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QUICK LINKS

European Commission issues proposed European Media Freedom Act

INTRODUCTION

On 16 September 2022, the European Commission published a proposal for a European Media Freedom Act (EMFA) that aims to protect and encourage media independence and pluralism in the EU through a common framework. It includes, among other proposals, a new requirement for Member States' national authorities to be notified of and to assess "*media market concentrations*" against criteria such as media pluralism and editorial independence.

BACKGROUND TO THE EMFA

The Commission's plan to deliver an EMFA was first introduced by Ursula von der Leyen, President of the Commission, in her September 2021 State of the Union address, when she emphasised that media companies "*cannot be treated as just another business*" and that their independence must be safeguarded. On 16 September 2022, the Commission published a draft Regulation for a common framework applicable to media services in the EU, together with a supporting Recommendation.

The stated objectives of the EMFA are to:

- foster cross-border activity and investment in media services;
- increase cooperation and convergence of media regulations across Member States;
- encourage the provision of quality media services by reducing public and private interference in editorial freedom; and
- ensure transparent and fair allocation of economic resources in the internal media market, ultimately promoting fair competition in that market.

The Explanatory Memorandum notes that the EMFA is intended to complement the EU merger control framework, which does not directly address the impact that concentrations could have on media pluralism or independence. It is also designed to complement the existing State aid rules, "*which are applied on a case-by-case basis (often ex post) and do not sufficiently address the problems created by the unfair allocation of state resources to the media service providers*".

KEY PROPOSALS

A NEW EUROPEAN WATCHDOG

The Commission proposes to establish a new independent European Board for Media Services (European Board) comprised of national media authorities. The European Board would be responsible for certain aspects of the new media EMFA framework, including

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

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

preparing guidelines on the regulation of the media and facilitating a structured dialogue between large online platforms and the media sector. It would have the power to issue opinions on national measures that affect the internal media market and to assist the Commission in drawing up guidelines for factors to be taken into account when assessing the impact of media market concentrations (see below).

THE ASSESSMENT OF "MEDIA MARKET CONCENTRATIONS"

Importantly, the proposal includes a requirement on each Member State to establish substantive and procedural rules to assess any concentration involving at least one media service provider, where that concentration "*could have a significant impact on media pluralism and editorial independence*".

The proposal is intended to target transactions that could result in a single entity "*controlling or having significant interests in media services which have substantial influence on the formation of public opinion in a given media market, within a media sub-sector or across different media sectors in one or more Member States*". An important criterion to be taken into account would be the reduction of competing views within that market as a result of the concentration.

Member States would be required to designate a national regulatory body to conduct these assessments, and to outline transparent, objective, proportionate and non-discriminatory criteria for the notification and assessment of such concentrations. In addition, the European Board would be given the power to issue opinions where media market concentrations may affect the functioning of the internal market, which national authorities would be required to "*take utmost account of*".

OTHER KEY PROPOSALS

The draft EMFA also proposes specific measures to:

- protect editorial independence – Member States would be required to respect the editorial freedom of media providers, who would be under an obligation to publicly disclose information about their ownership;
- safeguard against the use of spyware against the media and journalists – the only exceptions would be for national security or the investigation of certain crimes;
- improve the independence of public media services, which would be required to have adequate and stable funding and a transparent and open procedure for appointing their boards;
- increase transparency for state advertising; and
- better protect media content online – large online platforms would be required to inform media providers of the reasons for removing the relevant providers' content from their platform.

CONCLUSION AND NEXT STEPS

The proposed EMFA represents an ambitious first attempt by the Commission to create a European framework for the regulation of media services.

While the draft provisions that relate to the assessment of media market concentrations specify that the assessment would be "*distinct*" from the merger control assessment under the EU Merger Regulation, it is unclear how the two regimes will interact in practice. The rules (as currently drafted) would leave significant room for Member States to determine how they wish to conduct the assessment, provided certain baseline conditions are met.

The proposed EMFA will now move to the next stage of the EU's ordinary legislative process, and so will be considered by the European Parliament followed by the Council.

OTHER DEVELOPMENTS

MERGER CONTROL

CHINA CONDITIONALLY CLEARS JV BETWEEN SHANGHAI AIRPORT AND CHINA EASTERN AIR LOGISTICS

On 14 September 2022, China's State Administration for Market Regulation (SAMR) published a decision which conditionally cleared a proposed JV between Shanghai Airport Authority and logistics company China Eastern Air Logistics.

Shanghai Airport and Eastern Air Logistics's proposed JV will conduct a smart airport cargo terminal service business at Shanghai Pudong Airport. After closing, Shanghai Airport will hold 51% of JV shares and Eastern Air Logistics to hold the remaining 49%.

SAMR found that the proposed transaction was likely to eliminate or restrict competition in the relevant market of cargo terminal services of Pudong Airport and of other services relating to international/domestic air cargo arriving at and departing from Pudong Airport, with combined market shares of over 70% in the relevant market. SAMR therefore cleared the transaction subject to a number of restrictive conditions, which will stay in place largely for at least eight years:

- Shanghai Airport and Eastern Air Logistics must keep their cargo terminal businesses at Pudong Airport separate and ensure they continue to compete independently and fairly, including not exchanging competitively sensitive information or engage in monopolistic conduct prohibited by the Anti-monopoly Law.
- The parties and the JV must remain independent from, and compete with, each other, including ensuring no cross-employment, restrictions on shareholders' rights, stipulation on non-compete periods, separation of office spaces and information systems, and restrictions on office system user permissions.
- The parties and the JV must not exchange competitively sensitive information, either directly or indirectly. The JV must operate independently.
- Shanghai Airport and Eastern Air Logistics must honour customers' contracts and not refuse a customer's request to renew a contract or renew on worse terms than prior to the JV (this condition applies for only five years).
- The parties and the JV must provide cargo terminal services at Pudong Airport on fair, reasonable and non-discriminatory terms and not discriminate against downstream customers.
- A monitoring trustee and the China Air Transport Association will supervise and guide the JV's compliance with the conditions.

The decision demonstrates SAMR's continued willingness to clear deals subject to behavioural remedies, even where the market shares involved are relatively high. It has also been noted that this is the first conditional clearance imposed by SAMR on purely domestic PRC companies.

ANTITRUST

CMA FINES JD SPORTS, ELITE SPORTS, AND RANGERS FC FOR PRICE-FIXING

On 27 September 2022, the UK's Competition and Markets Authority (CMA) announced that it had issued an infringement decision finding that JD Sports and Elite Sports colluded to fix the retail prices of a variety of Rangers

FC-branded replica football kits and other clothing products, in breach of the UK Competition Act. The illegal conduct in question took place from September 2018 until July 2019. Rangers FC also participated in the collusion, however to the lesser extent of fixing the retail price of adult home short-sleeved replica shirts from September 2018 to mid-November 2018. The CMA established that the Glasgow-based football club had been concerned that JD Sports was selling their replica t-shirts for less than Elite Sports, who were at the time considered to be the club's retail partner. As a result, the three parties reached an agreement that JD Sports (the only UK-wide major retailer selling those products at the time) would raise its prices for the replica shirts by nearly 10 % in order to align with the prices charged by Elite Sports on its Gers Online store.

The CMA also found that JD Sports and Elite Sports colluded over a longer period to fix the prices of Rangers FC-branded clothing including training wear and further replica kits, without involvement from Rangers FC themselves. This particular collusion involved aligning the timing and rates of discounts offered to customers at the end of the 2019 football season, with the objective of avoiding competition between the retailers and keeping prices high.

The CMA imposed penalties totalling over £2 million: Elite Sports and JD Sports were fined £459,000 and £1,485,000 respectively, while Rangers FC was fined £225,000. These penalties include a settlement discount due to the fact that all three companies admitted to acting illegally, which enabled the CMA to resolve their investigation more quickly. Elite Sports and JD Sports also benefitted from a discount under the CMA's Leniency Programme as they came forward with information about their participation in the illegal conduct, and cooperated fully with the investigation. Michael Grenfell, executive director of enforcement at the CMA, said: "*Today's decision sends a clear message to football clubs and other businesses that illegal anti-competitive collusion will not be tolerated*".

REGULATORY

OFCOM TO LAUNCH MARKET STUDY INTO UK CLOUD SERVICES MARKET

The UK's Office of Communications (Ofcom) has announced that it is launching a market study into the UK's cloud services market, using its powers as a competition authority under the Enterprise Act 2002. The largest providers of cloud services – also known as 'hyperscalers' – are Amazon Web Services, Microsoft and Google. 'Hyperscalers' are technology companies that can quickly scale the size of their data systems upwards and downwards according to demand. Cloud services are a large and rapidly growing market, providing users with services including storage and computing power.

Ofcom has said that it will use the market study to assess how well this market is working. In doing so, it will examine the strength of competition in cloud services, as well as consider market features that might have an impact on innovation and growth. Ofcom has indicated that it plans to consult on its interim findings and expects to publish a final report within one year. If the market study concludes that the market is not working well, Ofcom can take the following steps, some of which can be taken cumulatively: (i) convey its recommended regulatory changes to the government; (ii) take competition or consumer enforcement action; (iii) make a market investigation reference to the CMA; (iv) accept undertakings in lieu of making a market investigation reference. Ofcom has also made it clear that although it will lead the market study, it will work closely with the CMA throughout the process.

In addition, Ofcom plans to start a broader program of work to explore competition dynamics in other digital markets, in particular online personal communication apps (such as WhatsApp, FaceTime and Zoom), as well as devices for accessing audio-visual content such as smart TVs and smart speakers.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650