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ANTITRUST AND COMPETITION

Record fine imposed by the European Commission for a cartel of truck producers

The European Commission ("**Commission**") has recently imposed a record fine of EUR 2.93 billion on some of the largest truck producers for their involvement in a cartel lasting 14 years and covering the entire European Economic Area.

The Commission found that the cartel concerned the market for the manufacturing of medium and heavy trucks. The sanctioned conduct was related to coordination of "gross list" price increases, the timing for the introduction of emission technologies and the passing on to consumers of the costs for these technologies. The cartel was initially organized through meetings of senior managers and phone conversations and later on through the companies' German subsidiaries, with competitively sensitive information exchanged by email.

The cartel came to light thanks to the leniency program pursuant to which immunity from fines is given to the first company that reveals the existence of the illicit agreement. The leniency program is by far the most successful enforcement tool that the Commission has to uncover secret cartels. Three other companies received a reduction of their fines because they cooperated with the Commission during its investigation. An additional fine reduction of 10% was applied because the cartelists agreed to enter into the settlement procedure. This procedure – introduced in 2008 – allows the Commission to adopt a faster decision in exchange of an additional fine reduction if the parties acknowledge their participation in the cartel as well as their liability.

The formal proceedings continue with regard to another truck producer which did not agree to take part in the settlement procedure.

In cases of infringements of competition law, such as cartels, individuals or companies who have suffered harm – e.g. because they paid a higher price for the products due to the cartel implementaion – can usually seek compensation before national courts. In the present case, it appears that damages actions have already been filed in certain European Union ("**EU**") Member States and others are expected to follow at the time when the EU Directive on Antitrust Damages is in the process of being transposed at the national level. This Directive is expected to boost private enforcement in the EU by enabling cartel victims to bring antitrust damages claims more easily.

EU merger control under review

The Commission has recently published a roadmap for the evaluation of procedural and jurisdictional aspects of

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the EU merger control regime ("**EUMR**") which could trigger significant changes. Under the EUMR, the Commission examines larger mergers with an EU dimension, meaning that the merging firms reach certain turnover thresholds.

Mergers that do not fall within the scope of the EUMR are reviewed by national competition authorities if they satisfy the relevant merger filing thresholds. The national thresholds are generally based on the level of sales of the merging parties in a given country though certain Member States (e.g. Spain, Portugal, the UK) also rely on the merging parties' market shares to assert jurisdiction over a transaction.

The Commission's evaluation of the EUMR follows the 2014 discussions on a possible reform of the EU merger control rules which contemplated the review by the Commission of acquisitions of non-controlling minority shareholdings in certain circumstances. However, this proposal attracted widespread criticism and, based on a number of declarations by senior officials of the Commission, will no longer be pursued.

According to the new roadmap, the Commission will assess whether the current notification thresholds based on turnover allow to effectively review all transactions having an impact in the EU, with reference in particular to the digital economy, and whether it is necessary to take into account the value of the transaction. At present, the Commission can only review transactions that result in an acquisition of control and meet the EU turnover thresholds.

Additional aspects under review will concern the referral system between the Commission and the national competition authorities, the treatment of certain categories of generally unproblematic cases and certain technical aspects, in view of possible further improvements or simplification.

The Commission is planning to launch a 12-week public consultation and at the same time to carry out interviews and discussions with selected stakeholder groups. Under its provisional planning, the Commission expects to publish the responses to the public consultation in the first quarter of 2017 and a Staff Working Document in the second half of 2017.

The evaluation at the EU level comes at a time when similar debates are taking place in certain EU Member States. For instance, in Germany a reform proposal has recently been put forward to ensure that the German merger control notification thresholds take into account the value of a transaction. The objective of this proposal is to enable the *Bundeskartellamt* to assert jurisdiction over takeovers of innovative startups by established companies which might escape review under the existing turnover-based rules.

Although there is no direct relationship with the EU's proposed review of its merger control rules, it is interesting to note that similar discussions are taking place in other major jurisdictions such as China where MOFCOM (the Ministry of Commerce of the Government of China which is responsible for the enforcement of merger control rules) has the discretionary power to review non-reportable transactions falling short of the Chinese turnover thresholds but that produce significant anti-competitive effects in China. While MOFCOM has not yet provided a clear guidance about the circumstances that may trigger its intervention, in September of this year MOFCOM announced it had decided to open an investigation into the combination of China's top two ride-sharing services even if that transaction was not initially notified. This investigation is also expected to provide further clarification on how to calculate a platform provider's turnover for merger control purposes.

INTERNATIONAL TRADE, CUSTOMS AND EXTERNAL RELATIONS

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WTO ruling in Airbus case

Since 2004, the EU and the United States ("**U.S.**") have been in legal battle over subsidies to large commercial aircraft builders. International trade rules provide that state aid for manufacturing is illegal if it can be proven to harm another World Trade Organisation ("**WTO**") member state's companies or industries.

On 22 September 2016, the WTO has given its most recent ruling in the on-going dispute. In a 2011 ruling, the WTO gave the EU specific instructions to withdraw state aid for a European aircraft builder, including subsidy programs that EU member states claimed were "launch aid" to help the company bring its products to the market. The WTO now ruled that the EU ignored the 2011 instructions, causing a "genuine and substantial" loss of sales for its U.S. rival. It further found that the EU company received new illegal subsidies of around USD 5 billion for its newest passenger jet.

The EU has downplayed the ruling, claiming that there are certain findings of the panel unsatisfactory and stressing their right to appeal. It also reminded of two other WTO rulings that are expected soon, regarding U.S. subsidies.

TTIP and CETA - the controversial trade agreements

Both the Transatlantic Trade and Investment Partnership ("**TTIP**") - a trade deal between the EU and the U.S. - and the Comprehensive Economic and Trade Agreement ("**CETA**") - a trade deal between the EU and Canada - have been under pressure for some time now.

The TTIP negotiations have become increasingly difficult since Greenpeace leaked confidential documents of the free trade deal early May 2016, claiming such a deal would undermine EU standards on health, labour, consumer protection and the environment. A wave of protest has taken place across the continent since then. As a result, some EU countries have called for a suspension of the negotiations, and even suggested to relaunch the negotiations with greater transparency, clearer goals and under a different name. Also, the Commission and EU ministers agreed that it is unrealistic to complete the negotiations before the Obama presidency leaves office - a deadline officials on both sides of the Atlantic had previously set. Another round of negotiations is about to take place during the first week of October, and negotiations will continue to take place until 19 January 2016, but will take a "natural pause" when the Obama administration leaves the White House. It is unclear (if and) when negotiations will restart under the new U.S. President.

CETA, on the other hand, seems to be reaching the finish line, as the German leader of the Social Democrats recently overcame left-wing resistance to the deal within his party, thus enabling EU member states to approve the CETA in October. If they do so, EU ministers will sign the accord in late October during the Canadian Prime Minister's visit to Brussels.

ECONOMIC AND FINANCIAL AFFAIRS

Corporate taxation stays high on European agenda

The most significant development in the sphere of EU tax policy over the past months was the Commission's ruling in the Apple state aid case published on 30 August. Using its competencies in the field of competition

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policy, the Commission decided that the tax treatment granted by Ireland to the American multinational was in violation of EU state-aid rules and ordered the Irish government to recover EUR 13 billion in unpaid taxes.

The ruling spurred a large number of polarized reactions, with members of the European Parliament applauding and American governmental and political figures (including U.S. Treasury Secretary Jacob Lew) strongly criticizing the measure. Even within Ireland, some government officials defended Apple's tax treatment and said they would appeal the ruling, while others supported the actions of the EU. The sheer size of the illegal state aid to be recovered and the politicisation of the case will help keep corporate taxation at the top of the EU and the US agenda in the autumn. The upcoming Commission proposal on the common consolidated corporate tax base (CCCTB) and discussions in the European Parliament on public country-by-country reporting (CbCR) of large multinationals will further contribute in this regard.

Finally, corporate taxation issues will also be directly influenced by the work of the European Parliament Committee on money laundering, tax avoidance and tax evasion, which was established in the wake of the Panama Papers scandal. Its four regular meetings planned before the end of the year, the first one of them being a hearing with the journalists who revealed the Panama Papers, are set to attract considerable attention.

Brexit reinvigorates work on Capital Markets Union

After Brexit, there was a widespread fear that the departure of the EU's largest financial market might negatively affect the EU's Capital Markets Union ("**CMU**") project - a set of legislative and non-legislative measures planned over a four year horizon that aims to deepen, strengthen and more closely integrate the EU's capital market. However, following statements by Commission Vice-President Dombrovskis that the current situation makes the CMU "more urgent than ever", the pace of work on the flagship initiative of the Juncker Commission is set to pick up in the coming period.

On 14 September, the Commission published a Communication on accelerating the CMU, which outlined the upcoming initiatives and called upon the EU co-legislators to step up the implementation of the CMU. A day later, the European Parliament adopted its negotiating stance on the Prospectus regulation. Trilogue negotiations are set to start in the coming weeks and an agreement is expected before the end of the year. Work on the proposals amending the European Venture Capital and European Social Entrepreneurship Funds regulations is also getting underway.

The drive towards CMU implementation will become even more apparent in the autumn, with two new proposals on business insolvency and the debt-to-equity tax bias set to be published alongside a review of the EU's capital requirement rules.

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