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ANTITRUST AND COMPETITION

Competition Policy and the Green Deal

In her recent keynote speech, delivered at the 25th IBA Competition Conference on 10 September 2021, European Commission (the Commission) Executive Vice President Margrethe Vestager called for a green revolution—the replacement of a linear economy with a circular one, coupled with investments in infrastructure. While this goal is not a new one, it is in line with the Commission's overall Green Deal ambition of making Europe the world's first climate-neutral continent by 2050, and she outlined possible implications for competition policy.

Vestager noted that green policies, like regulations, taxes, and investment, are key to the Green Deal. At the same time, keeping markets open and competitive pushes companies to find more sustainable ways to do business. The competition rules should therefore be enforced even more vigorously to enable the green transition, for example, in the field of merger control.

With respect to antitrust enforcement, Vestager spoke in favor of companies setting joint standards on what counts as a green product, pooling resources to speed up green innovation, or agreeing to cut dirty products out of their supply chains. To decide if a sustainability agreement is legal, the Commission needs to weigh the benefits it brings to consumers against the potential harm.

As for state aid control, the Commission is currently reviewing the relevant rules, to make sure they are in line with environmental goals. At the same time, the scope of the general block exemption regulation has been expanded, enabling granting green public investment without prior approval. On the other hand, new rules will also aim to discourage investments that use the most polluting fossil fuels.

Finally, Vestager reiterated the pressing need for actions to address climate change, noting that this is true for competition enforcers as for anyone else.

The Commission Orders the Italian Government to Recover Illegal State Aid Worth €900 Million from an Airline

On 23 April 2018, the Commission initiated formal proceedings to ascertain whether two loans granted by the Italian government to an airline were compliant with EU State aid rules. Under such rules, government support giving an unfair advantage (e.g., direct cash grants or indirect aid, such as preferential borrowing rates or tax credits) to a company over its competitors is prohibited unless it is approved by the Commission. A key principle to assess governmental support in favor of a company is the “market economy operator principle.” Under this principle, if the EU government invested in the company on terms that a private operator would have accepted under market circumstances, then the measure does not qualify as State aid.

The Commission's investigation was opened in response to several complaints lodged from airline competitors in the course of 2017. In particular, the competing airlines claimed that the loans granted by the Italian government to the airline constituted unlawful State aid.

The investigated airline had been losing money since 2008 and urgently required cash in early 2017 because of its precarious financial condition. In order to keep the airline running, the Italian government granted the airline two loans totaling €600 million and €300 million in May and October 2017, respectively. At the same time, the airline was put in special bankruptcy procedures pursuant to Italian bankruptcy legislation.

After an in-depth analysis, the Commission found that when granting the two loans to the airline, the Italian government did not assess in advance the probability of repayment of the loans, including interest, and for this reason the Italian government could not be considered as having acted as a private investor would have done. The Commission noted that when the Italian government granted the loans, it was unlikely that the airline could pay back the loans.

The Commission thus concluded that no private investor would have provided such loans at the time of the grant and that the two loans constituted illegal State aid pursuant to EU State aid law. The Italian government must now recover the State aid, plus interest, from the airline.

The Court of Justice of the European Union sets back the General Court's Judgment on Belgium's Excess Profit Exemptions Rulings to Multinational Companies and Refers the Case back to the General Court

On 16 September 2021, the Court of Justice of the European Union (CJEU) issued its judgment in the case Commission v Belgium and Magnetrol International (C-337/19). The CJEU has set aside the General Court's judgement of 14 February 2019 that annulled the European Commission's decision of 11 January 2016 on the excess profit exemptions implemented by Belgium.

In its 2016 decision, the Commission found that the Belgian system of exemptions constituted a State aid scheme that was unlawful and incompatible with the internal market and ordered the recovery of the aid granted from 55 beneficiaries, among which Magnetrol International. In 2019, the General Court upheld the action brought by Belgium and Magnetrol International against the decision and annulled the Commission's decision. Subsequently, the Commission appealed the General Court's judgment before the CJEU arguing that the General Court had made errors in the interpretation of the definition of an aid scheme.

In its 2021 judgment, the CJEU confirmed the Commission's views and found that the General Court had made errors in the interpretation of the definition of an aid scheme, and that the Commission correctly concluded that the Belgian measure constituted an aid scheme. The CJEU recalled that three cumulative conditions must be satisfied for a State measure to be classified as an aid scheme.

First, an aid may be granted individually to undertakings on the basis of an act. In relation to this condition, the CJEU clarified the concept of 'act', confirming that the term may also refer to a consistent administrative practice by the authorities of a Member State where that practice reveals a 'systematic approach'. The CJEU found that the General Court misapplied the notion of 'act'.

Second, no further implementing measure is required for that aid to be granted. Regarding this condition, the CJEU noted that the General Court failed to take account that Belgian tax authorities had systematically granted the excess profit exemption when the conditions were satisfied. The identification of such a systematic practice was capable of constituting a relevant factor in order to establish that the tax authorities did not in fact have any discretion.

Third, undertakings to which individual aid may be granted must be defined 'in a general and abstract manner'. With respect to this condition, the CJEU found that the errors of law made by the General Court concerning the first two conditions vitiated the General Court's assessment relating to the definition of the beneficiaries of the excess profit exemption.

On the basis of the above reasoning, the CJEU has set aside the General Court's judgment, and referred the case back to the General Court for a second review on the substance of the case.

DIGITAL AFFAIRS

New Organizations Join the Tracking-Free Ads Coalition to Ban Targeted Ads in the Digital Services Act

On 7 September, as announced by Dutch MEP Paul Tang (Group of the Progressive Alliance of Socialists and Democrats), 16 consumer and human rights organizations joined the Tracking-Free Ads Coalition to ban targeted ads in the Digital Services Act (DSA).

The Commission's proposal for the DSA introduced, among other things, the idea of greater transparency obligations for platforms in the field of targeted advertising. Notably, the DSA proposal considers rules that would give users immediate information on the sources of the ads they see online, including granular information on why an individual has been targeted with a specific advertisement.

The Tracking-Free Ads Coalition is composed of 16 members of the European Parliament and 50 civil society organizations and EU companies committed to ending the tracking advertising industry. The coalition states that tracking-based online advertisements enable the ad industry to manipulate the public debate through targeted messages. The majority of this ecosystem is controlled by big data firms who receive revenue that the coalition argues should be used to finance content creation instead.

The coalition also claims that tracking-based advertisements enable the dissemination of disinformation and other harmful online content.

On the same day, Facebook and news publisher Bertelsmann explained why, in their view, online tracking is necessary. During the IAB Europe digital marketing conference “Is the EU about to ban targeted ads?,” Marisa Jiménez Martin, Director of Public Policy and Deputy Head of EU Affairs at Facebook, said targeted advertising had been used to fight COVID-19 misinformation. This followed accusations in the Avaaz report “Left Behind: How Facebook is neglecting Europe's infodemic,” from April 2021, which stated that COVID-19 misinformation has been rampant on Facebook.

Large platforms have committed to join forces and work closely with networks of fact-checkers and researchers to combat the spread of pandemic-related misinformation. Facebook took the further step of removing posts that openly call on people to violate COVID-19-related government orders, and it committed to display warnings to people who had interacted with misinformation. These examples reflect a broader trend towards intense content moderation; however, several decision-makers still consider that these steps have not been enough to protect users and end misinformation.

ECONOMIC AND FINANCIAL AFFAIRS

The International Organization of Securities Commissions Released Guidance for Intermediaries and Asset Managers Using Artificial Intelligence and Machine Learning

On 7 September 2021, the International Organization of Securities Commissions (IOSCO) published guidance to help its members regulate and supervise the use of artificial intelligence (AI) and machine learning (ML) by market intermediaries and asset managers. Based on stakeholders' input, IOSCO found that financial firms' main challenges related to AI and ML reside in issues related to: appropriate governance, oversight, algorithm development, testing and ongoing monitoring, data quality, transparency, outsourcing, and ethical concerns. In this context, IOSCO proposes six measures focusing on the following:

- Appropriate governance, oversight, and accountability frameworks over the development, testing, use, and performance monitoring of AI and ML.
- Adequate testing and monitoring of the algorithms to validate the results of an AI and ML technique on a continuous basis.
- Ensuring staff have adequate knowledge, skills, and experience to implement and oversee the algorithms and outcomes of AI and ML, as well as conduct due diligence on any third-party providers.
- Adequate accountability, providing that firms should have a clear service-level agreement and contract in place clarifying the scope of the outsourced functions and the responsibility of the service provider.
- Appropriate transparency and disclosures to investors, regulators, and other relevant stakeholders, noting that regulators should consider requiring firms to disclose meaningful information to customers and clients around their use of AI and ML that impact client outcomes.
- Controls to ensure that the data on which AI and ML performance is dependent on is of sufficient quality and diversity so as to prevent bias and ensure a non-discriminatory application of AI and ML.

As for next steps, IOSCO noted that as AI and ML uses are increasing, it might review this guidance, including its definitions, to ensure it remains up to date.

The Commission Issues a Report Illustrating the Importance of Resilience for a Strong and Lasting Recovery

On 8 September 2021, the Commission adopted its second Strategic Foresight report, aiming to identify emerging challenges and opportunities to better steer the European Union's strategic choices. The report puts forwards four major trends that the Commission believes will shape EU policy. These are: climate change, digital hyper-connectivity, pressure on democratic values, and demographic changes.

In regard to financial services, the report recognizes that climate change can affect financial stability directly due to more-frequent and more-severe extreme weather events. As a result, it underscores that the EU financial system needs to systematically integrate sustainability risks in financial decision-making along with integrating long-term risk management and disaster risk-financing strategies. It also stresses that digitalization will also influence payment means and capital markets, with a growing role of crypto-assets and the development of digital currencies, making reference to the European Central Bank's initiative to launch a digital euro. Finally, yet importantly, it highlights that a wider use of the euro in international trade and services, including in energy markets, and pan-EU instant payments could significantly strengthen the EU's financial outlook.

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