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By: Francesco Carloni

ANTITRUST AND COMPETITION

Transactions in the digital sector and acquisition of data continue to attract scrutiny in Europe

On 6 September 2018, the European Commission cleared without conditions the proposed acquisition of a UK developer and distributor of music recognition applications by a U.S.-based global technology company.

The Commission had accepted to review the proposed transaction in February 2018, after a referral request from seven Member States (see our publication of March 2018). The transaction was notified to the Commission on 14 March 2018 and subsequently reviewed in-depth given the alleged competition concerns it raised in the European Economic Area ("EEA").

Initially, the Commission had voiced concerns that the transaction may lead to a reduction of choice of music streaming services for users. However, the in-depth investigation made possible to conclude that the acquisition would not raise competition concerns in the EEA or any substantial part of it.

In this case, the Commission was reassured about the impact on competitors of the possibility of the acquirer to access commercially sensitive information about customers of other music streaming services providers. It also found that the music recognition application's importance as an entry point to the music streaming services providers was limited, which was related to initial concerns that the acquirer may prevent the referrals from the application to its competitors. Finally, regarding integration of the two companies' datasets on user data, the Commission concluded that this: *"would not confer a unique advantage to the merged entity in the markets on which it operates",* because the target's data was not considered to be unique and competitors of the acquirer would continue to have access to similar databases.

In relation to this case, the EU Competition Commissioner Margrethe Vestager stated that: *"data is key in the digital economy. We must therefore carefully review transactions which lead to the acquisition of important sets of data, including potentially commercially sensitive ones, to ensure they do not restrict competition."* In addition to being yet another example of a transaction in the digital sector which has ended up being closely reviewed by the Commission despite not meeting the EU merger filing thresholds but referred to it following the referral request made by seven Member States, this case also illustrates the growing focus by competition authorities on the

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acquisition of data while reviewing transactions in the digital sector.

The Commission concluded that the two companies were not close competitors but that their services were complementary. The acquirer operates the second largest music streaming service in Europe, whereas the target offers a music recognition application.

Online sales restrictions in Europe attract increased scrutiny at both Commission's and national EU Member State's level

The past few years have seen a renewed and strengthened interest in vertical restraints and in particular in restrictions to online sales in Europe. There has been more scrutiny towards such issues by authorities at national level and from the European Commission.

The Commission has recently opened a new investigation into the online commercial practices of a platform reseller with respect to the exclusivity terms it imposes on fashion retailers. Under the contested exclusivity terms, retailers are required to list their inventory with the company and not on competing platforms. This new investigation has been prompted by a complaint lodged by a competitor and signals once more how online practices need to be carefully designed in order to prevent antitrust scrutiny.

More broadly, this antitrust complaint intervenes in the context of stronger enforcement activity with regard to commercial practices by companies online. At EU level, the Commission concluded a sector inquiry into e-commerce in May 2017 and has launched a number of investigations into practices covered in its inquiry. Recently, it imposed fines totaling more than EUR 111 million on four consumer electronics manufacturers. It found that the companies had imposed fixed or minimum resale prices on their online retailers and one of them had restricted retailers from selling cross-border.

Under EU competition rules, resellers must determine their resale prices themselves. Suppliers may only issue recommendations or provide maximum resale prices but they should not impose fixed or minimum resale prices as this is considered as illegal "resale price maintenance" or "RPM".

Similarly, at national level, vertical restraints in general and restrictive practices in the online environment in particular have also attracted significant attention. A case is currently pending in the UK opposing an online cosmetics retailer and a French cosmetics company. In particular, the dispute concerns a requirement for authorized online retailers to have a physical shop. Also, earlier this year, the Italian competition authority closed an investigation against a stove company and its parent companies which concerned alleged restrictive practices in relation to online distributors, such as imposition of minimum resale prices, limitations to the validity of the warranty of products sold abroad and a ban on delivering products sold online outside Italy.

All this shows that companies need to be particularly careful when engaging in sales online as this is a sales channel which is under scrutiny at the moment. However, this does not mean that companies have no means to control how their products are sold on the Internet. There are tools which allow manufacturers to achieve a certain

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degree of control over who and how their products are sold online without breaching competition rules. In particular, this can be achieved through the setting up of a selective distribution system where authorized resellers are selected on the basis of objective criteria of a qualitative nature which can apply with regard to physical and online stores. The Court of Justice of the EU has also recently upheld the imposition of restrictions on the use of online marketplaces in the framework of a selective distribution system. Such distribution model is particularly suitable for companies wishing to have more control over the distribution of their products online or the protection of their brand image.

STATE OF THE UNION 2018: THE COMMISSION PRESENTS EIGHTEEN NEW INITIATIVES

On 12 September 2018, the President of the European Commission, Jean-Claude Juncker, on the occasion of the State of the Union Address, announced eighteen new initiatives covering security, migration and borders, external investment, common foreign and security policy, seasonal clock changes and anti-money laundering.

In the security field, the Commission put forward, among other measures, a proposal for a Regulation on preventing the dissemination of terrorist content online, which imposes duties of care on hosting service providers and prescribes Member States to adopt measures to identify terrorist content and ensure its prompt removal by hosting service providers; a Communication to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes; a proposal for a Regulation establishing the European Cybersecurity Industrial, Technology and Research Competence Centre and the Network of National Coordination Centres. They will be called on to support the development of the cybersecurity technological and industrial capacities necessary to secure the Digital Single Market and to promote the competitiveness of the Union's cybersecurity industry.

With regard to the migration and border reform, the Commission unveiled, inter alia, a proposal for a Regulation to reinforce the European Union Agency for Asylum; a Communication to enhance legal migration; a proposal for a Directive on common standards and procedures in Member States for returning illegally staying third-country nationals; and a proposal for a Regulation on the European Border and Coast Guard to increase the Agency's resources, enhance its mandate and allow it to acquire its own equipment.

In the investment sector, the Commission presented a Communication towards a more efficient financial architecture for investment outside the EU and a Communication on a new Africa-Europe Alliance for Sustainable Investment and Jobs.

Furthermore, with the intention to increase the speediness and effectiveness of the decision making in some areas of the EU Common Foreign and Security Policy ("CFSP"), the Commission proposed a Communication to replace, within the existing legislative framework, the unanimity rule with a qualified majority voting. Still with reference to the CFSP, Mr Juncker expressed its intention to develop numerous European - African trade agreements and announced a Communication on a new Africa - Europe Alliance for sustainable investment and jobs; he also presented a Communication 'Towards a more efficient financial architecture for investment outside

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the European Union' with the aim of strengthening the European financial architecture in order to implement the recently proposed Neighbourhood, Development and International Cooperation Instrument.

Following a public consultation where 84% of respondents reacted in favor of ending seasonal clock changes in Europe, the Commission issued a proposal for a Directive with this objective, giving Member States the freedom to decide by April 2019 whether they want to permanently apply summer or winter time.

With the aim of countering money-laundering and terrorist financing threats, the Commission presented a Communication on strengthening the Union Framework for prudential and money laundering supervision for financial institutions and a proposal for a Regulation to adopt targeted changes to the three Regulations establishing the Supervisory Authority. The proposed amendments aim at ensuring the consistent investigation of the breaches of anti-money laundering rules, reinforcing the existing powers of the European Banking Authority and promoting a proper cooperation between the national anti-money laundering supervisors and the prudential supervisors (for further information about the Communication and the Regulation, see the article below).

It remains to be seen how far these proposals will go, considering that the European elections in May 2019 will change the composition of the European Parliament, which may require the Commission to withdraw its proposals

TRADE

Current EU Trade development trends on Singapore, China, Vietnam and Mercosur agreements

Singapore

The EU-Singapore free trade agreement is one of EU's first 'new generation' bilateral agreements. On top of the classical removal of customs duties and non-tariff barriers for trade in goods and services, it contains important provisions on intellectual property protection, investment liberalisation, public procurement, competition and sustainable development. The agreement establishes the conditions for EU businesses to take full advantage of the opportunities created in Singapore as the business and transport hub of Southeast Asia. Once approved by the Council of the EU, the agreement will be sent to the European Parliament, aiming for the entry into force before the end of the current mandate of the European Commission in 2019.

China

EU-China trade and investment negotiations are also moving forward, even if slowly. In early July both sides exchanged their first market access offers for their bilateral investment agreement. The discussions covered essentially subjects such as expropriation, national treatment, fair and equitable treatment and sustainable development. As trade ties with the US deteriorate, Chinese premier Li Keqiang declared in July during a meeting in Sofia with leaders from 16 European countries that Beijing wants deeper cooperation with the EU and more foreign investment. Nonetheless, the EU continues to stand by the view that China remains a closed economy for EU investors, in a sense that the lack of level playing field between domestic companies and foreign investors lies

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on the strong role of state-owned enterprises in the Chinese economy. The problem lies on the two sides not speaking the same language when it comes to the "strong hand of the state", with China insisting that its state-owned companies do not benefit from subsidies, the EU says de facto preferential interest rates they obtain from state-owned banks is beneficial to them. Likewise, the EU hesitates to open up to a sector that does not enjoy reciprocity. The 19th round of negotiations is tentatively scheduled for 29-30 October in Beijing, but the exact agenda and timing are yet to be confirmed.

Concerning trade, Beijing continues to insist it wants a free trade agreement with the EU – a call the EU has been rejecting for years. Brussels leaders argue that China is not to be treated as a market economy. Digital is where divergence between the EU and China is most pronounced, as China already controls 40% of the world's e-commerce market, has already shut out Western payment services providers and has ambitions for its platforms to enter the European market.

The EU and China formed a working group on WTO reform following their summit in July, an expression of the cooperative approach; but to what extent can one expect Beijing to agree on new and revised WTO rules that would discipline a number of fundamental features in its economy, remains in Brussels a worrying dilemma.

Vietnam

Efforts are being made to approve the EU-Vietnam deal before the European elections next year, despite the very short timeframe left to do so. The pace during spring was apparently slow because of the 'legal scrubbing' process that precedes translation into more than 20 European languages of their long-sealed trade pact. These are two lengthy procedures that must be concluded before a deal can be put to approval to the Council and the Parliament. By the end of June nonetheless, the scrubbing marathon was finalized and endorsed.

Negotiations for an EU-Vietnam FTA were launched in June 2012 and concluded in 2015. Vietnam has experienced a radical economic and social transformation over the past two decades alongside integration into the global economy. As a rapidly developing and fast growing ASEAN economy, Vietnam holds substantial potential for EU businesses. Brussels insiders regard the Vietnam – EU FTA as ambitious and comprehensive that ensures a conclusive environment for trade and investment relations.

The 'EU only' part of the Vietnam deal could come into force immediately and permanently after being ratified by the Council and the Parliament but before the 'investment agreement' part of the accord is finalized, the Commission will send the 'EU only' part to Member States this autumn. The final deadline for ratification in Parliament is next April, and policy insiders in Brussels consider doubtful that the deal can be sealed in time. This is mainly because it is unclear if the numbers in the Parliament will add up - which basically depends on the signals on labor and human rights issues they get from Vietnam. In this respect, Brussels insiders believe the Commission was in fact afraid of tabling a deal for ratification to a Parliament that has been pushing Vietnam to come up with tangible guarantees that it would start the process of ratifying three International Labor Organisation conventions on freedom of association, the right to organize and collective bargaining, and the abolition of forced labor; MEPs also want Vietnam to improve its human rights record. The question remains whether it is likely that

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there would be enough time to ensure a proper parliamentary scrutiny before the final vote. The geopolitics issue is important in EU Vietnam relations, with increased uncertainty around global trade, the hesitation towards trade liberalization, globalization and the rules-based trade system.

Mercosur

On the other side, the negotiation horizon on the Mercosur agreement looks endless again. This summer, the Mercosur side made fresh concessions on auto tariffs and car parts. The Commission however made it abundantly clear that this is not enough to conclude a deal, especially in view of the pending work to be done and differences to bridge in several areas, notably on cars and car parts, geographical indications, maritime services and dairy. Commission stressed during summer that solutions to very important EU interests in these areas are still outstanding and will need to be addressed to allow a successful conclusion of the process. Mercosur may have tabled an updated offer in those outstanding areas but still the window of opportunity to conclude the agreement is apparently expected to close relatively soon, in view of the EU and Mercosur negotiating teams folding down a 36th round of talks held in Montevideo in early September: they concluded that for the time being a breakthrough is not managed. To some extent, this is due to EU's not budging enough on expanding beef quotas. An additional factor lies apparently on the fact that Brazil's elections early next month make it hard for the South Americans to conclude a deal that would require some tough concessions from them on imports of automobiles or dairy. In mid-October, Brazil will hold hotly contested general elections, after which talks would likely slow down; poll participants deem the possibility of a final conclusion on the Mercosur Trade discussions until the end of 2018 highly remote.

ECONOMIC AND FINANCIAL AFFAIRS

European Commission upgrades the EU anti-money laundering supervision

On 12 September 2018, the European Commission published a proposal aiming to address some of the shortcomings in the EU anti-money laundering ("AML") framework exposed by recent scandals involving European banks. The proposed changes are summarized in the Commission's Communication, accompanied by a legislative proposal aiming to expand the AML mandate of the European Banking Authority ("EBA"). The proposal, which targets specifically financial instutions, amends the 4th EU Anti-Money Laundering Directive, as well as sectoral legislation related to the European Supervisory Authorities and financial markets legislation.

The Communication on "Strengthening the Union framework for prudential and anti-money laundering supervision for financial institutions" outlines the existing deficiencies in the system and calls for quick, short-term legislative as well as non-legislatives remedies to restore the EU's reputation after the revelations and reduce financial stability risks.

The Commission proposes to entrust the EBA with EU-level supervisory powers and to enhance its supervisory toolbox through amendments to its founding Regulation. The EU-level AML supervision would thus no longer be

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shared among the three European Supervisory Authorities ("ESAs") through their Joint Committee, but would be centralized in the EBA and its own standing committee composed of the heads of the national AML authorities. The EBA would oversee the conduct of all the "obliged entities" defined by the fifth AMLD Directive ("AMLD5"), which also fall under the supervisory remit of the ESAs. Its new tools would include, among others, periodic reviews on AML issues, which should be reported to the European Parliament, the Council of the EU and the Commission, if serious breaches are identified. Besides becoming an AML data hub, the EBA would take a leading role in third-country coordination and would be able to directly address financial sector operators.

Furthermore, the Commission underlines the need to undertake changes in the banks' prudential framework, including confidentiality waivers to all authorities processing AML-related information as well as duty of cooperation between prudential and AML authorities. These changes were already suggested by the Parliament under the review of the Capital Requirements Directive ("CRD"), which is currently under negotiation. As regards non-legislative proposals, the Commission invites the EBA to adopt common guidance for prudential supervisors to take account of AML/CTF concerns in a consistent manner.

The Commission calls on the Parliament and the Council ("co-legislators") to adopt the proposal by early 2019 at the latest. The Commission does not rule out larger scale reforms, which will be reflected in its report on the implementation of the AMLD5. These could potentially include transforming the AMLD5 into a directly applicable regulation and establishing a new EU AML body.

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

The Austrian Presidency proposes to discard the draft e-privacy rules on software settings

In July 2018, the Austrian Presidency of the Council of the EU released its first compromise text on the prominent provisions of the draft Regulation on Privacy and Electronic Communications.

Tabled in January 2017, the proposal is intended to complement the EU data protection and telecoms frameworks, aligning the existing privacy legislation for electronic communications to the EU General Data Protection Regulation. Among the changes introduced with such reform, the proposed Regulation covers also telecommunication services provided by market-players via the Internet (the so-called OTTs) and include new rules on permitted processing of data, tracking technologies such as cookies and privacy settings for e-communication software placed on the market.

Although the Commission stressed to have the final text ready by 25 May 2018 - in line with the GDPR - the proposal is still stalling within the Council as a result of fierce lobbying in Brussels and at national level. Consequently, only a few days after the start of the six-month presidency, the Austrian experts immediately rolled up their sleeves with the aim to complete the file before the 2019 European elections.

The first Presidency's move in order to break the Council deadlock focuses on the general privacy settings set up

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in e-communication software. The Commission's original proposal would require software such as browsers or mobile apps to provide users with the possibility to easily decide whether to allow third parties' access and storing of information on their devices. Moreover, software providers would be demanded to inform users about the availability of such privacy settings upon the software installation.

In the compromise text circulated to the other Member States' teams, the Austrian Presidency proposes to deviate significantly from the approach taken by the Commission and has decided to delete in full the above-mentioned requirements. Such removal has been praised by a relevant number of Member States along with telecommunications operators and digital businesses organizations.

The final text on browser and software settings can have significant implications for the whole digital advertising sector, companies whose main source of income is advertising (e.g. electronic media) and, more broadly, the data-driven industry. In the next few months, we will see whether the Austrian Presidency's strategy leads to a solid Council position on the e-privacy proposal. Even in that case, nothing will be definitive: the European Parliament (which is ready to negotiate with the Council in order to reach a joint text on the proposal) recommends that software and browsers should have, by default, strong privacy settings to prevent third parties' tracking, storing and collection of information from the end-users' equipment.

KEY CONTACTS



FRANCESCO CARLONI
OFFICE MANAGING PARTNER, BRUSSELS

BRUSSELS, MILAN
+32.2.336.1908
FRANCESCO.CARLONI@KLGATES.COM



GIOVANNI CAMPI
SENIOR POLICY DIRECTOR

BRUSSELS
+32.2.336.1910
GIOVANNI.CAMPI@KLGATES.COM

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