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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 2016

## Brexit and competition law

As a result of the UK referendum on "Brexit" it is anticipated that the UK's vote to leave the EU will result in changes in how European competition law can be applied. It is likely that the UK might be excluded, for example, from the one stop shop for mergers. The European Commission would also no longer be entitled to conduct raids in the UK. Lawyers who are only admitted to the bar in the UK might no longer be able to represent their clients in front of the European Court of Justice. State Aid policies could be affected. In a statement after the Council of Ministers, French President Hollande has mentioned that growth, employment and investment in the EU of 27 member states would need to provide for "industries of the future". The competition rules would be applied but above all adapted to support both private and public investments.

## AB InBev's acquisition of SABMiller approved

On 24 May 2016 the European Commission cleared under the Merger Regulation the proposed acquisition of SABMiller, the world's second largest brewer, by AB InBev, the world's largest brewer. The European beer markets have a total value of around €125 billion. The Commission had concerns that the merger could have led to higher beer prices in across Europe. By offering to divest practically all of SABMiller's beer business in Europe, AB InBev has addressed these concerns.

At global level the merged entity will be much larger than Heineken and Carlsberg, currently the third and fourth largest brewer. However, Heineken and Carlsberg are the market leaders in Europe and the merger brings together the third and fourth largest brewers. The merger would have removed an important competitor in Italy, the Netherlands, the UK, Romania and Hungary. The Commission's investigation revealed that European brewers seek where possible to engage in coordinated "follow the leader" type pricing. Under this approach, the market leader takes the initiative of price increases in the expectation that its rivals follow. If a rival deviates from those expectations, its competitors may then retaliate against it. In the Czech Republic, Hungary, Romania and Slovakia, the transaction would have created a substantial link between the merged brewers and its licensed bottler and distributor, Molson Coors. Overall, the transaction as notified would have likely facilitated tacit price coordination among brewers in the European Economic Area through an increase in the number of multimarket contacts. The Commission found evidence of brewers considering multimarket retaliation options.

The Commission's decision to approve the deal is conditional upon full compliance with the commitment that AB InBev will sell the whole of SABMiller's business in France, Italy, the Netherlands and the UK to the Japanese brewer Asahi. AB InBev will also divest SABMiller's business in the Czech Republic, Hungary, Poland, Romania and Slovakia.

On 30 June 2016 the European Commission has also opened an investigation to assess whether AB InBev has abused its dominant position in breach of Article 102 of the EU's antitrust rules. AB InBev's suspected strategy would restrict so-called 'parallel trade' by retailers of its beer from less expensive countries, such as the Netherlands and France, to the more expensive Belgian market.

## State aid: Danish energy contract cleared

The Commission found that the contract between the Danish transmission system operator Energinet.dk and DONG Energy for the supply of electricity at short notice did not involve any State Aid. The Commission concluded that the contract did not confer a selective advantage to DONG Energy.

Energinet.dk and DONG Energy agreed the contract for ancillary services in the eastern part of Denmark for the years 2011 to 2015. It required DONG Energy to supply electricity to the network at short notice to ensure the balance and technical stability of the Danish electricity system. Based on competitor complaints alleging that DONG Energy received State aid through the five-year contract, the Commission opened an in-depth investigation in 2013.

The Commission has now concluded that the contract conferred no selective advantage on DONG Energy. The Commission further assessed the price paid to DONG Energy and concluded that Energinet.dk secured a competitive price for the required ancillary services. It is noted that in 2013 the Commission had already concluded that combined heat and power plants in Denmark were not overcompensated and that the aid approved in 2005 remained compatible.

## €6.2m cartel fine for Pometon

On 25 May 2016 the European Commission found that Italian abrasives producer Pometon S.p.A. breached EU antitrust rules by participating in a cartel to coordinate steel abrasives prices in Europe for almost four years. The Commission has imposed a fine of €6.2m. The case is a follow up from the Commission's settlement decision in April 2014 concerning the participation in the same cartel including four other companies. However, Pometon chose not to settle at that time and the investigation continued under normal cartel procedures.

The steel abrasives cartel adversely affected a wide range of European manufacturing industries. Steel abrasives are loose

steel particles used for cleaning or enhancing metal surfaces in the steel, automotive, metallurgy and petrochemical industries and used for cutting hard stones. Metal scrap, which is the main raw material for steel abrasives, is characterised by sharp price fluctuations as well as significant price differences between the European Economic Area (EEA) countries. To compensate for such fluctuations, the cartel participants set up together a specific surcharge called the “scrap surcharge” or “scrap cost variance” based on a common formula. In addition, the companies agreed not to compete against each other on price with respect to individual customers. The Commission has found that for almost four years, Pometon participated in the cartel and had contacts on a bilateral and multilateral basis to coordinate prices of steel abrasives in the whole EEA.

## Spanish football clubs to pay back state aid

On 4 July 2016 the European Commission concluded that public support measures granted by Spain to seven professional football clubs gave those clubs an unfair advantage over other clubs in breach of EU State aid rules. As a result of three separate in-depth investigations Spain has to recover the illegal state aid amounts from the clubs.

Professional sport is considered an economic activity and clubs compete at international level. EU State Aid rules ensure that public funding does not distort competition between clubs and protect the level playing field for the majority of professional clubs who have to operate without subsidies. The first investigation concerned tax privileges. It appeared that for over 20 years that Real Madrid, FC Barcelona, Athletic Bilbao and Atlético Osasuna were treated as non-profit organisations, which pay a 5% lower tax rate on profit than limited liability companies. The clubs have now to pay the difference between the tax rate they paid as a non-profit and what they should have paid according to the corporate tax rate. The precise amounts will be determined in the recovery process. In the meantime, Spain has adjusted its legislation effective from January 2016.

The second investigation involved the land transfer between Real Madrid and the City of Madrid in which the land was overvalued by €18.4 million. Real Madrid benefited from an unjustified advantage over other clubs and has to pay that amount back.

The Commission’s third case concerned the guarantees given by the state-owned Valencia Institute of Finance for loans granted to three Valencia football clubs: Valencia, Hercules and Elche. In the period 2009 to 2013 those clubs were in financial difficulties. The public guarantee allowed the clubs to obtain loans on more favourable terms. The clubs paid no adequate remuneration for the guarantees, the state financing was not linked to any restructuring plan and none of the clubs implemented compensatory measures to offset the distortion of competition. The pay back of the advantage the clubs received ranges from €20.4m for Valencia to €6.1m for Hercules and €3.7m for Elche.

## General Court declares non-compete clause unlawful

On 28 June 2016 the EU’s General Court ruled that a non-compete clause included in a contract selling Portugal Telecom’s (PT) stake in Vivo to Telefonica was unlawful. In 2010, PT and Telefónica concluded a share-purchase agreement which had as its subject-matter the exclusive control of Vivo by Telefónica. In that agreement, the operators inserted a non-competition clause by which they undertook the following: ‘to the extent permitted by law, to refrain from participating or investing, directly or indirectly, through any subsidiary, in any project falling within the telecommunications sector which is liable to be in competition with the other company on the Iberian market’.

In its decision of 2013 the Commission stated that the clause amounted to a market-sharing agreement with the object of restricting competition in the internal market. The Court found that the very existence of the clause is a strong indication of potential competition between PT and Telefónica, and that its subject matter consisted of a market-sharing agreement, that it had a wide scope and that it was part of a liberalised economic context. The Court took the view that the Commission was not obliged, as PT and Telefónica assert, to undertake a detailed analysis of the structure of the markets concerned and of potential competition between companies on those markets in order to conclude that the clause constituted a restriction of competition by object.

The Court found, however, that the Commission had taken the wrong assumption for calculating the fines. It ordered the European Commission to recalculate the value of sales directly or indirectly linked to the infringement for the purpose of setting fresh fines. It remains to be seen how the Commission will interpret the verdict, especially if the use of such a clause might either express good faith to check legality of a contract or simply an attempt to lower the punishment by the Commission in case any activities resulting from the contract would eventually violate antitrust laws.



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