

ECLF Annual Plenary Meeting 7 December 2020

The ECLF annual plenary meeting took place virtually due to the ongoing pandemic. It consisted of four different sessions: (i) New tools to deal with gatekeeper platforms and third country subsidies; (ii) What changes to expect in EU merger control procedures: Articles 22 referrals and simplification; (iii) Review of the GBER, HBER and market definition notice – a state of play; and (iv) Competition policy supporting the Green Deal.

The new head of Policy at the European Commission, Inge Bernaerts, and her colleagues joined our meeting along with almost 50 ECLF members.

Gatekeeper platforms and third country subsidies

In relation to the DMA, we discussed procedural safeguards such as right of defence and companies' ability to contest (i) whether they are a gatekeeper at all; (ii) the appropriateness of the prohibitions that might apply in that sector, and (iii) the generalisation that different rules will apply to different digital companies given that their business models are completely different.

The plenary meeting took place ahead of the publication of the DMA, so the Commission was not in a position to discuss the actual proposal. It was noted that the Commission had received a very high number of replies to its consultation on the Digital Services Package proposals, and there appears to be a global convergence amongst policy makers that something needs to be done about big tech platforms.

There was a discussion on foreign subsidies. The discussion focused on the Commission's new and substantial responsibilities in combination with the effect of controlling subsidies on a global basis. Questions around resourcing were raised and whether the Commission envisages getting additional resources to be able to enforce these new regimes. It is clear that these new instruments are only going to be effective if adequate resources are allocated.

According to the Commission's paper on foreign subsidies, *de minimis* thresholds under the EU State aid rules should apply to third country subsidies. Given the low *de minimis* thresholds, this would potentially subject a huge number of subsidy regime around the world to investigations. There was a discussion around the feasibility of the budgetary constraints considering the potential for global complaints by companies that infringe subsidy regime that could have an impact on the internal market. The ECLF wondered whether any consideration had been given to whether the *de minimis* criteria would be increased for third party countries. The Commission noted that is under an obligation to ensure equal and fair treatment of third countries subsidies compare to EU subsidies.

EU merger control procedures: Articles 22 referrals and simplification

There was a discussion about whether the policy change affect any current mergers, or any mergers announced before the summer 2021 when the policy is set to come into effect.

Another part of the discussion focused on the expansion of the scope of Article 22 and whether the decision to start accepting referrals from NCAs, which fall below the national merger control thresholds, is in line with Article 22's original purpose to give Member States with no merger control the chance to ensure the review of potentially anticompetitive mergers. It was discussed how the Commission's guidance would address the scope for legal uncertainty as to the likelihood of a referral.

A Member State can make a referral within 15 working days of when the merger was "made known" to it, which the Commission has clarified goes beyond a press release and requires "sufficient information to make a preliminary assessment" of the criteria for making the referral. It was discussed how NCAs without jurisdiction to review a deal are expected to gather sufficient information about the deal, to decide whether or not to refer it and how the Commission intends to minimise

the uncertainty for businesses that need to know when the 15 day clock has started.

Since 2004, the Commission has only received 33 referrals under Article 22. It was discussed how many referrals under Article 22 the Commission expect annually once this policy change has fully come into effect this summer.

Finally, it was discussed how the Commission intends to deal with the risk of parallel reviews and potentially inconsistent outcomes given that the Commission is only granted jurisdiction over the territories of the Member State that referred it under Article 22.

GBER, HBER and market definition notice – a state of play

The discussion focused mostly on the market definition and the paper the ECLF had submitted in response to the Commission's review of the market definition. The discussion brought up the issue of how supply side substitution has changed, in particular, during Covid-19 and when supply side substitutability is to be taken into account in the market definition. The discussion naturally covered potential competition, which is important in the digital economy, and how potential competition can be factored in the market definition part of the analysis.

There was a discussion of data. Data collection and data sharing is a necessary feature of doing business and engaging with partners both horizontally and vertically data. Thus, it was discussed whether the guidelines on information exchange change will take this into account given these guidelines are currently based on information sharing separate from integration of business activity. The old way of distinguishing between vertical and horizontal is blurred in the digital economy where we see a lot of vertical integration. Thus, there was a question around whether the Commission is going to abandon this (horizontal/vertical distinction) way of thinking.