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Antitrust

European Union

Commission Fines Google for Abusive Practices in Online Advertising

By Maria E. Sturm

The EU Commission, which is in charge of ensuring the application of the EU principles of competition, has fined Google for breaching Articles 101 and 102 of the Treaty on the Functioning of the European Union. It found that Google abused its market dominance to restrict search advertising.

The Commission Decision of March 2019 in Detail

Many websites, such as newspaper websites, have embedded search functions. Search results normally include advertisements. Google's service AdSense for Search works as an intermediary between advertisers and websites. With a market share of over 70% from 2006 to 2016, the EU Commission regards it as dominant in this market.

As competitors cannot sell advertising space on Google's own search engine result pages, it is crucial for them to get access to third-party websites to compete with Google. However, the EU Commission reviewed a substantial number of individually negotiated contracts between Google and publishers and found that they contain clauses that abusively restrict third-parties' access to the market. These clauses are:

1. "Exclusivity" clauses: publishers were prohibited from placing competitors' adverts on their search result pages.

2. "Premium Placement" clauses: publishers had to reserve the most profitable space for Google's adverts.

3. "Control" clauses: publishers had to inform Google before changing the placement of competitors' adverts, which gave Google control with regard to interest and number of clicks for competitors' adverts.

The EU Commission emphasizes that it is not forbidden to have a dominant position in the relevant market. However, it is forbidden to misuse this position. Google has a large market share and, according to the EU Commission, entry barriers to the market are high, due to the substantial investments new competitors must make. The above-mentioned clauses further exacerbate the situation. The clauses led to market restrictions that harmed consumers and competitors without creating efficiencies that would justify Google's approach. The fine of 1.49 billion is based on 1.29% of Google's turnover in

2018.

History: Google already fined in 2017

In June 2017, the EU Commission fined Google € 2.42 billion for giving an illegal advantage to its comparison shopping service. Google had a dominant position, as its search engine's market share exceeded 90% EU-wide for nearly ten years. According to the Commission, market entry barriers are high due to network effects: the more users, the more attractive a search engine is to advertisers. Moreover, the more data the service generates, the better it can optimize its results. As already explained above, it is not forbidden to reach a dominant position, but it is forbidden to abuse it. General search engines and comparison shopping services belong to two different markets. Google used its dominant position in the former as leverage in the latter. For example, Google systematically placed its own comparison shopping service first among the search results, even if this was not how its own search algorithm would have ordered the results. Google also placed its major rivals' services 'artificially' lower in the search results. Consumer behavior has shown that the entry rank – not the quality of the results – decides who receives the most clicks. The most relevant results receive less clicks when they are placed lower on the search results page. The order of search results are even more important on mobile devices, as they have much smaller screens than a computer.

Critique and open questions

As we can see, the EU Commission regarded Google as dominant in the relevant markets and applied the same criteria in both cases. However, some legal scholars have questioned whether the criteria commonly used in antitrust law really fit in the new internet economy. In particular, critics have scrutinized the idea of the dominant position in the relevant market:

1. Relevant Market

To be able to confirm that a company has a dominant position, we must first define the relevant market. This can be difficult with regard to online platforms, as online markets are much harder to delineate. One could even argue that online markets bring more good than harm to consumers, because they significantly reduce transaction costs.[1] In addition, the SSNIP test does not work in this economic area, as services are often offered free of charge. Additionally, SSNIP does not consider network effects.[2] Apart from the difficulties in defining the market with regard to content, the geographical definition is challenging, too. Can the market be limited to one nation just by the language criterion? Should we consider that the internet works globally, with English as the international language? In particular, with the improvement of translation programs, language becomes less important as real barrier. A dominant

[1] *Hoffer/Lehr*, Online Plattformen und Big Data auf dem Prüfstand – Gemeinsame Betrachtung der Fälle Amazon, Google und Facebook, NZKart 2019, 10 (12).
[2] Ibid. 15

position worldwide is much more difficult to reach and to prove.

2. Dominant Position

Users have no contract with Google. In addition, users do not feel the same commitment to stay as they do with social media platforms.[3] Finally, it is crucial to keep in mind the dynamics of the digital economy[4]: monopolies can fail quicker than one might think, and even a market share of 90% is no guarantee of market dominance over the long-run. On the contrary, internet monopolies are primarily known as “contestable monopolies”[5]. Some authors even argue – contrary to the EU Commission – that it is simply impossible to reach a dominant position in the internet economy, for the following reasons[6]:

- Users can easily substitute services such as search engines
- Cost of substitution is low (nearly zero)
- Market entry barriers are low, because a new competitor does not need a lot of infrastructure to set up a new webpage or develop a new app

From my point of view, it is too early to decide where developments in the internet economy will take us. The EU Commission has to make decisions for today, not for the future. However, when applying established antitrust theories to the internet economy, one must pay particular attention to whether these antitrust theories are achieving the same goals in the context of the internet.

[3] Ibid.
[4] *Brauneck*, Google: Machtmissbrauch marktbeherrschender Stellung durch Suchmaschinenbetrieb?, GRUR Int. 2018, 103 (104).
[5] Ibid. 107.
[6] Ibid. 108.

Antitrust

European Union

The Concept of "Irreversible" Transactions and the Application of Ex-post Remedies: the Sky Italia / R2 Decision

By Gabriele Accardo and Sabina Pacifico

On 20 May 2019, the Italian Competition Authority ("**ICA**" or "**Authority**") issued its decision regarding the acquisition by Sky Italian Holding S.p.A. ("**Sky**") of certain assets of the digital terrestrial Pay-TV owned by Mediaset Premium S.p.A. ("**Mediaset Premium**"). The ICA decision imposed significant behavioral remedies to clear the transaction, which the parties decided to close prior to clearance. Sky is the dominant player in the market for Pay-TV services in Italy, and Mediaset Premium was the only significant competitor in the market.

Background

Between March and November 2018, Sky and Mediaset Premium entered into a number of preliminary interrelated agreements in view of the sale of R2 S.r.l. ("**R2**") to Sky. R2 is a company established in May 2018, through the transfer of a business branch of Mediaset Premium, that carries out technical and administrative activities necessary for companies offering Pay-TV services (such as the management of signal encryption, commercial services, administrative management of customers, activation and deactivation of services, call centers and assistance) and runs the terrestrial digital broadcasting technical platform of Mediaset Premium.

On 28 November 2018, Sky and Mediaset Premium submitted the merger filing to the ICA and two days later the transaction was closed without waiting for the clearance decision of the Authority (there is no stand-still obligation under Italian merger control rules), therefore facing the risk of significant remedies being imposed.

On 28 March 2019 the ICA sent a Statement of Objections ("**SO**") to the two companies, wherein it raised serious doubts as to the compatibility of the transaction with the competition rules.

The preliminary conclusions in the SO

In the SO, the Authority made clear its competition concerns and highlighted its intention to block the merger or to authorize it with remedies, chiefly due to the following issues:

- The transaction would have strengthened Sky's already dominant position in the **(i)** retail market for Pay-TV services – since Mediaset Premium was its sole direct significant competitor – and in the **(ii)** market for wholesale access to the technical platform used to offer paid digital terrestrial services.

- As a result of the transaction, Sky would be the sole provider of access services to the technical platform necessary for Pay-TV services by triggering the exit of Mediaset Premium from the market. According to the ICA, the mere acquisition of R2 would have the same (anticompetitive) effects as Sky acquiring the entire Mediaset Premium.

In essence, buying R2 allowed Sky to instantly reach almost five million additional customers who already have an R2 smartcard or set-top box.

The Decision and the behavioural remedies

Following the concerns set out in the SO, and the clear intention of the Authority to, at best, clear the transaction only with significant remedies, Sky dropped the plan to acquire R2 and withdrew the merger filing.

However, on 5 April the ICA approved the merger by imposing behavioural measures, having concluded that the transaction had already produced irreversible anticompetitive effects in the market.

In fact, as a result of the transaction, Mediaset Premium's clients migrated to Sky. According to the ICA, once the clients have moved to a different competitor, the effects of the acquisition are irreversible.

Thus, the ICA could not help but imposing remedies aimed at restoring the competitive level that had been reduced by the exit of the main – and sole – significant competitor from the Pay-TV market.

Under the conditions imposed by the ICA, Sky:

- will be prohibited from entering into exclusive rights for audiovisual content and linear channels for internet platforms in Italy for three years in order to restore the level playing field in the market for Pay-TV services and allowing other operators that provide their services through internet;
- shall grant access to competitors to any new platform it may develop that is compatible with the R2's assets, under fair, reasonable and non-discriminatory conditions.

Conclusive remarks

The case shows that the peculiar features of digital markets, such as the Pay-TV market, necessitate close scrutiny of the effects of a transaction in the market, prior to the transaction’s completion. In cases like the one at issue, once a transaction has been completed, it may be difficult – if not impossible – to restore the *status quo ante*. Therefore, extensive remedies may be expected, since even the "de-merge" would not be enough.

In the case at issue, the returning of R2 to

Mediaset Premium could not, according to the ICA, eliminate the anticompetitive effects caused by the transaction – as these occurred before the filing and, most importantly, prior to the clearance decision.

The conclusion reached by the Authority is quite innovative insofar as it approved a transaction and imposed *ex post* remedies. This decision may further fuel the international debate regarding the approaches that competition authorities may adopt in the face of the challenges posed by the digital economy.

Intellectual property

United States

U.S. Copyright Office Publishes Report on Moral Rights

By Marie-Andrée Weiss

The U.S. Copyright Office published on 23 April 2019 a report on moral rights entitled Authors, Attribution, and Integrity: Examining Moral Rights in the United States. Karyn Temple, the Office Director, wrote in her introduction that the report focuses "on the personal rights of individual authors and artists, who have often been excluded in broader conversations about copyright legal reforms."

This concern echoes the philosophy behind laws in European countries which are called "author's rights" (droit d'auteur) and protect a work as being the imprint of the author's personality. As it has been explained, for instance, by the European Court of Justice in Infopaq, a literary work is composed by words "which, considered in isolation, are not as such an intellectual creation of the author who employs them. It is only through the choice, sequence and combination of those words that the author may express his creativity in an original manner and achieve a result which is an intellectual creation."

Since a work expresses the personality of the author, he or she must then be provided moral rights to protect the integrity of the work, as well as his or her right to be presented as the author. Moral rights are often presented as the main difference between copyright and author's rights.

Are there moral rights in the U.S.?

Moral rights can be provided by contracts and licenses, which "have been at the forefront of protecting moral rights in the United States for many years and are commonly used in creative industries for that purpose" (p. 39 and p. 127). But what about the law?

The U.S. only acceded to the Berne Convention for the Protection of Literary and Artistic Works in 1988, in which article 6bis provides for moral rights, independently of the author's economic rights. The author has "the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation."

As this right seems to provide authors a way to prevent fair use of their work, including the creation of derivative works, which are protected by the First Amendment, it is not surprising that the U.S. has not embraced the doctrine of moral rights. The report deals with the tensions between the First Amendment and moral rights (p.28), and calls the fair use doctrine "a vital First Amendment safeguard" (p. 30).

Indeed, no seminal moral right law was enacted after the U.S. joined the Berne Convention, as Congress determined, maybe a little bit hastily, that the United States already provided sufficient protection for the rights of attribution and integrity "through an existing patchwork of laws," including the Lanham Act and some provisions of the Copyright Act (p. 7, p. 24 and p. 36).

However, in 1990 Congress enacted the Visual Artists Rights Act ("VARA"), section 106A of the Copyright Act, which provides authors of narrowly defined "work[s]of visual art" the right "to claim or disclaim authorship in the work, as well as a limited right to prevent distortion, mutilation, or modification of a work that is of recognized stature."

In 1996 and 1997, the U.S. ratified the WIPO Performances and Phonograms Treaty, article 5 of which provides a moral right to performers who interpret works of art. Congress also considered in this instance that this right was already protected in the U.S. by the existing patchwork of laws, and that there was thus no need to enact a specific law (p. 26).

Congress however did enact in 1998 the Digital Millennium Copyright Act, which added section 1202 to the Copyright Act. Section 1202 prohibits, in some instances, removing, altering, or providing false copyright management information ("CMI").

Article 5 of the 2012 WIPO Beijing Treaty on Audiovisual Performances gives performers a moral right in their live performances. While the U.S. signed the Treaty in 2012, it has not ratified it yet, and neither have any of the G6's members.

Finally, some states have their own moral right statutes, for instance, the California Art Preservation Act of 1979 (p.120).

No need for a blanket moral right statute

In its just-released report, the Copyright Office found no need to introduce a blanket moral rights statute at this time (p.9). Instead, it suggested amending the Lanham Act and the Copyright Act, as it "believes that updates to individual pieces of the patchwork may be advisable to account for the evolution of technology and the corresponding changes within certain business practices" (p. 39).

The Office also suggested that Congress could amend VARA. The federal statute only applies to "works of visual art," which are narrowly defined by Section 101 of the Copyright Act as works existing in a single copy or a limited edition. The report noted several cases denied VARA protection because "the work was considered promotional or advertising material" (p.66). The Office recommended, however, that only commercial art created pursuant to a contract and intended for commercial use be excluded from VARA's scope (p.68).

The Office also suggested that Congress consider narrowly amending section 43(a) of the Lanham Act so that its unfair competition protections would include false representations of the authorship of expressive works. Section 43(a) applies to "false designation[s] of origin, false or misleading description[s] of fact, or false or misleading representation[s] of fact." The Supreme Court had put a stop in 2003 to the use of Section 43(a) as a substitute for moral right, finding in *Dastar Corp. v. 20th Century Fox Films* that the section should not be recognized as a "cause of action for misrepresentation of authorship of noncopyrighted works."

This Supreme Court decision "resulted in the fraying of one square of the moral rights patchwork as originally envisioned by Congress" (p. 54). At stake in this case was the right of attribution of a work in the public domain, which had been commercialized by a third party without indicating the original author. Right of attribution is one of the standard moral rights.

The Office also suggested that Congress add a new cause of action in a new section 1202A of Title 17, so that the author of a work could recover civil damages if he or she can prove that the defendant knowingly removed or altered CMI with the intent to conceal the author's attribution information. Indeed, it "is common practice in the digital world for CMI to be stripped from works, disconnecting a work from its authorship and ownership information" (p.86).

Moral Rights and Right of Publicity

The Office recommended that Congress adopt a federal right of publicity law in order to reduce the uncertainty and ambiguity created by the diversity of state right of publicity laws. Almost all of the U.S. states have a right of publicity, whether at via common law, statutory law, or both, but they differ in the length and scope of protection. "As a result, there is significant variability among the protections available to an author depending upon where he or she chooses to live, and the specter of federal copyright preemption looms over many right of publicity claims" (p.117).

The report noted that "the right of publicity had provided authors with causes of action for misattribution of authorship, material alterations to the author's work, and distribution of the author's work in connection with inferior packaging and artwork" (p.111). However, as this right protects the name and likeness of the author or performer, it "cannot address situations where the author's name or likeness is absent. Thus, the right of publicity can stand as a proxy for the right of attribution against violations resulting from misattribution, but has little to say in cases where the author is not credited at all" (p.113). It cannot protect the integrity of the work either.

The report briefly noted that "the increasingly accessible video editing technology behind "deepfake" software can not only fundamentally alter the content of an author's work, but can also lead to social and moral harm for the artists and the subject of the video through malicious use" (p.8). This new technology is likely to trigger new right of publicity laws. For example, New York tried unsuccessfully to enact a new right of publicity statute that specifically addressed the issue of deep fakes.

It remains to be seen if Congress will heed the report’s suggestions. Whether it does or not, the debate on moral rights is likely to continue.

Intellectual property

European Union

The Controversial European Union Directive on Digital Copyright

By Marie-Andrée Weiss

The EU Directive 2019/790 of the European Parliament and of the Council on Copyright and Related Rights in the Digital Single Market was approved by the EU Parliament on 17 April 2019 and was published on 17 May 2019. It concludes a long and hard-fought lobbying campaign where authors, internet companies, and the general public fiercely debated the most controversial issues of the Directive, the new related rights of press publishers (Article 15) and the new responsibility regime for online platforms (Article 17).

The Directive also addressed how works in the public domain or out-of-commerce could be used by "cultural heritage institutions," that is, a library or a museum, and how research organizations could reproduce protected works for scientific research.

Facilitating use of content in the public domain: Article 14

Not all of the provisions of the Directive are controversial. For instance, Article 14 provides that reproductions of works in the public domain cannot be protected by copyright, unless this reproduction is original enough to be itself protected by copyright.

This means that museums and other institutions will no longer be able to claim a copyright on reproductions of works in the public domain which are in their collections. It remains to be seen if some of them will claim that the reproductions are original enough to be protected. Museums may change the way they photograph their works, although it would be difficult to claim that a mere reproduction of a painting is original enough to be protected. It could be, however, possible to claim so for the reproduction of a sculpture, a building, or a garment (clothes can be protected by copyright in the EU).

Cultural heritage institutions are, however, granted by Article 6 the right "to make copies of any works or other subject matter that are permanently in their collections, in any format of medium, for purposes of preservation…or other subject matter." They are thus given the fair use right to entirely reproduce a work, for preservation purposes only, and even for profit. The museum stores will be well stocked.

"Out-of-commerce works" Article 8

Collective management organizations which are "sufficiently representative of [relevant] rightholders" will have the right to conclude with cultural heritage institutions a non-exclusive non-commercial license for the use of "out-of-commerce works." This will, for instance, allow books which are no longer published to be copied and distributed by libraries, and orphan works to be featured in museums. Authors will, however, have the right at any time to exclude their works from this scheme.

Data mining

Articles 3 to 5 provide for a copyright exception "for reproductions and extractions made by research organizations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access."

The organizations will have to implement "an appropriate level of security" when storing the works. The rightholder will be able to expressly reserve their rights "in an appropriate manner, such as machine-readable means," if the work is made available online. It is thus not an opt-in scheme, but an opt-out one, and an author failing to constrain such use by digital marking, or any other method, may not have much recourse.

Digital teaching

Article 5 of the Directive provides for a copyright exception for works used for teaching, when provided by an educational establishment, either on-site or online, through "a secure electronic environment accessible only by the educational establishment's pupils or students and teaching staff." This definition encompasses MOOCs, but not blogs, even if the sole purpose of the blogger is to provide information about a particular topic.

The two most controversial articles in the Directive are Article 15, which provides a related right to press publishers, and Article 17, which makes platforms liable for content protected by copyright which are illegally shared online.

Article 15 (formerly Article 11): a related right for press publishers

Article 15 provides press publishers established in the EU the exclusive right, for two years, to reproduce the works they publish and to make them available to the public, a right which has been named by some of its detractors "ancillary copyright." Authors retain, however, the right to independently exploit their works.

Recital 54 of the Directive explains that the wide availability of online news is a key element of the business models of news aggregators and media monitoring services, and a major source of profit for them. However, this makes licensing their publications more difficult for publishers, and thus it is "more difficult for them to recoup their investments."

Not surprisingly, this proposal was fiercely debated, by news aggregators, of course, but also by non-profit organizations that viewed this new right as a threat to free exchange of information on the Web. The rights provided by Article 15 do not apply, however, “to private or non-commercial uses of press publications by individual users.”

Article 15 does not apply to either “very short extracts of a press publication” or to “individual words,” an exception which can hardly be described as a fair use exception. It is nice to know, though, that one has the right to reproduce a single word without having to pay a fee.

Article 17 (formerly article 13): Towards an EU “DMCA”?

“Online content-sharing service providers” are defined by article 2(6) of the Directive as “provider[s] of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes.”

This long definition refers to digital platforms, such as Google or Facebook. They will have to obtain the authorization of the rightholder, for instance, through a license, in order to have the right to share the protected work with the public.

If they do not have this authorization, that is, in almost all cases, they will be liable for unauthorized acts of communication to the public of works protected by copyright, unless they “acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the… works…and made best efforts to prevent their future upload” (Article 14.4(c)).

The platforms will have to put in place “an effective and expeditious complaint and redress mechanism…available to users of their services in the event of disputes.” This requirement is similar to the one put in place in 1998 by the Digital Millennium Copyright Act (DMCA), which provided a safe harbor for online service providers if they “expeditiously” remove or disable access to the infringing material after receiving a DMCA takedown notice.

Several legal scholars, such as Professor Wendy Seltzer and Professor Daphne Keller, have argued that the DMCA is a threat to free speech. Indeed, platforms regularly delete, automatically and zealously, works which are protected by the fair use doctrine upon receiving a DMCA notice. It is likely that the EU scheme will lead to similar overreach.

The Directive is ambiguous as to the way platforms are required to fulfill their new duties. Article 17.8 expressly provides that “application of [Article 15] shall not lead to any general monitoring obligation,” but Article 17.4(b) provides that the platforms must be able to demonstrate that they “made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of [protected] works.” Platforms may be inclined to consider that monitoring content by algorithms is indeed the current “high industry standards of professional diligence.”

Next stop: implementation, on a bumpy road

Member States have up to 7 June 2021 to transpose the Directive into their legal systems, since Directives, unlike Regulations, are not directly applicable in the EU.

However, the road to implementation is likely to be a bumpy one. Poland filed in May a complaint to the Court of Justice of the European Union against the EU Parliament and the EU Council, claiming that Article 17 of the Directive would lead to online censorship. The debate over the Directive is likely to continue.

Other developments

European Union

CJEU: Investment Court System in CETA Compatible with EU Law

By Gabriel M. Lentner and Oleksandra Novikova

Background

On 30 April 2019, the Court of Justice of the European Union held that the Investor-State Dispute Settlement mechanism (ISDS) provided for in the EU-Canada Comprehensive Economic and Trade Agreement (CETA) is compatible with EU law.

The envisaged mechanism, called the Investment Court System (ICS), departs from the existing ad hoc system of international investment arbitration and provides for the establishment of the Tribunal (Article 8.27) and the Appellate Tribunal (Article 8.28). In the long term, these are to be substituted by the multilateral investment Tribunal (Article 8.29).

The Kingdom of Belgium asked the Court for a legally binding opinion based on concerns regarding its compatibility with EU primary law, including fundamental rights. In particular, worries were expressed with regard to the autonomy of (1) the EU legal order, (2) the principle of equal treatment and the effectiveness requirement, and (3) the right of access to an independent tribunal.

Because of previous decisions by the Court that found that the establishment of a Patent Court, the EU accession to the European Court of Human Rights or intra-EU investment arbitration (*Achmea)* were incompatible with EU law, the decision was highly anticipated as resolving the issues surrounding the EU's participation in international dispute settlement outside the control of the EU judicial system.

(1) ISDS and the autonomy of the EU legal order

The Court held that EU law does not preclude the CETA from creating tribunals outside the EU legal order when they are called upon to interpret and apply the provisions of that Agreement in accordance with the rules and principles of international law applicable between the Parties (118).

Key was that CETA limited the tribunals' jurisdiction to the provisions of the Agreement (122), thus not conferring jurisdiction over the interpretation and application of EU law other than those relating to CETA (136).

Consequently, the CJEU found no adverse effect of the ISDS in CETA on the autonomy of the EU legal order (161).

(2) The ISDS and the general principle

of equal treatment and the requirement of effectiveness

The Court then addressed the issue of ‘equality before the law’ as guaranteed by Article 20 of the Charter of Fundamental Rights of the European Union which requires comparable situations not to be treated differently and different situations not to be treated in the same way, unless it is objectively justified (176).

The Kingdom of Belgium claimed that foreign investors that invest in the EU are treated differently than those from within the EU, who would not be able to bring a case before ISDS under CETA. (179). The Court, however, brushed this argument aside by holding that foreign investors are not in a comparable situation to investors within the EU and for this reason ‘are to have a specific legal remedy against EU measures’ (181).

The CJEU further concluded that ISDS in CETA does not impede the full application of the TFEU provisions on competition in the internal market and therefore has no adverse effect on the requirement of the effectiveness of EU competition law (188).

(3) The ISDS and the right of access to an independent tribunal

Finally, the ISDS was assessed in light of the right to a remedy before an independent and impartial tribunal previously established by law (second paragraph of Article 47 of the Charter), and to effective access to justice (third paragraph of this Article) (189). Not to breach those rights, a certain level of accessibility and independence must be achieved.

The CJEU concluded that ‘the approval of the CETA by the Union is thus dependent on the abovementioned commitment by the Union to guarantee effective access to the envisaged tribunals for all EU investors subject to the CETA’ (221). With such a link established, it was held that the CETA complies with Article 47 of the Charter (222).

Lastly, the Court held that ISDS in CETA with its provisions on composition of the tribunals, appointment procedures and remuneration, etc. were sufficient to conclude that the requirement of independence was met (244).

Conclusion

With this decision the CJEU clarifies that ISDS is in principle compatible with EU law but also sets out the relevant conditions for continued compatibility. Therefore the decision has broader implications beyond the CETA agreement but also the other agreements concluded or negotiated by the EU with third states that include ISDS.

The decision also supports the EU Commission’s efforts internationally to establish a new multilateral investment court system that would then replace the individual ISDS mechanisms in the future.

Still, another challenge against ISDS in CETA is currently pending before the German Constitutional Court, so it is not yet certain whether the new ICS mechanism will see the light of day.

Other developments

European Union

EU Releases Proposal on New WTO Rules for Electronic Commerce and Puts Privacy at its Core

By Nikolaos Theodorakis

On 3 May 2019, the European Union (EU) published its proposal on future rules and obligations related to e-commerce (Proposal). This Proposal forms part of the ongoing World Trade Organization (WTO) negotiations on e-commerce that kicked off in January 2019 and is aimed at achieving transparency in developing the future digital trade policy and creating consistency regarding cross-border data flows and privacy regulations across the globe. The Proposal takes to heart the role of privacy, data protection and internet neutrality in advancing e-commerce and eliminating barriers to digital market access across countries.

The Proposal

The Proposal recognizes that the rapid growth of e-commerce and the digitalization of the economy are having a tremendous impact on businesses and consumers globally. It aims to strengthen consumer confidence in online transactions, keep internet access open, and shield traders from attempts to restrict data flows or seize data and source code.

The Proposal addresses the dated WTO rules on the provision of services that are found in the General Agreement for Trade in Services (GATS). GATS entered into force in 1995, long before the internet revolution, the use of e-commerce globally and the wide-ranging data protection regulations. Further, there are currently no other multilateral rules that regulate digital trade. This means that both businesses and consumers have to rely on disparate rules that certain countries agree in their bilateral or regional trade agreements.

To this end, the EU is proposing a broad set of rules and commitments regarding digital trade in three main areas: e-commerce, telecommunications services, and market access requests.

E-commerce

The Proposal provides that WTO members should, inter alia:

- Enable cross-border data flows to facilitate digital trade and cross-border sales. As such, WTO members should not: (i) force the use of specific, pre-approved or pre-certified, computing facilities or network elements; (ii) require data localization for storage or processing; or (iii) block the storage or processing in the territory of another country;

- Protect personal data by adopting and maintaining safeguards, for instance through the adoption and application of rules for cross-border data transfers.
- Guarantee the validity of e-contracts and e-signatures, save for certain exceptions;
- Strengthen consumer's trust in the online environment, particularly through enacting measures that protect them from fraudulent and deceptive commercial practices;
- Adopt measures to effectively combat spam messages (unsolicited commercial electronic messages), by requiring the recipients' explicit consent and facilitating the ability to opt-out from any future communication;
- Prohibit that WTO members require the transfer of, or access to, the source code of software owned by a company or an individual in another country;
- Permanently ban customs duties on electronic transmissions; and,
- Adhere to the principle of open internet access, namely allow for non-discriminatory network access and device connectivity.

Telecommunication Services

The Proposal recommends that the existing telecommunication services regulations be upgraded to ensure that they are fit to support today's vibrant internet ecosystem, which is the main enabler of e-commerce. This includes provisions that prevent anti-competitive practices (e.g. illegal subsidies), interconnection of telecommunication services without discrimination, and licensing criteria for these services.

Market Access

The market access suggestions are geared towards allowing seamless access to computer and telecommunication services. For that purpose, the EU suggests that other WTO members join the Information Technology Agreement, which aims to completely eliminate tariffs on IT products, and the Understanding on computer and related services, which aims to bring down barriers in computer services. The same goes for telecommunication services, where the EU is pushing for zero market access limitations (e.g. no requirement to use networks of specific suppliers, no requirement of commercial presence, and no requirement for commercial arrangements).

Going Forward

Of the WTO's 164 members, 77 have agreed to try to bring the e-commerce rules up to speed with current developments, including the EU, the US and China (which joined with the caveat that rules on data flows must be subject to the precondition of security). Overall, the Proposal touches on aspects like data localization, cross-border data flows, geo-blocking, net neutrality and data protection standards and aims to create a liberalized and secure environment where digital trade and e-commerce can thrive.

Other developments

European Union

The European Central Bank Crypto-Assets Task Force Occasional Paper on Crypto-Assets

By Jonathan Cardenas

In May 2019, the European Central Bank ("ECB") Crypto-Assets Task Force (the "Task Force") published an Occasional Paper on the potential risks posed by crypto-assets to financial stability, monetary policy and financial market infrastructures in the euro area.[7] The Occasional Paper analyzes the extent to which current regulatory and financial oversight frameworks provide an adequate mechanism for the containment of risk posed by crypto-assets. This article provides a brief summary of the Task Force's regulatory analysis and policy recommendations.

I. Role of the ECB Crypto-Assets Task Force

The Task Force was established in March 2018 to monitor the development of crypto-assets and to assess the potential risk posed by crypto-assets to the stability of the European financial system, including the potential impact on European payment systems. The work of the Task Force is centered around three pillars: (1) the characterization of crypto-assets and related activities, (2) the monitoring of crypto-assets and related activities, including monitoring of channels that could potentially transmit crypto-asset risk to the euro area and European economy at large, and (3) the identification of potential control measures to mitigate risks posed by crypto-assets. The Task Force's overall objective is to contain any adverse impact of crypto-assets on the use of the euro, European monetary policy and the stability of the European Union ("EU") financial system as a whole.

The Task Force's analysis serves as a basis for ECB contributions to regulatory policy discussions with the European System of Central Banks, the EU institutions, EU Member State financial regulatory authorities, and internationally. It also complements work on crypto-assets already undertaken by other financial sector authorities around the world, including the G7, G20 and Financial Stability Board, all of which are focused on crypto-asset implications for global financial stability.

II. Occasional Paper Overview

The Occasional Paper provides a balanced

[7] European Central Bank Crypto-Assets Task Force, "Crypto-Assets: Implications for financial stability, monetary policy, and payments and market infrastructures," Occasional Paper Series No. 223, May 2019. Available at: https://www.ecb.europa.eu/pub/pdf/scpops/ecb.op223~3ce14e986c.en.pdf

look at the crypto-asset phenomenon, recognizing that crypto-assets pose risk with respect to money laundering, terrorism financing and consumer protection, while also acknowledging that the distributed ledger technology that underpins crypto-assets could potentially increase the efficiency of financial intermediation and of the financial system as a whole. In the Occasional Paper, the Task Force offers a characterization of crypto-assets which forms the basis of its analysis; it describes trends linking crypto-assets to financial markets; it assesses the potential impact of crypto-assets on European monetary policy and financial stability; and, it identifies gaps in crypto-asset regulation.

III. Characterization of Crypto-Assets

The Task Force recognizes that there is currently no international consensus on how to define a crypto-asset. With this in mind, the Task Force defines a crypto-asset for purposes of its analysis as “a new type of asset recorded in digital form and enabled by the use of cryptography that is not and does not represent a financial claim on, or a liability of, any identifiable entity.”[8] In characterizing crypto-assets, the Task Force creates a distinction between what it refers to as the “infrastructure layer” and “asset layer” of a crypto-asset.[9] The infrastructure layer is comprised of the software that underpins crypto-assets, namely distributed ledger technology. With respect to the asset layer, the Task Force describes this layer as the “sole focus”[10] of its analysis and acknowledges that although crypto-assets “derive their novelty and specific risk profile, particularly their inherent high volatility, from the absence of an underlying fundamental value,”[11] crypto-assets can be considered valuable by crypto-asset users as an investment and/or means of exchange, and could therefore be considered an asset.

IV. Trends Linking Crypto-Assets to Financial Markets

According to data gathered by the Task Force, an important share of bitcoin trading volume is settled in euro, implying that the euro area’s exposure to crypto-assets is “non-negligible.”[12] However, the Task Force states that there are no indications that banks have systemically-relevant holdings of crypto-assets at the present time. The combined indirect exposure of banks to crypto-assets via exchange-traded notes and contracts for differences, for example, did not exceed 20,000 EUR at the end of Q3 2018.[13] Notwithstanding the fact that current links between crypto-assets and the traditional financial sector are limited, the Task Force recognizes that these links could increase in the future as a result of recent market trends including the growth of futures contracts linked to bitcoin prices, as well as strong hedge fund and asset manager interest in crypto-asset based products. The Task Force states that euro area financial stability concerns could potentially arise in the future should the financial sector’s exposure to crypto-

[8] *Id*. at p. 3.
[9] *Id*. at p. 6.
[10] *Id*. at p. 6.
[11] *Id*. at p. 3.
[12] *Id*. at p. 15.
[13] *Id*. at p. 18.

assets increase as a result of these developments.

V. Financial Risk Assessment

a. Monetary Policy

According to the Task Force, crypto-assets do not currently have a significant impact on monetary policy because they do not fulfill the traditional functions of money.[14] The Task Force predicts that it will be difficult for crypto-assets to fulfill the traditional functions of money in the near future due to (1) the high price volatility of crypto-assets, (2) the absence of central bank backing of crypto-assets, and (3) the reportedly low number of merchants that allow goods and services to be purchased with crypto-assets, which collectively prevent crypto-assets from being used as substitutes for cash and deposits. Should crypto-assets become more widely adopted and serve as a credible substitute for cash and deposits in the future, monetary policy implications could potentially materialize.

b. Financial Stability

The Task Force also states that crypto-assets do not currently pose a material risk to the financial stability of the euro area because their combined value is small relative to the overall size of the financial system. Nevertheless, the Task Force recognizes that there is currently no adequate means from a prudential regulation standpoint by which to address future crypto-asset risk. As such, this gap in prudential regulation should be filled at the present time while crypto-assets do not pose systemic risk. Clarifying how crypto-assets are treated under accounting rules would provide one step forward in this direction.

V. Regulatory Gap Analysis

The Task Force recognizes that there is no international consensus at present as to how crypto-assets should be regulated. Given the global reach of the crypto-asset phenomenon, however, inconsistent and uncoordinated regulatory approaches could lead to ineffective regulation and provide incentives for regulatory arbitrage. The Task Force suggests that EU level regulation of crypto-asset gatekeeping businesses, such as crypto-asset custody and trading/exchange services, could allow crypto-asset risk to be addressed at the points at which crypto-assets enter the financial system and could thereby help to avoid “disjointed regulatory initiatives”[15] at the EU Member State level. The Task Force also makes clear, however, that regulation of crypto-asset gatekeepers could have unintended negative consequences for the financial system by unintentionally creating a perception that crypto-asset businesses are legitimate.

VI. Conclusion

[14] See Yves Mersch, “Virtual or virtueless? The evolution of money in the digital age,” Official Monetary and Financial Institutions Forum, 8 February 2018. Available at: https://www.ecb.europa.eu/press/key/date/2018/html/ecb.sp180208.en.html.

[15] ECB Crypto-Assets Task Force Occasional Paper No. 223 (May 2019) at p. 4.

The Task Force concludes that the current the level of risk associated with crypto-assets is “limited and/or manageable”[16] and that crypto-assets do not “currently pose an immediate threat”[17] to the financial stability of the euro area. Since crypto-assets could become more deeply integrated in the European financial system in the future, however, the crypto-asset sector requires careful monitoring of potential future risks that crypto-assets could transmit to the European financial system. In this regard, it is important that the ECB continue to monitor the crypto-asset phenomenon and develop preparedness for future adverse scenarios in cooperation with other financial sector authorities in Europe and around the world.

[16] *Id*. at p. 31.

[17] *Id*. at p. 3.

Other developments

European Union

EU Submission on ISDS Reforms at the UNCITRAL

By Pratyush Nath Upreti

Mandate of UNCITRAL Working Group III

On 19 January 2019, the European Union (EU) and its Member States put forward a submission to UNCITRAL Working Group III, which has the mandate to work on reforms on Investor-State Dispute Settlement (ISDS). The Working Group comprises the Member States, observer States, and observer inter-governmental and non-governmental organizations. The Report of UNCITRAL, Fiftieth Session states that the main aims of the Working Group III are to (i) identify and consider concerns regarding ISDS (ii) consider whether reforms were desirable in the light of any identified concerns and (iii) develop any relevant solutions.

EU Submission

In its submission, the EU expressed some fundamental concerns on ISDS in particular (i) lack of consistency, coherence, predictability and correctness of arbitral decisions (ii) no mechanism under the current system to address inconsistent and incorrectness of decisions (iii) lack of diversity, independence and impartiality of decision makers in ISDS. It is interesting to note that the Submission reminds the Working Group III that the nature of concerns are 'intertwined and are systemic [and] addressing one specific concern would leave other concerns unaddressed'. Therefore the EU urged the Working Group III to find a systemic response to these problems. Although, the submission does reflect the EU response to the concern, it seems that the EU has adopted the World Trade Organization (WTO) Dispute Settlement as a benchmark while suggesting a possible solution to the concern. This is understandable because the overarching aim of the EU is to create a Multilateral Investment Court, offering an alternative to ISDS. However, it is worth noting that the submission does not refer to a 'multilateral investment court' but rather to a 'standing mechanism' throughout the text of the submission. Later, the Commission clarifies that the proposal aimed at establishing a permanent multilateral investment court. There are some noticeable suggestions, including the following: (1) the creation of two-tier adjudication, i.e., a first instance tribunal and appellate tribunal, (2) a provision in a bilateral agreement that 'would be necessary to ensure that parties to a bilateral agreement would retain control over the interpretation of their agreement by being able to adopt binding interpretations,' (3) the participation of the non-disputing party to the treaty in the dispute, (4) the standing mechanism could also be used for state to state dispute resolution,

(5) the creation of a mechanism to ensure that all disputing parties can operate effectively in the investment dispute settlement regime. Such a mechanism could aid least developed and developing countries in litigation in international investment disputes and possibly in other aspects of the application of international investment law.

The way forward

The ongoing ISDS reforms are at the preliminary stage. The recently held 37th Session (1-5 April 2019, New York) of the Working Group III agreed that a distinction between incremental and systemic reforms was not useful. Further, the Working Group allocated time and structured the reform project in three steps. First, solutions to the problem are required and a project schedule will be submitted to the Secretariat by 15 July 2019. Second, in the next session, there will be discussion on the proposals and the project will be scheduled. Third, after the creation of the project schedule, there will be further deliberation on potential solutions before recommendations are made to the Commission. It seems that the ISDS reforms are taking a turtle walk, but we can hope that a slow and steady process will bring the best out of the Working Group.

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