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Antitrust and Competition

The European Commission imposes another significant fine on a company for negligently providing incorrect information during the merger proceedings

On 8 April 2019, the European Commission announced it fined a multinational conglomerate active in the renewable energy sector EUR 52 million for negligently providing incorrect information in the merger notification of its proposed acquisition of a wind turbine blades manufacturer.

Under Article 14 of the EU Merger Regulation, the Commission can impose fines not exceeding 1% of a company's aggregate turnover in the last financial year where it provides, intentionally or negligently, incorrect or misleading information in a merger filing or supplement to that filing. This contrasts with the previous EU Merger Regulation, which capped fines for the same type of infringement at EUR 50,000 per infringement.

In January 2017, the energy company notified to the Commission its proposed acquisition of a wind turbine blades manufacturer. The notification form notably stated that the company was not developing wind turbines for offshore use that were more powerful than its existing 6-megawatt turbine. However, the Commission's market investigation revealed that the company was simultaneously offering a 12-megawatt offshore wind turbine to potential customers. The company then quickly withdrew its notification and refiled the proposed transaction with complete information. The transaction was later approved by the Commission on the basis of the second notification. In July 2017, the Commission opened an investigation against the energy company alleging the breach of EU merger procedural rules.

When assessing the seriousness of the infringement, the Commission noted that the contested conduct prevented it from having all relevant information for the assessment of the transaction. The Commission also noted that the energy company should have been aware of the relevance of such information, based on its regular contacts with the Commission, notably with respect to pipeline products. However, this infringement was deemed less serious in comparison to a similar Commission's investigation against a major social networking service provider, where the infringement was found to be at least negligent. In that proceeding, the social networking service provider committed two separate infringements by providing incorrect and misleading information in the merger notification form and in the reply to a Commission's request for information. In addition, the Commission contended that the major social networking service provider's staff were aware of the relevance of the information for the Commission's assessment and of its obligations under the Merger Regulation. In 2017, the Commission fined the social networking service provider EUR110 million for providing misleading information about the proposed acquisition of an instant messaging services provider.

This is the second time in a relatively short period of time that the Commission has fined a company for providing incorrect or misleading information under the 2004 EU Merger Regulation. There are other two ongoing investigations for alleged incorrect or misleading information, which were opened by the Commission on the same day in which the investigation against the energy company started.

It is also worth noting that, under Article 14 of the EU Merger Regulation, the Commission can impose fines not exceeding 10% of a company's aggregate turnover in the last financial year for implementing a proposed transaction before obtaining the Commission's approval (gun jumping) or for breaching commitments imposed by a clearance decision. In 2018, a cable and telecommunications company was fined EUR 125 million for gun jumping. Investigations on alleged breach of commitments by a telecom operator following a 2014 clearance decision and on gun jumping by an imaging and optical products manufacturer are ongoing.

These proceedings demonstrate how significant the risk for procedural breaches is. Companies should be careful in providing correct and accurate information in the context of a merger notification in order to avoid serious delays and exposure to significant fines. The Commission will not hesitate to intervene in presence of alleged procedural breaches during the merger review of a transaction.

The European Commission fines Sports Company for restricting cross-border sales of merchandising products

On 25 March 2019 the European Commission fined a global sports apparel and footwear designer company €12.5 million for preventing traders from selling licensed branded merchandise to other countries within the EU/EEA, leading to a reduced choice and augmented prices for consumers in violation of EU competition rules.

In June 2017, the Commission opened three separate investigations against companies operating in the EU to assess certain licensing and distribution practices under EU competition law. In context of these investigations, the Commission found that a global sports apparel and footwear designer prevented licensees in Europe, between 2004 and 2017, from selling merchandising products cross-border, causing partitioning of the Single Market and infringing Article 101 TFEU. The other investigations are still on-going.

In this sports case, the Commission found that the imposition of illegal clauses and measures in non-exclusive licensing and distribution agreements caused a breach of EU competition rules. In particular, the agreements under investigation included direct measures restricting out-of-territory sales by licensees amounting to prohibiting these types of sales. In order to implement out-of-territory restrictions, indirect measures were also enforced by the licensor, such as threatening to end the contract with the licensees in case the out-of-territory sales occurred; or by refusing to supply "official product" holograms. Furthermore, master licensees in each territory were compelled to grant sub-licenses only within a specific territory, through the imposition of direct and indirect measures.

Lastly, the non-exclusive licensing agreements under scrutiny contained clauses explicitly prohibiting licensees from supplying merchandising products to customers who could be selling the products outside of the territories allocated to the licensees. Furthermore, the company under investigation would actively intervene in order to ensure that retailers would stop purchasing products from licensees outside their territory in other EU/EEA countries.

The fine of €12.5 million imposed by the Commission in this case was based on the Commission's 2006 Guidelines on fines. The fine takes into account in particular the value of the sales relating to the infringement; the gravity and duration of the infringement and the company's cooperation throughout the investigation. In fact, in this case the Commission granted a 40% reduction of the fine as the company under investigation provided evidence with significant added value and evidence which enabled the EC to extend the scope of its investigation.

ECONOMIC AND FINANCIAL AFFAIRS

European Parliament finalized its position on the proposal for a sustainable finance taxonomy

On 28 March 2019, the European Parliament ("EP") finalized its position on the proposal for a Regulation to establish a framework to facilitate sustainable investment, also known as the taxonomy file. The proposal aims to establish a uniform and harmonized classification system, which determines the activities that can be regarded as environmentally sustainable for investment purposes across the EU. The regulation only provides the framework for the subsequent development of the taxonomy through delegated acts. These will specify which activities contribute to the regulation's six key objectives based on technical screening criteria.

The regulation foresees the establishment of a Platform on Sustainable Finance, a group of public and private sector experts that will assist the European Commission with defining the technical screening criteria as well as the progressive development and the update of the taxonomy. Once the regulation is adopted, the Platform will replace the existing interim Technical Expert Group (TEG), which was temporarily set up to prepare a first list of economic activities delivering on climate change mitigation and adaptation objectives. Among other amendments to the mandate of the Platform, the Parliament proposes that it should be tasked with providing advice to the Commission on the development of sustainability accounting and integrated reporting standards, possibly also through a revision of the Directive on company financial statements (Directive 2013/34/EU).

The Members of the European Parliament ("MEPs") rejected an amendment that would establish a "brow taxonomy" i.e. criteria defining when an activity has a significant negative impact on sustainability. Nevertheless, it was agreed that, by the end of 2021, the Commission should evaluate the remits and consequences of singling out the "brown activities". MEPs also agreed that the technical screening criteria should take into account "serious transition efforts" in companies running harmful business activities. These could include sustained R&D efforts, large investments into new technologies or concrete transition plans already being implemented. However, under the Parliament's text any power generation activities using solid fossil fuels and producing non-renewable waste should not be considered as sustainable.

The MEPs retained the timing of the review clause as originally proposed for the end of 2021, but expanded its content. They asked the Commission to assess whether the regulation has not led to an excessive administrative burden and whether there has been sufficient data availability to financial market participants. The review should also include an assessment of the possible extension of the regulation's scope to cover social sustainability objectives.

Following the European elections in late May, the new EP will resume work on the file again in fall. The newly appointed rapporteurs will hold political negotiations with the Council of the European Union based on the adopted text, but the Parliament will still be able to modify its position in the second reading. The Romanian Presidency of the Council re-started the Member States' discussions on the file in early April and aims to finalize Council's position before the summer.

European Commission's push to scrap Member States' veto on energy taxation

On 9 April 2019, the European Commission published a Communication entitled "A more efficient and democratic decision making in EU energy and climate policy", alongside with its fourth progress report on the state of the Energy Union. The Communication sets out the rationale for moving towards the use of the EU ordinary legislative procedure in EU environmental and energy taxation matters, which effectively means removing Member States' veto in tax related decisions. It also proposes to increase the EP and national parliaments' involvement in policy-making under the Euratom Treaty, which provides the legal framework in the areas of nuclear safety, waste management and radiation protection. A proposal to scrap the Member States' veto in the field of taxation is however unlikely to receive their unanimous approval, necessary for such change.

The move towards the ordinary legislative procedure in taxation matters was already set out in the January 2019 Communication by the Commission, which outlined a gradual roadmap to shift away from unanimity in the Council of the European Union ("Council") to qualified majority voting ("QMV"). To implement such change of the voting regime without amending the European Treaties, the Commission proposed to make use of the so-called general passerelle clause (Article 48(7) of the Treaty on European Union) and the specific passerelle clause in the environmental field (Article 192(2) of the Treaty on Functioning of the European Union), which covers provisions of fiscal nature. However, the passerelle clauses are themselves subject to unanimous approval by the Member States.

The Commission explains that the current energy taxation framework has remained unchanged since 2003 and provides for a special legislative procedure with unanimity in the Council. Highlighting the "self-defeating nature" of unanimity regime, the Commission argues that a harmonized and targeted taxation on negative social and environmental externalities in the EU energy market, based on the "polluter pays" principle, would enable the EU to shift towards a more efficient and sustainable economy. The Commission further warns that due to differences among the Member States' taxation levels and various sector-specific energy tax exemptions, there is a risk of growing distortions of competition and an erosion of the tax base in high-taxing countries.

As a solution, the Commission recalls its January 2019 Communication, and invites the EU heads of state and government to swiftly decide on the use of the general passerelle clause, notify the national Parliaments thereof and seek the approval of the European Parliament. The EU finance ministers already held a first exchange of views on this issue at the February Ecofin Council. The idea was not particularly welcomed; while some showed openness to consider such a change, the majority called for keeping the current taxation voting regime. While the finance ministers' discussion does not pre-empt any decision by the EU leaders, it signals EU countries' reluctance to give up on sovereignty in taxation matters and ultimately the impossibility to reach unanimity needed to adopt the passerelle clauses.

TRADE

EU - China Summit 2019: Safeguarding the unknown

During the 21st EU-China summit both sides agreed on a joint statement setting out their commitment to further strengthen their strategic partnership, their joint support for multilateralism and rules-based trade, their engagement to a WTO reform, their work to address industrial subsidies and the need to speed up the talks for the establishment of an EU-China investment Treaty.

"We need to accelerate negotiations on the China-EU Investment Treaty", Chinese Premier Li Keqiang highlighted at the 21st EU-China summit that took place in Brussels on 9 April 2019, where he met with European Council President Donald Tusk, European Commission President Jean-Claude Juncker and the EU High Representative Federica Mogherini. The two sides reaffirmed the strength of their Comprehensive Strategic Partnership, their commitment to multilateralism and their respect for international law and for fundamental norms governing international relations, with the United Nation at its core.

In line with last month's Joint Communication on China issued by the European Commission and the discussion among EU leaders at the March European Council, the Summit addressed the desire for a more balanced economic relationship with China. Capturing a broad range of deliverables that have been achieved over a four-year period, EU and China committed to ensuring a level playing field and mutually beneficial cooperation in bilateral trade and investment and to work together to solve the market access issues facing businesses on both sides. The talks focused, among other topics, on the ongoing Investment Agreement negotiations as a top priority towards the establishment and maintenance of an open, predictable, fair and transparent business environment for their respective investors. Besides, the establishment of a balanced investment protection framework accords to the recent entry into force of the EU Regulation for the screening of foreign direct investments into the Union as well as the adoption of the Chinese new Foreign Investment Law that will enter into effect on 1 January 2020.

The two sides agreed on a Joint Statement which provides, inter alia, for: (i) the promotion of the reform process of the international monetary and financial system and completion, at the latest at the 2019 Annual Meetings, of the 15th General Review of Quotas of the International Monetary Fund; (ii) cooperation on green finance in order to harness private capital flows towards a more environmentally sustainable economy; (iii) a commitment to work on the WTO reform by enhancing international rules on industrial subsidies and combatting the forced transfer of technology; (iv) cooperation to improve Europe-Asia connectivity and interoperability, through the adherence to shared principles of market rules, open procurement and fair competition; (v) forging synergies between the EU strategy on Connecting Europe and Asia and the China's Belt and Road Initiative; (vi) collaboration under the EU-

China Cyber Taskforce against malicious activities in cyberspace; and (vii) protection of intellectual property against bad faith registrations of IP rights, enforcement and trade secrets.

In addition, the leaders expressed satisfaction about the outcome of the dialogues on Competition, State Aid Control and Fair Competition Review and their role as platforms for promoting mutually beneficial cooperation. In that regard, they reaffirmed their shared understanding that those are important factors to ensure consumer welfare and to provide a level playing field and legal certainty for the business community.

Following the Summit, Commission President Juncker took the view that the meeting was devoted to bilateral relations, as well as to global economic governance. He estimated that negotiations have been difficult, but ultimately fruitful, because the Joint Statement agreed sets the direction for an EU - China partnership based on reciprocity. Likewise, European Council President Donald Tusk highlighted that China and Europe both have a strong economic interest in maintaining significant trade flows, which are possible thanks to the rules-based trading system. Nonetheless, he stressed that for this system to continue to operate, it needs to be quickly updated: for the EU, this means a serious reform of the WTO that would cover industrial subsidies, as a priority.

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