

SLAUGHTER AND MAY

Slaughter and May Podcast

The new European Commission's agenda: impact for business and investment in Europe

Charlotte Boden	Hello and welcome to the Slaughter and May podcast. This podcast episode is a live recording of a client event we held recently, on the new European Commission's plans for the next five years. Specifically in the areas of FDI, data, competition, environment and tax. You will hear from experts Jordan Ellison, Rob Sumroy, Ariel Ezrachi, Lisa Wright, Samantha Brady and Dominic Robertson.
Jordan Ellison	So thank you everyone for joining us for this event. As you all know we are here today to talk about the European Commission's plans for the next five years. The European Commission works on these five year cycles pinned to European elections which happen every five years. So last year after lots of politics we had elections in May of 2019 after lots of horse trading, a new European Commission was appointed at the end of 2019 under a new president Ursula von der Leyen, who is a very senior German politician and in fact the first female president of the European Commission. At the end of the year, the Commission as it always does at the start of a new five year term, set out its plans in a range of different policy areas. And now over the past few months we have really seen some of those plans become more detailed and we are getting a real idea of what this Commission is looking to achieve over the next five years. Now, the Commission has very wide competence and its plans for new regulation, new law and new policy have a huge effect on business across a whole range of areas. That's why today we've decided to select five of the most important areas where EU legislation and policy will really effect business in Europe over the next five years. We are going to start with a look at competition anti-trust policy and I am very pleased to say that we've got Professor Ariel Ezrachi from Oxford University to help us talk through that area. Then we will talk about foreign investment restrictions and the impact of foreign investment rules on M&A, in particular, takeovers of European companies by non-European companies and my partner, Lisa Wright, from Slaughter and May will be talking about that subject. We will then go to what's been called the European Green Deal which is the Commission's package of proposals to fight climate change where Slaughter and May's environmental specialist, Samantha Brady, will be filling us in on the latest developments. After that, we go to digital data and privacy where our head of Digital Regulation, Rob Sumroy, will be informing us of key points. And finally, last but not least, we'll talk about international taxation with Slaughter and May tax partner, Dominic Robertson. So there is a lot to cover and we will try to focus on the very most important issues for international business in Europe. So without further ado, I will turn to Aria Rithraki to talk about competition law.
Professor Ariel Ezrachi	What we have seen for the past decade is the Commission increasingly realising that digitalisation, virtual competition, big data, big analytics and network effects, all of these change the dynamics of competition. And initially the Commission was quite firm in its approach that the existing toolbox competition law is sufficient to deal with all the new dynamics and any possible future threats. And indeed the European Commission had been rather interventionist on this front and we have of

	<p>course the Google decisions, but we also had the ongoing Amazon investigation. We had the Apple investigation and generally speaking a much closer scrutiny if you look at the way the thinking has evolved over the years we had the sector enquiry into E-commerce and of course last year the special advisers report on competition in the digital era. And the result of all of this has been an appreciation that we need, to some extent, to recalibrate the approach when it comes to possible activities in digital markets. Part of it has been a more nuanced application of the existing competition rules but part of it has also been an appreciation that competition law is mostly reactive in nature. What happens is that competition provisions can be applied once the damage has been done and because of the long process, the long investigation, the appeal process and the limitation of remedies, there is certainly a call to supplement competition with regulatory instruments. Some of these are general, the GDPR or the platform to business regulation. or the forthcoming e-privacy new in privacy regulation but indeed there is a call for something which is more specific to competition.</p>
Jordan Ellison	<p>Could you perhaps explain what the European Commission’s proposing, in terms of competition based regulation of the tax sector?</p>
Professor Ariel Eizrachi	<p>Yeah, I mean certainly we have a revolution in the pipeline. So the Commission envisages three key pillars, one is the traditional competition law enforcement, Article 101, that deals with agreements, Article 102 that deals with abuse of dominant position but there are two additional competition related pillars that the Commission is now proposing, and we are in the process of a public consultation. The first one is a new ex ante regulatory regime that will deal with very large digital platforms and gatekeepers, and the third pillar will be a new competition tool. So maybe I’ll just say a few words about what is the idea behind each of these proposals.</p> <p>The online platforms, here there is an understanding that very large online platforms operate their own eco-system, so they govern the type of competition that takes place that can determine the parameters of competition, the entry, the exit and we have the ability of those platforms to leverage market power and affect competition downstream. It can make use of data, they can make use of big analytics, there is a clear imbalance in bargaining powers and all of that the Commission argues affect the fairness of competition, the dynamic of competition but also dynamic efficiencies and innovation, and these are elements that the Commission is thinking of addressing. And the policy proposals here are either to supplement the existing platform to business regulation from last year, with additional provisions for greater transparency but mostly about leveraging of market power, the ability to use information that others are using on the platform, so these type of things data access this sort of things.</p> <p>The other two proposals under this new instrument are more interventionist, one would be possibly a new instrument for information collection and the other one would be a completely new tool that enables the Commission to target very large</p>

	<p>platforms and engage in remedies, in the case that they see any competitive problem.</p> <p>The third pillar that I mentioned, this is new competition tool and this something for those that are familiar with the UK market investigation. It is an attempt to adopt something that broadly is very similar to the UK regime. Here the idea would be that you are not necessarily looking to find a company that infringe the law, you are looking for problems when it comes to the market structure. Some sort of a failure on the market. Either a failure because the market is about to peep and the idea is that network effects are leading the market in a certain direction and the Commission considers intervention necessary, or just existing market failure. And here, the Commission also proposes a few options, one would be a very wide tool that enables it to target dominance across all sectors not just digital markets. There is a slim version of this, dominance in very specific industries and then there is another option which is market structure based tools, again across all sectors or more limited. And the reason I refer to that as a revolution is because this creates a certain instrument that bypasses the first pillar, Article 101 and 102, so we will have new jurisprudence and no one knows exactly what will be the powers that the Commission will have over those markets using these two tools.</p>
Jordan Ellison	<p>Great that's really helpful, thank you Ariel. I want to stay with M&A and deals in Europe but move from thinking about the competition regulation of that to thinking about foreign investment rules. So in particular, restrictions on non-European international companies buying businesses based in Europe. So I turn to my partner Lisa Wright, and Lisa maybe you could just tell us what we can expect from the new European Commission in terms of foreign investment restrictions on M&A activity?</p>
Lisa Wright	<p>Yes sure, so there has been quite a lot of anxiety in recent times about investment into Europe by investors from hostile states, and this lead the European Commission to adopt an FDI screening regulation last year and that will come into full force in October of this year. Now that regulation does not create a one stop shop for FDI review like we have on the competition side in merger control, where the European Commission reviews mergers hitting certain thresholds on behalf of the member state agencies, it doesn't do that. Instead it sets up a framework for the European Commission member state to cooperate and coordinate closely with each other in relation to FDI screening going on at national level. Now that pre-existing anxiety about hostile foreign investment was really ratcheted up recently by the COVID-19 crisis, so when that crisis was really escalating in Europe back in March, the European Commission came out with some guidance urging members to state businesses that were key to the pandemic once from hostile foreign investment and the Commission told member states in quite strong terms that they should be using their existing FDI controls to protect those businesses, and to member states which did not already have FDI controls in place, the strong advice was to introduce them as a matter of some urgency and to that end we have seen various member states across Europe taking steps to either introduce FDI screening or to expand the reach of their existing regimes.</p>

	<p>Separate or slightly separately, there is also been a lot of concern about the impact of foreign subsidies on market in Europe, for instance, companies operating with the benefit of subsidies granted by foreign government outbidding European counterparts for contracts or acquisition targets in European markets, and to address this European Commission announced just last week a consultation on introducing three new possible powers and they are:</p> <ol style="list-style-type: none"> 1. A general market scrutiny tool which would allow the European Commission or member state agencies to investigate whether a company benefit from a foreign subsidy that's distorting competition in the EU. 2. A new notification regime requiring companies benefitting from foreign subsidy to get approval from the European Commission before acquiring European Company, so a bit like merger control system, that we already have on the competition front. 3. And the third proposed new power is a regime for the investigation of foreign subsidies in the context of European procurement processes. <p>So there's a lot happening and some potential new rules coming down the line.</p>
Jordan Ellison	<p>Just in practical terms, which does this mean for international businesses who are doing business in Europe or thinking of buying businesses in Europe?</p>
Lisa Wright	<p>Yeah, so I mean I think the proliferation of FDI screening that we are now seeing, you know the focus by the European Commission on getting member states to talk to each other on making sure that everybody has FDI screening, on making sure it's as broad as it possibly can be. I think probably means that international companies looking to invest in Europe can expect to face increase scrutiny on the foreign investment side as well as Ariel mentioned on the Competition side, and so that is likely to have an inevitable impact on transaction timetables and you know where you are facing this in multiply member states, there's going to be a need for a significant coordination regime because as we've seen the Commission has set up its own regulation to really make sure that the member states talk to each other, so you can expect that information you put in to one agency will find its way into the hands of another so you really need to be coordinated upfront.</p>
Jordan Ellison	<p>I like now to turn to something a little bit different in terms of the Commissions policy focus and talk a bit about climate change. Clearly a huge priority for governments in many parts of the world, and the European Commission is no different it's a key part of its focus for the next five years is climate change policy, an energy policy that tackles climate. And this whole area has been I guess described by a set of proposals called the European Green Deal. Maybe I'll turn to my colleague Samantha Brady and Samantha maybe you could start just by explaining a little bit about what is the EU Green Deal and what sort of policies does that include?</p>

Samantha Brady	<p>Thanks Jordan. So I think the important thing to remember is that the EU Green Deal despite the label of the Green aspect and lots of people focusing on the sort of environmental and climate change perspective. The Green Deal is actually much broader than that, in that it looks at sustainability and a drive towards a sustainable focus growth strategy. So it aims to transform the EU into a fair and prosperous society with a modern resource sufficient in competitive economy. So it does focus on the not having any net emissions of greenhouse gases by 2050 but it's also important that looking at much broader resources, and ensuring that the economic growth is decoupled with resources. So it looks at the EU's natural capital which is obviously very, there's a lot of natural capital throughout the EU and it can be very different depending on the particular geography of the country. But then also looking at the health and wellbeing of citizens but looking at it very much from an environmental related risks and impact perspective, so the transition is intended to be just an inclusive, and it's very much aligned with the sustainable development goals in that perspective and that's as much boarder UN initiative. The intention is that the European Green Deal with encourage global partners to pursue sustainable growth and so it's not just for Europe, it's something that's considered that would have much more of a global impact.</p>
Jordan Ellison	<p>What are we seeing in terms of the European investment environment and how's that been affected by the European Green Deal?</p>
Samantha Brady	<p>Well because of it being a very wide ranging initiative, it's also going to impact very different sectors and there is different investment opportunities in those sectors, so as you say, energy is clearly a key part of that and driving the clean energy supply. But beyond that, you are just looking at industry more generally and production and consumption, and then in order for people to get to different places, it is also important to have that infrastructure and transport in place which at the moment we are obviously not able to benefit from, but is a much more long term goal.</p> <p>There is also the food and agriculture element so the whole idea of the sustainability needs to be meeting population growth, particularly where the population density is different in different parts of the EU. And then looking much more at the kind of the social benefits and the key part of that is taxation and how everything that the way that we conduct our lives need to be in a much more sustainable manner. So for the kind of businesses that we're used to advising, we can see that's there's a lot more opportunity for investment and innovation in energy and infrastructure but it's not just a matter of focusing in work on wind and solar energy, it's looking at something that's taking much more innovative as well and really supporting this move from the sort of coal based to renewable energy and to do it at the lowest possible cost from both an environmental perspective but also obviously the cost to society in terms of taxation.</p>
Jordan Ellison	<p>So maybe I'll turn to my colleague Rob Sumroy and Rob maybe you could give summaries for us, you know, what this new Commission is doing in the areas of digital and data?</p>

<p>Rob Sumroy</p>	<p>Thanks Jordan. Yes so the Commission certainly has been busy in this area. It's not a new area of focus of course, for the EU Commission you know, the previous Commission launched its digital single market structure in 2015 which lead to five busy years in the digital sphere. But certainly the new Commission has seen a renewed focus in energy in this area. If you look at the industrial policy package that was launched in March of this year, there were three key principles for the future of the EU mentioned in that, and one of those was shaping Europe's digital future, so there's many hundreds of pages of analysis and discussion and proposals linked to this and we've only got about six minutes, so I'll try and summarise it as best I can, but I think there are four key areas of current Commission activity. One is data and I'll come back to that but just to mention the other three, intellectual property and maybe we'll have a bit of time today to talk about IP but you know there's always an ongoing challenge isn't it there? Within the EU and for the Commission to on the one hand acknowledge the importance of rewarding innovation by giving intellectual property protection, but at the same time ensuring that doesn't prevent an open and level playing field for all people to do business and so the development of intellectual property action plan is something that the Commission is keen to promote. Promoting a global level playing field to better fight intellectual property theft and to adapt the legal framework to support this digital transformation. So IP is one area of focus.</p> <p>Emerging technology is another one and the industrial package confirms that the EU wants to support or to continue to support the development the development of key enabling technologies that will be strategically important for Europe's future. They mention, for example, artificial intelligence robotic microelectronics, high performance computing, cloud infrastructure, block chain, quantum all of the sort of the new and emerging technologies but at the same time ensuring that the development and protection of those technologies doesn't impinge on individual rights, including in particularly around data privacy.</p> <p>The third area of activity is around cyber and cyber security. The EU is clearly driving improvements in relation to cyber security. Acknowledging that security is key to ensuring confidence in the digital economy, and there are proposals for developing a new cyber certification framework as well as bringing forward the review of the NIS directive, which is the directive that aims to improve national security across the EU for operators of essential services.</p> <p>So those are three key areas but I come back to the fourth which is data. This actually covers areas that Ariel was touching on earlier as well because it's very much acknowledging that there has been a huge growth in the importance of data, but also that this will do it to expand across the five years of the Commission. Data volume is expected to grow five times between now and 2025 and there's going to be a change in the way that we use data in our businesses, and in international companies because removing from the point at the moment where 80 per cent of our data is processed centrally within our organisations, and we are moving into a position in five years' time where 80 per cent of it will be on a more disparate basis around devices. So devices, internet a thing at the perimeter and this data is the thing that is going to drive the value of the digital economy, I think the data</p>
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	<p>economy itself is expected to be worth around 830 billion euros in five years' time. So with this in mind, the Commission is clear that they want to create a single market for data where data can flow within the EU and across sectors for everyone's benefit making sure that European rules in particular around privacy and data protection but also competition law are fully respected. But also that the rules around the use of data are fair, they are practical and they are clear. So this is going to be a real focus for the Commission in coming years and there's some very exciting concepts but also challenges here so the there's a real push to having more open data. Recognising, and this really goes to what Ariel was discussing earlier, recognising that the accumulation of vast amounts of data in the hands of a small number of big tech companies can be stifling for competition and can act against the interests of European citizens and European businesses. And so looking at ways of ensuring the data can be more open and encouraging the open sharing of data across sectors and within sectors, improving availability and interoperability, so looking at governance framework and technical standards to ensure that international businesses can again share data but do so in a way that they can understand issues around ownership interoperability and the like. And then developing concepts of data pooling, so this will be specific sectors and value chains where there's an acknowledgement that the sharing of data within sectors can really have a systemic impact on the entire ecosystem. And there are eight or nine different areas of European industry, including manufacturing, Green Deal as Sam's just been talking, about green technologies around mobility, health data, financial services and financial data, energy, agriculture and skills, and these are all sectors in which the European Commission is looking to develop governance and frameworks for the pooling of data. Sharing of data in a way that will protect the right of individuals and still ensure the privacy can be protected and ensure that it can be done in a free open way, so as not to impact on competition but in a way that will drive value for the European community. So it's a bit of a quick whistle stop tour but I think in effect what the Commission is saying is data is the future, it will drive the future of the digital economy and we need to provide frameworks where data can be shared in an open way and still protect the rights of individuals.</p>
Jordan Ellison	<p>Great, thank you so much Rob, lots to watch out for there over the next four or five years. I'm going to move now from new areas of regulation back to an old and perpetual friend which is tax regulation and tax law. For many years the European Commission didn't really have much to do with taxation that was largely a national competence of individual member states, but over the last five years the European Commission has been incredibly active on tax issues. I'm going to turn to my taxation partner, Dom Robertson and ask Dom can we expect the European Commission to keep being active on taxation, or are we finished with that now?</p>
Dominic Robertson	<p>We're definitely not finished with that now no. The Commission was more active on tax in the last five years than I think it had been in the previous 50, and their plans for the next five years indicate that they are going to continue being active in the tax area under three particular pillars. Two of those will not be a surprise to anyone who come to listen to the rest of this talk, the EU Green Deal and digitalisation and then the third is the Commissions continuing to fight against aggressive tax competition. On the EU Green Deal, Sam has talked about a number of the tax</p>

changes which are being proposed there to help encourage the decarbonisation of the economy. Yet one policy which they are working up at the moment, which is I think particularly important for businesses outside the EU is the proposal to introduce an EU wide carbon border tax which will effectively be a levy on imports into the EU from countries with lower or worse emissions standards than the EU has, theory being if we're trying to fight global warming we need to do that on a global basis rather than saying to businesses, "well actually your customers you can export your carbon emissions from the EU to somewhere else". So the Commissions have been tasked with working that up and producing that in a WTO confined way which maybe a bit of a challenge.

On the digital side, until last week, essentially what the EU had been tasked with doing was to work with the OECD on their global attempt to change the existing arms-length standard and how you allocate taxing rights within a business. A general view from a lot of people has been actually that has not kept up with the increase importance of data and is allocated too little by way of taxing rights to countries where users are based and given the value which the companies are getting from user data. The OECD has said very clearly we want to come up with a single agreed solution globally absolutely don't have lots of different taxes being created in different countries here and we are working towards doing that and reaching an agreement by the end of 2020. Last week the United States announced that they were not going to play ball anymore on that and that they were pausing their participation at least until the presidential election and perhaps beyond. And the Commission has been very clear that if that happens and there's no progress on this that they will look at bringing in an EU wide digital sales tax to some countries, notably France have already enacted digital sale taxes themselves on a single country basis. EU is applying to bring in an EU wide digital sales tax, yet that is seen by the United States as discriminatory against the United States because it was largely applied to US tech companies, and so there will potentially be a evasive trade dispute in the next few years if digital sales taxes are progressed.

In the third aspect of what they are doing is that they're fighting aggressive competition. Some of this is really implementing things they last year under the last Commission implementing their advance disclosure rules tax fix, for example, continuing to use their list of non-cooperative jurisdictions, where if you are on this list, you can't get tax deductions for payment to encourage tax reform in low tax jurisdictions and also continuing to support the introduction of a global minimum effective corporate tax rate and that is the other part of the OECD's big policy reform in this area, this part of a reform the US has said well they are still committed to, partly because the US themselves introduced the minimum effective tax rate in 2017, so it's not a big change for them, and so we can expect at the end of this year the agreement on that from the OECD and an implementation to follow. Big question for a lots of international businesses will be where that rate is set of course, if that's set in particular below the headline tax rate in Ireland, 12½ per cent then that could have some pretty significant impacts for international businesses.

Jordan Ellison	<p>Great, thank you very much Dominic and thank you everyone for your contributions on the various areas here. After listening to all this it's sort of mind blowing how big and how wide ranging the reform proposals are over the next five years. I can't think of a European Commission that had such an ambitious set of goals since I've been working in EU law. It seems if there's a kind of unifying theme it's really an idea that State and Government needs to be much more hands on in driving what's happened in the European economy than whilst traditionally the case, whether its new more aggressive interventions on the competition side, whether it's more tightly regulating foreign investment that previously was allowed to flow very freely or developing really quite detailed industrial strategies in technology and data or in the Green Deal, or in starting to try, you know, more tightly regulate how states tax business. This European Commission is really trying to put its hands on the economy and change things in quite radical ways. I think as private practice lawyers and as businesses, you know, we often see all the threats in all of that and we see it as more regulation and more burden, but there's also the point that the businesses that make the best predictions about what's going to happen and the businesses who adapt most quickly to new regulation will be the ones who get a competitive advantage there. So there are also real opportunities in this for nimble, forward looking, businesses.</p>
Charlotte Boden	<p>Thank you all for listening if you would like more information about anything that we have talked about please do feel free to contact anyone you have heard from on this podcast or your usual Slaughter and May contact. You can find all contact details on the Slaughter and May website.</p>