

# BRUSSELS REGULATORY BRIEF: SEPTEMBER/OCTOBER

Date: October 2015

European Regulatory / UK Regulatory Newsletter

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

## ANTITRUST AND COMPETITION

### TeliaSonera and Telenor withdraw from proposed merger in the Danish telecom sector

On 11 September, TeliaSonera and Telenor have abandoned the proposed merger of their business units in Denmark. The contemplated transaction would have resulted in the establishment of a joint venture active in the provision of mobile telephony, fixed telephony and broadband internet services in Denmark.

The European Commission ('**Commission**') opened an in-depth investigation on the deal last April. It expressed concerns that the reduction in the number of mobile network operators ('**MNOs**') in Denmark would stifle competition and lead to higher prices for consumers and less innovation.

The remedies offered by the parties (which included *inter alia* the divestiture of spectrum to a new player, as well as rent out of network capacity to the new rival) were considered insufficient by the Commission to dispel its competition concerns. In particular, the European watchdog stated that the creation of a fourth MNO in Denmark would have been necessary in order to avoid negative impacts on competition and prices.

Although Competition Commissioner Vestager repeatedly recalled that each transaction has to be assessed on its own facts and merits, the withdrawal of the *TeliaSonera/Telenor* deal raises concerns for similar transactions involving MNOs in the future. Such transactions are likely to become more difficult to defend and their outcome more uncertain.

This is especially the case for two larger mobile telecom transactions currently pending in the UK and in Italy. Both deals reduce, as it was in the Danish deal, the number of MNOs in the market from four to three. It remains to be seen how the Commission will approach these transactions in the next months when they will be assessed.

## ENERGY AND RENEWABLES

### New Directive on the sustainability of biofuels and indirect land-use change

The Directive on the sustainability of biofuels and indirect land-use change ('**ILUC Directive**') was published in the EU Official Journal on 15 September and entered into force 20 days later (i.e., on 5 October). It amends both the Directive on the quality of petrol and diesel fuels (Directive 98/70/EC) and the Directive on the promotion of the use of energy from renewable sources (Directive 2009/28/EC).

The new Directive seeks to improve the sustainability of biofuels and minimize their impact on the indirect land use change (i.e., the conversion of grasslands and forests into cropland due to biofuel production). In order to do so, the ILUC Directive sets a limit on the way EU Member States can meet the 10% target of transport fuels from

renewables by 2020. It sets a cap of 7% on the contribution of biofuels produced by using food or feed crops (so-called first generation biofuels); the remaining 3% will have to come from other sources, including biofuels produced from waste, algae and other materials not competing with food and feed crops (so-called second and third generation biofuels).

The EU Member States have until September 2017 to transpose the Directive into their national legal systems, and to show how they are going to meet the targets imposed by EU legislation.

## **TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY**

### **The Commission launches several public consultations to receive input for future legislation in the framework of the DSM**

The Commission opened in these months several public consultations to ask stakeholders for their views on the key Digital Single Market's ('**DSM**') challenges ahead. The Commission initially launched a consultation at the end of August on the review of the Satellite and Cable Directive. With this consultation, the EU regulator asked stakeholders whether EU rules, which define where and how satellite broadcasters and cable companies should clear copyright, are up-to-date. The deadline for submitting a response is set on 16 November 2015.

On 11 September, the Commission opened two other consultations simultaneously: one on the evaluation and review of telecoms rules, and another one on the needs for Internet speed and quality beyond 2020. On 23 September, the Commission launched a consultation aiming at gathering views on priorities for standards in 5G communications, cloud computing, cybersecurity, eHealth, Intelligent Transport Systems ('ITS') or even the Internet of Things ('IoT'). These two consultations both close on 7 December 2015.

On 24 September, two very important public consultations for high-tech companies were launched: the first on the need to regulate online platforms and the second on how to tackle unjustified geo-blocking. The following day, the Commission also opened a public consultation on legislative proposals to reduce the administrative burden on businesses arising from different VAT regimes. The first consultation closes on 30 December 2015 while the second terminates on 28 December 2015.

The Commission will also launch a public consultation with a view to building a Public-private partnership on Cybersecurity and another to agree on an e-Government action plan for 2016-2020 in the months to come.

The above public consultations are intended to provide the Commission with feedback to nurture the forthcoming legislative proposals it will put forward in the framework of the Digital Single Market strategy released on 6 May 2015.

## **PRIVACY, DATA PROTECTION AND INFORMATION MANAGEMENT**

### **The ECJ strikes down the US-EU 'Safe Harbour' agreement putting companies at risk**

On 6 October 2015, the Court of Justice of the European Union ('**CJEU**') declared in the 'Schrems case' that the 'Safe Harbour' agreement concerning the transatlantic exchange of data for commercial purposes is invalid (we highlight this decision [here](#)). This agreement, currently being renegotiated by the EU and the US, contains core principles that US companies have to comply with if they want to transfer personal data from the EU to the US.

It goes hand in hand with the data protection 'Umbrella agreement' which also puts in place high data protection standards when personal data is exchanged between the EU and US law enforcement authorities for the purpose of prevention, detection, investigation and prosecution of criminal offences, including terrorism.

On 16 October 2015, European national data protection authorities ('DPAs') gave Member States and the EU institutions three months to find an alternative to the invalidated 'Safe Harbour' agreement that fully respects fundamental rights. DPAs added they reserve the right to sanction companies if their own studies were to find out the other legal instruments used in the meantime to transfer data from the EU to the US (i.e., standard contractual clauses ("SCCs"), binding corporate rules ("BCRs"), etc.) could actually not be used (the Article 29 Working Group's statement may be found [here](#)).

Since then, regional German data protection authorities have stopped authorising new applications for resorting to these alternative legal mechanisms to transfer personal data to the US, thereby breaching the harmonised approach reached by the DPAs (our lawyers discuss how this decision may lead to challenges under German Data Privacy Law [in this alert](#)).

On 26 October 2015, the European Parliament held an exchange of views with Věra Jourová, Commissioner for Justice, Consumers and Gender Equality, on the Commission's views with regard to the 'Schrems case'. Commissioner Jourová told Members of the European Parliament the Commission will give businesses some guidance on the legal implications of the Safe Harbour ruling at the beginning of November 2015 (the Commissioner's speech may be found [here](#)).

Some American companies have already decided or are considering storing European users' data within their EU-based data centres or transferring them to local cloud computing services providers in order to reduce their legal risks when providing online services in the EU.

Learn how this decision may impact your business [in this recording from our recent webinar](#).

## ECONOMIC AND FINANCIAL AFFAIRS

### European Parliament tackles tax issues

Addressing the European Parliament on 17 September, European Commission President Jean-Claude Juncker placed the fight against tax fraud and tax avoidance among the Commission's top priorities. Along with Commissioner Moscovici, he said to favour a common consolidated corporate tax base, but says this will require a step-by-step approach. The specific issue of mandatory automatic exchange of tax information should be turned quickly into legislation since the Council reached an agreement on the proposed directive and the Commission accepted this compromise. The European Parliament however expressed disappointment regarding the final text since it significantly reduces the role of the Commission and the scope of the directive. The legislative process is now completed and the directive is expected to be published soon. The European Parliament has also been pushing for more transparency since a number of EU Member States refused to disclose information on tax rulings in the framework of the TAXE Committee work on the issue. Finance Ministers from France, Italy, Spain and Germany appeared before the European Parliament on this topic on 22 September but did not announce any steps towards transparency related to confidential documents in the short term. The TAXE Committee have also invited some multinational corporations to appear for an hearing on 16 November 2015 and to cooperate with the work of the Committee.

## Capital Markets Union Action Plan

The European Commission released a Capital Markets Union ('**CMU**') Action Plan on 30 September.

Much awaited, CMU proposes various tools to create a more competitive investment environment in the EU, where deeper and more diversified markets can better support economic growth. The aim of the CMU is to create the right regulatory environment for alternative funding sources to complement existing ones. In particular, the CMU focuses on diversifying funding sources available to businesses, removing cross-border barriers, and easing small and medium-sized enterprises' ('**SMEs**') access to capital markets.

The CMU is built on six key pillars: i) Financing for innovation, start-ups and non-listed companies; ii) Making it easier for companies to enter and raise capital on public markets; iii) Investing for long term, infrastructure and sustainable investment; iv) Fostering retail and institutional investment; v) Leveraging banking capacity to support the wider economy; and vi) Facilitating cross-border investing.

## 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

---

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.