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Antitrust and Competition

The Court of Justice of the European Union Reinforces the European Commission's Strict Approach on Parental Liability for Antitrust Breaches of Subsidiaries

On 28 October 2020, the Court of Justice of the European Union (CJEU) confirmed the General Court of the European Union (GCEU) judgment and the fine imposed by the European Commission (Commission) on a tire manufacturer and its subsidiary on the basis of its long-standing case law on parental liability for cartel activity.

In this case, Commission imposed in 2014 a €302 fine on a number of manufacturers of underground and submarine cables for a power cable cartel. From 1999 to 2009, the cartel members engaged in market sharing and customer allocation in breach of EU antitrust rules. An Italian tire manufacturer was found jointly and severally liable for the involvement of its former subsidiary in the power cable cartel. The Italian tire manufacturer sold its subsidiary to a global investment firm in 2005 and challenged the Commission's decision on grounds that it should not bear liability for its former subsidiary and that the subsidiary directly involved in the cartel should be held responsible for the infringement.

Under EU well-established case law, the parent company can be held responsible where its subsidiary does not decide independently upon its own commercial conduct but carries out, in all material aspects, the instructions given by the parent company. The Commission has extensively relied on the concept of parental liability to hold parent companies liable for antitrust breaches of their subsidiaries when the parent company actually exercises decisive influence over the commercial conduct of the subsidiary. There is not a single factor to prove decisive influence but rather a number of legal and economic links on which the Commission relies to establish parental liability. However, a 100 percent (or almost 100 percent) shareholding of a parent company in a subsidiary is sufficient to create a presumption that the parent company exercised decisive influence over the commercial policy of the subsidiary. This presumption gives the Commission sufficient reason to hold the parent company liable for antitrust breaches of its subsidiary. In practice, this presumption is very difficult for

the parent to rebut.

On 12 July 2018, the GCEU upheld the Commission's fining decision. The Italian tire manufacturer appealed the GCEU judgment to the CJEU arguing that it was a conglomerate-type holding company, allowing its subsidiaries to operate autonomously in the market. It also argued that the subsequent sale of the subsidiary did not affect the latter's involvement in the power cable cartel indicating a level of independence from the parent company. In its judgment, the CJEU rejected the appeal and confirmed the GCEU judgment.

This judgment demonstrates the difficulty for companies to challenge the presumption of decisive influence. It also reinforces the importance for parent companies (including structures such as holdings or private equity firms) to practice good governance over their wholly-owned subsidiaries, even though they de facto operate autonomously.

Consumer Policy

The Commission Launched the New Consumer Agenda

On 13 November 2020, the Commission launched the [New Consumer Agenda](#) (Agenda), a roadmap of priorities and key action points, aimed to empower European consumers in the green and digital transitions. The Agenda focuses on five key priority areas for 2020-2025:

1. *Green transition*, ensuring that EU consumers have adequate information and availability of sustainable products (e.g., in 2021, the Commission plans to present a legislative proposal aimed to provide consumers with better information on products' sustainability and better protection against certain practices, such as greenwashing and early obsolescence);
2. *Digital transformation*, addressing online commercial practices that disregard consumers' right to make an informed choice or distort their decision-making processes, such as hidden advertising. The Commission will update its guidance documents on the Unfair Commercial Practices Directive and the Consumer Rights Directive and prepare a proposal for a revision of the General Product Safety Directive;
3. *Redress and enforcement of consumer rights*, where the Commission aims to assist EU countries in the timely implementation and enforcement of consumer law;
4. *Specific needs of certain consumer groups*, the Commission will, for example, assess requirements for childcare product standards; and
5. *International cooperation*, where the Commission will develop an action plan with China in 2021 to enhance the safety of products sold online.

Following the launch of the Agenda, the Commission plans to introduce the announced initiatives and submit them for a broader stakeholder dialogue.

Digital Economy

Commission's Executive Vice-President Vestager Clarified Upcoming Digital Initiatives

By the end of October, Commission's Executive Vice-President Vestager delivered two important

speeches on the Digital Services Act (DSA) and the Digital Markets Act (DMA), further clarifying both upcoming initiatives which are expected on 9 December 2020.

During a [speech on 29 October 2020](#), Vestager noted that the envisaged draft laws will have a two pillars' structure. The first pillar, the DSA, will update the E-Commerce Directive, and require digital services to introduce procedures for dealing with illegal content and dangerous products (e.g., by checking sellers' identification before letting them on the platform). For example, the services will have to tell users when they remove content, and give users effective rights to challenge the removal of this content.

During a [speech on 30 October](#), Vestager further specified that services will have to be transparent about the way their algorithms work, for example they will have to tell users how their recommended systems operate or provide regular reports on the content moderation tools. Moreover, digital services will be obliged to cooperate with regulators and to give regulators (and researchers) access to the data they hold—including advertisement archives.

Under the second pillar, the DMA will introduce a clear list of dos and do nots for big digital gatekeepers (such as prohibition of unfair self-preferencing) and will provide for a harmonized market investigation tool across the whole EU single market. The DMA will enable the Commission to tackle market failures in digital markets, and to stop new ones from emerging.

UK's Response to the EU's Regulation of Big Tech Companies

The Commission is expected to put forward a package of legislation at the beginning of December to regulate Big Tech companies, the DSA and the DMA. Following the EU Platform to Business regulation, that became applicable earlier this year, the DSA and the DMA will be the next ex-ante legal instruments aimed at regulating online services. With the United Kingdom leaving the European Union, this new set of rules will not apply to the United Kingdom, which will therefore pursue its own approach to digital markets.

Digital Markets Unit

In this context, the Competition and Market Authority (CMA) has proposed setting up a Digital Markets Unit to “sustain and promote effective competition in digital markets” by giving the CMA the ability to enforce a Code of Competitive Conduct. The Code of Competitive Conduct would only apply to companies with ‘Strategic Market Status’. The increased scrutiny of these companies will aim at ensuring that they do not engage in practices likely to reduce trust and transparency or to exclude competitors from the market. However, these initiatives, suggested in the Report of the Digital Competition ‘Unlocking digital competition’ published in March 2019, remain long-term plans.

Digital Markets Taskforce and Merger Control Focus

As a more immediate initiative, the CMA has set up a Digital Markets Taskforce (the Taskforce) to advise the UK government on the potential design and implementation of pro-competitive measures for promoting competition in digital platform markets. The Taskforce has recently proposed an update of the current Merger Assessment Guidelines, clarifying that the CMA has a “wide margin of appreciation in its use of evidence”. Under the new guidance, the CMA would not be required to make precise predictions, for example about the impact on innovation or on price resulting from a particular merger. However, the resulting uncertainty won't preclude it from blocking a merger if it finds competition concerns.

Furthermore, the new guidance would grant the CMA more freedom to attach greater weight to various types of evidence, depending on the relative quality of such evidence. Decisions on whether to approve mergers have often focused on short-term impacts. In dynamic digital markets, long-run effects are key to assess whether a merger will harm competition and consumers. In addition, the Taskforce is also considering a parallel merger control regime for companies with Strategic Market Status, imposing requirements to notify all transactions and assessing them under a more cautious standard of proof than the current threshold.

While the European Union seems ready to embrace regulatory change by introducing ex-ante rules, the UK's path to establishing a new regulatory regime will likely still take time. On 27 November 2020, the UK government announced that it aims at establishing the new Digital Markets Unit and at consulting the industry on proposals for the new pro-competition regime in early 2021. In the meantime, the CMA has stated that it will continue using its existing powers and tools to the maximum extent by adapting them to the evolving digital markets.

Economic and Financial Affairs

Stakeholders' Consultation in the Framework of the AIFMD Review

On 22 October 2020, the Commission issued a [public consultation](#) on the review of the Alternative Investment Fund Managers Directive (AIFMD). The consultation builds on the: (i) [2019 KPMG study](#) of the operation and impact of the AIFMD tasked by the Commission; (ii) the June 2020 Commission's [report](#) informing the European Parliament and the Council of the European Union on the degree to which the AIFMD has realized its objectives; and (iii) the August 2020 European Supervisory and Markets Authority [letter](#) to the Commission outlining its recommendations for the AIFMD review.

The consultation on which interested stakeholders can provide input until 29 January 2021, addresses the following areas:

The Functioning of the AIFMD Regulatory Framework, Scope, and Authorization Requirements

The questions in this section seek input on the scope of the Alternative Investment Fund Managers (AIFM) license, its potential extension to smaller AIFMs, the functioning of the AIFMD passport and level playing field concerns on the regulation of other financial intermediaries, such as Markets in Financial Instruments Directive (MiFID) firms, credit institutions, or Undertakings for Collective Investments in Transferable Securities (UCITS) managers that provide similar services.

Investor Protection

This section focuses predominantly on the possibility of the creation of a passport for retail Alternative Investment Funds (AIFs), the adequacy of disclosure requirements, the need for clarification of the AIFMD rules on prime brokers, the ambiguities in the depositary regime and lack of a depositary passport and the AIFMD valuation rules.

International Relations

This area concerns the interaction of the AIFMD with third country regulatory regimes. The Commission asks for feedback on how to enhance the competitiveness of the EU AIF industry,

whether national private placement regimes create an uneven playing field between EU and non-EU AIFMs, and whether delegation rules are sufficiently clear to prevent creation of letter-box entities in the European Union.

Financial Stability

The Commission sets detailed questions on the tools available to competent authorities and AIFMs to mitigate and deal with systemic risks, the supervisory reporting template, and cooperation measures among competent authorities.

Improvements in the Provisions for Investing in Private Companies

The Commission asks stakeholders whether asset-stripping rules should be amended.

Assessing the Appropriateness of the AIFMD Rules in Integrating Sustainability Risks

The Commission's key questions include: (i) whether AIFMs should be required to quantify sustainability risks; (ii) whether the investment decision processes of any AIFM should integrate the assessment of non-financial materiality; and (iii) how AIFMs should account for the long-term sustainability and social impact of their investment decisions.

The Treatment of UCITS

The Commission's questions address: a single license for AIF and UCITS managers, harmonized metrics for leverage calculation, and reporting on the use of liquidity management tool.

Trade

Commission Launches New Complaints System to Fight Trade Barriers and Violations of Sustainable Trade Commitments

On 16 November 2020, the Commission has launched a new complaints system for reporting market access barriers and breaches of trade and sustainable development commitments in the EU's trade agreements, designed to strengthen their enforcement and implementation.

This initiative follows the Commission's appointment of its first [Chief Trade Enforcement Officer](#), which took place in July of this year, and whose main role is to ensure the enforcement of trade policy and the Commission's Trade and Sustainable Development Action Plan.

The complaints procedure, which is open to EU Member States, individual companies, business/trade associations, civil society organizations, as well as citizens from the European Union, will be processed through a new centralized Single Entry Point system within the Commission's Directorate General for Trade (DG Trade).

There are two complaint forms, one for market access barriers and one for violations of sustainable development commitments, which will be accessible online for EU-based stakeholders on the "Access2Markets" portal on DG Trade's website.

For market access issues, the complainant will be required to describe the factual context and the potential economic impact of the alleged barrier, whereas for sustainable development issues, the

complainant will need to provide details of the impact and seriousness of the alleged breach. The complainant will be informed by the Commission's services as to whether it leads to an enforcement action. In such a case, the Commission's services will inform the complainant about the content of the Commission's action plan. Such a plan may identify the steps suitable for tackling the issues subject to the complaint, as well as indicate timelines of specific actions.

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