

THE NATIONAL LAW REVIEW

2018 EU Competition & Regulatory Trends

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Introduction

Our “trends for 2018” are only a selection of interesting developments to watch for in 2018.

Within the political and legislative cycle of the European Union, 2018 promises to be an eventful year, given that it is the last full year before the 2019 EU elections when a new European Commission will be appointed and the European Parliament will hold new elections. This means, in practice, that there will be pressure in 2018 on the current European Commission and European Parliament to act on all their initiatives and to complete their legislative agenda.

Our team of EU lawyers will continue to report on noteworthy developments including for instance, Brexit and its implications for competition and regulatory policies, the surge in foreign direct investment controls, the opening of new competition enforcement fronts, the practical implementation of the EU damages directive, as well as the development of alternative means of resolution in competition investigations and their impact on rights of defence.

Our predictions for 2018 include:

Competition in the digital world

Competition enforcement is set to continue to focus on the digital world to ensure that European consumers enjoy the full benefits of innovation. The European Commission is currently collecting data on the power of large digital companies focusing on concentration trends, margins, firm entry and exit. The findings will feed into an ongoing debate on whether a more interventionist competition approach is needed for online markets. Key areas of focus will be (i) how Big Data should be treated in the context of merger control and to what extent they can confer market power, (ii) the follow-up from the e-commerce sector enquiry and continued enforcement against pricing restrictions and geo-blocking in online distribution channels and finally, (iii) algorithms or decision-making software which is at the core of the functioning of many digital products. To the extent algorithms can be used to monitor competitors' prices and adapt price, this can raise competition concerns.

State aid and tax optimisation

The European Commission will pursue its investigations of alleged disproportionate tax advantages given to multinationals in a bid by Member States to attract investments (“tax rulings”). In parallel to a number of EU legislative initiatives against tax evasion, the European Commission is testing 1,000 tax rulings of 700 companies communicated by the Member States in the light of EU State aid rules. The European Commission is creatively using the EU State aid rules (“subsidies” for U.S. readers) in its crusade against certain forms of tax rulings, which it regards as ‘outliers’ under certain conditions (basically not being in compliance with the arm’s length principle). The European Commission has already taken decisions against Ireland, the Netherlands, Luxembourg and Belgium (35 multinationals). There are other ongoing State aid investigations into tax rulings or tax schemes in Luxembourg, in the Netherlands and in the UK (Controlled Foreign Company rules). This illustrates the continued interest of the European Commission in potential “Tax State aid”. 2018 may be the year for guidance from the General Court of the EU, which should hear the first actions for the annulment of these decisions. The outcome is



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unpredictable, but recent EU judgments have showed that the EU judicature does not shy away from its responsibilities when the European Commission's approach is open to criticism.

All multinationals with operations in Europe and benefitting from tax rulings or other favorable tax provisions are targeted. The question is whether these State measures qualify as "State aid" (a selective advantage not complying with normal market conditions). The response to this question will require companies to thoroughly scrutinise their tax affairs and apply the difficult and evolutive concept of State aid under EU law.

Public consultation on fake news and online disinformation

In recent months, the phenomenon of "fake news" has emerged from relative obscurity and has taken on unexpected prominence. This term refers to misinformation, often spread through online platforms, to deliberately mislead and damage an institution, a business or a person. It is now widely seen as a real threat to democracy. Beyond its political ramifications, fake news can also cause damage to markets and affects a wide range of public policies and sectors, including health, the environment, the economy and finance. The European Commission has recently launched a public consultation to collect views from all parties concerned by fake news across the EU. The purpose is to understand the scope of the problem and the effectiveness of measures already put in place by industry to prevent the spread of disinformation online. The consultation, which ends on 23 February 2018, is an opportunity to influence the directions for future action in the EU and to shape new measures to improve the reliability of information. Member States are also taking various initiatives to block the spread of fake news and/or to fine social media companies for failing to remove illegal content. Competition authorities are also following this issue closely since content and quality are significant competition parameters in the online platform market.

Bid rigging: towards more enforcement in 2018

As stressed in the 2009 OECD guidelines for fighting bid rigging, public procurement represents a significant share of GDP and government spending. Bid rigging generally raises prices and lowers quality, at the expense of taxpayers. Eradication of bid rigging has become a priority in the EU. National competition authorities actively investigate and impose significant fines for bid-rigging violations. They tend to focus on key sectors such as, inter alia, construction and public health, but smaller industries are also facing risk of investigations. Additionally, since detection and avoidance of public procurement cartels can lead to significant savings in government spending, competition authorities are likely to step up enforcement in the near future. In particular, competition authorities in Central and Eastern Europe have been more and more focused on public procurement infringements. For instance, in 2017, bid rigging cases represented almost 85% of Bulgarian competition decisions. In Poland, during the last five years, more than half of the infringements of competition law concerned bid rigging violations. The Czech authority has also clearly stated that fighting bid-rigging is a top priority. Bid rigging has been on the radar of other competition authorities too, such as for example in Portugal, where a Fighting Bid Rigging in Public Procurement campaign has been ongoing for the past two years. In 2018, bid-rigging cases and their prevention will also be at the top of the agenda.

2018 New Year Resolution: Avoid Jumping the Gun

For the last few years, both the European Commission and national competition authorities have shown a growing interest in investigating and imposing significant fines if confronted with gun-jumping practices in M&A cases. Being traditionally less active on this issue than its U.S. counterpart, the European Commission is now adopting a much more aggressive enforcement on gun jumping violations. The €20 million fine imposed on Marine Harvest in 2014 could perhaps be seen as an appetizer. In May 2017, after the opening of two other proceedings against Altice and Canon, EU Commissioner Vestager declared that the European Commission takes gun jumping "very seriously", even concerning deals which are not substantively problematic. While competition authorities in the EU are growing more vigilant on gun jumping, and despite a still erratic case law, merging companies must also ensure that, during the merger review process and before obtaining clearance, they conduct business as usual and avoid any behaviour that could compromise the acquired company's competitiveness. For its part, the European Commission undoubtedly will thoroughly investigate any infringement of the EU merger notification and/or standstill requirements. The "and/or" is quite important here, as in the current state of EU law, not notifying and closing a transaction before clearance would result in a fine for these two separate infringements, as confirmed by the General Court of the EU in the *Marine Harvest* case on 26 October 2017 (now under appeal on points of law before the Court of Justice of the EU).

Sport and competition law competition rules focus

There is a clear focus on the application of competition rules to the sports sector. There are indeed increasing competition law concerns, both at EU and national level, in the field of professional sports. Interventions of

competition authorities target media rights, ticket sales arrangements, federations' organisational issues, as well as State aid given to sports infrastructure or to individual clubs. All these issues will be highly relevant for the forthcoming Olympic Games, the Formula One FIA Concorde Agreement and for other big events and championships. At the end of 2017, the European Commission adopted a formal decision against the International Skating Union (ISU) in which it declared certain exclusivity arrangements in contracts signed between sports federations and athletes as incompatible with the EU competition rules. The clauses in question contained severe bans for athletes wanting to participate in commercial sports events not organised or authorised by the ISU or by its national counterparts. These clauses were regarded as an undue restriction of the athletes' freedom to engage in their professional activities, and as a restriction of competition between competing organisers of sports events. Even though no fine was imposed on the ISU, this decision has sparked a lot of interest, because it might open the door for other cases of a similar kind. Since sport is also "big business", activities of event organisers and also of athletes can be caught by the competition rules. Other investigations are already under way, e.g. the German Bundeskartellamt is currently looking into advertising restrictions imposed on athletes before and after the Olympic Games, so as not to interfere with the official sponsors of the IOC. With more cases of such kind, this trend may lead to the gradual opening of what used to be considered as a well-kept monopoly of the incumbent sports federations.

EU Data Protection in 2018: The beginning is in sight!

The new EU General Data Protection Regulation (GDPR) will be applicable on 25 May 2018. It will strengthen data protection rules for all organisations that touch personal data in the EU. Most companies are doubling efforts to be GDPR compliant by this date. Any organisation holding data on individuals in the EU must comply, wherever they are based in the world. The GDPR introduces some new concepts, rights and requirements whose implementation have left most EU Data Protection experts pondering.

Further guidance in 2018 from the so-called Working Party 29 (WP29), the supranational advisory platform of all local Data Protection Authorities in the EU, is eagerly awaited. Many guidelines have been issued by WP 29 including on "Data Portability" for example (Guideline WP 242 rev.01), however, many questions remain unanswered. The WP 29 will have a lot on its plate before it is dissolved in May 2018 and merged into the new European Data Protection Board (EDPB). Keep an eye on our [Eye on Privacy Blog](#) for regular updates on these guidelines and any other GDPR related matter.

Clean, connected and competitive transport in Europe

The EU's transition to a modern, circular and low-carbon economy inevitably includes reforms of the transport sector which accounts for one third of the energy consumption in the EU. The European Commission published two Clean Mobility Packages in 2017 focusing on new CO2 standards to stimulate zero and low-emission electric vehicles. Whilst legislative work on those packages will continue in 2018, a Connected Mobility Package is planned for Spring 2018. This will focus on connected and automated driving which is currently largely unregulated at EU level. This will have significant implications not only for car manufactures, but also for IT and technologies companies as well as digital platforms. The EU will also launch a new battery alliance initiative in February 2018 to support the production in Europe of next generation batteries and to compete with Asian and US manufacturers. Batteries are key not only to electro-mobility, but also to energy renewables and storage.

Screening of Foreign Direct Investment in the EU

The European Commission has proposed a new framework to review foreign direct investment (FDI) in the EU in order to protect critical European assets against investment that would be detrimental to legitimate interests of the Union or its Member States in light of security concerns or public order of the EU or the Member States. The rules would establish greater clarity concerning the nature of individual Member States' screening of FDI taking account of their individual situations and national circumstances. The proposed Regulation provides legal certainty for Member States that maintain a screening mechanism for FDI or that wish to adopt such mechanism. The tightening of national security reviews in other jurisdictions, notably the US, has led to increased interest by countries with ambitious FDI programs, such as China, to target the high technology sector in the EU. China's official 2025 policy to become a global leader in various areas of high technology and its vast currency reserves and State control foretell a growing trend of Chinese FDI targeting EU technology companies. In light of these trends, one can expect the EU proposal to advance and influence the prospects and legal steps required for FDI in the EU. The US experience with the Committee on Foreign Investment in the United States (CFIUS) offers an interesting parallel for how FDI reviews in the EU may evolve in the future.

Major International Trade Developments Continue

The global WTO system has incurred major shocks in 2017 following the change in US administrations. The

prospects for a TTIP that would open up freer transatlantic trade are now remote, and the WTO itself is plagued by depopulation of its Appellate Body as a result of US refusal to approve new appointments. Meanwhile, the EU has instituted a new regime for the assessment of market economy treatment in antidumping cases, resisting China's position that its WTO terms of accession require it to be accorded market economy treatment. China has initiated WTO complaints against both the EU and the US over their failure to accord China market economy treatment. The EU has also been affected by sudden shifts in US taxation policies affecting international trade, with the US tax reform having imposed a new Base Erosion Anti-Abuse Tax (BEAT) affecting payments by large corporations to related foreign entities. The EU has questioned the BEAT's compliance with WTO rules as well as its implications under US tax treaties with Member States. EU supply chains also face indirect threats from the shifting US position on NAFTA. These developments have prompted the European Commission to accelerate trade agreement negotiations with Mexico, Japan and other trading partners, creating new opportunities for EU importers and exporters to compete more effectively. At the same time, the US threat to abandon the Iran nuclear deal and reinstitute strict sanctions poses a threat not only to the EU policy of constructive engagement with Iran, but also an eventual threat of secondary US sanctions that could restrict US business opportunities for EU companies that continue trading with Iran. These currents and cross-currents affecting international trade are playing out at a remarkably rapid pace that will require constant reassessment and responses from EU companies and policy makers.

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