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ANTITRUST AND COMPETITION

EU Cartel Damages: Advocate General says that liability in cartel damages cannot be avoided through corporate restructuring

On 6 February 2019, Advocate General Nils Wahl found in his Opinion, that companies cannot avoid liability in cartel damages claims by attributing the illegal activity to subsidiaries that have since been liquidated. As a result, the companies' corporate restructuring should not allow them to avoid a multimillion-euro fine in Finland for operating a cartel.

In this case, the Supreme Administrative Court of Finland ("Supreme Administrative Court") imposed a fine on seven companies for anticompetitive conduct in the asphalt sector between 1994 and 2002. Two of the companies involved in the cartel had since been dissolved and their assets were acquired by their respective Finnish shareholders (the "Appellants"), which continued the dissolved companies' economic activities.

Following the Supreme Administrative Court's decision, one of the victims sought joint and several damages compensation from the seven companies involved in the cartel for the harm caused by excessive prices. The Appellants contested the action on the ground, inter alia, that they could not be held liable for harm caused by legally independent companies. They argued that the claims should have been directed against the companies dissolved in liquidation procedures.

The Supreme Administrative Court decision was challenged by the Appellants before the Supreme Court of Finland ("Supreme Court"), which stayed the proceedings and referred the case to the Court of Justice of the European Union, asking, inter alia, (i) whether Article 101 TFEU or national provisions should apply in the determination of the parties liable for the compensation of harm caused by an anticompetitive conduct; and (ii) whether the determination of the persons liable to pay compensation is governed by the principle of economic continuity.

In his opinion, AG Wahl explained that the system of private enforcement of EU competition law is based on the interplay between EU law principles and their application in the laws of EU Member States. To ensure full effectiveness of EU competition law, the private enforcement system established by EU case law ensures that the harm caused by an anticompetitive conduct is repaired.

AG Wahl the underlined, in his analysis of the first point of appeal, the need for uniformity in the conditions of liability to ensure equality and effective enforcement of EU competition law. Economic operators should not be treated differently from one Member State to another as this would be contrary to one of the fundamental objective of EU competition law which is to create a level playing field for all undertakings active on the internal market and would also be a forum shopping invitation. The determination of the persons liable to pay compensation for harm caused by an EU competition law infringement shall therefore be governed by EU law, with reference to Article 101 TFEU, and not by national law of EU Member States.

As regards the second point of appeal, AG Wahl stated that antitrust damages actions aim at deterring undertakings from engaging in anticompetitive conduct. The principle of economic continuity should therefore apply in the case at hand. Liability is attached to the assets rather than to a particular legal personality. A legal or organizational change of an undertaking does not free the undertaking from the conduct of its predecessor when the two entities are identical from an economic point of view. Not applying the principle of economic continuity in the context of actions for damages would enable companies to avoid private liability by means of corporate restructuring and would weaken the deterrent effect of damages claims.

A major social networking service company attracts antitrust scrutiny in Europe

On 7 February 2019, the German Federal Cartel Office ('FCA') issued a prohibition decision against a social networking service company. Following an investigation that has started in March 2016, the FCA found that the company had abused its dominant position on the market for social network by collecting user data from third parties' websites and from its own services (e.g. from its own messaging app) without consent. Under EU and national competition law, it is not illegal to hold a dominant position (typically when the company's market share is 40% or more), since a dominant position can be obtained by legitimate means of competition. However, a dominant company is prohibited from abusing this position to eliminate competition.

The FCA first established that the company held a dominant position in the market for social network by noting that it had a market share of more than 95% when considering its daily active users and of more than 80% when considering its monthly active users. The German competition watchdog excluded professional networks and other services providers (e.g. video-sharing websites) from its definition of the relevant market considering that they only provide parts of the services provided by social networking service companies.

The FCA did not call into question the ability for the company to process data generated on its own website as it is a crucial element of its business model. However, it complained that the company was able to collect data from third party sources (including its own services) via various types of interaction between its website and third parties' website. Examples of such interaction are the possibility to log in to a third party website with its social media account or the possibility to 'like' or share third party's website content on its social media account. Social media users are forced to agree with this form of data collection if they wish to use the social media network.

The FCA concluded that this conduct resulted in an exploitative abuse as it directly affected the social media network users due to the loss of control over how their personal data is used. The FCA notably based its assessment on the fact that the way the company collected user data was in violation of the General Data

Protection Regulation ('GDPR'). It also considered that by optimizing its own service and improving its targeted advertising this conduct gave an unfair advantage to the company to the detriment of other social media network and advertising competitors.

The social networking service company already announced that it will appeal the decision, notably considering that the definition of the relevant market was incorrect, that it was in compliance with the GDPR provisions and that its use of data across services was helping to make them better and protect people's safety.

This decision, which marks the first prohibition of an anticompetitive practice based on the abusive use of data by a company, raises the question as to whether or not Big Data means market power.

TRADE

Is Bigger Better? The failed giant European Railway

On 6 February 2019, the European Commission decided to block the merger of the two largest European railway companies, one from France, the other from Germany, preventing the creation of a Franco-German "European rail champion".

The German company makes the ICE trains for Deutsche Bahn and also builds units for Channel Tunnel operator Eurostar. The French company is the manufacturer of France's signature bullet train, locally known as the TGV. It is also a rolling-stock maker selling urban and suburban trains as well as signaling systems. The French and German governments favored the birth of industrial champions, with a Minister pointing out that "it is the best response to compete more effectively with the rising power of the Chinese in the rail sector".

The Commission dismissed the merging companies' argument about the merger being important to compete with bigger China's state-owned CRRC in the European market, after conducting an investigation on the potential impact of the merger for competition in markets for railway signaling systems and high speed trains. In that regard, the two companies had put forward a proposal to transfer or license signaling assets, such as divesting investments in Italy or licensing a line of production. They wanted to produce a stand-alone and future-proof business that would give the buyer the ability and incentive to develop a competing very high speed train. Competition Commissioner Magrethe Vestager considered the suggested remedies insufficient, stating that the merger would have resulted in higher prices for the signaling systems that keep passengers safe and for the next generation of very high speed trains. A number of national competition authorities including Germany, Belgium, Netherlands, Spain and UK commented negatively the attempted consolidation, arguing that it would create an undisputed leader in the supply of mainline and urban signaling as well as a dominant player in the market for trains capable of 300 km/h and above in the European Economic Area and the rest of the world, except for South Korea, Japan and China which are not open to competition.

A few days after the Commission's announcements, Governments in Berlin and Paris presented a proposal to change European competition rules to facilitate large cross-border mergers, with the German government announcing that it will seek the reform during its presidency of the European Union in the second half of 2020. The German Economy Minister stated that industrial policy should be factored into the Commission's review of a merger. Likewise, French Economy Minister Bruno Le Maire named the rejection of the merger a clear economic and political mistake, as it would give rise to the second largest train manufacturer in the world with a combined turnover of €15 billion and 62,000 employees, roughly half the size of CRRC; he further argued that this is a moment of truth for Europe to create European champions which can compete with rivals from China and the United States.

Changes to existing law however need time in order to be approved by all EU member states (which may have different positions even though they may have not been as vocal) during a legislative procedure involving the Commission, the European Parliament and the Council.

The Commission has approved over 3,000 mergers in the past 10 years and blocked only nine, including those on Wednesday. Whatever follows regarding changes to the merger legal framework, and as it happened with a similarly largely contested merger case of two electrical giants in 2001, this failed railway case is expected to be studied for years to come and marks a turning point; not only as it opposed two major EU governments entailing a huge political weight, but also as it presents two radically different views of competition policy. After this case, merger control rules have made their way into the wider political debate in a rather unprecedented way, a fact that will be more intensified with European elections around the corner.

TELECOMMUNICATIONS, MEDIA AND TECHNOLOGY

First ever EU-wide contract rules on the supply of digital content ready to be formally adopted

After three years of legislative discussion, the European Parliament and the Council of the EU reached an agreement on the Directive regarding contracts for the provision of digital content and services. Consumers who download music, apps, games or use cloud and streaming services will be better protected where a company fails to supply the content/service or provides a faulty one. Companies in the digital content industry should pay particular attention to the new contractual remedies available to consumers. At the same time, this single set of rules for digital content and services will make it easier for businesses to operate throughout the EU, since they will no longer have to deal with different contract rules in each Member State.

The Directive covers *business-to-consumer contracts* for the supply of digital content, certain digital services and "goods with digital elements". Digital content can take the form of music and video files, mobile applications, computer software, digital games and e-books. Digital services include, for instance, cloud computing services, social media platforms, online games or pay-per-view streaming. Goods with digital elements are tangible means incorporating digital content such as CDs or DVDs carrying music or movies. And this is not only about money. The Directive will also apply when consumers provide their data in order to receive digital content or services.

The agreed text basically provides contractual remedies in case of failure to supply or non-conformity. In case of lack of supply, the Directive generally offers suppliers a "second chance" before the contract can be terminated by the consumer. In case of lack of conformity, consumers can request to have the digital content or digital service brought into conformity, or to receive a proportionate reduction in the price, or - if the lack of conformity is not minor- to terminate the contract.

The burden of proof on the conformity of content and services at the time of supply will be on the supplier if the lack of conformity becomes apparent within a period of one year. At the end of this time period, the burden will be on the consumer.

The Directive is a maximum harmonization instrument, therefore Member States cannot introduce more consumer-friendly rules within its scope unless the Directive authorizes otherwise. In this context, the text does not fully harmonize guarantee periods in case of lack of conformity, which may not be shorter than two years.

The major sticking point in the negotiations was the inclusion or not of embedded digital content in tangible goods or ancillary digital services (e.g. software that allows a washing machine or a fridge to connect to the Internet). Such content was ultimately excluded from the scope of the Directive and will be covered -along with the tangible good that embeds it- by a "twin" Directive covering the sale of goods.

The agreed text must now be formally adopted by the Parliament and the Council; the Directive will enter into force 20 days after its publication in the EU's Official Journal. Member States will then adopt national rules necessary to comply with the Directive within two years from its entry into force.

ECONOMIC AND FINANCIAL AFFAIRS

EU legislators move forward with the review of the EU financial supervision

On 12 February 2019, the finance ministers of the EU Member States' adopted their position on the review of the three European Supervisory Authorities ("ESAs", i.e. the banking, insurance and securities sectors' supervisors) and the European Systemic Risk Board ("ESRB", i.e. macroprudential authority).

The ESAs review package, put forward by the European Commission in September 2017, amends the tasks, powers, governance and funding of the ESAs as well as the ESRB to reflect the changing political, regulatory and financial markets environment. In October 2018, this package was further broadened by a proposal to boost the role of the European Banking Authority ("EBA") in the fight against money laundering and terrorist financing ("AML/CTF").

The adoption of the so-called general approach by finance ministers came rather unexpectedly, as the original intention of the Romanian Presidency was to separate the AML/CTF provisions of the package, where the position was already finalized in December. The ministers underlined that the compromise strikes a delicate balance, which they want to keep preserved in the trilogue negotiations with the European Parliament and the Commission. The governance provisions related to the role and powers of the ESAs management board and the decision procedures within the board of supervisors are key elements for the Member States.

The Parliament and the Council already launched the political negotiations on 14 February, with the next meeting scheduled for 21 February. Despite the different level of ambition in equipping the ESAs with more powers, the co-legislators may be able to agree on the reform before the end of the legislative term, marking an important milestone in the context of Brexit. The EU system of financial supervision will be crucial for the development of the EU capital market, which, in a post-Brexit world, is likely to develop around multiple financial centers. The overall aim is to establish adequate supervisory coordination preventing regulatory arbitrage and ensuring that firms entering the EU market in different places will be treated equally.

OECD unveiled elements of a potential corporate tax overhaul addressing the digitalization challenge

On 13 February 2019, the Organization for Economic Cooperation and Development ("OECD") published a consultation document setting out elements of a possible global solution to the tax challenges arising from digitalization of the economy. The OECD introduced a number of proposals revising the nexus between companies and the taxing jurisdictions as well as profit allocation rules, which are further complemented by "anti-base erosion" or a minimum tax proposal. These proposals could substantially change the way the global corporate tax system works, by redirecting taxing rights to countries where companies sell, rather than where their offices and assets are based.

The revised profit allocation and nexus rules are designed to address the key taxation challenges associated with digitalization: scale without mass, heavy reliance on intangible assets and the increasing role of user data and participation in income generation. The OECD intentionally avoids the term "digital tax" as this would imply that digital businesses may be "ring-fenced" from the rest of the economy and ultimately be treated differently for tax purposes than traditional businesses. This means that some of the proposed solutions might also affect more traditional multinational companies, especially if they rely on digital technology in provision of their services and/or have branches established in, and/or payments flowing from low-tax jurisdictions.

The OECD outlines three high-level options, which differ in scope:

- User participation proposal targeting primarily business models of social media platforms, search engines and online market places, leaving out traditional businesses.
- Marketing intangibles proposal with a wider scope potentially affecting traditional businesses.
- Significant economic presence proposal, under which companies would be deemed to have a taxable presence based on certain factors that prove a purposeful and sustained interaction with the country via digital technology and other automated means.

The OECD further outlines a so-called global anti-base erosion proposal, which is unrelated, but could reinforce the revised nexus and profit allocation rules. The proposed "income inclusion rule", inspired by the U.S. Global Intangible Low-taxed Income ("GILTI") would reduce the incentive to allocate returns to low tax entities through a minimum rate on multinationals' income. This would be accompanied by a "tax on base eroding payments", which could also trim the benefits normally provided under double tax treaties affecting among others, dividends, interests, royalties and capital gains.

The consultation period ran until 6 March. The OECD also organized a public hearing on 13-14 March. This will feed into the development of a final report with a global solution, which will be presented to the G20 in 2020. A detailed work plan leading up to the final report can be expected in June at the G20 finance ministers meeting.

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