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ANTITRUST AND COMPETITION

The European Commission to Take Action to Address Territorial Supply Constraints

On 24 May 2024, the EU Commissioner for Competition, Margrethe Vestager, announced that the European Commission (Commission) will conduct a fact-finding exercise on territorial supply constraints (TSCs). The Commission's announcement follows a request coming from eight Member States, i.e., Belgium, Croatia, Czech Republic, Denmark, Greece, Luxembourg, the Netherlands, and Slovakia. These Member States have urged the Commission to: (i) prohibit, through existing or new common EU instruments, unfair practices in business-to-business relations that discriminate against a retailer on the basis of its place of establishment; and (ii) investigate the extent to which manufacturers use differentiated languages on labels and packaging to justify why the same products cannot be sold in all Member States. In this respect, the Member States also recommend an examination of opportunities and risks related to digital labelling.

TSCs are perceived to cause different prices within the European Union for identical products. They may result in higher prices and less choice for consumers, as well as lower profit margins for retailers. Already in July 2020, the Commission published a study on the effects of TSCs in the EU retail sector which revealed that if retailers were able to purchase their products without constraints, then consumers would potentially save EUR 14.1 billion annually on their purchases of certain categories of food products.

However, EU competition law rules do not effectively address the potential TSCs' distortions unless TSCs are implemented through an anticompetitive agreement or concerted practice or are the result of a unilateral abusive conduct of a dominant company. As a result, EU competition law cannot be used to address TSCs.

The fact-finding exercise will involve manufacturers, retailers, and consumers and will seek to understand TSC-related concerns. Following the fact-finding exercise, the Commission may open a public consultation, which, in turn, can lead the Commission to identify the corrective legislative measures to address potential concerns stemming from TSCs.

The fact-finding exercise follows a wider trend by the Commission to aggressively address practices that lead to unjustified price differences in Member States and cross-border trade restrictions within the European Union. Most recently, on 23 May 2024, the Commission imposed a fine of EUR 337 million to one of the world's leading chocolate manufacturers for having engaged in anti-competitive deals and having abused of its dominant position to prevent cross-border trade of chocolate, biscuits and coffee products between EU countries. While it remains to be seen the full ramifications of the Commission's fact-finding exercise into TSCs, the fine imposed by the Commission indicates that the Commission will continue its crackdown on companies imposing territorial supply constraints on distributors and retailers.

FINANCIAL AFFAIRS

ESMA publishes Final Guidelines on ESG Funds' Names Using Sustainability-related Terms

On 14 May 2024, the European Securities and Markets Authority (ESMA) published a final report containing guidelines for funds using environmental, social, and governance (ESG) or sustainability-related terms in their names.

The Guidelines aim to establish specific requirements to use sustainability-related terms for investment funds under the Alternative Investment Fund Managers Directive and the Directive on Undertaking for Collective Investment in Transferable Securities. The final Guidelines apply to both retail and professional funds and broadly define terms used in fund names as: (i) transition, social, and governance related terms; (ii) environmental or impact related terms; (iii) sustainability related terms; and (iv) a combination of those terms.

ESMA underlines that only those funds with a minimum threshold of 80% of investments in sustainability areas, and in line with the disclosures under the Sustainable Finance Disclosure Regulation, should make use of ESG terms in their names. Depending on the specific ESG wording, minimum safeguards and exclusion criteria will apply either according to the Paris-aligned Benchmarks rules (for terms 'environmental', 'impact' and 'sustainability') or the Climate Transition Benchmarks requirements (for terms 'transition', 'social' and 'governance').

The final Guidelines are not mandatory and are addressed to national competent authorities, which are required to notify ESMA on whether they: (i) comply with the Guidelines; (ii) do not comply with the Guidelines but intend to comply; and (iii) do not comply and do not intend to comply with the Guidelines. They will be applicable three months from their publication, which will occur once they are translated in all EU languages. Existing funds will have six months to comply with the new rules, while all new funds created after the application date should apply the Guidelines as soon as possible.

The European Commission Consults on the Review of the Regulatory Framework for Nonbanks

On 22 May 2024, the Commission launched a targeted consultation on the review of existing macroprudential rules to identify vulnerabilities and risks in the area of nonbank financial intermediation (NBFI). The consultation will run until 22 November 2024.

The consultation follows a related report, issued by the Commission in January 2024, on the macroprudential review for credit institutions, the systemic risks and vulnerabilities of NBFI. In the report, the Commission stressed the need to revise the regulatory framework applicable to nonbanks, which is currently outlined in several pieces of legislation (e.g., Money Market Fund Regulation); Capital Requirements Regulation; Securities Financing Transactions Regulation.

The objective of the consultation is to assess how existing rules are working and in which way they should be revised to foster nonbanks' resilience. The consultation mainly focuses on three areas: (i) evaluating the effectiveness of existing macroprudential tools and supervisory arrangements in achieving their purpose; (ii) considering repurposing or reviewing existing microprudential and reporting tools; and (iii) assessing the possibility to introduce new macroprudential tools, as well as tools to improve EU-wide coordination.

The consultation specifically targets EU institutions and bodies, national competent authorities that supervise NBFIs and markets, central banks and the NBFI industry at large. All stakeholders are invited to respond to the consultation, but some questions may indicate that feedback is particularly sought from specific types of stakeholders. To respond to the consultation, stakeholders are required to use the online questionnaire available on the dedicated webpage. Inputs and responses provided through the consultation will be used to inform the policy planning of the upcoming 2024-2029 Commission, which is expected to take office in late 2024. The Commission may put forward a proposal to review the existing legislative framework during 2025 or 2026.

SUSTAINABILITY

New EU Guidance on Nonprice Criteria for Renewables Auctions

On 13 May 2024, the Commission adopted the recommendations on auction design for renewable energy which assist Member States in setting nonprice criteria in their auctions.

The EU renewable industry has long called for a stronger emphasis on nonprice criteria in auctions, especially since EU manufacturers of green technologies, such as wind turbines or electrolysers, struggle to compete on price alone vis-à-vis non-EU competitors.

According to the Commission, Member States should make use of nonprice criteria in auctions as pre-qualification or award criteria, or both, in order to pursue objectives that cannot be captured by the price-only dimension, such as:

- quality;
- ability to deliver the project on time;
- responsible business conduct;
- cyber-security and data security;
- contribution to resilience;
- environmental sustainability; and
- innovation.

The recommendations provide specific guidance on the application of certain nonprice criteria depending on the goal pursued. For example, Member States should include as soon as possible the criteria pertaining to the contribution to a resilient supply chain if they want to avoid overdependence on a single source of supply while preserving the competitiveness of the auctions.

Regardless of the use of nonprice criteria, the auctions should ensure a competitive bidding process. They should be open, clear, transparent, and nondiscriminatory.

The recommendations are another step towards the EU 42.5% renewable target by 2030 and they align with the recently adopted Net Zero Industry Act, which promotes green technologies' manufacturing in the European Union.

SANCTIONS

The European Commission Announces Provisional Anti-subsidy Duties on Imports of BEVs Produced in China

On 4 July 2024, the Commission imposed provisional countervailing duties on imports of Battery Electric Vehicles (BEVs) from China.

On 4 October 2023, the Commission had formally commenced an ex officio anti-subsidy investigation on imports of BEVs from China. As part of its ongoing investigation, it provisionally concluded that unfair subsidies benefitting the entire value chain of BEVs imported into the European Union from China are causing a threat of clearly foreseeable economic injury to BEV producers in the European Union.

In the end the Commission imposed he following individual duties on the three sampled Chinese producers t: 17.4$% for BYD, 19.9% for Geely, and 37.6% for SAIC. Other BEV producers in China that cooperated in the investigation and were not sampled are subject to the 20.8% weighted average duty, whereas for other noncooperating companies the duty is set at 37.6%.

This level is considered by the Commission to be sufficient to remove the substantial unfair competitive advantage of the Chinese BEV producers caused by the unfair subsidies with the aim of ensuring that BEVs produced in China and the European Union compete on a level playing field. The provisional duties will be introduced by means of a guarantee and collected only if and when definitive duties are imposed. There is a possibility for the Commission to decide at a later stage whether to also collect duties on imports registered as of 90 days prior to the date of the imposition of provisional measures.

Overall, the investigation must be concluded within 13 months from the date of initiation and definitive duties (if any) must be imposed within four months after the imposition of the provisional duties, i.e., by early November 2024. Any definitive measures would apply for five years. Member States will have the opportunity to oppose the imposition of definitive duties through a qualified vote against them or - if there is no qualified majority in favor of the measures - by a simple majority. The provisional, as well as the final duties (if any) could be challenged by the affected exporters before the EU courts and by the government of China before the World Trade Organization.

In response to criticism that the imposition of duties on imports of BEVs will negatively affect the green transition, the Commission states that the European Union "welcomes imports of goods necessary for the green transition [but that] these imports must compete on fair terms with the corresponding EU goods" and emphasizes that it is assessing the impact of countervailing duties on importers, users, and consumers of BEVs in the European Union.

European Union Sets Up New Sanctions Framework Against Those Responsible for Human Rights Violations in Russia

On 27 May 2024, the Council of the European Union (Council) established a new framework for restrictive measures against those responsible (including those who provide financial, technical, or material support) for serious human rights violations, repression of civil society, and undermining democracy and the rule of law in Russia.

In this context, the Council designated one entity and 19 natural persons:

- the Federal Penitentiary Service of the Russian Federation, which is the central authority managing the Russian prison system; and
- several judges, prosecutors, and other members of the judiciary, who played a key role in recent politically motivated proceedings.

The persons targeted by the restrictive measures are subject to an EU travel ban, as well as an asset freeze. Additionally, it is forbidden to make funds available, either directly or indirectly, to those who are listed.

The new framework also introduces trade restrictions on exporting equipment, which might be used for internal repression (e.g., certain explosives, razor barbed wire, firearms, ammunition, and related accessories), as well as on equipment, technology, or software intended primarily for use in information security and the monitoring or interception of telecommunications (e.g., radio frequency monitoring equipment, network and satellite jamming equipment, remote infection equipment, speaker recognition/processing equipment).

The new framework will be existing alongside the sanctions measures targeting certain Russian individuals and entities that have been adopted on 22 March 2024 within the framework of the EU Global Human Rights Sanctions Regime.

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