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VBB on Competition Law

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MERGER CONTROL

– EUROPEAN UNION LEVEL –

European Commission conditionally clears ArcelorMittal's acquisition of Ilva

On 7 May 2018, the European Commission conditionally approved the acquisition by ArcelorMittal of rival steel producer Ilva, following a phase II investigation.

The Commission considered that several significant overlaps between the parties would give rise to concerns. In particular, the Commission found that the merged entity would have controlled over 40% of the production capacity for hot rolled, cold rolled and galvanised flat carbon steel products in the EEA, with a far larger market share than any of its competitors in Europe, such as Tata Steel, Thyssenkrupp and Voestalpine. According to the Commission, its investigation showed that the merged entity's competitors in Europe would have neither the incentive nor the ability to replace the reduced competition as a result of the transaction.

In order to address these concerns, ArcelorMittal committed to divest a package of six steel production assets in Belgium, the Czech Republic, Luxembourg, Italy, Romania, and Macedonia, as well as steel distribution assets in France and Italy.

Interestingly, the transaction faced a number of non-competition related concerns, including local environmental, employment and state aid issues, against the background of EU-wide trade defence measures in the steel industry. While such concerns fall outside the scope of the Commission's merger review, the Commission seems to have addressed some of these issues. For instance, the Luxembourg Government wrote to Competition Commissioner Vestager claiming that the proposed asset divestment might, inter alia, jeopardise local employment. Commissioner Vestager addressed this concern, noting that the Commission would only approve a purchaser of the divested production assets if it developed the assets as a viable competitor. In other words, the sale of a plant to a buyer, which would plan to subsequently close it down, would not be an acceptable solution.

General Court orders Commission to re-examine Lufthansa's request to review merger commitment

On 16 May 2018, the General Court ("GC") ruled that the European Commission had failed to properly examine a request by Lufthansa to review a merger commitment given by Lufthansa in order to secure EU merger clearance of its acquisition of Swiss Airlines.

In order to allay competition concerns in the 2005 *Lufthansa/Swiss* transaction, Lufthansa had committed to reduce its fares by an equivalent percentage on the Zurich-Stockholm route each time it reduced its fares on a comparable route elsewhere. Under the commitment, which applied indefinitely, the Commission was empowered to review, waive or modify the fare commitment in light of evolving market conditions. On 4 November 2013, Lufthansa requested the Commission to waive the fare commitment on the grounds that the competition concerns identified in 2005 on the Zurich-Stockholm route had ceased to exist. The Commission rejected this request and Lufthansa subsequently appealed against this decision before the GC.

For three reasons, the GC concluded that the Commission had made a manifest error of assessment and annulled the Commission's rejection decision. First, the Commission had not taken account of the fact that Lufthansa had terminated a joint-venture with SAS. Second, in its 2008 *Lufthansa/Brussels Airlines* merger decision, the Commission had changed its policy by no longer taking alliance partners into account for the determination of overlaps giving rise to so-called "affected markets" (i.e., markets that need to be discussed in the notification form). The GC held that the Commission had failed to adequately respond to Lufthansa's argument that, if the *Lufthansa/Swiss* merger were notified today, the Zurich-Stockholm route would no longer be regarded as an affected market and that a similar fare commitment would thus not have been deemed necessary. Third, the GC held that the Commission had failed to examine the existence of competition between Swiss and SAS/LOT.

The GC therefore concluded that the Commission was not justified in rejecting Lufthansa's request to review the 2005 fare commitment for the Zurich-Stockholm route. The Commission must now carry out a revised assessment of whether the fare commitment is still necessary.

ECJ issues important ruling on "gun jumping"

On 31 May 2018, the Court of Justice of the European Union (the "ECJ") issued an important judgment on the scope of the standstill obligation contained in Article 7(1) of the EU Merger Regulation (the "EUMR"), which prohibits companies from implementing a notifiable concentration prior to clearance by the Commission. Consistent with the Opinion of AG Wahl issued on 18 January 2018 (see VBB on Competition Law, Volume 2018, No. 1), the ECJ ruled that only actions which, in whole or in part, in fact or in law, contribute to a change of control of a business are capable of breaching the standstill obligation.

By way of background, on 18 November 2013, KPMG Denmark entered into a merger agreement with its competitor, E&Y. Prior to clearance of that merger by the Danish Competition and Consumer Authority ("DCCA"), KPMG Denmark terminated its cooperation agreement with KPMG International in accordance with the merger agreement. Although the DCCA ultimately cleared the transaction on 28 May 2014, it later held that KPMG Denmark had infringed the Danish equivalent of the standstill obligation contained in the EU Merger Regulation. On appeal, the Danish Commercial Court sought a preliminary reference from the ECJ on the interpretation of the standstill obligation.

In its ruling, the ECJ considered that Article 7(1) of the EUMR did not specifically define when a concentration is deemed to be "implemented," and that it was therefore necessary to look at the purpose and general scheme of the EUMR. As the standstill obligation applied only to "concentrations" (i.e., transactions which give rise to a change of control), the ECJ reasoned that it did not extend to pre-closing arrangements that did not contribute to a lasting change of control. Importantly, the ECJ ruled that, contrary to the position taken by the Commission and Denmark, ancillary or preparatory acts in the context of a merger or acquisition that do not contribute to a change of control do not fall within the standstill obligation. Further, the ECJ held that it is immaterial whether those acts give rise to market effects, although, along the same lines, it also confirmed that actions that contribute to a lasting change of control are subject to the standstill obligations even if they do not have any effects on the market. The ECJ explained that this interpretation was consistent with the separate functions of the EU Merger Regulation (which governs mergers and acquisitions) and Regulation 1/2003 (which governs, in particular, the application of Article 101 TFEU to agreements that restrict competition).

The case is noteworthy as it will help merging parties to answer the difficult question of where to draw the line between pre-implementation measures, which breach the standstill obligation, and other pre-closing, preparatory measures. Nevertheless, a careful assessment in light of the specific circumstances of a transaction will still be required. In particular, merging parties will still need to carefully assess whether actions which do not contribute to a change of control may raise competition concerns under Article 101 TFEU.

– MEMBER STATE LEVEL –

AUSTRIA AND GERMANY

Austrian and German competition authorities publish joint draft guidance on new filing thresholds

On 14 May 2018, the German Federal Cartel Office ("FCO") and the Austrian Federal Competition Authority ("FCA") published for public consultation joint draft guidance on the newly introduced transaction value merger filing thresholds in Austria and Germany.

By way of background, in May 2017, new merger control thresholds were introduced in Germany and Austria to catch certain significant transactions that would have escaped a filing requirement under the old thresholds because the target had very low turnover (see VBB on Competition Law, Volume 2017, No. 5). The German and Austrian competition authorities considered that there was a risk of such transactions primarily in highly innovative sectors, such as the pharma industry or digital markets, where the turnover of the target company does not represent its overall competitive significance. In order to counter this perceived "gap" in the merger control system, these countries introduced a "transaction value" threshold (€ 200 million in Austria and € 400 million in Germany), which triggers a notification even if the turnover of the target or

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another merging party does not exceed € 5 million (for Austria: worldwide or in Austria; for Germany: in Germany), provided the other turnover thresholds are met and the target company has a "substantial domestic operation". The current draft Guidance focuses on the definition of the "transaction value" and provides explanations on the local nexus criterion.

First, the draft Guidance clarifies that the transaction value will be defined as "all assets and other monetary benefits that the seller receives from the buyer in connection with the merger in question". The draft Guidance discusses valuation and explains how to quantify future payments. It contains hypothetical case studies which outline different types of considerations (e.g., cash, securities, asset swaps, assumed liabilities, new joint ventures and amalgamations).

Second, the draft Guidance discusses different criteria by which to assess the requirement of a "substantial domestic operation". For example, in the digital sector the number of monthly active users or the access frequency of a website may serve as indicators for measuring domestic activity, while for R&D related activities a local nexus may be established at the location where the relevant R&D activities are carried out. When assessing the significance of domestic activity, turnover may also serve as an indicator provided it adequately reflects the competitive potential of the target company.

An English version of the draft Guidance is available here. Interested parties may provide comments to the FCA or the FCO by 8 June 2018.

HUNGARY

Hungarian Competition Authority conditionally clears acquisition of Invitel by DIGI and conducts first unannounced on-site inspection during merger review

On 10 May 2018, the Hungarian Competition Authority ("GVH") conditionally approved the acquisition by fixed telecommunications service provider DIGI of its rival Invitel.

The GVH found that the transaction gave rise to concerns in relation to several significant overlaps in the parties' businesses in fixed telecommunications services in Hungary. In order to address these concerns, DIGI committed to divest 16 municipal telecommunications networks.

In addition, the GVH had concerns about the elimination of competition in 25 municipalities where DIGI provided TV services via a leased network and Invitel supplied potentially competing wired telecommunications services. In order to address these concerns, the parties committed to terminate the lease contracts for wired telecommunications services.

This case is particularly noteworthy because, for the first time in a Hungarian merger review, the GVH conducted an unannounced on-site inspection during its investigation.

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ABUSE OF DOMINANT POSITION

– EUROPEAN UNION LEVEL –

European Commission accepts commitments from Gazprom to settle investigation into conduct affecting Central and Eastern European gas markets

On 24 May 2018, the Commission adopted a decision accepting a number of commitments from Gazprom to address the Commission's competition concerns regarding conduct by Gazprom that allegedly restricted the free flow of gas at competitive prices in Central and Eastern European gas markets.

The decision follows a Statement of Objections ("SO") sent by the Commission in 2015. The SO set out its preliminary view that Gazprom had breached EU competition law by pursuing an overall strategy to partition gas markets along national borders in eight EU Member States (namely Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia), enabling Gazprom to charge higher prices in five of them (namely Bulgaria, Estonia, Latvia, Lithuania and Poland). Gazprom will now be subject to a series of commitments it offered to remedy the Commission's concerns.

More specifically, the commitments lay out a set of rules that will affect how Gazprom operates in Central and European gas markets. First, Gazprom will need to remove any restrictions which prevent customers from reselling gas across national borders or which reduce any incentive to do so, regardless of whether they make cross-border sales impossible or merely financially less attractive. These restrictions include export bans and clauses requiring the purchased gas to be used in a specific territory (destination clauses).

In addition, Gazprom will be required to take positive actions to further integrate these markets, by addressing the lack of interconnection between certain countries. In particular, Gazprom's customers must be free to alter the final destination of gas supplied to them. For instance, customers that buy gas originally for delivery to Hungary, Poland and Slovakia may now have all or part of it delivered to Bulgaria or the Baltic states instead. Gazprom must offer these swaps in both directions for a fixed fee and in a transparent manner. These commitments are designed to ensure the free flow of gas throughout the region even in the absence of interconnectors between certain countries.

The third set of obligations seeks to give customers a tool to ensure that prices charged are competitive. In particular, if prices charged to Central and Eastern European countries diverge from competitive Western European price benchmarks, customers in the former region may demand an adjustment to their prices. If Gazprom and its customers do not agree on a new price within 120 days of such a demand, the dispute can be referred to an arbitrator.

Finally, Gazprom will be unable to leverage its dominant position to obtain favorable treatment concerning gas infrastructure. This is of particular relevance with regard to the South Stream project in Bulgaria and the Yamal pipeline in Poland.

The commitments are binding. If Gazprom breaches any of the obligations imposed under the Commission's decision, the Commission can impose a fine of up to 10% of Gazprom's worldwide turnover, without having to prove an infringement of EU competition law.

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CARTELS AND HORIZONTAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

German Federal Cartel Office imposes total fines of € 13.2 million on two potato and onion packaging companies

On 3 May 2018, the German Federal Cartel Office ("FCO") fined two potato and onion packaging companies a total of € 13.2 million for their involvement in a price-fixing cartel between 2005 and 2013.

The two companies involved in the infringement, namely Hans-Willi Böhmer Verpackung und Vertrieb ("Böhmer") and Kartoffel-Kuhn ("Kuhn"), are two major suppliers of packaged potatoes and onions of the Metro group, a German retailer and cash and carry wholesaler. Their activities include the purchase of potatoes and onions which are then packaged and sold to the food retail sector. Böhmer and Kuhn were found to have aligned the purchase prices of these products.

The FCO initiated proceedings in May 2013 following the leniency application of an unnamed company. Kuhn was reported to have cooperated extensively with the FCO, which led to a reduction of the fine. The fining decision can be appealed to the Higher Regional Court of Düsseldorf.

SPAIN

Spanish Competition Authority imposes fines on advertising companies for exchanging sensitive bidding information

On 3 May 2018, the Spanish Competition Authority ("CNMC") imposed fines totalling € 7.1 million on five advertising companies for their involvement in a cartel on the market for the provision of advertising services to public administrations.

The CNMC found that, over a period of 18 months, four of the companies fined, namely, Carat España, Persuade Comunicación, Media by Design Spain and Media Sapiens Spain, had exchanged sensitive information concerning the allocation of public contracts for institutional advertising. The CNMC also found that the fifth undertaking, Inteligencia y Media, had been instrumental in the exchanges taking place and in the establishment of the cartel.

The CNMC did not impose a fine on one company because it had no business activities in 2017. However, the CNMC is currently investigating whether an infringement procedure could be initiated against any other entity of that company's group, by virtue of the "single economic entity" principle.

In addition to the fines imposed on the companies, the CNMC also imposed fines amounting to almost € 110,000 on three of the infringing undertakings' CEOs.

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VERTICAL AGREEMENTS

– MEMBER STATE LEVEL –

GERMANY

Higher Regional Court of Düsseldorf significantly increases resale price fixing fine against Rossmann

According to a press release of the German Federal Cartel Office ("FCO"), the Higher Regional Court of Düsseldorf (the "Court") has significantly increased the fine that the FCO had imposed on the retailer Rossmann in December 2015 for vertical price fixing related to the sale of Melitta roasted coffee. The Court increased the fine from € 5.25 million to € 30 million. Overall, the FCO had originally imposed fines totalling € 260.5 million on 27 companies for vertical price fixing related to confectionery, coffee and beer products (see VBB on Competition Law 2016, No. 12).

In the present case, Melitta Kaffee GmbH ("Melitta") was found to have entered into vertical price-fixing agreements for roasted coffee products with its retailers including, among others, Rossmann. According to the FCO, Melitta had introduced a price steering system in 1999, in which Rossmann allegedly participated from 2005 until the FCO's dawn raid in 2008. It is reported that Melitta and Rossmann agreed weekly on Rossmann's promotional prices for Melitta filter coffee, protecting Melitta from price moves by Rossmann. In turn, Rossmann received information about the pricing of its competitors in the retail trade market. According to the press release of the FCO, the Court set the fine taking into account that the vertical infringement of competition law had horizontal effects in the sale of a major consumer product in Germany. More detailed reasoning for the significant increase in the fine is not yet available. The judgment is expected to be published in the second half of 2018. Rossmann has since appealed the judgment to the Federal Court of Justice.

In parallel to this case, two appeals were brought by two EDEKA trading companies against fines that the FCO had imposed for vertical price fixing of beer products. These proceedings are still pending before the Higher Regional Court of Düsseldorf.

ITALY

Italian Competition Authority accepts commitments regarding restrictions on online sales of stoves

On 18 April 2018, the Italian Competition Authority ("ICA") formally accepted commitments offered by Cadel and its parent companies, Zanette Group and MCZ, for potential violations of Article 101 TFEU uncovered during the ICA's probe into restrictions on online sales of stoves. According to the ICA, the potential infringements included: (i) imposing minimum online retail prices by specifying maximum discounts allowed from list prices; (ii) limitations on the validity of warranties applicable for products sold online outside Italy unless such products were installed by personnel authorised by the relevant company; and (iii) prohibiting the delivery of products sold online outside the Italian territory. In addition, Cadel had required retailers to use only .it domain names and only the Italian language on their websites. The commitments under which the companies primarily agree to refrain from the above types of conduct, which were published on 4 December 2017 (see VBB on Competition Law, Volume 2017, No. 12), are now binding on the companies.

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STATE AID

– EUROPEAN UNION LEVEL –

ECJ clarifies application of selectivity criterion to exemptions from Spanish regional taxes on large retail establishments

On 26 April 2018, the Court of Justice of the European Union ("ECJ") issued judgments on three requests for preliminary rulings from the Spanish Supreme Court regarding the qualification as state aid of regional taxes on large retail establishments situated in the territories of Catalonia (Case C-233/16), Asturias (Joined Cases C-234/16 and C-235/16) and Aragon (Joined Cases C-236/16 and C-237/16), as well as on its compatibility with the principle of freedom of establishment.

The three Spanish autonomous regions introduced taxes on retail establishments with a sales area exceeding 2000m², 2500m² or 4000m², depending on the region. Retail establishments with sales areas below those thresholds are exempted from the tax, as well as retailers pursuing certain activities, such as, for example, the sale of garden materials, vehicles or construction materials. The taxes are intended to offset the potential negative impact of large retail establishments on town and country planning and the environment. The revenue from those taxes is used to fund environmental action plans and make improvements to infrastructure.

A national association of large distribution companies challenged the lawfulness of the taxes before the Spanish courts. The Spanish Supreme Court was uncertain as to the compatibility of the regional taxes with the principle of freedom of establishment and was doubtful as to whether the exemptions to the taxes constituted state aid. Therefore, it decided to stay the proceedings and to refer questions to the ECJ.

First, the ECJ ruled that the taxes did not amount to (direct or indirect) discriminatory treatment in violation of the principle of freedom of establishment and the right of national treatment as laid down in Articles 49 and 54 TFEU. According to the ECJ, the criterion relating to the sales area of the establishment does not appear in most cases to place at a disadvantage nationals from other Member States or companies whose seat is in another Member State.

Second, the ECJ examined whether the exemptions from the regional taxes constituted state aid within the meaning of Article 107(1) TFEU. Most importantly, the ECJ assessed whether the tax exemptions fulfil the criterion of selectivity. This would be the case if, in light of the objectives pursued by the taxes, i.e., environmental protection and town and country planning, the retail establishments excluded from the scope of the taxes are in a comparable situation to establishments coming within their scope.

As regards the exemption criterion based on the size of the establishment, the ECJ accepted that the environmental impact of retail establishments depends largely on their size and that large establishments have a particular significance for town and country planning policies. Therefore, the ECJ concluded that the tax regimes differentiate between categories of establishments that are not in a comparable situation in the light of the objectives pursued by the regional taxes. The tax exemptions received by smaller retailers cannot, therefore, be regarded as conferring a selective advantage on those establishments.

As regards the exemptions for certain activities pursued by establishments, the national governments had argued that activities such as the sale of garden materials, vehicles or construction materials have fewer adverse effects on the environment and on town and country planning since they require, by their very nature, large sales areas but do not attract a large number of consumers and do not increase traffic flows. The ECJ considered that these factors may justify the distinction adopted by the taxes, but decided that it is for the Spanish Supreme Court to determine whether in fact that is the case.

The judgment of the ECJ confirms that the state aid rules do not prevent Member States from imposing taxes on certain companies in view of contributing towards environmental protection and town and country planning

objectives. If companies exempted from paying such tax have a lesser negative impact on the objectives pursued than companies subject to the tax, they can be found not to be in a comparable factual situation to the taxed companies and thus not to receive a selective advantage.

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LEGISLATIVE, PROCEDURAL AND POLICY DEVELOPMENTS

– EUROPEAN UNION LEVEL –

Commission proposes legislation to increase fairness and transparency on online platforms

On 26 April 2018, the European Commission proposed a new Regulation on promoting fairness and transparency for business users of online intermediation services (the "Proposed Regulation").

The Proposed Regulation aims to address business practices which are likely to be harmful to business users which use online platforms to sell goods and services to consumers. Under this legislation, online platform providers will be required to: (i) update their terms and conditions; (ii) comply with a range of transparency requirements; and (iii) implement a dispute resolution mechanism. The proposal comes as part of the Commission's Digital Single Market Strategy, which aims to remove obstacles to the free circulation of goods, services, capital and data from online marketplaces.

The Proposed Regulation focuses on online intermediation services ("OIS") and online search engines ("OSE"). OIS are defined as services which: (i) are "information society services" within the meaning of Directive 2015/1535 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services; (ii) allow businesses to offer goods and services to consumers with a view to facilitating direct transactions between those parties; and (iii) are provided on the basis of a contractual relationship between business users and service providers as well as between business users and consumers. Well-known OIS providers include eBay, Amazon Marketplace, Apple App Store, Skyscanner and Google Shopping. An OSE is defined as "a digital service that allows users to perform searches of, in principle, all websites […] on the basis of a query on any subject in the form of a keyword, phrase or other input, and returns links in which information related to the requested content can be found".

The Proposed Regulation will have a broad geographical scope. Regardless of where OIS or OSE providers are established, they will be subject to the Proposed Regulation if they: (i) provide services which are used by EU-based businesses; or (ii) offer goods and services to EU consumers.

Terms and conditions

OIS providers will be required to update their terms and conditions if they do not conform to certain minimum standards of clarity and transparency. In particular, terms and conditions must be drafted in clear and unambiguous language, and be easily available before, during and after the conclusion of the commercial relationship. In substance, terms and conditions must also set out the objective grounds on which the OIS provider may decide to suspend or terminate their relationship with business users. Any changes to terms and conditions must be communicated to business users in advance. The notice period shall not be less than 15 days, unless waived by the business user.

Failure to comply with these provisions will have repercussions for service providers, as any terms and conditions which do not comply with the aforementioned requirements will not be binding on the business user concerned.

Transparency

The Commission has identified transparency concerns in relation to page rankings and algorithms. In this regard, the Proposed Regulation acknowledges that the ranking of websites by OSE providers has an important impact on consumer choice and the commercial success of business users.

Pursuant to the Proposed Regulation, OIS and OSE providers will be required to clearly set out the main parameters used to determine the rankings of business users and corporate websites. While it is not unlawful to alter rankings for payment, OIS and OSE providers must clearly explain their policy if they do so.

OIS providers must include this information as part of their terms and conditions. OSE providers must provide this information in an easily-accessible, publicly-available manner. While this information must allow users to understand

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the main parameters of the ranking system, OIS and OSE providers will not be required to disclose trade secrets.

The Proposed Regulation also addresses differentiated treatment by requiring a description of any differentiated treatment given to goods and services offered by OIS providers, or by business users which they control, in the terms and conditions used by OIS providers.

Dispute resolution mechanisms

Finally, OIS providers will be asked to implement a dispute resolution mechanism based on complaints-handling and mediation. An internal complaint-handling system will be mandatory. Business users will be entitled to submit complaints on compliance with the Proposed Regulation, non-negligible technological issues, and the conduct of the OIS provider. This section of the Proposed Regulation will not apply to smaller OIS providers, however.

In addition, OIS providers must commit to mediation as a form of alternative dispute resolution. The Proposed Regulation will oblige providers to identify a suitable mediator (normally an EU-based practitioner), to engage with the mediation process in good faith, and to bear at least half the costs of mediation.

Pursuant to the Proposed Regulation, associations representing businesses will be granted the right to bring court proceedings on behalf of businesses to enforce the new transparency and dispute settlement rules.

For its part, the Commission will review and evaluate the Proposed Regulation every three years. It will encourage OIS and OSE providers to establish codes of conduct and has published a Commission Decision setting up an Observatory on the Online Platform Economy. This body will bring together industry experts and Commission officials, providing expert advice to the EU legislator.

Next steps

The Commission is currently inviting feedback on its proposal. The Proposed Regulation is available here, and observations may be submitted here before 23 June 2018. The final text will then be sent to the European Parliament and the Council for their input and approval.

European Parliament and Council agree on ECN+ Directive

On 30 May 2018, the European Parliament and the Council reached a provisional political agreement on a Commission proposal for a Directive to make Member States' competition authorities even more effective enforcers of EU antitrust rules (the so-called "ECN+ Directive"). The Commission's proposal dates back to March 2018 and follows a public consultation which the Commission launched in November 2015.

The ECN+ Directive intends to further empower the national competition authorities by providing them with appropriate enforcement tools, to bring about a genuine common competition enforcement area. According to Margrethe Vestager, Commissioner in charge of competition policy, the new rules "will give national competition authorities effective tools and make sure they have the resources necessary to detect and sanction companies that break EU competition rules. It will also ensure that they can take their decisions in full independence".

The proposed rules, once adopted, will provide the national competition authorities with a minimum common toolkit, making sure that they will:

- act independently when enforcing EU antitrust rules and work in a fully impartial manner, without taking instructions from public or private entities;
- have the necessary financial and human resources to do their work;
- have all the powers needed to gather relevant evidence, such as the right to search mobile phones, laptops and tablets;
- have adequate tools to impose proportionate and deterrent sanctions for breaches of EU antitrust rules (the proposal includes rules on parental liability and succession so that companies cannot escape fines through corporate re-structuring, as well as the possibility for national competition authorities to enforce the payment of fines against infringing companies that do not have a legal presence on their territory); and

- have coordinated leniency programmes which encourage companies to come forward with evidence of illegal cartels.

The draft legal text still needs the formal approval of the European Parliament and Council, which is expected by the end of 2018.

– MEMBER STATE LEVEL –

Austrian Federal Competition Authority publishes report on pharmacy sector

On 18 May 2018, the Austrian Federal Competition Authority ("FCA") published a partial report on the results of the ongoing sector inquiry into the healthcare sector which was launched in early 2017. The sector inquiry currently focuses on four subsectors: pharmacies, ambulances and medical transport, health insurance and hospitals.

This first report deals with the pharmacy subsector. It aims at encouraging a general discussion on the enhancement of competition in the pharmacy market. The report examines the market structure of the Austrian pharmacy sector (e.g., number of pharmacies, turnover, and ownership). It then assesses market access and a number of operational rules from a competition law perspective (e.g., opening hours, online market). In addition to the 42-page report (German version available on the FCA website), the FCA has published proposed solutions to solve the issues that were identified. Among others, the FCA identifies regulatory hurdles to the entry into the online pharma market and proposes partial liberalisation.

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