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EU Law News

A bi-monthly review of EU legal developments affecting business in Europe

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Newsletter May/June 2017

Google fined €2.42bn

On 27 June 2017 the Commission fined Google €2.42bn because it allegedly abused its market dominance as a search engine by giving an illegal advantage to another Google product, its comparison shopping service. The Commission stated that Google denied other companies the chance to compete and innovate and that Google prevented European consumers finding a genuine choice of services. Google has to change its practice within 90 days or face penalty payments of up to 5% of the average daily worldwide turnover of Alphabet, its parent company.

Consumers compare products and prices online in order to find deals from retailers, shops of manufacturers and re-sellers. The consumers pay for the service with their data. Comparison shopping services rely to a large extent on traffic, as more traffic leads to more clicks and revenues. Almost 90% of Google's revenues stem from adverts alongside results of a search query. Given Google's dominance in general internet search, its search engine is an important source of traffic for the separate market of comparison shopping services.

In 2004 Google entered the comparison shopping market, started a strategic push in 2008 and re-named its product "Google Shopping" in 2013. The Commission found that Google gave systematically prominent placement to its own comparison shopping service and demoted rival comparison shopping services in its search results. Even on a desktop, the ten highest-ranking generic search results on page one together generally receive 95% of all clicks on generic search results. The top result receives 35% of all clicks. The effects on mobile devices are even more pronounced given the smaller screen size. Giving prominent placement only to its own comparison shopping service and by demoting competitors, Google has given its own shopping service a significant advantage compared to rivals.

The Commission has already come to the preliminary conclusion that Google has abused a dominant position in two other cases which are still being investigated. Regarding the Android operating system it is concerned that Google has stifled choice and innovation for mobile apps and services by pursuing a strategy to protect and expand its dominant position in general internet search. Regarding AdSense the Commission is concerned that Google has reduced choice by preventing third-party websites from sourcing search ads from its competitors.

Commission approves aid for Italian banks

On 25 June 2017 the Commission approved Italian state measures to facilitate the liquidation of Banca Popolare di Vicenza and Veneto Banca under national insolvency law. It follows the declaration by the European Central Bank of 23 June 2017 that they were likely to fail. Both are small Italian commercial banks located in the Veneto Region. Over the last two years, the banks suffered from continuous outflow of deposits. The Single Resolution Board within the Banking Union stated also that action is not warranted in the public interest. That means Italian authorities are responsible for winding up the institution under national insolvency law. Italy subsequently considered that state aid was necessary to avoid an economic disturbance in the Veneto region. On 25 June 2017 the Commission also published an overview of how EU rules apply to banks with a capital shortfall.

The Commission decision allows Italy to take measures in support the sale and integration of activities and the transfer of employees to Intesa Sanpaolo. Cash injections of €5bn and guarantees of €12bn are backed up by the Italian State's senior claims on the assets in the liquidation mass. Shareholders and junior creditors have fully contributed, reducing the costs to the Italian State, whilst depositors remain fully protected. These measures will also remove €18bn in non-performing loans from the Italian banking sector and contribute to its consolidation.

On 1 June 2017 Commissioner Vestager reached an agreement with the Italian Minister of Economy and Finance on the restructuring plan of Monte dei Paschi di Siena to enable the precautionary recapitalisation of the bank in line with EU rules.

€24.1bn German nuclear waste fund approved

On 16 June 2017 the Commission approved the transfer of radioactive waste liabilities to a new public fund in return for the payment of about €24.1bn by nuclear power plant operators. The Commission concluded that the state support is proportionate to the objective.

Germany intends to transfer the liabilities relating to the management of radioactive waste and spent fuel from nuclear power plant operators to the German state. To this end, a new public fund will be set up and the necessary funds secured in it. In return for being released from their radioactive waste liabilities, nuclear power operators in Germany have to make a cash payment to the fund of about €24.1bn. While the amount is based on the best cost estimates these calculations are highly uncertain for a number of reasons. There are no comparable cost benchmarks for building this kind of facility.

Member States are free to determine their energy mix and have the choice whether or not to invest in nuclear technology. The Commission's role is to ensure that when public funds are used to support companies this is done in line with EU state aid rules. The main objective by the German authorities is to secure the necessary funds for radioactive waste management in public hands and to protect these funds from changes in the financial situation of the nuclear operators. The authorities regard the measure as necessary because of the decision to phase out nuclear electricity production by 2022. Germany could have faced a situation where financial difficulties of the nuclear operators would have forced it to cover the full cost of radioactive waste management. The Commission concluded that the support granted does not exceed what is necessary to achieve this objective and that the competition distortions created by it are limited.

Car lighting system producers fined €26.7m

On 21 June 2017 the Commission fined Automotive Lighting and Hella a total of €26.7m for participating in an automotive lighting cartel. Valeo received full immunity for revealing the existence of the cartel, thereby avoiding a fine of more than €30.5m.

Lighting systems include headlamps, daytime running, rear and fog lights and stop lamps. The cartel relates to the original equipment spare parts market for car models whose production had ended. The Commission's investigation revealed that for over three years Automotive Lighting, Hella and Valeo coordinated prices and other trading conditions for the supply of vehicle lighting systems, across the European Economic Area.

The three companies met, mainly bilaterally, at trade fairs, on the margins of supplier days organised by customers, during customer visits but also independently of such events. Company executives discussed quotes for tenders and negotiation strategies and exchanged information on the status of negotiations. The parties also agreed on aiming for a price increase on spare parts after the end of mass production of specific car models, and co-ordinated how long after that they would end contractual availability of these spare parts.

Facebook fined €110m for providing incorrect information

On 18 May 2017 the Commission fined Facebook €110m for providing incorrect or misleading information during the Commission's 2014 investigation of Facebook's acquisition of WhatsApp.

In 2014 Facebook informed the Commission that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. However, in August 2016, WhatsApp announced updates to its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities.

Facebook committed infringements by providing incorrect and misleading information in the merger notification form and in the reply to a Commission request for information. The Commission found that the technical possibility already existed in 2014, and that Facebook staff were aware of such a possibility. Therefore, Facebook's breach of procedural obligations was at least negligent. Facebook cooperated with the Commission and acknowledged its infringement and waived its procedural rights to have access to the file and to a hearing. Based on that the Commission concluded that a fine of €110m is proportionate compared to a potential limit 1% of turnover. The fine has no impact on the Commission's 2014 decision to authorise the acquisition of WhatAp as the incorrect or misleading information given by Facebook did not have an impact on the outcome of that decision.

Investigation into Guess and the Commission's e-commerce report

On 6 June 2017 the Commission opened an investigation into the distribution agreements and practices of clothing manufacturer and retailer Guess. The Commission wonders whether these agreements might illegally restrict retailers from selling cross-border to consumers or wholesalers from selling to retailers in other Member States. Companies are generally free to set up the distribution systems, however these must comply with competition rules, which prohibit agreements between companies that prevent, restrict or distort competition within the EU's Single Market.

On 10 May 2017 the Commission's final report on the e-commerce sector inquiry identified that more than one in ten surveyed retailers experienced cross-border sales restrictions in their distribution agreements. Such restrictions limit their ability to sell online to consumers in other Member States. The formal investigation concerning Guess is a stand-alone procedure that is separate from the e-commerce sector inquiry but follows up on one of the issues identified in the final report.

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