OTA provider in the EEA with a market share of more than 60%. Other OTAs are much smaller and not able to exert sufficient competitive pressure on the Buyer;
- As flight OTA services, as provided by the Target, are the second largest OTA market after accommodation, the Proposed Transaction would have allowed the Buyer to acquire a main customer acquisition channel;
- The Proposed Transaction would have allowed the Buyer to expand its travel services ecosystem around the hotel OTA business. Flight OTA services as provided by the Target would generate significant additional traffic as flights have the highest chance to lead to cross-selling of accommodation. The Commission stated that the Buyer would have benefited from existing customer inertia because a significant share of these additional customers would have stayed on the Buyer's platforms;
- The Proposed Transaction would have reinforced network effects and increased barriers to entry and expansion due to the increasing traffic to and sales by the Buyer's platforms; and

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- The Proposed Transaction would have further strengthened the Buyer's bargaining position towards hotels, which could have resulted in higher costs for hotels and, possibly, consumers.

The Commission considered that the behavioral commitments offered by the Buyer—including the possibility to display multiple hotel offers from competing hotel OTAs, allowing customers clicking on the displayed offer to be redirected to the hotel OTA's website—were insufficient to comprehensively and effectively address the competition concerns. In Phase II, the Commission's market test revealed that the remedies offered were not sufficiently transparent and nondiscriminatory and would have been difficult to monitor effectively—which is a key concern when proposing behavioral remedies as opposed to structural (e.g., divestiture), which are easier to implement and monitor.

In its assessment, the Commission appears to have departed from the analytical framework of the non-horizontal guidelines (i.e. regulating mergers between companies active on different relevant markets), which requires evidence of anticompetitive foreclosure, and instead reverted to an “extension of dominance” test. Even though the Proposed Transaction was a conglomerate merger, the Commission essentially relied in a theory of harm based on the strengthening of dominance in the Buyer's core market (i.e. quasi-horizontal).

The Proposed Transaction had already been cleared without conditions by the UK Competition and Markets Authority and the US Federal Trade Commission. That shows another case of divergent outcomes between competition authorities. Moreover, this is the first Commission's prohibition based on the “ecosystems” theory of harm.

The Buyer announced that it intends to appeal the Commission's prohibition decision. This negative decision is only the 11th transaction blocked by the Commission in the last past 10 years. The full ramifications of this decision remain to be seen, particularly whether the Commission may be taking a tougher stance on transactions in the digital sector.

DIGITAL AFFAIRS

European Commission Report Shows Progress towards Digital Transformation Targets but also Points to Shortfalls and Funding Gaps

On 27 September 2023, the Commission published its first report on the State of the Digital Decade. The report presents a comprehensive look at the European Union's progress toward achieving its objectives on digital transformation to promote the digital sovereignty, resilience, and competitiveness. It shows good progress in some areas but identifies significant gaps in others. The Commission therefore calls for cooperation between EU member states, the adoption of currently pending policy and legislative measures, and investments to achieve the European Union's objectives for 2030.

Some of the report's key findings are as follows:

Semiconductors

The European Union is on a good path to reaching its target of doubling its share to 20% of global production of cutting-edge semiconductors, with the European Chips Act expected to contribute significantly to achieving this target.

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Digital Transformation of Businesses

The Commission found that without further investment and incentives, the projected baseline trajectory indicates that only 66% of businesses will use cloud services by 2030, 34% big data and 20% AI, below the overall target of 75%. The report therefore calls on EU member states to raise awareness about the benefits of digitalization. The growth of EU-based unicorns (companies with a valuation over €1 billion) in the past 10 years, according to the report, puts the European Union on a tratrajectory to meet its target of doubling their number by 2030 compared to the 2022 baseline.

Digital Skills

Under current conditions, only 59% of the population will master at least basic digital skills in 2030, significantly below the target of 80%. Furthermore, the number of trained IT specialists is projected to be 8 million lower than the target of 20 million.

Sustainability and the Digital Transition

The report highlights that several recently adopted measures, such as the right to repair and the eco-design criteria for products, will reduce the environmental impact of digital technologies.

International Partnerships

The Commission reports that digital partnerships with Japan, the Republic of Korea, and Singapore, as well as Trade and Technology Councils with the United States and India have contributed to promoting the European Union's values in the context of the digital transformation internationally.

EU member states are expected to publish national roadmaps setting out the actions they intend to take to reach the relevant objectives and targets toward which insufficient progress has been made so far. The Commission will publish annual reports taking stock of the progress on the digital transformation in the coming years.

ENVIRONMENTAL AFFAIRS

CBAM: Transitional Phase Starts to Apply

On 1 October 2023, the transitional phase for the Carbon Border Adjustment Mechanism (CBAM) started to apply. This stage, mainly finalized at gathering data, will remain applicable until 31 December 2025: importers and producers of specific goods, including cement, iron and steel, aluminum, fertilizers, electricity, and hydrogen, will have to report on the volume of their imports and greenhouse gas emissions embedded during their production.

The implementing regulation, adopted by the Commission on 17 August 2023, outlines the reporting framework for the transitional period. Declarants are required to provide detailed information such as quantity, embedded emissions, country of origin, and production of specifics of goods imported in the European Union. The implementing regulation includes guidelines for emission calculations, reporting formats, and penalties, emphasizing the importance of prompt and accurate reporting to avoid financial sanctions.

The reporting requirements will apply to businesses both within and outside the European Union, necessitating a comprehensive approach across their supply chain. Declarants must engage with supply chain partners and non-EU installation operators to collect relevant data. The calculation of embedded emissions will be possible through

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various methods until the end of 2024, including default values published by the Commission or estimations provided by operators.

The CBAM transitional registry, managed by the Commission, serves as the central database for reporting during this phase. It facilitates information exchange among EU member states and allows declarants to rectify incomplete or incorrect reporting. Confidential information marked as such will be treated with professional secrecy, while penalties for noncompliance range from €10 to €50 per ton of unreported emissions.

Relevant importers and suppliers will need to act swiftly to meet the reporting deadline of 31 January 2024. To support implementation, the Commission has released supplementary guidance and is organizing informative events. As the CBAM transitional phase unfolds, stakeholders are encouraged to adhere to the regulations and make use of available resources to ensure a smooth transition into the new framework.

FOREIGN DIRECT INVESTMENT

The European Commission Publishes its Third Annual Report on FDI Screening

On 19 October, the Commission published its Third Annual Report on the screening of Foreign Direct Investments (FDI) into the European Union. Since October 2020, the EU FDI Screening Regulation has been fully operational. The Commission is currently evaluating the EU FDI Screening Regulation, with an aim to publish a proposal for its revision by the end of 2023.

In its Third Annual Report, the Commission relayed, notably, that the number of EU member states having implemented a screening mechanism has almost doubled, increasing from 11 to 21 since the entry into force of the EU FDI Screening Regulation. Moreover, future additions to this list are expected.

EU member states with FDI screening mechanisms are obliged to notify any foreign investments to the Commission and all other EU member states that are undergoing screening. The Commission's role is to evaluate these investments, and if any concerns arise, they are shared with the notifying EU member state for consideration before approval.

The Third Annual Report provided several insights on transactions that were notified to the Commission by EU member states under the EU FDI Screening Regulation. First, the Commission normally completed assessment of FDI transactions within 15 days, with 87% of notified transactions assessed within this time period. Additionally, less than 3% of the over 420 notified cases screened in 2022 led the Commission to designate an opinion. Finally, it is notable that the Third Annual Report found that the major contributors of FDI into the European Union in 2022 were the United States, United Kingdom, China, Japan, the Cayman Islands, and Canada. Predominantly, the investments were directed toward manufacturing sectors like energy, aerospace, defense, health, data processing, communication, and more.

Finally, it should be noted that 560 requests for exports of dual-use goods—items usable for both civil and military purposes that, when part of the portfolio of a target, can trigger FDI review—were also declined by EU member states during this period.

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OTHER EU NEWS

Recommendation on Critical Technology Areas for the European Union's Economic Security

On 3 October, as a follow up to the Joint Communication on a European Economic Security Strategy, the Commission adopted a recommendation on critical technology areas for the European Union's economic security for further risk assessment with EU member states (Recommendation).

The Recommendation identifies four technology areas considered highly likely to present the most sensitive and immediate risks related to technology security and technology leakage:

- Advanced semiconductors (microelectronics, photonics, high-frequency chips, semiconductor manufacturing equipment);
- Artificial intelligence (high-performance computing, cloud and edge computing, data analytics, computer vision, language processing, object recognition);
- Quantum (quantum computing, quantum cryptography, quantum communications, quantum sensing and radar); and
- Biotechnologies (techniques of genetic modification, new genomic techniques, gene-drive, synthetic biology).

These technology areas were selected based on their potentially transformative nature, their relevance for both the civil and military sectors, and the risk the technology could be used in violation of human rights.

The Commission recommends that EU member states conduct collective risk assessments of these four areas by the end of 2023. The Recommendation includes some guiding principles to structure the collective risk assessments, including consultation of the private sector and protection of confidentiality. The collective assessment of the level and nature of the risks will then serve as the basis for a further discussion on the need for any precise and proportionate measures to promote, partner, or protect on any of the technology areas.

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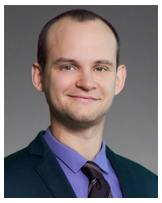
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