SLAUGHTER AND MAY

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European Parliament votes to approve amended geo-blocking legislation

On 25 April 2017 the European Parliament's Committee on Internal Market and Consumer Protection (IMCO) voted to approve amended draft legislation to ban unjustified geo-blocking in business-to-consumer relationships. A separate vote on the opening of institutional negotiations with the European Commission and the Council of the EU was also approved.

Background

Geo-blocking refers to practices whereby customers in one Member State are prevented from purchasing or accessing goods or digital content from retailers or content providers located in other Member States. This can be achieved by preventing customers from accessing websites located in other Member States, automatically re-routing customers to different websites based on their location or refusing delivery or payment based on a customer's location or delivery address.

In March 2016 the **results** of an inquiry into the e-commerce sector, which was launched on 6 May 2015, were published. These results showed that 38 per cent of the respondent consumer goods retailers and 68 per cent of respondent digital content providers geo-block consumers located in other EU Member States.

Based on the findings of the inquiry, a three-stage process then began in order to prepare for the commencement of the 'ordinary legislative procedure' under which it is expected that three-way talks between the Commission, the Council and the Parliament will result in legislation to restrict geo-blocking.

(i) First, a **draft Regulation** was presented by the Commission to the Parliament and the Council on 25 May 2016.
(ii) Second, the Council reviewed the draft Regulation and, on 28 November 2016, agreed a **general approach** that will form the basis of its future negotiations with the Commission and the Parliament. Although it largely preserved the Commission's drafting, the Council clarified that the Regulation will only apply to unjustified geo-blocking.
(iii) The IMCO votes on 25 April 2017 represent the third stage in the process. IMCO, like the Council, reviewed the draft Regulation. It, however, has made some more substantial amendments in order to establish its negotiating stance.

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

The draft Regulation approved by the Parliament

The draft Regulation sets out certain scenarios in which geo-blocking will be prohibited. In such circumstances, online sellers will not be able to discriminate against consumers elsewhere in the EU in their general terms and conditions (including those relating to pricing) on the basis of their nationality, place of residence or even their temporary location.

The result of this is that buyers from a different country to the seller would, without paying a higher price, be able to:

- Buy goods (e.g. household appliances or clothes) even when the trader does not deliver them in the consumer's Member State of residence, if there is an option to collect the goods at an agreed location in another EU country (the proposal does not introduce an obligation to deliver across the EU);
- Receive online from the trader services not protected by copyright, such as cloud services, firewalls, data warehousing and website hosting; and
- Make a booking outside the consumer's place of residence (e.g. hotel stays, sports events, car rentals, music festivals or leisure park tickets).

Moreover, automatic re-routing to another website will not be permitted unless either the seller has obtained the customer's prior consent or an EU or national provision (such as one relating to the protection of minors) makes such re-routing necessary.

Key amendments to the original draft Regulation proposed by the IMCO are that:

- Non-audiovisual copyrighted content (i.e. e-books, e-music, games and software) will also be within scope if the trader has the right or a licence to use such content for the countries concerned;
- There are stronger safeguards to protect a retailer's freedom to offer only certain payment means and to limit the risk of fraud or non-payment;
- The retailer is not required to comply with the laws of or use the language of a Member State into which it does not intend to sell its products or services; and
- The retailer does not have to obtain consent every time a customer visits the same website.

Responses and analysis

Rapporteur for the IMCO, Róża Thun, **expects** that the legislation will result in consumers having "*better access to goods and services online*" and that "*for traders it will be less burdensome to sell to consumers from different member states*".

Some sectors remain, for the time being, outside the scope of the draft Regulation despite the IMCO's amendments. These include audiovisual services (such as the broadcasting of sports events that are provided pursuant to exclusive territorial licences) and financial, transport, electronic communication or healthcare services.

However, within three years of the Regulation's entry into force, the Commission must re-assess whether these areas should be covered in the future. Audiovisual services is arguably the area that will most likely

be re-assessed by the Commission given that it was covered in the initial draft and that Commissioner Margrethe Vestager has spoken out against geo-blocking in this area. For example, in a **speech** in Berlin on 26 March 2015, Commissioner Vestager said: "*I, for one, cannot understand why I can watch my favourite Danish channels on my tablet in Copenhagen - a service I paid for - but I can't when I am in Brussels*".

Consumer groups have similarly called for the legislation to cover audiovisual services. Responding to the IMCO votes, the Director General of the European Consumer Organisation (BEUC), Monique Goyens, **commented**: "*[n]ow EU legislators need to go the extra mile and also ban geo-blocking for films, sport and TV*".

Other concerns about the draft Regulation have been raised by bodies such as EuroCommerce, the association representing the retail sector. Its Director General, Christian Verschueren, **said**: "*[w]e appreciate the Parliament's work in improving the text, but regret that what was a flawed proposal remains an imperfect one*". EuroCommerce's main criticism appears to be one of legal uncertainty in relation to delivery. It notes, for example, that even with amendments by the IMCO, the draft Regulation is still unclear on practicalities such as additional costs incurred by shipping returned or defective products.

Next steps

Ms Thun's negotiating team now has a mandate to begin negotiations with the Council and the Commission with the aim of reaching an agreement on the final legislation. It is expected that the talks will result in further amendments to the draft Regulation as the institutions consider their differing approaches and the concerns voiced by interested parties.

Speaking in a **press conference** after the vote, Ms Thun stated that the first trialogue will occur later on this month and was hopeful of the agreed Regulation being adopted by the end of July.

Other developments

Merger control

MOFCOM imposes penalties for failure to submit merger notification

Since 2 December 2014 China's Ministry of Commerce (MOFCOM) has published 14 **formal decisions** against companies for failing to submit a merger notification in breach of the Anti-Monopoly Law (AML), with seven (50 per cent) of these being in the past twelve months. Most recently, MOFCOM **announced** on 11 April 2017 that it had fined a wholly owned subsidiary of Cummins, Inc., the New York-listed manufacturer of power generation equipment, and Xiangyang Kanghao Mechanical & Electrical Engineering for failing to notify their PRC-based joint venture deal, imposing a fine of RMB 150,000 on each of the parties. On 4 January 2017 MOFCOM published its **decision** to fine Canon Inc. for failure to notify its acquisition of Toshiba Medical Systems Corporation. This was the first foreign-to-foreign transaction to attract a MOFCOM penalty for failure to notify.

The current statutory maximum fine for failure to notify is RMB 500,000, although the largest fine to date, **announced** on 3 May 2016, is still only RMB 400,000, which was imposed on Bombardier Transport Group Sweden Limited for failure to notify the creation of a joint venture with Xinyu Group Co., Ltd.

The deputy director general of MOFCOM, Mr. Han Chunlin, is reported to have stated publicly on 21 April 2017 that the agency considers the current statutory maximum fine to be too low. MOFCOM are working to propose amendments to the AML to increase fines for failure to notify and other possible punitive measures.

Currently under the AML, MOFCOM may also order the undertakings concerned to stop implementing the transaction, divest all or some of the shares or assets acquired, unwind the transaction or adopt other necessary measures to restore the market conditions prior to the concentration. Based on the 14 formal decisions to date, MOFCOM has not yet sought to impose such orders, possibly due to the fact that none of these cases have raised any competition concerns.

General competition

European Commission takes preliminary step in possible sector inquiry on syndicated lending

The European Commission has recently issued a call for tenders (available **here**) which provides further details on its proposals for a study in relation to syndicated lending and its impact on competition. The Commission indicated its intention to study the sector in February in its **Management Plan 2017**, commenting that the sector "*exhibits close cooperation between market participants in opaque or in-transparent settings, such as over-the-counter (OTC) activities, which are particularly vulnerable to anticompetitive conduct*", and that its initial work in 2017 would focus on "*obtaining relevant information on market structure, dynamics between market participants and potential competition issues*". The work requested by the tender represents the initial information gathering referred to in the Commission's Plan and provides an insight into the Commission's areas of interest in the loan syndication market.

For a more detailed analysis of the Commission's and national competition authorities' interest to date in loan syndication, please see our recent **briefing** on the topic.

The work being commissioned by this tender includes a review of the impact of loan syndication on competition in EU credit markets and will extend to markets in Germany, Poland, Spain, France, the Netherlands and the United Kingdom. The Commission is seeking an overview of the syndication process with regards to loans offered for project finance, leveraged buy-outs and infrastructure finance in particular. This will involve an examination of how syndicates are formed and the way in which lenders co-operate to offer loans, including contractual terms, ancillary services and market transparency. The Commission also wants to understand the economic benefits and drawbacks of syndication for lenders and borrowers and the shifts in bargaining power between them, as well as the relevant regulatory and enforcement framework.

The Commission has prescribed that the review shall provide a "*systematic analysis*" of the loan syndication market and "*detailed factual information…based on direct information from market participants through stakeholder interviews based on agreed questionnaires*". The Commission anticipates that the project will take nine months.

Public procurement damages only available for "sufficiently serious" breaches

The UK Supreme Court has **ruled** on an appeal relating to the circumstances in which damages may be recoverable for failure to comply with the requirements of the EU and UK procurement rules (the Rules).[1] Remedies include the setting aside of contract awards and compensation.[2] The Rules provide for a ten day stand-still period during which the contracting authority must refrain from entering into a contract with the successful bidder. If proceedings are issued challenging the award decision during this period, the period is extended until court order or disposal of proceedings.

The respondent to the proceedings, ATK Energy EU, brought a damages claim against the appellant, the Nuclear Decommissioning Authority (NDA),[3] for breaches of NDA's obligations under the Rules in connection with ATK's unsuccessful bid for a contract for the decommissioning of twelve power stations. The damages were sought for breach of the obligation to award the contract to the most economically advantageous tender. The parties sought judgment on preliminary issues relating to whether (i) the court had any discretion under these Rules not (or only partially) to award damages for losses deriving from NDA's breach of its obligations and (ii) ATK's failure to start proceedings within the ten day standstill period (which would have automatically suspended NDA's right to award the contract) meant that the tenderer was not entitled to damages as it had failed to mitigate its losses.

In first instance proceedings, NDA had argued that the phrase "[the court] may award damages" in Regulation 47J(2)(c) gives effect to the "Francovich conditions" applicable to award of damages in EU law, as developed from EU case law.[4] One of these conditions provides that the breach of EU law must be "sufficiently serious", which necessarily introduces an element of discretion to the award of damages, according to NDA. ATK's argument, however, which had been accepted by Edwards-Stuart J, was that ordinary English law principles were applicable to such awards of damages, and that once a breach of the Rules was established the award of damages was not discretionary. On the second issue, Edwards-Stuart J had concluded that he could not decide whether ATK's failure to issue proceedings in time to prevent the conclusion of the contract deprived ATK of the right to any damages, because "*that issue raised questions of fact that could not be determined without evidence as a preliminary issue*".

On appeal, the Court of Appeal dismissed NDA's appeal on the first issue and allowed ATK's appeal on the second issue. It held that while breaches of the Remedies Directive are subject to the "Francovich conditions", the latter were "minimum conditions" and it was open to national law to lay down criteria that provide a less restrictive remedy in damages, which it did (i.e. there was no requirement in English law for a breach to be shown to be "sufficiently serious"). The Court further concluded that "*there is nothing in either the Remedies Directive or the Regulations to suggest that a person whose rights under these instruments have been infringed should be deprived of damages because of a failure to invoke any*

[1] In this case, Directive 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts and the Public Contracts Regulations 2006. Following the enactment of a new directive (Directive 2014/24), the Public Contracts Regulations 2015 have superseded the Public Contracts Regulations 2006 but the latter remain applicable for the purposes of this case and the principles examined in this article.

[2] Directive 89/665 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (as amended by Directive 2007/66).

[3] NDA is a non-departmental public body established under the Energy Act 2004. It is responsible for 17 nuclear sites and the associated civil nuclear assets and liabilities formerly owned by the UK Atomic Energy Authority and British Nuclear Fuels Ltd.

[4] Case C-6/90 *Francovich v Italy,* judgment of 19 November 1991.

other available remedy". The standstill and court application regime was available as an option to the unsuccessful tenderer, and not as a pre-condition to the availability of damages.

NDA appealed the Court of Appeal's decision to the Supreme Court,[5] which:

- Did not accept ATK's case that EU law requires a remedy in damages for any breach. The Court concluded that the liability of a contracting authority for breach of the Rules exists only where the minimum "Francovich conditions" (including the condition providing that the breach must be "sufficiently serious") are met, "*although it is open to States in their domestic law to introduce wider liability free of those conditions*";
- Accepted NDA's case that the Court of Appeal had wrongly held that domestic law goes further than EU law by requiring a remedy in damages for any breach, whether serious or not. It based this conclusion on an examination of the legislator's intention when implementing the EU procurement rules (i.e. there was no intention to 'gold plate'); and
- Agreed with the Court of Appeal that the economic operator is not required to take advantage of the opportunity to stop the wrongful award of a procurement contract to a competitor. The operator is free to issue a claim for damages after awaiting the entry into the contract.

The impact of this ruling on the willingness of economic operators to bring similar actions for damages remains to be seen. On the one hand, the ruling adopts a relatively restrictive approach to the availability of damages, concluding that damages are available only in instances of "sufficiently serious" breaches. On the other hand, it makes clear that these operators do not have to exhaust other remedies before starting such action.

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[5] The parties settled the claim out of court (after the hearing but before a ruling) but asked the Supreme Court to issue a judgment nonetheless.