# BRUSSELS REGULATORY BRIEF: MARCH

Date: March 2017

**European Regulatory / UK Regulatory Newsletter**

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## ANTITRUST AND COMPETITION

### The Commission imposes fines in the used car batteries cartel

On 8 February 2017, the Commission announced it had imposed fines totaling almost EUR 68 million on three companies for participating in a cartel to fix purchase prices of scrap lead-acid automotive batteries.

The cartel was uncovered thanks to the leniency application of a fourth participant in the cartel, which received immunity from fines for its cooperation with the Commission. The leniency program is one of the most successful enforcement tools in its fight against cartels. It provides incentives for companies participating in cartels to come forward and report such activities to the Commission. In exchange of their cooperation, cartelists can be exempted from fines. In this case, by revealing the existence of the cartel, the fourth cartelist was able to avoid a fine of more than EUR 38 million.

The anticompetitive conduct of the recycling companies consisted in exchanges of information (including on the prices offered by suppliers of used automotive batteries or on the final prices agreed with these suppliers) and agreements on target prices, maximum prices and purchasing volumes.

The illegal scheme was mainly based on bilateral contacts between senior managers of the four companies. They used telephone calls, emails, text messages and sometimes meetings in person. The Commission also explained that sometimes the cartelists used coded language in order to hide the true nature of their communications.

This case highlights two of the Commission's current priorities, namely fighting cartels and developing the "circular economy" in the EU. As far as the cartelized conduct is concerned, it is interesting to note that the cartelists did not collude on the sales prices (which is often the case in price-fixing cartels). Instead, they intended to fix the price they pay when purchasing used car batteries. Concerning the development of the circular economy, the Commission noted that almost 99% of car batteries in the EU are recycled.

These two priorities were echoed by the EU Competition Commissioner Margrethe Vestager's statement on the case that the fines imposed "*send out a clear message that* [the Commission] *will not tolerate cartels or anticompetitive behaviour that could damage the circular economy*."

### Further clarity to be expected in relation to pharmaceutical "pay-for-delay" cases in the EU

Patent settlement agreements are commercial agreements to settle patent-related disputes between originator and generic companies. Some patent settlements may prove to be problematic from a competition law perspective if they restrict generic market entry in exchange for benefits transferred from the originator to the generic company ("pay-for-delay"). Such agreements result in delayed market entry of cheaper generic medicine,

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to the detriment of patients and taxpayers financing the health system. At the same time, such agreements may prevent costly and lengthy litigation.

Following its sector inquiry into the pharmaceutical sector of 2008-2009, the Commission has adopted a number of individual follow-up decisions against pharmaceutical companies for delaying market entry and maintaining unnecessarily high prices.

In September 2016, the General Court ("**GC**") handed down a landmark ruling in its first pharma "pay-for-delay" case. The GC found that a pharmaceutical company and four generic competitors had concluded agreements that harmed patients and health care systems pursuant to which the pharmaceutical company was able to keep the price of its blockbuster drug artificially high in breach of EU competition rules.

The GC upheld the Commission's EUR 93.8 million and EUR 52.2 million fines imposed on the pharmaceutical company and the generic producers involved. Significantly, the GC concurred with the Commission's findings that the agreements constituted a restriction of competition "by object". This means that the Commission does not have to look into their effects on the market.

The GC's position differs from that of the U.S. Supreme Court which in 2013 ruled that such deals could potentially be a violation of antitrust law, although it refused a Federal Trade Commission request to declare them to be *per se* illegal. Since then, branded drug companies have struck far fewer such deals with generic drugmakers.

The GC's ruling has been challenged before the Court of Justice which is expected to provide clarity as to whether "pay-for-delay" agreements constitute a restriction of competition "by object".

## TRADE

### Rejecting national challenges, the Court of Justice of the EU ("CJEU") confirms right of the EU to ratify copyright Marrakesh Treaty on its own

The Marrakesh Treaty ("**Treaty**") is an international agreement concluded on 28 June 2013 in the Moroccan city, requiring countries to allow published works to be reproduced and distributed in formats for visually impaired persons, without the authorization of the rights holder. In other words, the Treaty focuses on overcoming access barriers in copyright law for the benefit of the visually impaired, and it does so in two main ways. First, the Treaty requires signatories to include an exception for the visually impaired in domestic copyright law. This will allow visually impaired persons and organizations representing them to make accessible format copies without needing to ask permission first from the copyright holder, such as the author or the publisher. Secondly, the Treaty makes import and export of accessible format copies possible, again without the permission of the copyright holder. This will ensure transcription of materials without duplicated efforts of different countries. It will also allow visually impaired persons from one country to have access to content from countries with larger collections of accessible works.

After having participated in the Marrakesh negotiations on behalf of the EU, the Commission, in October 2014, formally asked the Council of the EU and the European Parliament for authorization to ratify the Treaty. However, the Commission got resistance from a number of EU Member States, including France, the UK and Italy, arguing that the EU didn't have permission to conclude the agreement without Member State participation.

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To settle the matter, the Commission decided to ask the CJEU for an opinion, pursuant to Article 218(11) Treaty on the Functioning of the EU ("**TFEU**"), according to which the Commission "*may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the Treaties*". The CJEU rendered its opinion on 14 February 2017, in which it ruled that the EU has exclusive competence to conclude the Treaty, thus without the participation of Member States.

The CJEU reviewed whether the Treaty falls within the common commercial policy, which is an exclusive competence of the EU, but concluded that the Treaty is in fact not connected with the common commercial policy. The CJEU decided in this way because the Treaty does not intend to promote, facilitate or govern international trade in copyrighted work, but merely aims to improve the position of the visually impaired. In addition, the cross-border exchange of accessible format copies only takes place between government institutions or non-profit organizations, and is intended only for visually impaired persons.

Nevertheless, the CJEU ruled that the EU has exclusive competence to conclude the Treaty on its own. The reason put forward by the CJEU is that the EU *"has exclusive competence when the conclusion of an international agreement may affect 'common rules' or alter their scope"*. The CJEU argued that the Treaty *"falls within an area that is already covered to a large extent by common EU rules"*, in particular the EU Directive on Copyright ("**Copyright Directive**"), and ratification of the Treaty may indeed affect this Directive or alter its scope. The Copyright Directive already provides for an option for the Member States to introduce an exception or limitation to the rights of reproduction and communication to the public for the benefit of persons with a disability. The same goes for the import and export of accessible format copies. By turning these options into obligations for Member States, the Treaty touches upon the area already harmonised by the Directive.

Thus, the path is now open for the EU to ratify the Treaty. But the CJEU's opinion potentially opens new questions, with an impact difficult to foresee: is there such a thing as cross-border exchange of goods and services that may in fact be considered as non-trade? So, are there some "trade-like" exchanges excluded from "ordinary" trade rules?<

## ENVIRONMENT

### The Commission reports on the delivery of its Circular Economy Action Plan

On 26 January the Commission issued a report on the progress achieved in delivering the Circular Economy Action Plan (here). This was presented in December 2015 to push the European transition to a "*stronger circular economy where resources are used in a more sustainable way*".

Together with the report, the Commission also adopted further measures to create a **Circular Economy Finance Support Platform**, delivered a **Communication on the role of waste-to-energy** (here) and proposed a **Directive on the restrictions of the use of certain hazardous substances in electrical and electronic equipment** (here).

As announced by the Commission, the objective of the Circular Economy Finance Support Platform is to link together the European Investment Bank with National Promotional Banks, investors and innovators, to build on existing instruments and to stimulate new financial tools for circular economy-related projects. It also intends to promote best practices and raise awareness of investment opportunities within the circular economy sector.

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The Communication addressing Member States on the role of waste-to-energy in the circular economy provides them with guidance on converting waste to energy and is expected to enhance the role of the waste hierarchy which classifies waste management options according to a scale of sustainability. Moreover, it encourages Member States to grasp the opportunities for cross-border partnerships when in line with European environmental targets.

The draft Directive on the restrictions of the use of certain hazardous substances in electrical and electronic equipment amends the Directive 2011/65/EU and proposes the substitution of hazardous materials in order to "*make the recycling of components more profitable*". The proposed amendment should ease repairing of electrical and electronic equipment and boost second-hand market operations.

The implementation report offers an overview of the actions already delivered and introduces key objectives for 2017. Among others, it touches upon the following initiatives:

- the proposed Directive on certain aspects concerning contracts for the supply of digital content (here), which intends to harmonize guarantees for consumers against faulty products and contribute to the durability and reparability of products;
- the proposed Regulation on fertilizers (here), which aims to boost the market of organic and waste-based fertilizers;
- the proposed Directive on waste (here) setting targets to reduce waste and encouraging waste management and recycling;
- the Ecodesign Working Plan 2016 - 2019 setting products requirements relevant for the circular economy (e.g. durability, reparability, upgradeability, design for reassembly etc.)
- measures on food waste via the EU Platform on Food Losses and Food Waste, which was established on August 2016 to develop a methodology to measure food waste, and the EU guidelines to ease food donation;
- the Best Available Techniques Reference Documents guiding Member States in issuing permits for industrial installations (here);
- the Green Public Procurement criteria (here) encouraging the use of recycled materials for the construction of roads and buildings;
- the guidelines under the Common Implementation Strategy for the Water Framework Directive to encourage water reuse in water planning and management.

To show the objectives achieved and to debate future goals with stakeholders, the Commission and the European Economic and Social Committee will host a Circular Economy Conference in March 2017.

## ECONOMIC AND FINANCIAL AFFAIRS

### Resolution framework for central counterparties

On 1 February 2017, the Financial Stability Board ("**FSB**") published for public consultation draft guidance regarding central counterparty ("**CCP**") resolution and resolution planning.

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The FSB recognizes that central clearing is a key element of the post-crisis financial system. With the objective of preserving the financial stability, the FSB underlines that CCPs should not give rise to new 'too-big-to-fail' situations.

Consequently, the FSB draft guidance details powers to be granted to resolution authorities so they are able to ensure the continuity of CCPs' critical functions, their recovery and address default as well as non-default losses. It also provides guidance for the allocation of losses to existing equity holders in case of resolution and for the safeguard of the 'no creditor worse off' principle. In addition, the FSB proposes a framework for cross-border cooperation via the establishment of a Crisis Management Group within CCPs of systemic importance over several jurisdictions.

As large CCPs acquired a systemic role over the past decade, the draft guidance published by the FSB reflects the increasing attention that global regulators are giving to the need to plan for a potential CCP failure. On 28 November 2016, the Commission also published a legislative proposal on this issue, to ensure rules are in place to preserve CCPs' critical functions in times of crisis.

## Increased regulatory and supervisory attention to FinTech developments

The development of financial technologies ("**FinTech**") is catching the attention of European and international regulators and supervisors. Recent comments and reports show that they are eager to foster the potential of FinTech in terms of cost reduction and efficiency gains but are aware of new potential risks for the financial system.

The European Securities and Markets Authority ("**ESMA**") published on 7 February a report assessing potential applications of distributed ledger technologies ("**DLT**") to securities markets. ESMA outlines that DLT could bring a number of benefits to financial markets. In particular, it could bring improvements to post-trade services and to reporting capabilities. For the time being, ESMA considers there is no need to review the regulatory framework, as it provides the adequate safeguards to ensure market stability while DLT continues to be developed.

An official from ESMA, Patrick Armstrong, shared views on other FinTech topics during a conference organized in Oslo at the end of January 2017. He mentioned in particular that ESMA was closely monitoring robo-advice and innovations related to big data and artificial intelligence, in addition to its work on DLT.

On 18 January 2017, the European Agency for Network and Information Security ("**ENISA**") published a report analyzing the impact of DLT on cybersecurity issues for the financial sector. In this report, ENISA detailed different cybersecurity challenges related to the use of DLT, while recognizing that it has the potential to significantly improve costs and speed for the financial industry. ENISA gathered good practices across the EU and pointed out areas where improvement is particularly needed, such as privacy preserving and interoperability between DLT protocols.

At global level, the International Organization of Securities Commissions ("**IOSCO**") also published a report dedicated to FinTech and securities. Looking at various new business models for platforms as well as at DLT, the IOSCO report describes the potential opportunities brought by FinTech and associated risks. It particularly focuses on the growing availability of data, which is significantly easier to analyze thanks to the exponential growth in computing powers. IOSCO encourages regulators to adopt a proactive approach, for example via dedicated task forces or sandbox frameworks.

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Finally, the Commission will host a stakeholder conference on 23 March to discuss the regulatory and supervisory approach to financial innovation.

## TAXATION

### European Parliament co-rapporteurs' ambitious draft report on public country-by-country reporting

The European Parliament is progressing in its work on the legislative

**proposal**

to establish public country-by-country reporting ("**CbCR**") requirements.

The proposal was put forward by the Commission on 12 April 2016. It proposes to have CbCR of multinational companies with a consolidated net turnover of at least 750 millions EUR or more made available online to the public. Such country-by-country reports will have to outline information such as taxes paid, taxes due, profit before tax, turnover, number of employees, nature of activities and accumulated earnings. Under the proposed rules, information will have to be disclosed for each EU country as well as for third countries identified as non-cooperative jurisdictions.

As the proposal is amending the Accounting Directive, the text is subject to the ordinary legislative procedure and the European Parliament is fully involved. The committees responsible for the public CbCR file, which are Economic and Monetary Affairs Committee (ECON) and the Committee on Legal Affairs (JURI), named Hugues Bayet (S&D, BE) and Evelyn Regner (S&D, AT) as co-rapporteurs. Their draft report was published on 9 February 2017 and suggests significant amendments to the Commissions' proposal.

The co-rapporteurs proposed in their report to substantially lower the threshold above which companies are subject to public CbCR requirement from EUR 750 million to EUR 40 million in terms of consolidated net turnover. This would significantly enlarge the scope of the provisions. The report also asks for more precise requirements regarding the information to be disclosed.

In addition, the co-rapporteurs consider that multinationals should disclose CbCR for each jurisdiction in which they operate worldwide, not only wihtin the EU or in jurisdictions considered as non-cooperative.

### Council of the EU agrees to extend hybrid mismatches rules to third countries

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he Council of the EU, meeting in its economic and financial affairs ("**Ecofin**") formation agreed on 21 February to amend the Anti-Tax Avoidance Directive ("**ATAD**") in order to address hybrid mismatches with third countries. The first version of ATAD, adopted on 12 July 2016, already sets rules to prevent companies from using cross-border arrangements within the EU in order to create double non-taxation situations. Following the Organisation for Economic Cooperation and Development ("**OECD**") Base Erosion and Profit Shifting ("**BEPS**") recommendations, the revised ATAD ("**ATAD 2**") extend the scope of these provisions to cover hybrid mismatches schemes involving third countries.

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ATAD 2 includes a temporary carve-out clause for the banking sector. Hybrid regulatory capital will be exempted until 1 January 2022. Payments made by financial traders also benefit from a specific regime, although not limited in time.

The Council of the EU will formally adopt ATAD 2 once the European Parliament adopts its non-binding opinion. The plenary vote on ATAD 2 is scheduled for 24 April 2017, with first a vote in the Economic and Financial Affairs Committee on 27 March 2017. ATAD 2 will apply as of 1 January 2020.

## INSTITUTIONAL DEVELOPMENTS

### New comitology rules proposed

On 14 February 2017, the Commission released a legislative proposal to amend the current Comitology Regulation. The so-called Comitology procedure outlines the rules and principles for Member States'control over the exercise of its implementing powers by the Commission. Implementing acts subject to the Comitology procedure can only be adopted by the Commission if the legislator explicitly provided for such acts in the legislation.Member States' experts vote within a Committee to either validate or reject acts adopted by the Commission in application of the EU law. Committees are specialised by topics of expertise and chaired by a Commission official. Pursuant to the political commitment taken by Commission's President Jean-Claude Juncker on 16 September 2016[1], the Commission proposed to amend the current Comitology rules in order to reinforce transparency and accountability of the procedures for implementing EU legislation. One of the major objectives for the Commission is also to limit cases in which the Committee made of Member States' experts cannot agree on a common opinion, thus leaving the decision up to the Commission.

The Commission's draft proposes to amend the voting rules for the Appeal Committee, which is the last stage of the Comitology procedure. To reduce the number of abstentions, the Commission proposed that only the votes in favour or against should be taken into account. Importantly, the role of national ministers will be reinforced as a second referral to the Appeal Committee at ministerial level would be possible in the absence of a common position. As regards votes, transparency will be enhanced at the Appeal Committee level. Moreover, the Commission will be able to refer a matter to the Council of the EU if the Appeal Committee cannot reach a position.

The legislative proposal is subject to the ordinary legislative procedure and will require the approval of both the European Parliament and the Council of the EU.

**Notes:**

[1] State of the Union Speech, Bratislava, 16/9/2016.

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