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Antitrust and Competition Litigation Insights

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The European legislator continues to create mechanisms to combat greenwashing in all sectors of activity. The latest sector to be affected by this legislative trend is air transport. There has been an increase in unfair competition litigation.

It is well known that, in the last decade, society's concern for the care and protection of the environment has grown exponentially. As a result, the environmental aspect of products and services has also become very important, significantly affecting consumption decisions.

At the same time, the ease of claiming, without proof, that a product or service is environmentally friendly, or more environmentally friendly than a competitor's, has led to the emergence of an unfair practice that has spread to all sectors of activity: greenwashing. Many companies participating in greenwashing try to lure consumers and end-customers into buying their products or services by trying to make them believe, through environmental campaigns or labels, that their products, services or brands are environmentally friendly, or at least that they are more environmentally friendly than those of their competitors.

This behaviour was already defined by Regulation (EU) 2020/852 of the European Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment, as "*the practice of gaining an unfair competitive advantage by marketing a financial product as environmentally friendly, when in fact basic environmental standards have not been met*".

In any event, greenwashing had already been sanctioned for years by the Spanish courts in application of Law 3/1991 of 10 January 1991 on Unfair Competition (the "**Unfair Competition Act**"), as amended by Law 29/2009 of 30 December 2009, which transposed Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market (the "**2005 Directive**"). Greenwashing is still an act of deception, a misleading omission, an act of denigration of a competitor, or a combination of some of the above.

An illustrative example of the treatment of this issue by our courts is the Judgment of Commercial Court No. 5 of Barcelona of 1 April 2014 [ECLI:ES:JMB:2014:216], which ended a case in which the National Association of Bottled Drinking Water Companies sued a company engaged in the commercialisation of filters (attached to a water tap connected to the public water supply network). In these proceedings it was disputed whether an advertising campaign by the water filter company, which included allusions to the greater environmental protection allegedly achieved by filtered water as opposed to bottled water, should be classified as misleading and unfair.

Ultimately, the court ruled that such conduct was unfair under Articles 5 (misleading acts) and 9 (denigrating acts) of the Unfair Competition Act, as it found that the campaign included misleading and disparaging information about a competitor that was intended to give consumers the impression, without any evidence or factual basis, that consuming

filtered water instead of bottled water would protect the environment. It also held that this campaign was perfectly capable of influencing the economic behaviour of consumers by diverting them from the consumption of bottled water to the consumption of filtered water.

In this regard, although the Unfair Competition Act and the 2005 Directive are being applied to greenwashing practices on a case-by-case basis, neither include specific rules defining such practices as unfair. Given the inexorable rise of environmental concerns in consumer decisions and the consequent increase in greenwashing, the European legislator has decided to strengthen existing regulations and create new mechanisms to prevent these unfair conducts.

Before taking this decision, the Commission carried out a study in which it assessed 150 environmental claims and found that a significant proportion of these claims (53.3%) provided vague, misleading or unsubstantiated information on the environmental characteristics of products across the EU and across a wide range of product groups.

On 6 March 2024, Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information was published.

Accordingly, the 2005 Directive has been amended to include, inter alia, (i) "environmental and social characteristics and circularity aspects" in the list of product characteristics in respect of which a trader must not mislead a consumer, (ii) "environmental claims without clear, objective and verifiable commitments and targets" in the list of actions to be considered misleading, and (iii) the prohibition of the following misleading practices, among others: (a) displaying sustainability labels that are not based on a certification scheme; (b) making generic environmental claims that are not supported by recognised environmental performance; and (c) claims that, based on greenhouse gas emission offsets, state that a product has a neutral, reduced or positive impact on the environment.

In addition to the above, on 22 March 2023, the European Commission presented the proposal for a Directive on environmental claims (Proposal for a Directive of the European Parliament and of the Council on the substantiation and communication of explicit environmental claims), which aims to (i) more specifically regulate greenwashing, (ii) prevent misleading environmental claims, and (iii) tackle the proliferation of public and private labels that create confusion for consumers and may also provide misleading information about the environmental characteristics of products or services.

As can be seen, the European legislator continues to make progress in the creation and regulation of mechanisms to combat greenwashing in all sectors of activity. The latest sector to be affected by this legislative trend is air transport.

In this respect, the Regulation of the European Parliament and of the Council on ensuring a level playing field for sustainable air transport (the "**Regulation**") has been applicable since 1 January 2024 (subject to certain exceptions).

This Regulation expresses the European legislator's concern about the lack of properly certified, reported and monitored environmental criteria and indicators in the industry, which allows aircraft operators to declare emission performance levels for their flights that are not comparable and may lead to unfair practices.

Furthermore, it considers that passengers need to be able to rely on information provided by aircraft operators on the sustainability of the aviation fuels they use and the sustainability of their flights, in order to make informed consumption decisions when comparing the different options offered by aircraft operators. In this respect, it is considered that more robust, reliable, independent and harmonised information

on the environmental impact of flights is needed to enable consumers to make informed choices.

In line with the above, the Regulation establishes a voluntary scheme (voluntary application) for environmental labelling that will allow the environmental performance (carbon footprint per passenger and CO_2 efficiency per kilometre) of flights to be measured. Although this is a step forward, as the system is voluntary, it is likely that some operators will not apply for the environmental label and will continue to greenwash in relation to the sustainability of their flights.

However, the Regulation itself provides that, by 1 July 2027 at the latest, the Commission will assess the developments on the functioning of the labelling scheme in place, with a view to possibly establishing a compulsory rather than a voluntary environmental labelling scheme encompassing all aspects of the environmental performance of flights. As can be seen, regulation in this area is gradual but inevitable.

In short, the growing specific weight of environmental concerns in consumer decisions about all products and services, the correlative increase in cases of greenwashing, and the progressive regulatory support to prevent such unfair practices, are leading to an increase in unfair competition litigation in this area.

Proof of this is that, in recent days, Iberdrola has filed a lawsuit against Repsol before the Commercial Courts of Santander, claiming that the latter's advertising campaigns constitute an infringement of the Unfair Competition Act, as they include acts of deception and misleading omissions regarding the company's environmental commitment.

It is foreseeable that this litigation will increase even more in the coming years, when all the European legislation on the subject is finalised, enters into force, and where necessary, is transposed into national law.

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The Supreme Court clarifies the importance of the geographic delineation of the market when analysing competition law infringements

On 30 January 2024, the Administrative Chamber of the Supreme Court handed down Judgment 493/2024 ("**SCJ 493/2024**"), which analysed whether, in the case of conduct classified as a cartel, the precise delineation of the relevant market, and in particular the geographic market, is an element of the type of infringement provided for in Article 1 of Law 15/2007, of 3 July, on the Protection of Competition ("**LPC**"), and in Article 101 of the Treaty on the Functioning of the European Union ("**TFEU**").

The case concerned the conduct of a group of companies that had reached agreements to submit bids at maximum prices in order to win contracts for different school routes, with each of these companies operating on a different island within the Autonomous Community of the Balearic Islands.

The companies argued that since they operated on different islands, the geographic market for each of them was different, which prevented the conduct from being considered a cartel.

However, in SCJ 493/2024, the Court held that the coincidence of the area or territory in which the companies provide their services did not constitute an independent objective element of the type of infringement contemplated in Article 1 of the LPC and Article 101 of the TFEU. The commission of the infringement referred to in the aforementioned articles in fact depends on the content of the agreement reached and its intention, which is what has an impact on the market, and what affects the legal interest that these articles are intended to protect.

This reasoning does not imply that the delineation of the geographic market is irrelevant for the purposes of competition sanctions, since this delineation will be relevant insofar as (i) it affects the determination of the sanctioning body's competence and (ii) it affects the amount of the possible sanction to be imposed on the infringers.

Therefore, the delineation of the geographic market is a factor to be considered when analysing the processing of possible competition sanctioning proceedings, and when assessing the economic impact that this sanction may entail, but it is not an element to assess the unlawfulness of the conduct.

The Court of Justice of the European Union establishes the criterion for determining territorial jurisdiction in disputes in which the place where the contract of sale was signed and the place of delivery of the goods are different

On 22 February 2024, the Court of Justice of the European Union ("**CJEU**") delivered its judgment in the case of *FCA Italy v FPT Industrial* (C-81/2023, EU:C:2024:165), ruling on a request for a preliminary ruling on the interpretation of Article 7(2) of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("**Regulation 1215/2012**").

This provision regulates the criterion of territorial jurisdiction in actions seeking damages in tort, delict or quasi-delict, in such a way that territorial jurisdiction will correspond to *the place where the harmful event has occurred or may occur*.

This judgment was handed down as a result of a claim for damages by the purchaser of a vehicle in which a device had been installed that reduced the effectiveness of the emission control systems, although this practice is prohibited by Article 5(2) of Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 ("**Regulation 715/2007**").

The particularity of this case stemmed from the fact that the purchaser of the vehicle was domiciled in Austria, the purchase contract was entered into in Germany, the vehicle had been delivered in Austria and the vehicle had been manufactured in Italy, and the device for reducing the efficiency of the emission control systems was installed during the manufacturing process.

The CJEU judgment therefore clarifies where the harmful event is to be considered to have occurred when the causes that could have given rise to it took place in different Member States.

This is not the first time that the CJEU has ruled on territorial jurisdiction in cases involving the sale of vehicles equipped with systems that limit or alter emissions. An example of this would be the judgment in *Verein für Konsumenteninformation* (C-343-19, EU:C:2020:534), which also analysed where the *harmful event* should be interpreted as occurring in a case where a vehicle equipped with an emission-altering system was manufactured in one Member State (Germany), but purchased and delivered in another Member State (Austria). In that case, the CJEU ruled that the place where the *harmful event* occurs was the place of purchase of the vehicle (Austria).

However, in the judgment in *FCA Italy v FPT Industrial*, what was at issue was where the vehicle was to be considered as having been purchased, if the contract of sale was entered into in one Member State (Germany), but delivered in another (Austria).

The CJEU held that, in that context, the damage occurs where the vehicle was delivered. Therefore, in cases where the contract of sale was entered into in a first Member State but delivered in a second Member State, territorial jurisdiction for the purposes of Article 7(2) of Regulation 1215/2012 lies with the courts of the latter Member State. That is, the place where the good was delivered.