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By: Mélanie Bruneau, Giovanni Campi, Francesco Carloni, Antoine de Rohan Chabot

ANTITRUST AND COMPETITION

A Subsidiary can be Held Liable for the Harm Caused by the Anticompetitive Conduct of its Parent Company

On 19 July 2016, the European Commission (the Commission) imposed fines on several car manufacturers for anticompetitive agreements on the pricing of trucks. Following this decision, a Spanish company brought a damages action before the Spanish courts against a subsidiary of one of the car manufacturers fined by the Commission. In the European Union, any person or company that suffers harm as a result of a breach of EU competition rules is entitled to claim compensation from the party who caused it and bring an action for damages before the EU national courts. If the Commission has adopted a prohibition decision regarding the infringement of EU competition rules, the Commission's decision can be used by the claimant before the EU national courts to prove that the behavior took place and was illegal.

In this case, a Spanish appeals court asked the EU top court (i.e., the Court of Justice of the EU (CJEU)) to clarify whether: (i) a subsidiary can be held liable for an infringement of EU competition rules by its parent company, and (ii) under what conditions such liability can arise. The Spanish appeals court's request was made on the basis of the preliminary ruling procedure, which allows national courts of the EU Member States to refer questions to the CJEU regarding the interpretation of EU law or the validity of an EU act (e.g., an EU regulation).

Pending the judgment from the CJEU, in his opinion of 15 April 2021, Advocate General (AG) Pitruzzella suggested the CJEU that it should apply the so-called single economic entity principle. Under this principle, companies of a group are considered one single economic entity and a parent holding 100 percent of the shares of a subsidiary is presumed to exercise decisive influence over the subsidiary. The Commission has used this presumption to impose fines on a parent company for the anticompetitive conduct of its subsidiaries (so-called “bottom-up” liability).

AG Pitruzzella has suggested that it is possible to use the single economic entity principle to establish a so-called “top-down” liability (i.e., the liability of a subsidiary for harm caused by the anticompetitive conduct of its parent). In particular, AG Pitruzzella suggests that a subsidiary can be held liable for the anticompetitive conduct of its parent if the subsidiary:

- Operates in the same area as that in which the parent company has engaged in the anticompetitive conduct; and
- Is able, through its conduct on the market, to give effect to the infringement.

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Although the opinion of the AG is not binding on the CJEU, the CJEU usually follows such opinions. If the CJEU does follow its AG, this would extend the scope of the application of the single economic entity principle and significantly increase the risk for a company to be held liable for the conduct of its parent. In a context where cartels tend to be global and company groups operate all around the world, such risk is significant. It remains to be seen whether the CJEU will confirm the AG's position.

ENVIRONMENTAL AFFAIRS

Developments in European Climate Change Legislation

On 21 April 2021, the Council of the European Union and the European Parliament reached a preliminary agreement on the Commission's proposal for a European Climate Law, which constitutes a foundational element of the European Green Deal.

The provisional agreement enshrines the European Union's commitment to reach climate neutrality by 2050 and reduce net greenhouse gas emissions by 55 percent by 2030, compared to the 1990 level, as well as a process for setting a 2040 climate target, taking into account an indicative greenhouse gas budget for 2030–2050 to be published by the Commission. The European Parliament and Council's final approval is expected in June 2021. In the meantime, the European Parliament's Environment Committee on 10 May approved the preliminary agreement on the European Climate Law.

Similar environmental obligations are also contained in the German Climate Change Act, effective since 2019. The German Federal Constitutional Courtin an order published on 29 April decided that the act was partially unconstitutional because it lacked sufficient specifications on how the reduction targets for greenhouse gas emissions (GHG) will be adjusted after 2030. The German legislator needs to enact sufficiently detailed provisions by 31 December 2022.

ECONOMIC AND FINANCIAL AFFAIRS

The Commission Issues a Sustainable Finance Package to Streamline Green Investments and Sustainability Reporting

On 21 April 2021, the Commission released the Sustainable Finance Package, which includes measures to redirect capital towards sustainable investments. The Sustainable Finance Package includes the following initiatives:

The Communication provides an overview of all the initiatives under the Sustainable Finance Package and outlines how the package will develop an enabling sustainable finance ecosystem to achieve change and ensure a just transition to reach the European Union's sustainability goals.

1. A Communication Setting Forth the Commission's Rationale Behind the Sustainable Finance Package

The Communication provides an overview of all the initiatives under the Sustainable Finance Package and outlines how the package will develop an enabling sustainable finance ecosystem to achieve change and ensure a just transition to reach the European Union's sustainability goals.

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2. The EU Taxonomy Climate Delegated Act

The EU Taxonomy Climate Delegated Act aims to support sustainable investment by clarifying which economic activities most contribute to meet the European Union's environmental objectives. Through the EU Taxonomy Climate Delegated Act, the economic activities of roughly 40 percent of listed companies, in sectors which are responsible for almost 80 percent of direct GHG in Europe, are covered, with more activities to be added in the future.

The new rules laid out the EU Taxonomy Climate Delegated Act provide for detailed green finance criteria for renewables, forestry, and bioenergy activities. However, the EU Taxonomy Climate Delegated Act leaves out natural gas, agriculture, and nuclear power, which will be covered in a complementary Delegated Act expected in summer 2021.

Importantly, the Commission emphasized that the EU Taxonomy Climate Delegated Act will continue to evolve over time based on scientific evidence, with more activities added to its scope by means of amendments. As for next steps, the EU Taxonomy Climate Delegated Act will be subject to a four-month objection period by the European Parliament and the Council of the European Union, which can be extended by two months at their request.

3. A Proposal for a Corporate Sustainability Reporting Directive (CSRD)

The draft proposal on the CSRD will revise the existing reporting rules that were introduced by the Non-Financial Reporting Directive (NFRD). Generally, the CSRD aims to make sustainability reporting by companies more consistent, so that financial firms, investors, and the broader public can use comparable and reliable sustainability information.

One of the key changes brought by the CSRD is the extension of the scope to include all large companies and all companies listed on regulated markets except listed micro-companies. Large companies not listed on regulated markets are defined as companies that exceed at least two of the following criteria: (i) a balance sheet total of €20,000,000; (ii) a net revenue of €40,000,000; and (iii) an average number of 250 employees during the financial year. The Commission estimates that this will result in approximately 50,000 companies reporting sustainability information, compared to the current 11,600 companies that are within the scope of the NFRD.

As for next steps, the draft proposal will now be discussed by the co-legislators (European Parliament and Council of the European Union). In this regard, if the co-legislators reach an agreement on a final text in the first half of 2022, then the Commission will be able to adopt the first set of reporting standards under the new legislation by the end of 2022. That would mean that companies would apply the standards for the first time to reports published in 2024, covering the 2023 financial year.

4. Six Amending Delegated Acts

On fiduciary duties, investment, and insurance advice aim to ensure that financial firms, e.g., advisers, asset managers, or insurers, include sustainability in their procedures and their investment advice to clients.

The draft Delegated Acts concern the incorporation of sustainability considerations into the EU financial services regulatory framework, including the UCITS Directive, the Alternative Investment Fund Managers Directive (AIFMD), MiFID II, the Solvency II Directive, and the Insurance Distribution Directive. On a general note, the amendments clarify the obligations for financial firms when assessing their sustainability risks, such as the

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sustainability of their business models. The amendments also include a clarification of rules on investment and insurance product oversight and governance so that sustainability factors are considered in designing products.

As for next steps, all six amending Delegated Acts are subject to scrutiny by the European Parliament and the Council of the European Union for a period of three months, which can be extended once by three additional months. The Delegated Acts provide for a 12-month period for market participants to implement the requirements, with their implementation expected from October 2022.

SINGLE MARKET

Update of the 2020 EU Industrial Strategy

On 5 May 2021, the Commission presented an update to the EU Industrial Strategy in order to adapt it to post-pandemic circumstances and to boost the EU recovery.

The strategy contains new measures to enhance the resilience of the Single Market and reduce its dependencies in strategic areas. In this respect, the Commission proposed a Single Market Emergency Instrument to guarantee that the free movement of persons, goods, and services is safeguarded in future crises. The Commission also proposed to fully enforce the Services Directive to ensure that EU member states comply with their existing obligations. In addition, the strategy aims to strengthen market surveillance and mobilize significant investment to small and medium-sized enterprises.

To tackle the issue of EU dependencies, the Commission has presented the result of six in-depth reviews on key products, such as raw materials, batteries, active pharmaceutical ingredients, semiconductors, and cloud technologies. The Commission will therefore work on diversifying international supply chains and on establishing new partnerships and alliances to accelerate activities in strategic areas.

The Commission Proposes a new Regulation to Address Distortions Caused by Foreign Subsidies in the Single Market

On 5 May 2021, the Commission published a legislative proposal for a new regulation to address potential distortive effects of foreign subsidies in the Single Market. In recent years, foreign subsidies have had a distortive impact on the European Union's internal market, creating an uneven playing field for competition. Indeed, EU competition rules, public procurement, and trade defense instruments do not apply to foreign subsidies, which provide their beneficiary with an unfair advantage when acquiring EU companies, but also when participating in public procurements or when engaging in other commercial activities in the European Union.

Foreign subsidies can take different forms, including zero-interest loans, unlimited state guarantees, tax exemptions, or reductions in respect of foreign investments or trade, as well as direct financial grants. In many cases, such subsidies would be problematic if granted by EU member states and assessed under EU state aid rules. In a recent report, the European Court of Auditors found that certain subsidies granted by the Chinese government would, if granted by an EU member state, constitute illegal state aid and noted that this “difference in treatment can distort competition in the EU's internal market.”

The proposed regulation's objective is to close this regulatory gap and to tackle foreign subsidies that cause distortions and harm the level playing field in the Single Market in any market situation.

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Under the proposed regulation, the Commission will have the power to investigate financial contributions granted by public authorities of a non-EU country that benefit companies engaging in an economic activity in the European Union and to redress their distortive effects. The regulation proposes the introduction of two notification-based tools and a general market investigation tool. First, a notification-based tool aims at investigating mergers and acquisitions involving a financial contribution by a non-EU government, where the EU turnover of the company acquired (or of at least one of the merging parties) is €500 million or more and the foreign financial contribution is at least €50 million. Another notification-based tool aims at investigating public procurement bids involving a financial contribution by a non-EU government, where the estimated value of the procurement is €250 million or more. Finally, a market investigation tool pursuant to which the Commission could start ex officio to investigate other market situations, smaller mergers and acquisitions, and public procurement procedures.

The enforcement of the regulation would lie exclusively with the Commission to ensure its uniform application across the European Union. Under the proposed regulation, the Commission will have the power to impose redressive measures or accept commitments from the companies concerned to remedy the distortion. The proposed regulation includes a range of structural or behavioral remedies, such as the divestment of certain assets or the prohibition of a certain market behavior.

The legislative proposal, which is now open for an eight-week public consultation, follows the adoption of the white paper in June 2020 and a consultation process with stakeholders. It is also accompanied by an Impact Assessment report, which describes several situations in which foreign subsidies may cause distortions in the Single Market.

Once adopted, the regulation will be directly applicable across the European Union. According to the current text of the proposal, it will also apply, in certain specific circumstances, to foreign subsidies granted before the regulation is applicable where such foreign subsidies distort the EU internal market after the application of the regulation.

TRANSPORTATION POLICY

European Parliament Passes Rail Passenger Rights Reform

On 29 April 2021, the European Parliament approved new rail passenger rights legislation. The new legislation proposes a number of amendments to Regulation (EC) No 1371/2007 on rail passengers' rights and obligations, in order to enhance protection for passengers and to encourage an increase in rail travel.

This reform translates into several measures, such as better protection to passengers in case of re-routing, stronger rights for people with disabilities or with reduced mobility, and it makes it easier to transport bicycles on trains.

According to the new regulation, “granting the same rights to rail passengers taking international and domestic journeys seeks to raise the level of consumer protection in the European Union, to ensure a level playing field for railway undertakings and to guarantee a uniform level of passengers' rights.”

There are several notable developments resulting from this new legislation:

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Travel Delay Options

One outcome of the new legislation is that railways now will have to cover alternative options for passengers in case of delays. If there is a delay of over 100 minutes, passengers will be able to choose to either be reimbursed or re-routed with no additional costs. Passengers also will be able to travel in the same class as their original ticket, meals and refreshments will be provided and accommodation costs reimbursed.

Provision of Information

The new rights include ticket vendors providing general information on the service, in accessible format, prior to the travel and where a station manager also has such information, the station manager should provide it to the passengers.

Increased Mobility

Every train must now include space for four bike racks and disabled passengers only have to pre-notify train staff of their needs 24 hours before departure, rather than the previous 48 hours.

Through-Tickets

Through-tickets are also to be promoted in the reform. A through-ticket is a ticket that can be used to travel to a specified place, but the passenger may change trains on the way. Where ticket vendor sells separate tickets as a bundle, they must clearly inform the passenger that those are not through-tickets and do not offer the same level of protection.

Scope of Regulation

The Regulation states that its own clauses should not prevent railways, tour operators or ticket vendors from offering more favorable conditions than those laid down. Nonetheless, the Regulation does bind a railway to more favorable contractual conditions offered by a tour operator or ticket vendor to travelers, unless an arrangement between the railway and the tour operator or the ticket vendor provides otherwise.

Most of the rules are set to come into force in 2023, with the exception of the bicycle space requirements, which will be applicable from 2025.

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KEY CONTACTS



MÉLANIE BRUNEAU
PARTNER

BRUSSELS
+32.2.336.1940
MELANIE.BRUNEAU@KLGATES.COM



GIOVANNI CAMPI
SENIOR POLICY DIRECTOR

BRUSSELS
+32.2.336.1910
GIOVANNI.CAMPI@KLGATES.COM



FRANCESCO CARLONI
OFFICE MANAGING PARTNER, BRUSSELS

BRUSSELS, MILAN
+32.2.336.1908
FRANCESCO.CARLONI@KLGATES.COM



ANTOINE DE ROHAN CHABOT
COUNSEL

BRUSSELS
+32.2.336.1941
ANTOINE.DEROHANCHABOT@KLGATES.COM

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