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By: Mélanie Bruneau, Giovanni Campi, Francesco Carloni, Antoine de Rohan Chabot, Cecilia Sbrolli, Francesca Lai, Nicolas Hipp, Alessandro Di Mario, Miguel A. Caramello Alvarez, Philip Torbøl

ANTITRUST AND COMPETITION

The EU General Court adopts the first two judgements on the content of tax rulings

On 24 September 2019, the General Court of the European Union (General Court) adopted two judgments regarding actions for annulment brought against two European Commission's decisions on State aid. The Commission's decision concerning a tax ruling issued by Luxembourg to a car manufacturer was upheld, while the decision addressing a similar measure issued by the Netherlands to a coffee company was annulled.

Background

Tax rulings function as comfort letters sent to a company by the national tax administration explaining how its corporate tax will be calculated. The Commission has expressed on several occasions that tax rulings are normally not considered to be in breach with EU State aid rules, if the rulings *"simply confirm that tax arrangements between companies within the same group comply with the relevant tax legislation"*.

However, according to the Commission, this legal procedure may become problematic if it uses artificial and complex calculation methods, designed to send profits abroad (*via* artificial transactions between two companies belonging to the same group) in order to reduce the taxes due by the company. The Commission considers that tax rulings allowing such arrangements result in a selective advantage granted by Member States and therefore a State aid measure incompatible with EU law. State aid must be recovered by the Member State concerned if the Commission concludes it distorts competition within the EU.

Since October 2015, the Commission has adopted seven decisions ordering Member States to recover allegedly undue tax benefits from companies, the most notable being the decision of August 2016 ordering Ireland to recover up to EUR 13 billion from an American consumer electronics manufacturer. All these decisions have been challenged before the General Court. Further investigations regarding alleged State aid granted by Luxembourg and the Netherlands are still ongoing.

The judgments of 24 September

Getting back to the judgments of 24 September, the General Court stated that, while direct taxation is a competence reserved to Member States, the Commission was entitled to assess whether these tax rulings constituted illegal State aid. It added that the Commission was entitled to analyse the tax rulings at issue in accordance with the arm's length principle (i.e., financial transactions between related companies should be

valued as if they had been carried out between unrelated parties, each acting in its own best interest).

The General Court's, however, concluded differently in the two case. Only in the case concerning Luxembourg's tax ruling to a car manufacturer, did the court find that the Commission succeeded in demonstrating the existence of a selective advantage to the company. Such a selective advantage was not sufficiently demonstrated in relation to Ireland's tax ruling to the coffee company, and Commission decision in this case was consequently annulled.

Implications

These two judgments provide for the first time some clarity on the role of State aid rules in the context of tax rulings. For years, the Commission's investigations of those tax rulings have been the subject of a lively debate among companies and legal practitioners, some of whom consider that the EU State aid rules are not the appropriate tool to tackle the issue of undue tax exemptions. Although the judgements can (and probably will) be appealed to the Court of Justice of the European Union, they are already now reinforcing the Commission's approach with respect to its ongoing investigations into the fiscal aid cases.

EU Merger notifications: Advocate General says that fines imposed by the European Commission for the infringement of merger notifications should be partially annulled.

On 26 September 2019, Advocate General Evgeni Tanchev issued an Opinion finding that the implementation of a merger following the acquisition of a company through a share purchase agreement before such transaction is cleared by the European Commission constitutes an infringement of Article 7(1) of the EU's Merger Regulation.On 30 September 2013, the European Commission conditionally approved the acquisition by Marine Harvest ASA ("Marine Harvest") of Morpol ASA ("Morpol"), upon compliance with certain commitments. The acquisition was carried out in two steps: first, Marine Harvest entered into a share purchase agreement with the main shareholder of Morpol thereby acquiring 48.5% of the stake of Morpol; and second, Marine Harvest submitted a public bid for the remaining shares of Morpol.

Marine Harvest finalized the first step of the transaction prior to notifying the Commission. The Commission determined that the 48.5% stake was sufficient to confer on Marine Harvest control over Morpol, and therefore constituted a concentration for the purposes of Regulation (EC) No 139/2004 (the "Merger Regulation"). Consequently, the Commission, by its Decision of 23 July 2014, concluded that Marine Harvest violated the notification obligation imposed by Article 4(1) and the standstill obligation under Article 7(1) of the Merger Regulation, imposing "two" fines of €10 million each for these violations.

After an unsuccessful appeal of the Commission Decision before the General Court, Marine Harvest subsequently brought an appeal before the Court of Justice of the European Union (CJEU) alleging: (1) the General Court erred in its judgment by failing to consider that the two steps of the acquisition constituted a unique transaction according to Article 7(2) of the Merger Regulation; and (2) the General Court erred in failing to apply the principle of *ne bis in idem* (i.e., double jeopardy), or in the alternative, the penalty set-off principle or the principles governing concurrent offences.

In his Opinion, Advocate General Tanchev indicates that, to assess the question, the CJEU needs to decide whether the acquisition of the 48.5% stake alone constitutes a concentration, or whether that acquisition and the subsequent public bid must be regarded as a single concentration. According to the Advocate General, where a company acquires another entity by means of two transactions but control actually is transferred by means of the first transaction alone, those two transactions must be considered separately (and not as a single concentration), and the first transaction alone constitutes a concentration.

In addition, Advocate General Tanchev clarifies the principle of concurrent offences. When the same conduct is caught by more than one provision, but one provision is more specific than the other, only the more specific one shall apply. According to Advocate General Tanchev, where two different provisions of EU law (in this case, Article 4(1) and Article 7(1) of Regulation No 139/2004) apply to the same conduct and one of them subsumes the other, only that provision should be applied. Since Article 7(1) contains all elements of Article 4(1), the conduct at issue does not amount to a violation of both provisions, but only Article 7(1) of the Merger Regulation. Therefore, only "one" fine should be applied.

Finally, on the second ground of appeal related to double jeopardy, Advocate General Tanchev found that it does not apply to the case under review because there is no earlier decision imposing a fine on the same person with respect to the same conduct. The Advocate General also dismisses Marine Harvest's alternative argument on the breach of the set-off principle, which requires the adjudicator to take into account the first penalty imposed when setting a second penalty. This principle only comes into play, however, when the Commission and a competition authority of a Member State conduct parallel proceedings. Therefore, it is not applicable in this case as the Commission is a "one-stop shop" for merger review and no parallel proceedings can be held by a Member State.

TECH

Connected cars

One of the pillars of the new European Commission's program is the EU's digital future. President-elect Ursula von der Leyen's mission letter to Commissioner-designate for Transport Rovana Plumb stressed that the EU must make the most of the opportunities linked to connected and automated mobility, with a strong focus on digital innovation. Despite this prioritization, this area of EU policy remains very uncertain. [1]

The connected and automated driving (i.e., vehicles that can guide themselves without human intervention) has been on the Commission's to-do list since April 2017. At that time, the Commissioner for Research, Science and Innovation Moedas noted that connected and automated driving would not happen on its own: "*We have to invent that future, we have to create that future, we have to guide that future. Car manufacturers are in a worldwide race towards automation, including new entrants from the global ICT industry*,' he said. *'Europe needs to win this race*."

The verbal commitment was also accompanied by policy initiatives. The EU for example supported three projects setting up 5G trials over more than 1000km of highway including four cross-border corridors: Metz-Merzig-Luxembourg, Munich-Bologna via the Brenner Pass, and Porto-Vigo and Evora-Merida, both between Spain and

Portugal.

Another crucial initiative was the European Strategy on the Cooperative Intelligent Transport Systems (C-ITS). C-ITS is a system allowing the exchange of information between vehicles (V2V), and between vehicles and the road infrastructure (V2I). The objective of the C-ITS strategy was to facilitate the convergence of investments and regulatory frameworks across the EU.

The strategy culminated in the preparation of a Commission draft delegated Regulation on the deployment and operational use of cooperative intelligent transport systems. The proposal quickly encountered problems, however, when both the European Parliament's Transport Committee and the Council of the EU rejected it, in April and in July 2019, respectively. The most contentious part proved to be the Commission's strict technological preference for Wi-Fi solutions as a means to ensure connectivity. Critics of the proposal cited the need for technological neutrality, thereby allowing for the deployment of 5G as a possible solution.

Although current Transport Commissioner Violeta Bulc promised to work expeditiously to find a suitable way forward, it still remains to be seen whether the Commission can develop a new framework from the ashes of the previous proposal.

To date, the hearings of the new Von der Leyen Commission have not provided any new details. Competition Commissioner Margrethe Vestager and Commissioner-designate Sylvie Goulard (also rejected by the European Parliament) briefly mentioned the issue. While further light could be shed by the new nominee for the Transport portfolio, with the recent collapse of Romania's government it is unclear when Bucharest will put forward its candidate for the position. Further complications might arise if Commissioner Vestager follows up on recent demands to consider launching a sector inquiry to better understand the market dynamics surrounding the use of in-vehicle data.

TRADE

US to Impose Tariffs, EU Examines Options

On 2 October 2019, the WTO Appellate Body publicly issued its decision ruling in favour of the United States' 2004 complaint against the EU (then, European Communities or "EC"), France, Germany, Spain and the United Kingdom. The American complaint argued that a series of state subsidies to Airbus, the largest European aircraft manufacturer, were inconsistent with the obligations of the EC and some of its Member States under the WTO Agreement on Subsidies and Countervailing Measures ("SCM") and the General Agreement on Trade in Goods ("GATT").

The contested measures included the provision of loans under preferential terms and government-provided goods and services to develop, expand and upgrade Airbus manufacturing sites. Although some of the measures were meant to develop and produce the Airbus A380, the subsidies had an impact on the entire range of Airbus planes,

from A300 to A380.

The 2010 WTO panel report found that the EC and its Member States had been subsidizing Airbus for over forty years. This had caused adverse effects to US interests under the terms of the SCM Agreement in so far as it displaced European orders of US-produced large civil aircraft ("LCA") into the European market and American LCA exports from a number of third countries into the European market, ultimately resulting in lost sales for American companies.

In 2010, both the European Union and the United States appealed to the Appellate Body, which, after issuing its report in 2011, ultimately reached a decision this year putting an end to the fifteen-year-old dispute.

Following the publication of the decision, the United States announced its intention to impose tariffs on EU goods in an amount of US$7.5 billion, approximately 33% less than the $11 billion the United States had contemplated. The United States Trade Representative announced tariffs of 10 percent on some European aircrafts and tariffs of 25% on other unrelated European products. These products include spirits and liqueurs (approximately $2 billion), wine ($1.32 billion), dairy products ($690 million), as well as olive oil, seafood and crustaceans, textiles, and certain tools. On 14 October, the WTO officially approved the list of tariffs the United States will levy on European goods, and they became effective on 18 October. They are not limited in time, although American officials have reserved the right to reach a settlement.

Surprisingly, some goods that were initially on the United States' preliminary list have not been included in the new tariffs, despite the fact that the goods were more relevant to the case on appeal: helicopters, new civil aircrafts, and fuselage. Other agricultural products such as strawberries or grapefruits also have been excluded from the final list. It is worth noting that few French products will be impacted, the probable result of President Macron's bilateral negotiations with the United States during the July 2019 G7 meeting. British products like whiskey have been included, however, prompting Prime Minister Boris Johnson to plead with President Trump to have them removed.

Predictably, the European response came immediately, as a parallel case involving a complaint from the EU against alleged illegal subsidies to Boeing, Airbus' main competitor, is now pending at the Appellate Body. Although a decision is expected for 2020, it may be in jeopardy following the current deadlock on the renewal of members of the Appellate Body, as the current U.S. administration keeps vetoing new appointments. The U.S. blocking of the Appellate Body would also mean that the WTO would not be able to rule on matters related to the dispute, such as the EU's compliance with WTO findings on subsidies granted to Airbus. Compliance proceedings are meant to establish whether the EU now complies with its obligations under WTO rules.

European Commissioner for trade Cecilia Malmström has said that although the EU prefers a negotiated approach, the European Commission is examining every possibility for retaliation, possibly before the Appellate Body's decision in the Boeing matter in 2020. Such a quick response would involve turning back to old decisions of the Appellate Body for which the European Union never used its right to impose retaliatory measures against the United States. The Commission has however not specified which decisions those would be, and it seems

unlikely that any decision will be taken before the next Commission take office, in December at the earliest.

NOTES

[1] The uncertainty grew even further when Ms Plumb could not complete her European Parliament confirmation process. The European Parliament's Legal Affairs Committee declared her "unable to exercise the function" due to a conflict of interest that emerged after the examination of her declaration of financial interests.

KEY CONTACTS

MÉLANIE BRUNEAU
PARTNER

BRUSSELS
+32.2.336.1940
MELANIE.BRUNEAU@KLGATES.COM

GIOVANNI CAMPI
GOVERNMENT AFFAIRS ADVISOR

BRUSSELS
+32.2.336.1910
GIOVANNI.CAMPI@KLGATES.COM

FRANCESCO CARLONI
PARTNER

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

ANTOINE DE ROHAN CHABOT
COUNSEL

BRUSSELS
+32.2.336.1941
ANTOINE.DEROHANCHABOT@KLGATES.COM

