

EU Law News

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

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- €2.9bn fine for truck makers
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Apple ordered to pay back €13bn state aid to Ireland

On 30 August 2016 the Commission concluded that Ireland granted undue tax benefits of up to €13bn to Apple. This selective tax treatment of Apple in Ireland is considered illegal under EU state aid rules by the Commission, because it gives Apple a significant advantage over other businesses that are subject to the same national taxation rules. Ireland was ordered to recover this amount as illegal state aid.

An in-depth state aid investigation was launched in 2014 into detailed aspects of various legal entities of Apple and the tax rulings with the Irish tax authorities. The Commission confirmed that tax rulings as such are perfectly legal. They are comfort letters issued by tax authorities to give a company clarity on how its corporate tax will be calculated or on the use of special tax provisions. However, the Commission has concluded that two tax rulings issued by Ireland to Apple have substantially and artificially lowered the tax paid by Apple in Ireland since 1991. The rulings endorsed a way to establish the taxable profits for two Irish incorporated companies of the Apple group (Apple Sales International and Apple Operations Europe), which did not correspond to economic reality: almost all sales profits recorded by the two companies were internally attributed to a “head office”. The Commission’s assessment showed that these “head offices” existed only on paper and could not have generated such profits. These profits allocated to the “head offices” were not subject to tax in any country under specific provisions of the Irish tax law, which are no longer in force. As a result of the allocation method endorsed in the tax rulings, Apple only paid an effective corporate tax rate that declined from 1% in 2003 to 0.005% in 2014 on the profits of Apple Sales International.

Finally, the Commission stated that this decision does not call into question Ireland’s general tax system or its corporate tax rate. Furthermore, Apple’s tax structure in Europe as such, and whether profits could have been recorded in the countries where the sales effectively took place, are not issues covered by EU state aid rules. If profits were recorded in other countries this could, however, affect the amount of recovery by Ireland.

€2.9bn fine for truck makers

On 19 July 2016 the Commission imposed a fine of €2.93bn in total on truck makers for violation of the EU competition rules. MAN, Volvo/Renault, Daimler, Iveco, and DAF colluded for 14 years on truck pricing and on passing on the costs of compliance with stricter emission rules. These companies acknowledged their involvement and agreed to settle the case. MAN was given full immunity and not fined as it revealed the existence of the cartel to the Commission. Scania is not covered by this settlement decision and therefore that investigation will continue under

the standard (non-settlement) cartel procedure.

The cartel covered the entire European Economic Area for medium and heavy trucks. Initially the companies held meetings at senior manager level in the margins of trade fairs and by phone conversations. Later they organised electronic exchange of information via their German subsidiaries.

The main activities were:

- Coordination of prices at “gross list” level as set by each manufacturer as the basis for pricing.
- Timing for the introduction of emission technologies to comply with the European emissions standards from Euro III through to the currently applicable Euro VI.
- Passing on to customers of the costs for the emissions technologies required to comply with these standards.

Court annuls decision to recover state aid from Deutsche Post

On 19 July 2016 the European Court of Justice (ECJ) set aside the Commission’s decision ordering Germany to recover from Deutsche Post part of the subsidies paid in respect of former civil servant postal workers’ pensions.

Deutsche Post is a public limited company formed in 1995 following the privatisation of the former German postal services operator Postdienst. Deutsche Post had to maintain the employment of Postdienst postal service workers and to contribute to a pension fund for them. On 25 January 2012 the Commission decided that the public financing of pensions constituted unlawful state aid incompatible with the internal market insofar as it was disproportionate - an amount between €500m and €1bn.

However, the Court found that the fact that Germany partially covered the cost of pensions for former civil servant postal workers is not sufficient in itself to show that Deutsche Post had an advantage over its private competitors. Since the Commission has not shown, at the stage of its review concerning the existence of state aid, that Deutsche Post enjoyed such an advantage, the Commission committed an error of law which entails the annulment of the part of the decision concerning the disputed pensions-related subsidies.

Commission clears telecom merger in Italy and joint venture in the Netherlands subject to divestments

On 1 September 2016 the Commission approved a €20bn telecommunications joint venture in Italy between Hutchison, which owns Three Italia, and VimpelCom which owns Wind telecom. The approval is conditional on the divestment of sufficient assets that will allow a new operator to enter the market.

The decision concluded the in-depth review of the two companies. Wind and Three Italia are the third and fourth largest operators in the Italian retail mobile market. The Commission's analysis showed that the deal was likely to result in less choice, a potential decrease in quality of services, and higher prices as it would also have created a market with only three competitors. The effective structural changes that Hutchison and VimpelCom have offered convinced the Commission to override competition law concerns. The key offer is the market entry of French telecom operator Iliad as a new mobile network operator in Italy. The transfer of the spectrum blocks and mobile base station sites to Iliad will enable that company to start in Italy and develop and roll out its own mobile network as a fourth mobile operator.

On 3 August 2016 the Commission also cleared the proposed creation of a joint venture in the Netherlands by mobile telecom operator Vodafone and cable company Liberty Global. That approval was conditional on Vodafone divesting its consumer fixed line business in the country. This case is interesting in that the Commission rejected a request from the Netherlands to refer the merger to the Dutch competition authority for assessment under Dutch competition law. The Commission concluded that, given its extensive experience in assessing cases in the telecommunications sector, and the need to ensure consistency in the application of merger control rules in this sector across the European Economic Area (EEA), it was better placed to deal with this case.

Meda / Mylan and Boehringer Ingelheim / Sanofi mergers cleared subject to divestments

On 20 July 2016 the Commission approved under the EU Merger Regulation the proposed acquisition of Meda AB of Sweden by Mylan N.V. of the Netherlands, subject to conditions.

The Commission had concerns that the transaction, as initially notified, would have reduced competition on the markets for several pharmaceutical products. It examined the effects of the proposed transaction on competition in several therapeutic areas and found that, for the majority of the products, no competition concerns arise. However, the Commission identified 15 markets where it had competition concerns, in particular because of the strong position of the two companies and the lack of sufficient alternatives on the market.

To address these concerns, Mylan offered to divest its own or Meda's local businesses in the markets concerned, including the relevant marketing authorisations, customer information and brands, wherever relevant. The Commission's approval is therefore conditional upon the divestment of a number of Mylan's or Meda's businesses in Austria, Belgium, Estonia, France, Luxembourg, Ireland, Italy, Norway, Portugal, Spain and the UK.

On 4 August 2016 the Commission also approved the proposed acquisition of the consumer health business of Germany's Boehringer Ingelheim by Sanofi of France. The Commission had concerns that the transaction, as initially notified, would have reduced competition in the markets for several pharmaceutical products. The decision is therefore conditional upon the divestment of a number of businesses in the Czech Republic, Estonia, France, Hungary, Greece, Ireland, Latvia, Poland and Slovakia.

Commission investigates proposed merger between Dow and DuPont

On 11 August 2016 the Commission opened an investigation as to whether the proposed merger of Dow and DuPont is in line with the EU Merger Regulation. The deal may reduce competition in areas such as crop protection, seeds and certain petrochemicals. The Commission wants to be sure that the proposed merger does not lead to higher prices or less innovation for these products.

The transaction would take place in industries that are already globally concentrated. Dow and DuPont are both headquartered in the US. The merger would create the world's largest integrated crop protection company including herbicides and insecticides portfolios. There are only a limited number of global companies with significant R&D capabilities to develop and launch new active ingredients.

Dow and DuPont both develop so-called "gene editing" technologies that could be used to materially accelerate the breeding of new seed varieties. The merged company may have fewer incentives to license these technologies to competitors or may make the development of competing technologies more difficult. The Commission will also look at the relationship between sales of crop protection products and seeds.

Dow and DuPont are strong suppliers of specialty polyolefins, which are thermoplastics derived from petrochemical products and are widely used in packaging and adhesive applications. The Commission is investigating the effect the merger and the creation of new vertical links in these concentrated markets.

The Commission has until 20 December 2016 to make a decision and is co-operating closely with the Department of Justice in the US and the antitrust authorities of Brazil and Canada.

This publication is intended for general information only. On any specific matter, specialised legal counsel should be sought.

Luther, EU Law Center
Avenue Louise 326, 1050 Brussels, Belgium
Phone +32 2 6277 760, Fax +32 2 6277 761
helmut.janssen@luther-lawfirm.com
gabrielle.williamson@luther-lawfirm.com

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