BRUSSELS REGULATORY BRIEF: DECEMBER

Date: December 2017

European Regulatory / UK Regulatory Newsletter

By: Philip Torbøl, Francesco Carloni, Giovanni Campi, Alessandro Di Mario, Ignasi Guardans

ANTITRUST AND COMPETITION

European Commission's "hybrid" cartel settlement decision attracts criticism from the EU General Court

On 10 November 2017, the European Union ("EU") General Court ("GC") rendered a judgment partially annulling the European Commission's ("Commission") decision fining a broker for its involvement in the Libor Yen interest rate derivatives cartel. The decision is interesting as it suggests that the Commission needs to carefully consider the defense rights of the companies that refuse to settle in cartel investigations when other companies decide to settle (i.e., the "hybrid" settlement procedure).

The cartel settlement procedure was introduced by the Commission in 2008. It allows for a speedier process and a reduction of the fine. In exchange of acknowledging their involvement in the cartel and their liability for the infringement, companies can benefit from a 10% fine reduction. However, when one or more parties refuse to settle, the Commission continues to investigate the parties that decided not to participate in the settlement.

Back in 2013, the Commission settled the case with most of the companies involved in the Libor Yen interest rate derivatives cartel and imposed fines totaling approximately EUR 670 million. The broker, however, decided not to participate in the settlement. Subsequently, in 2015 the Commission fined it approximately EUR 15 million for having facilitated six out of seven cartels.

Even though the broker was fined after it decided not to participate in the settlement procedure, it scored a partial victory in its action for annulment of the Commission's decision before the GC. The GC found the Commission did not succeed in proving the broker's involvement in one of the bilateral cartels. It also found fault with the Commission's determination of the duration of the broker's involvement in some of the infringements. Finally, it annulled in its entirety the part of the decision relating to the fines imposed as the Commission's reasoning was found to be insufficient.

Additionally, the GC also stressed the importance of respecting the presumption of innocence of a party which decides not to settle in the framework of a "hybrid" settlement procedure.

Companies should factor in their transaction timeline the risk of "stop-the-clock" when filing to the Commission

Under the EU merger control regime, transactions which meet the EU turnover thresholds must be notified to the

©2005-2021 K&L Gates LLP. All Rights Reserved.

Commission for review before they can be implemented.
The review procedure is organized in two phases, each with set time limits. During phase I, the Commission has 25 working days for the review of the transaction. If commitments (i.e., modifications of a transaction, aiming at eliminating the competition concerns identified by the Commission) are offered in phase I, the deadline is extended by additional 10 working days.

If it decides to open a phase II investigation in order to conduct a more in-depth analysis, the Commission has 90 working days to make its assessment. This deadline can be extended if commitments are offered or at the request of the notifying party or the Commission up to 125 working days.

The timing of review of a transaction can be impacted by a so-called "stop-the-clock". For instance, if the Commission has requested information from the parties or if the filing is incomplete, it can stop the clock until the information is provided or until the filing is declared complete. This results in pushing back any initially set deadline for the Commission to decide on a deal.

The Commission has made use of this tool in a growing number of cases in the recent months, which were not hostile takeovers. For example, it suspended its review of a merger between a lens manufacturer and a frame maker after it decided to start an in-depth review of the transaction. It has suspended twice so far the review of an acquisition by a German chemical and pharmaceutical company of a US-based agrochemical company. It has also stopped the clock two times concerning a takeover by a US chipmaker of a Dutch semiconductor supplier.

Stopping the clock for the review of a transaction may be more common in more complex cases which require more extensive analysis and information gathering by the Commission. In these circumstances protracted pre-notification discussions could facilitate the review process. However, this increased recourse by the Commission to the "stop-the-clock", including in non-hostile transactions, poses significant risks to companies. This should be factored in when agreeing the timing for closing of a transaction. It remains to be seen whether this trend may further impact non-contentious cases as well.

INTERNATIONAL TRADE

The EU Parliament approved new antidumping methodology

On 4 December 2017, the Council of the European Union ("Council of the EU") approved a new Regulation amending the current EU antidumping and anti-subsidy rules (Regulation (EU) 2016/1036 and Regulation (EU) 2016/1037 respectively), after the European Parliament ("Parliament") approved the new rules on 15 November this year. The new Regulation was a response to the expiry of parts of China's WTO accession protocol in December 2016. The adoption of these measures was provoked by unfair trade practices from third countries consisting in an export flood to the EU of products at or below cost price. The new legislation aims to preserve the European industry and to prevent the loss of hundred of thousands of jobs in the EU.

The new legislation introduces a new methodology for determining dumping margins for imports from third countries. Currently, the Commission bases its approach on a distinction between market economies and non-market economies. The new rules provide for an assessment based on the distinction between WTO members and non-WTO members. This new approach applies to situations where the imported items reach a price

©2005-2021 K&L Gates LLP. All Rights Reserved.

substantially different from the price that would be achieved under conditions of competition. The new rules also refer to cases of considerable state interference in economy (e.g. in cases of state-owned or state-controlled companies). The Commission will continue to apply its current method with regard to non-WTO countries.

Under the new Regulation the Commission shall publish reports on specific situations in certain countries based on these criteria. The Regulation provides further that the Commission must prove the existence of dumping or other unfair practices.

The Commission will further consider other aspects, such as the exporting country's compliance with international labor, fiscal and environmental international standards and potential discriminatory measures against foreign investments.

The new framework would only apply to antidumping investigations initiated upon entry into force of the amended provisions. Ongoing antidumping investigations fall under the scope of the current antidumping Regulation.

The text of the Regulation will be signed in Strasbourg by the Presidents and the Secretaries-General of the Parliament and the Council of the EU on 13 December 2017. The Regulation will be published in the Official Journal of the European Union on 19 December 2017 and will enter into force on the next day.

ENERGY AND RENEWABLES

The Commission's Third Report on the state of the Energy Union

The Commission's Third Report on the State of the European Energy Union was published on 24 November 2017. The report reflects EU's progress regarding the implementation of the Energy Union project and its impact on jobs, growth and investments in 2017. The report also points to tendencies in the coming year.

The Commission pointed to Europe's progressive transition from a fossil fuels-based energy system to a low-carbon, fully digital and consumer centric one. The report highlights that this main trend, observed during the past years, has continued and has strengthened in some areas.

The Commission reported the share of renewable energy in the EU energy mix continues to rise and is likely to reach the 20% target by 2020 (under the so called “Europe 2020 Strategy”, the EU Member States (“MS”) have to reduce emissions greenhouse gas emissions by at least 20% compared to 1990 levels, increase the share of renewable energy in final energy consumption by 20% and increase efficient energy use by 20%). The Commission concluded that MS' Gross Domestic Product has increased while greenhouse gas emissions have been reduced. The Commission underlined that this process has been facilitated by innovation in the energy sector.

The Commission report confirms that energy transition cannot be achieved without adapting existing infrastructure to the needs of future energy systems. The report highlights that infrastructures used in the fields of energy, transport and telecommunications, are increasingly interconnected. The Commission advised project promoters applying for financial support to create synergies between infrastructures in these three fields and to develop the next generation of smart infrastructure while optimizing the use of existing links. The Commission reminded that increasing digitalization of infrastructure provides for smart grid management.

©2005-2021 K&L Gates LLP. All Rights Reserved.

The report suggests that local networks will be of key importance for EU citizens as they would increasingly switch to decentralized energy production (electrical generation and storage performed by a variety of small, grid-connected devices located close to the load they serve) and electro-mobility (usually defined as a road transport system based on vehicles that are propelled of electricity).

The report makes reference to the correlation between energy poverty (i.e. lack of access to modern energy services) and energy efficiency (a concept that traditionally suggests reducing the amount of energy required to provide products and services). In fact, high energy consumption due to low energy efficiency increases energy costs. Therefore, energy efficiency can substantially improve a household's ability to afford the required energy services, particularly if incomes are low. The Commission reminded that energy poverty in the EU affects nearly 50 million people and stressed that this issue should be addressed through higher energy efficiency, safeguards against disconnection and monitoring by MS.

The Commission emphasized that the completion of the European Energy Union requires close cooperation between the Commission, MS and society. The EU's main executive body insisted that MS need to finalize their agendas on energy policy and climate protection for the post-2020 period by early 2018.

With reference to the United States' withdrawal from the Paris Agreement, the Commission announced that the EU should affirm its commitment to fight against climate change and to strengthen global partnerships to this purpose.

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

The Parliament approves limited reform measures on online TV and radio across borders

On 21 November the Parliament's Committee on Legal Affairs adopted its report on the proposed Regulation laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes.

The legislative proposal was presented by the Commission in September 2016 with the intention of extending to the online environment the “country of origin” principle, a well tested rule of the cable & satellite copyright framework. In short, the text sought to apply the principle of country of origin for ancillary online services of broadcasting organizations (“catch up” TV); as a result, copyright relevant acts will be considered as taking place solely in the member state where the broadcasting organization is established. Moreover, it aims at easing the clearance of rights for retransmission services by introducing rules on mandatory collective management. Overall, the final objective of the Commission is to tackle the ancillary online services “geo-blocking” in order to make available more audio-visual copyrighted content across member states. But by doing so, many considered it was putting at serious risk the whole business model behind online audio-visual distribution, in particular but not only in the case of cinema.

The rapporteur (the Member of the Parliament in charge of drafting the report) intended to apply the country of origin principle to most audio-visual content, with the exception of sport events, purchased cinematographic works

©2005-2021 K&L Gates LLP. All Rights Reserved.

and co-productions. But after passionate debates, the center and right-wing political groups carried a wide number of alternative compromise amendments which considerably reduce the scope of the proposal.

First and foremost, the Parliament's proposal now limits the application of the principle of country of origin to just news and current affairs programs, excluding therefore movies, TV programs and other audio-visual content. On the other side, it confirms the Commission approach requiring the holders of copyright to deal with licenses only through collective management organizations.

Finally, the report also clarifies the copyright régime for “direct injection”, that is, the mechanism which allows broadcasters to directly transmit audio-visual content to retransmission networks in such a way that the signal cannot be received by the public during such transmission and distributors can offer the content to the public simultaneously.

This Parliament proposal will now be the object of tough negotiations with the Council of the EU.

ECONOMIC AND FINANCIAL AFFAIRS

EU supervisor warns about risks of ICOs and calls for regulatory compliance

Following the rapidly increasing use of Initial Coin Offerings (“ICOs”), the European Securities and Markets Authority (“ESMA”) issued two statements to warn investors on ICOs' risks and to encourage companies involved in ICOs to comply with the relevant European legislation.

ESMA defines an ICO as “an innovative way of raising money from the public, using coins or tokens”. In an online ICO campaign, businesses issue tokens and sell them in exchange for traditional, or more often, virtual currencies like Bitcoin or Ether. The tokens are created and disseminated using distributed ledger or blockchain technology (“DLT”).

Following a similar warning by the U.S. Securities and Exchange Commission (“SEC”), ESMA alerts investors that ICOs might not be captured by the EU regulatory framework and may be used for illicit purposes, including money laundering and fraud. Describing ICOs as extremely risky and speculative instruments, ESMA warns about the possibility of a total loss of invested capital and inability to redeem the tokens, as well as the lack of exit options.

ESMA also cautions investors that ICOs' underlying blockchain technology might be subject to hacking or malfunction.

In the second statement, ESMA stresses that firms using ICOs have to comply with the EU regulatory framework. More specifically, where tokens qualify as financial instruments and/or transferable securities, firms are likely to be conducting a regulated activity. ESMA thus calls for compliance with relevant EU law.

The Commission seeks views on sustainable finance

In September 2016, the Commission set up a High-Level Expert Group on Sustainable Finance (“HLEG”) with the objective to prepare a roadmap on ways to mobilize capital towards sustainable investment.

©2005-2021 K&L Gates LLP. All Rights Reserved.

In its interim report of July 2017, the HLEG recommended, among other measures, that the Commission should better clarify the fiduciary duty of asset managers and institutional investors. The HLEG suggested that the duty explicitly integrates sustainability considerations i.e. environmental, social and governance (“ESG”) factors.

The Commission has launched a public consultation seeking stakeholders' views on how asset managers and institutional investors could include ESG factors in their decisions. It will help to gather and analyze the necessary evidence for the possible policy actions.

The Commission also published an Inception Impact Assessment setting out identified policy options on this issue.

The Commission will consider imposing disclosure rules to document how institutional investors and asset managers are taking into account sustainability factors, and explore ways to enhance the consideration of ESG factors in the investment strategy and asset allocation. Furthermore, it will also analyze the consideration of sustainability risks as part of the risk management processes and look at ways to ensure appropriate decision-making capabilities in the governance arrangements.

As regards forthcoming actions, the Commission explains that the objectives can be achieved either by a non-legislative action, through guidelines clarifying the existing duties, or through a legislative action, by reviewing the existing provisions of the relevant EU legislation governing institutional investors and asset managers.

Stakeholders are invited to express their views by 22 January 2018 here. The final recommendations by the HLEG are expected in January 2018 and will feed into the Commission Impact Assessment. The Commission plans to publish an Action Plan in the first quarter of 2018.

KEY CONTACTS

PHILIP TORBØL
PARTNER

BRUSSELS
+32.(0)2.336.1903
PHILIP.TORBOL@KLGATES.COM

FRANCESCO CARLONI
PARTNER

BRUSSELS, MILAN
+32.(0)2.336.1908
FRANCESCO.CARLONI@KLGATES.COM

GIOVANNI CAMPI
GOVERNMENT AFFAIRS ADVISOR

BRUSSELS
+32.(0)2.336.1910
GIOVANNI.CAMPI@KLGATES.COM

ALESSANDRO DI MARIO
SENIOR ASSOCIATE

BRUSSELS, MILAN
+32.(0)2.336.1938
ALESSANDRO.DIMARIO@KLGATES.COM

©2005-2021 K&L Gates LLP. All Rights Reserved.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2021 K&L Gates LLP. All Rights Reserved.