BRUSSELS REGULATORY BRIEF: NOVEMBER

Date: 30 November 2018

European Regulatory / UK Regulatory Newsletter

By: Francesco Carloni, Mélanie Bruneau, Giovanni Campi, Antoine de Rohan Chabot

ANTITRUST AND COMPETITION

EUROPEAN COMMISSION CONSULTING ON A NEW SET OF COMMITMENTS IN PAY-TV INVESTIGATION

On 9 November 2018, the European Commission announced it was seeking comments on commitments proposed by a film studio in the framework of its pay-TV investigation.

In 2015, the Commission sent a Statement of Objections to six US film studios and a pay-TV broadcaster in an investigation regarding clauses in bilateral agreements for the licensing of output of films in Europe. Under the contested clauses, the broadcaster allegedly could not allow EU consumers outside UK and Ireland to access pay-TV services in these countries. Under some clauses, the studios had to make sure that other broadcasters did not make their pay-TV services available in the UK and Ireland. The Commission found this to amount to a restriction of "passive sales" as broadcasters are restricted in their ability to accept unsolicited requests from consumers outside the licensed territory.

Under EU competition rules, companies under investigation by the Commission can decide to offer commitments in order to address its concerns. If the Commission makes the commitments binding, it does not conclude on the infringement and does not impose fines. However, a breach of a binding commitment may result in fines up to 10% of the company's global turnover in the last financial year. In 2016 the Commission already made legally binding commitments submitted by another film studio which was also investigated.

This new set of commitments provide that the studio will not (re)introduce contractual obligations: (i) preventing or limiting a pay-TV broadcaster from responding to unsolicited requests from consumers who are not in its licensed territory; or (ii) requiring the film studio to prohibit or limit other pay-TV broadcasters from responding to unsolicited requests from consumers within the licensed territory. As far as the existing agreements are concerned, the studio's commitments provide that it would not seek to bring actions before a court or tribunal for the violation of a broadcaster and/or studio obligation and that it would not act upon or enforce such obligations.

Before taking a decision to make the commitments binding, the Commission will market test the proposal inviting comments from interested third parties.The Commission has also published a summary of the commitments in the Official Journal of the EU in order to solicit the comments from any third party which have one month from the

©2005-2026 K&L Gates LLP. All Rights Reserved.

date of publication to do so. Should the market test feedback be positive, the Commission will adopt a decision making the commitments binding.

Public procurement: The Court of Justice ruled that participants can be ordered to disclose cartel decisions and measures implemented as proof of trustworthiness

By its judgement of 24 October 2018, the Court of Justice of the European Union ruled that a public procurement contracting authority is allowed to ask an economic operator previously involved in cartels to disclose the competition authority's decision and to describe appropriate measures adopted for the re-establishment of its reliability as proof of the operator's trustworthiness. The Court also clarified that the maximum period during which an economic operator can be excluded from public procurement proceedings is calculated from the date of the competition authority's decision, and not from the end date of the cartel.

In this case, the German Federal Cartel Office ("Bundeskartellamt") imposed a fine in March 2016 on the company Vossloh Laeis, a manufacturer of railway material, for having taken part in a cartel concerning switches until 2011. Vossloh Laeis applied for leniency during said antitrust proceedings.

Later in 2016, Vossloh Laeis submitted an offer in a tender for the provision of railway material organized by the Munich utility company ("Stadtwerke München"). In the context of this tender Vossloh Laeis was asked by Stadtwerke München to disclose the Bundeskartellamt decision, pursuant to a German legislation according to which contracting authorities may ask economic operators to prove the re-establishment of their reliability if they have previously been found to have engaged in anticompetitive conduct. Vossloh Laeis refused to provide said decision and was therefore excluded from participating in the tender procedure, on the grounds that such refusal raised doubts on the company's trustworthiness following its participation in a cartel (from which Stadwerke München presumably suffered harm, bringing also civil action for damages against Vossloh Laeis).

This decision was challenged by Vossloh Laeis before the Public Procurement Board for Southern Bavaria, which stayed the proceedings and referred the case to the Court, asking (i) whether a contracting authority can ask for a copy of the competition authority's decision; and (ii) from when the period of exclusion from public procurement should be calculated.

On 24 October 2018, the Court held that, as a general rule, a contracting authority is allowed to demand full cooperation from an economic operator, but that such cooperation must be limited to what is strictly necessary for the pursuit of its objective. In that context, contracting authorities should be able to assess the risks they could face by awarding contracts to doubtful economic operators. As a result, economic operators must cooperate in an effective manner. This includes providing the decisions of competition authorities. The contracting authority may also require an economic operator to prove the adoption of appropriate measures in order to demonstrate the re-establishment of its trustworthiness.

As regards the calculation of the exclusion period from public procurement, the Court held that the period of exclusion (for 3 or 5 years under German law) shall be calculated from the date of the competition authorities'

©2005-2026 K&L Gates LLP. All Rights Reserved.

decision.

TRANSPORT

Brexit Impact on Air Transport

Deal or no deal? The state of play

The EU-UK Draft Withdrawal Agreement was agreed at negotiators level on 14 November 2018 and approved by the EU leaders on 25 November 2018. Ratification is awaited by the UK and EU Parliaments, with the former vote considered as the most risky one. If both Parliaments approve the Agreement, parties have until December 2020 to negotiate the future EU-UK relationship (with a possibility of a Joint Committee agreeing, before July 2020, an extension of said transition period only once and until July 2022 the latest) - during which period the legal position of the UK in the EU along with all rights and obligations deriving therefrom will remain the same. If however, UK Parliament's vote on the Agreement is negative, there will be no time to negotiate a revised version until March 2019. The air transport industry shall be therefore prepared for the implications of a no-deal case.

What will be the ultimate consequences of a no-deal scenario for the aviation sector and your business?

The areas of aviation safety, aviation security and flights between the UK and the EU are regulated by precise legal provisions, on which the effects of a no deal scenario are difficult to predict. For EU to UK flights and vice versa, both the EU and UK registered airlines will need to obtain a licence from the UK Civil Aviation Authority and the European Safety Agency respectively. Regarding the allocation of slots at UK airports, the current rules would most likely remain unchanged in the event of no deal and there would likely be no disruption to the UK's provision of air navigation services as a result of leaving the EU without a deal. The UK government, however, has stated that it assumes a mutual interest in preserving the status quo based on a multilateral or bilateral level and has stressed that it would expect the recognition of equivalent safety standards to be on a reciprocal basis.

Are there any legal instruments in place for the conclusion of an EU-UK Agreement on aviation services?

Following the withdrawal, the UK will be treated as a third country by the EU. The Political Declaration on the outline of the future relationship, published on 22 November 2018, provides an overview on the legal framework that will cover market access, investment, safety and security in the aviation industry: the EU and the UK agreed on the future conclusion of a Comprehensive Air Transport Agreement that ensures open and fair competition in the air services sector.

©2005-2026 K&L Gates LLP. All Rights Reserved.

Are negotiations underway for the signing of bilateral agreements?

In the case of ASAs (Air Services Agreements) with non-EU states, for airlines from one of the 111 countries with whom the UK has a bilateral ASA, including China, India and Brazil, there will be no substantial change. For airlines from one of the 17 non-EU countries where the EU has negotiated individual ASAs, negotiations are either still underway between the UK and those countries for replacement arrangements to be in place before the exit day, or already closed. This is the case for example of the new UK-Canada air services agreement which has reached an advanced stage; also of the UK-US open skies pact, the conclusion of which was realised on November 29, 2018. The new US aviation deal is one of nine new bilateral arrangements the UK has already achieved with countries around the world such as Albania, Georgia, Iceland, Israel, Kosovo, Montenegro, Morocco and Switzerland.

ECONOMIC AND FINANCIAL AFFAIRS

IOSCO consults on a new framework to assess leverage in investment funds

On 14 November 2018, the Board of the International Organization of Securities Commissions ("IOSCO") launched a consultation on the proposed framework to measure leverage used by investment funds. Leverage is a financial technique used to increase fund's market exposure by using derivatives and/ or borrowed money. The IOSCO framework is a response, to a request by the Financial Stability Board ("FSB") made in the context of its recommendations to address financial stability risks stemming from vulnerabilities associated with asset management activities. The broader aim of the ongoing work is to ensure that the financial stability risks potentially arising from the growing asset management sector are properly understood and addressed, if necessary.

The existing regulatory and supervisory measures in most jurisdictions already set leverage limits or disclosure requirements on certain types of funds. These however do not always serve the purpose of risk mitigation from the financial stability perspective and do not always provide for regulatory intervention, when leverage builds up across the funds. Moreover, absence of consistent standards for measuring and analyzing leverage across funds and across jurisdictions results in a lack of comparable data. The ultimate goal of the IOSCO framework is therefore to enhance the authorities' understanding and monitoring of risks that leverage in funds may create. Identification of funds largely relying on the use of leverage would help to better target and prioritize regulatory resources.

IOSCO proposes a two-step assessment process. In the first step, using different exposure metrics, authorities would be able to exclude funds, which are not considered "risky" and filter out those that warrant further analysis. The subset of risky funds, would then in the second step, be subject to a risk-based analysis, e.g. focused on market or counterparty risks[1]. Acknowledging that no single measure is able to capture exposure by all types of funds, the IOSCO framework does not prescribe the metrics to be used by jurisdictions. Instead, IOSCO consults on three possible metrics and their combinations: (i) gross notional exposure of a fund without adjustment

©2005-2026 K&L Gates LLP. All Rights Reserved.

("GNE"), (ii) adjusted GNE; and (iii) net notional exposure ("NNE"). It is also proposed to analyze these metrics by asset class, instead as a single figure of market exposure adding together exposures from all asset classes. Thereby, regulators would be able to identify funds with exposures to the assets with higher risk.

The second step would cater for the inherent limitations of the proposed metrics in the first step. For example, it would allow reflecting the counterparty risk-reducing margin or collateral posted by fund in derivatives transactions. In this step, authorities could decide to analyze funds' exposures to particular counterparties, issuers or market sectors experiencing market stress.

Interested stakeholders can submit their comments on the proposed framework until 1 February, 2019. Under the FSB recommendations, national regulators should collect the data, and take action where appropriate, on leverage and its use in funds, which are not subject to leverage limits or when the funds present financially stability concerns. IOSCO was requested to collect the aggregated data on leverage across the jurisdictions based on its framework by the end of 2019.

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

Green light for the free flow of data as the 5th EU fundamental freedom

The European Union co-legislators, the European Parliament and Council of the EU, formally adopted the Regulation on *a framework for the free flow of non-personal data in the EU*.

The proposal was presented by the European Commission in September 2017 with the main objective of improving the mobility of non-personal data across borders in the EU, by preventing Member States' data localization restrictions and making it easier for professionals to switch data service providers. Once in force, the recently adopted Regulation will stand alongside the GDPR as a pillar of the new 5th fundamental freedom, the free movement of data across the EU Single Market.

The final text of the Regulation is very similar to the Commission's original proposal. Member State's restrictions to the free flow of non-personal data within the EU may be justified only on grounds of public security. Moreover, Member States will have two years to repeal all existing localization requirements that are not in compliance with the Regulation and will have to notify to the Commission any new data localization measures they seek to introduce.

In the case of data sets composed of both personal and non-personal data, the Regulation will apply only to the non-personal data part of the set. When personal and non-personal data are "inextricably linked", the Regulation will apply without prejudice to the GDPR.

Finally, the Regulation does not include binding provisions on porting of data but instead it calls on cloud service providers to adopt codes of conduct covering, among others, best practices for facilitating the switching of providers and the porting of data. In this context, it is worth mentioning that cloud stakeholders started such self-regulatory work in April 2018.

The legislative procedure of the Regulation is now concluded. The new rules will apply from May 2019.

©2005-2026 K&L Gates LLP. All Rights Reserved.

[1] Counterparty risk is the threat to each party of a contract, that the other party will not live up to its contractual obligations: e.g. default.

KEY CONTACTS



FRANCESCO CARLONI
OFFICE MANAGING PARTNER, BRUSSELS

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



MÉLANIE BRUNEAU
PARTNER

BRUSSELS
+32.2.336.1940
MELANIE.BRUNEAU@KLGATES.COM



GIOVANNI CAMPI
SENIOR POLICY DIRECTOR

BRUSSELS
+32.2.336.1910
GIOVANNI.CAMPI@KLGATES.COM



ANTOINE DE ROHAN CHABOT
COUNSEL

BRUSSELS
+32.2.336.1941
ANTOINE.DEROHANCHABOT@KLGATES.COM

©2005-2026 K&L Gates LLP. All Rights Reserved.