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to the point technology & digitalisation

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Digitalisation vs Antitrust – Round 2

How quickly times are changing! Some six months ago I mentioned in the TTP editorial that "there was growing belief amongst regulators that competition may not be working effectively in technology markets" and that a "radical overhaul of competition law" was needed. Fast forward to November 2020, and we are eagerly awaiting the publication by the European Commission of new draft legislation (announced for 9 December), to improve the enforcement of rules to counteract perceived novel problems posed by digital service providers.

The Commission will propose rules to address the risks faced by users of platforms and enable effective enforcement, the Digital Services Act ("**DSA**", see also here). In this context, the European Commission will also propose the so-called New Competition Tool ("**NCT**"), which will include powers to impose ex ante measures on digital platforms even in the absence of demonstrated abusive conduct. The DSA and NCT shall ensure effective competition and prevent unfair and anticompetitive trading practices, such as self-preferencing, anti-steering, tying & bundling, and unwillingness to share data by large online platforms that can be regarded as "gatekeepers", which as per the Commission "set the rules of the game for their users and their competitors".

Ultimately, the proposals by the Commission are all about closing the alleged enforcement gap that currently exists according to the Commission.

Some might note, though, that talk of an enforcement gap is exaggerated. As I have mentioned earlier, it seems that ensuring effective competition first and foremost requires practical measures and that competition authorities will have increasing appetite to bring cases against technology companies in the future. And authorities have shown lately that they are not shying away from taking on platforms in particular:

The European Commission recently opened investigations into Apple over App Store rules and Apple Pay. The first follows a complaint filed by Spotify in March 2019, whereby the music streaming service took issue with Apple's 30 % commission levied on in-app purchases. Apple responded by announcing a new App Store Small Business Programme, dropping the commission to 15 % under certain circumstances.

National competition authorities are not holding back either: The German Federal Cartel Office has opened a second investigation into Amazon, this time focusing on how the company influences pricing on its marketplace. According to the FCO, it received numerous complaints from merchants regarding Amazon's conduct. In similar fashion, the Polish Office of Competition and Consumer Protection has commenced an investigation into leading online marketplace provider Allegro, following complaints related to unfair conditions of engagement between Allegro and sellers.

The battle between technology companies and competition law legislators and enforcers has always been fascinating. Ultimately, it is about driving innovation for the benefit of consumers. We therefore cannot wait to see the next round. Bring it on!

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  Authors Austrian chapter: Christoph Haid, Veronika Wolfbauer, Michael Lindtner

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  Authors Austrian chapter: Thomas Kulnigg, Ursula Rath

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- **LEXOLOGY Getting the Deal Through: Technology M&A 2021**

  Authors Austrian chapter: Thomas Kulnigg, Dominik Hofmarcher

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To the Point:

- **European Commission to publish Digital Markets Act and New Competition Tool soon**

  The European Commission (EC) will publish its highly anticipated Digital Markets Act (DMA) and Digital Services Act (DSA) on 9 December. The EC's legislative package will include an ex ante regime for gatekeeper platforms and market investigations tool for digital markets. The new competition tool ("**NCT**") would give the authority investigation powers similar to those of the UK Competition and Markets Authority (CMA). The EC would be able to impose behavioural and also structural remedies. The NCT proposal would go "hand in hand" with the DSA. The Commission's goal is that online marketplaces must not be controlled by gatekeepers, which can foreclose important players or competitors. Rather, online platforms should be "vibrant ecosystems".
  Christoph Haid

- **A victory for innovation in Austrian passenger transportation?**
  Austria's Occasional Traffic Act, which governs the taxi transport business, is bound to be changed (see here) to enable innovative, digital business models to prevail. The national competition authority has already voiced support for the changes (see here), following an enquiry earlier this year in which it found the existing act to impede competition and create a barrier to entry (see here). The changes envisaged will add more flexibility in terms pricing and business models (e.g. shared drives).
  Christoph Haid

- **New Competition Authority decision on non-compete obligations to boost start-up investments in Hungary**
  In recent years, Hungary, especially Budapest, has become a thriving start-up centre in CEE. In 2016 the Government adopted a Digital Start-up Strategy which effectively facilitates start-up investments by adopting favourable regulatory instruments and funding.

  Until a recent decision of the Hungarian Competition Authority ("**HCA**"), competition law posed a notable obstacle to investments in start-ups. Investors usually require founders to undertake non-compete obligations for a certain period. This means that when exiting the start-up after a successful buyout, the founders cannot compete with the buyer in the same market. Such non-compete clauses guarantee that the full value of the assets are transferred to the buyer, including both physical assets and know-how. However, they must be limited in time, and in terms of geographical and personal scope.
  Previously the HCA allowed such non-compete obligations only for a three-year term as of the investment if the seller kept a minority share in the company. But in the case of start-up companies, the founder (who possesses all the know-how) usually remains with the company and only exits completely at a later stage. If after three years the founders could compete with the company in which they still hold a minority share, it would undermine the value of the capital investment.
  Therefore the HCA decided that in the case of a capital investment, the founders who remain with the start-up company as minority stakeholders can be lawfully prevented from imposing parallel competition during the entire term of their minority ownership, and up to two years after the termination of the minority ownership.
  Márk Kovács

- **Special Pre-Emptive Rights in insolvency are admissible**
  The admissibility of special pre-emptive rights of co-shareholders in the event that a creditor compulsorily executes (seizes) a share of a shareholder or a shareholder becomes insolvent, has long been disputed. The Austrian Supreme Court has ruled - such special pre-emptive rights are admissible. This is particularly important for start-ups and its investors, as such rights are market standard in the articles of association in order to prevent a third party from putting its foot into the company. The price may well be lower than the market value, but only if this price difference may be applied to all special pre-emptive cases. For more information check out our new blog post.
  Thomas Kulnigg and Maximilian Nutz

- **First six artificial intelligence and blockchain technology funds backed by InnovFin raise a total of EUR 700m**

  The European Investment Fund recently signed the first six equity agreements with venture capital funds in Austria, Finland, Germany, Luxembourg and the Netherlands, raising a total of EUR 700m under the InnovFin – EU Finance for Innovators initiative.
  InnovFin – EU Finance for Innovators is a joint initiative launched by the European Investment Bank and the European Investment Fund in cooperation with the European Commission under the framework Horizon 2020. As part of the InnovFin – EU Finance for Innovators initiative, the InnovFinEquity programme provides equity investments and co-investments to or alongside investment funds, focusing on companies in their early stages of development or in their growth stage operating in innovative sectors covered by Horizon 2020, including scalable artificial intelligence / blockchain technologies (AI/BT), B2B software, data/analytics, IoT, Smart Cities, automation, language and machine learning, Saas, Fintech, cybersecurity and the future of work.
  For more information and to check out which funds are on board, please visit the website of the European Commission.
  Dominik Tyrybon

- **New referral to the CJEU: Is storage space in the cloud subject to copyright leviesy?**
  As far as member states allow reproductions of copyrighted works for private use and for ends that are neither directly nor indirectly commercial, the rights holders must receive fair compensation (see Art 5 (2) b Directive 2001/29/EC). Such compensation is normally not collected at the level of private users, but from

those, who commercially market storage media of any kind suitable for such reproductions (CDs, DVDs, USB-Sticks but also Computers, Smartphones etc.). Such copy-right levy is then added to the price of the storage media and thus ultimately borne by the private user.
The Vienna Higher Regional Court now wants to know what "reproductions on any medium" in Art 5 (2) b Directive 2001/29/EC means, and whether this also applies to cloud storage, which would mean that providers of cloud storage services would have to pay copyright levies (see Higher Regional Court Vienna 33 R 50/20w).
Dominik Hofmarcher

- **Schrems II – follow-up on new protective measures for safe data transfers**

  On 11 November 2020 the European Data Protection Board ("**EDPB**") issued recommendations on measures that supplement transfer tools to ensure compliance with the EU level of protection of personal data, and recommendations on the European Essential Guarantees for surveillance measures. The recommendations, resulting from a high-level Schrems II judgment, are intended to help data controllers and processors fulfil their obligation to define and implement appropriate complementary measures when transferring personal data to third countries.
  In short, the recommendations contain a plan of action to be taken by data exporters to determine whether it is necessary to implement complementary measures to transfer data outside the EEA in compliance with EU law, and to identify the most effective measures in each case. The recommendations also present an open catalogue of examples of complementary measures and how they could work for the given data transfer. Consultations for complementary measures will be ongoing until 21 December 2020.
  Continuing its work, on 19 November 2020 the EDPB presented the long-anticipated new sets of standard contractual clauses between controllers and processors, and another one for data transfers outside the EU, as well as a statement on the ePrivacy Regulation and the future role of supervisory authorities and the EDPB ("**Statement**"). According to the Statement, the competent authority with respect to the ePrivacy Regulation should be the data protection office. In Poland it would mean transferring part of the responsibilities from the Office of Electronic Communications (*Urząd Komunikacji Elektronicznej*) to the Polish Data Protection Office (*Urząd Ochrony Danych Osobowych*).
  The Statement can be found here.
  Daria Rutecka

- **GBP 49m for the automotive industry**

  The automotive sector has been suffering during the coronavirus crisis, with new vehicle registrations in 2020 lagging behind the numbers in 2019. But there are positive signs, such as the UK's announcement to invest GPB 49m in dozens of projects aiming to advance and support "go green" ambitions, such as developing low carbon emission technologies.
  It will be interesting to see how these projects, one of which is led by a larger OEM, will turn out and whether they will give a boost to the "go green" movement in the automotive industry. With Tesla leading the way, autonomous driving has lately somewhat overshadowed (potential) green alternatives, especially to state-of-the-art motors but also (non-reusable) batteries for electric vehicles. Similar initiatives in the CEE would be welcomed.
  Sara Khalil

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For further information, please contact any of the individuals named above, your usual contacts at Schoenherr or any member of our technology & digitalisation group!

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