BRUSSELS REGULATORY BRIEF: JULY

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INTRODUCTION

On 23 June, the UK voted to leave the EU. To fully prepare clients for the legal and business implications now that Britain has decided to exit from the EU, K&L Gates has launched a global client support initiative—a dedicated team of multidisciplinary lawyers, a 24-hour hotline reachable by emailing Brexit@klgates.com, and a series of briefings by topics and sectors. K&L Gates updates and analyses concerning the Brexit are available here.

On 12 July, the EU-U.S. Privacy Shield was signed, providing a new legal framework for Transatlantic Data Transfers. An in-depth analysis on such important development is available here.

This Regulatory Brief is dedicated to other recent developments at the EU level which also deserve to be analysed.

ANTITRUST AND COMPETITION

European Commission publishes its Notice on the Notion of State Aid

On 19 May 2016, the European Commission ('Commission') completed its State Aid Modernization initiative, launched in 2012, publishing the final element: a Notice on the Notion of State Aid ('Notice').

The Notice clarifies key concepts of the definition of State aid by explaining the Commission's view on how and when State aid applies and by summarizing the case law of the European Union ('EU') Courts. The aim of the Notice is to provide legal certainty through specific guidance, on whether public spending falls within the scope of EU State aid control. This guidance is also expected to decrease the administrative burden of public authorities and companies by helping them to assess whether public support measures qualify as State aid.

The Notice mainly intends to facilitate public investment in the EU, by allowing Member States and companies to work out ways of introducing public funding without distorting competition in the Single Market or forcing out private investment.

CJEU Sends a Reminder to Parent Companies as regards the Imposition of Liability for their Subsidiaries' Involvement in a Cartel

In a recent case decided on 16 June 2016, the Court of Justice of the EU ('CJEU') relied on the notion of parental liability in order to hold the parent companies liable for the conduct of their subsidiaries even if the parents did not

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participate in the cartel. It is sufficient to find liability where the parent company is able to exercise decisive influence over the subsidiaries at the time of the infringement.

The CJEU rejected the parent companies' arguments contesting their respective parental liability. It found that the mere fact that a subsidiary did not comply with the parent company's order not to enter any anticompetitive agreement is "not sufficient to establish the absence of actual exercise of decisive influence".

Under EU competition law, where a parent company holds (almost) all of the capital in a subsidiary, there is a rebuttable presumption that the parent exercises decisive influence over its subsidiary (so-called "100 per cent presumption") and is therefore held to be liable for the acts of that subsidiary. The judgment reaffirms how in practice it is extremely difficult for the parent company to rebut the presumption of decisive influence once it is established. On that basis, a parent company will be held jointly and severally liable for the anticompetitive conduct of its subsidiary.

Whilst compliance programmes do not allow companies to escape liability for their subsidiaries' behavior, such programmes play an important role in mitigating the antitrust risk.

INTERNATIONAL TRADE

EU renews its Sanctions against Russia

As of March 2014, the EU had increasingly imposed sanctions on Russia in connection with the annexation of Crimea and destabilisation of Ukraine.

These sanctions include different kinds of measures. First, diplomatic measures were taken, such as expelling Russia from the G8 governmental political forum by holding G7 meetings instead. Secondly, restrictive measures were imposed, where asset freezes and visa bans were applied to specific persons and entities supporting actions that undermined or threatened Ukraine's sovereignty, territorial integrity and independence. Thirdly, the EU introduced a non-recognition policy of the annexation of Crimea and Sevastopol, which included restrictions on economic exchanges with the territory. Fourthly, the EU implemented economic sanctions affecting sectoral cooperation and exchanges with Russia. Lastly, the EU took measures concerning economic cooperation under which the European Investment Bank ('EIB') was asked to suspend the signature of new financing operations in Russia under which the implementation of EU-Russia cooperation programmes was suspended.

In response, Russia took countermeasures against the EU and its Member States, which significantly impacted European economies. These countermeasures mainly constituted of an import ban of several categories of agricultural products, such as fresh fruit and vegetables, meat, dairy products and various other foods.

The restrictive measures (i.e. asset freezes and visa bans) are due to expire on 15 September 2016. The EU has recently renewed its restrictions regarding Crimea and Sevastopol until 23 June 2017. The economic sectoral sanctions expired on 31 July 2016. That being said, the Council of the EU ('Council') recently decided to extend these sanctions by another six months, until the 31 January 2017. This decision was taken at a time the EU's united front on Russia was being challenged: Italy, Hungary and Greece raised concerns about extending sanctions against Russia, stressing Russia's importance as a trade partner, energy supplier and key player in efforts to end the war in Syria.

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Moreover, a group of 12 members of the European Parliament ('MEPs') - from France, Germany, Malta, Slovenia, and Italy - published an open letter calling for sanctions against Russia to be re-evaluated. They argued that EU sanctions against Russia must be lifted in order to fight terrorism more effectively: the EU has imposed visa bans on personalities of the Russian intelligence, thus jeopardising security cooperation between Russia and the EU. The MEPs further maintained that Russia, because of its strategic position in Syria, has access to critical information on the positions and intentions of Isis, which the EU would be wrong to turn away from. They therefore called upon the EU to no longer let the geo-economic war stand in the way of the fight against terrorism.

There are growing expectations that EU sanctions against Russia will be lifted in 2017 - especially in light of the UK voting for an exit from the EU, as the UK has been one of the strongest voices for sanctions.

PRIVACY, DATA PROTECTION AND INFORMATION MANAGEMENT

Trade secrets: Directive adopted

On 27 May the Council adopted a Directive to protect undisclosed know-how and business information ('trade secrets') against their unlawful acquisition, use and disclosure, which was proposed by the Commission in November 2013. The decision of the Council endorses an agreement reached with the European Parliament ('Parliament') on 15 December 2015. From the publication of the Directive in the Official Journal (occurred on 15 June 2016) Member States will have a maximum of two years to implement it.

The draft Directive aims to harmonize national laws by establishing a common legal definition of trade secrets in accordance with current international standards.

It also outlines the relevant practices of misappropriation and maintains that "reverse engineering and parallel innovation" will be ensured, considering that trade secrets do not constitute a form of exclusive intellectual property rights.

Furthermore, the Commission proposed a harmonised regime of civil measures in order to protect and compensate the victims of trade secrets' misappropriation.

The Directive only covers unlawful conduct aiming at acquiring or disclosing, without authorization and through illicit means, information having a commercial value that attributes to companies a competitive advantage over their contenders in the market. Whether or not the illegal conduct occurs, the disclosure or acquisition of the trade secret is out of the scope of the Directive.

In order to preserve the right to information and the freedom of expression as guaranteed by the Charter of Fundamental rights of the European Union, a specific safeguard has been foreseen in the Directive in the case the trade secret, divulgated for the sake of public interest, was acquired by, or transmitted to the press, trough the use of illicit means.

The strong interest of the business community towards the issue is also demonstrated by the fact that in parallel to the EU Directive, the American legislature passed the Defend Trade Secrets Act of 2016 ('DTSA') last April, then signed by President Obama in May.

E-Commerce: Directive proposals for the supply of digital content and for the online and other distance sales of goods

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On 14 July the Committee on the Internal Market and Consumer Protection and the Committee on Legal Affairs held a joint committee meeting during which a Working Document was presented on the Directive on certain aspects concerning contracts for the supply of digital content and on the Directive on certain aspects concerning contracts for the online and other distance sales of goods. The document clarifies the key principles on which the Co-Rapporteurs will work. These proposals constitute the pillars of cross-border e-Commerce. They intend to deal with the main hindrances to cross-border e-Commerce in the European Union, namely the legal fragmentation affecting consumer contract law and the consumer reluctance when it comes to online purchases from another Member State.

To address these challenges the draft Directives propose the full harmonisation of the main rights and obligations of the parties to a contract for the online and other distance sale of goods and the supply of digital content.

On the one hand, consumers will enjoy higher protection when they access digital content and buy goods online. In fact, the draft Directives recognize supplier's liability for defects and reverse the burden of proof, weighing it on the supplier, in case of defective content.

On the other hand, these Directives will allow businesses to supply digital content and sell goods online across the EU, based on the same contract rules. This harmonization will cut the costs of adaptation to the contract rules of each Member State where businesses wish to sell, helping small and medium enterprises to build their customers-portfolio beyond national borders.

Shortly after the Directive's presentation, some MEPs expressed their concerns about the overlap between the rules for offline and online sales of goods, especially regarding the distinction of digital content and physical goods. Next week the responsible parliamentary Committee will discuss both proposals whose reports should have been discussed by September, while the plenary vote will only take place in 2017.

In relation to the Council, rumours emerged about its position, which could severely refer negotiations behind schedule. It seems, in fact, that some Member State want to delay the vote on the proposal on the sale of goods until the Commission presents the re-evaluation of six consumer laws, while other countries estimate that the proposal on the supply of digital content is too consumer-friendly and does not provide satisfactory safeguards for digital start-ups. This means that it will be responsibility of the Slovak Presidency of the Council to propose an earlier compromise.

ECONOMIC AND FINANCIAL AFFAIRS

Money Market Funds regulation moves at last

On 17 June 2016, the Council revived the Money Market Funds ('MMF') regulation by finally agreeing on its negotiating stance. The European Parliament, having adopted its position already in May 2015, has been waiting for discussion to progress in the Council for more than a year. Now the MMF regulation has moved to the trilogues (negotiations between Council, Parliament and Commission), which represent the last hurdle to overcome before its final adoption. However, it is still unclear how the results of the British referendum on EU membership will impact developments on the file, in particular as the European Parliament Rapporteur for it is Neena Gill, a British MEP.

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Recent developments in the field of anti-tax avoidance

Reflecting the prominent position of corporate taxation issues on the European political and regulatory agenda, the Council adopted the Anti-Tax Avoidance Directive ('ATAD') on 12 July 2016. The legislation incorporates some of the measures put forward by the OECD Base Erosion and Profit Shifting ('BEPS') project into European law, namely controlled foreign company ('CFC') rules, rules on hybrid mismatches and interest limitation rules. In addition, the final text goes beyond the scope of BEPS by including a general anti-abuse rule ('GAAR') and Exit taxation rules. Transposition into national law is expected by 31 December 2018.

In the European Parliament plenary, the final report of the TAXE2 committee dealing with tax avoidance was adopted on 6 July 2016. Although the committee has now ceased its activities, tax avoidance did not fall off the political agenda: A new committee of inquiry into money laundering, tax avoidance and tax evasion related to the Panama papers scandal was established on 8 June 2016 as the Commission released a new package of measures aimed at improving tax transparency, including new rules on access to anti-money laundering information by tax authorities under the Directive for Administrative Cooperation in Taxation, on 5 July.

Ongoing work on the Capital Markets Union

Work is progressing on several CMU files. On the Prospectus Directive, the Council reached a general agreement on 17 June 2016 and the Parliament adopted its committee report on 13 July. The report is expected to be approved in plenary in September, after which trilogues are expected to start. Work on the Securitization Regulation is also moving forward, albeit at a slower pace, with ECON committee discussions in the Parliament still ongoing with a strong focus on issues like the retention ratio for securitized products and third country securitisations. The Council has already agreed its negotiating stance on the regulation in December 2015. A new legislative proposal, revising the European Venture Capital Fund ('EuVECA') and European Social Entrepreneurship Fund ('EuSEF') Regulations was published on 14 July.

In terms of consultations, the Call for evidence on the EU regulatory framework for financial services concluded with a summary report published on 17 May 2016. The Commission states that it wants to learn lessons from the evidence provided and that its aim is not to put into question the regulatory changes enacted after the crisis, but to ensure their consistency and effectiveness. A public consultation on barriers to cross-borders distribution of investment funds was launched on 2 June 2016 and will stay open until 20 September 2016. Another CMU consultation, this time on a possible cross-border personal pension product, will be launched in the coming period, with the responses feeding into the Commission proposal expected by the end of the year.

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