Newsletter EU Law

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Commission approves Nets' acquisition by Mastercard

On 17 August 2020 the Commission approved the acquisition of Nets' account-to-account payment business by Mastercard. The decision is conditional on the transfer of a license for Nets' "Realtime 24/7" technology for account-to-account core infrastructure services (A2A CIS).

Mastercard's main activities include the ownership and operation of payment card schemes and provision of switching services for card transactions as well as providing alternative payment solutions. Nets A/S operates account-to-account payment services and technology solutions, mainly in Europe's Nordic region, as well as in the Single Euro Payments Area. The Commission's investigation focused on the markets for the provision of A2A CIS, where the activities of the companies mainly overlap in Europe. A2A CIS allows real-time payments, directly from one bank account to another, without the need for a card. They can be provided either as a software-only solution, or as a managed solution consisting of the provision of the core infrastructure as well as the management and operation of the infrastructure. The Commission found that the transaction would have raised competition concerns for A2A CIS in relation to the managed solutions. Both companies have strong positions in this market and the transaction would have led to the strengthening of the leading player, Mastercard. The investigation revealed that the parties face a limited number of credible competitors for managed services.

Mastercard and Nets offered to transfer to a suitable purchaser a global license to distribute, supply, sell, develop, modify, upgrade or otherwise use Nets' Realtime 24/7 technology. The purchaser would have access to the licensed technology on an exclusive basis in Europe. The transfer would include all personnel and services. The proposed commitments were accepted by the Commission.

Investigations of state aid for battery industry plants

On 11 August 2020 the Commission opened and in-depth investigation into public support for expansion of LG Chem's electric vehicles battery plant in Poland. It will assess whether €95m of public support granted by Poland to chemical company LG Chem for investing in the expansion of its battery cell production facility for electric vehicles in the Dolnośląskie region is in line with EU rules on regional state aid.

The Commission has doubts about whether the decision by LG Chem to expand its battery production capacity was directly triggered by the Polish public support, or whether the investment would have been carried out without the public support. It has doubts about the appropriateness and proportionality of the support's contribution to regional development; and whether the support exceeds the maximum permissible aid intensity for the project.

On 2 July 2020 the Commission approved the €46.5m Hungarian investment aid to Toray's lithium-ion battery separator film plant. The Commission found the aid to the chemical company in the Central Transdanubia region to be in line with EU state aid rules. The Commission found that without the public funding, the project would not have been carried out in Hungary or in any other Member State, and that the aid is limited to the minimum necessary to trigger the investment in Hungary.

Acquisition of Fitbit by Google

On 4 August 2020 the Commission opened an in-depth investigation to assess the proposed acquisition of Fitbit by Google. The Commission is concerned that the transaction would further entrench Google's position in the online advertising markets by increasing the already vast amount of data that Google could use for personalisation of the ads it serves and displays.

Google is active in a wide range of online advertising technology, internet search, cloud computing, software and hardware. It develops licencable operating systems for smartphones and smartwatches, as well health and fitness applications and services for the healthcare industry. Fitbit develops and distributes wearable devices as well as connected software and services.

The Commission has concerns about the impact of the transaction. Google is dominant in the supply of online search advertising services. It holds a strong market position in the supply of online display advertising services and the supply of "ad tech" services. By acquiring Fitbit, Google would obtain the database maintained by Fitbit about its users' health and fitness; and the technology to develop a database similar to Fitbit's one. The Commission will also further examine the effects of the combination in the digital healthcare sector and whether Google would have the ability and incentive to degrade the interoperability of rivals' wearables with Googles Android operating system for smartphones. The Commission has until 9 December 2020 to take a decision.

Commission clears Alstom's acquisition of Bombardier

On 31 July 2020 the Commission conditionally approved the acquisition of Bombardier Transportation by Alstom.

Alstom in France and Bombardier Transportation in Germany are global leaders in the rail transport industry offering a wide range of transport solutions, rail electrification systems and digital mobility services. The Commission's investigation found that the transaction would have raised serious competition concerns in very high-speed rolling stock. The merged entity would have had the ability and the incentive to make it more difficult for other suppliers to interface with its many already installed signalling systems and operating fleet of trains. Alstom offered final commitments that satisfied the Commission's concerns. It includes the divestment of Bombardier's joint very high-speed platform with Hitachi, and of several production facilities. The merged companies will supply legacy on-board units that provide safety controls on mainline and urban rail networks to signalling competitors and to the Dutch infrastructure manager, ProRail, in favour of interested operators.

General Court annuls Commission decision in Apple-Ireland case

On 15 July 2020 the General Court of the EU annulled the Commission's decision asserting that Apple had wrongfully benefitted from Irish tax rulings amounting to €13bn.

In 2016 the Commission decided on two tax rulings by the Irish tax authorities in 1991 and 2007 in favour of Apple Sales International (ASI) and Apple Operations Europe (AOE). ASI and AOE are incorporated in Ireland but are not tax resident in Ireland. The tax rulings endorsed the methods used by ASI and AOE to determine their chargeable profits in Ireland relating to the trading activity of their respective Irish branches. The Commission considered that these tax rulings amounted to state aid (a selective economic advantage) and were unlawfully put into effect by Ireland.

The General Court endorsed the Commission's assessments relating to normal Irish tax law, such as the arm's length principle, to check whether the level of chargeable profits endorsed by the tax authorities corresponds to that which would have been obtained under market conditions. However, the Commission incorrectly concluded that the Irish authorities had granted ASI and AOE an advantage as a result of not having allocated to them the Apple Group intellectual property licences held by ASI and AOE, and, consequently, all of ASI and AOE's trading income obtained from the Apple Group's sales outside North and South America. The Commission failed to show that that income represented the value of the activities actually carried out by the Irish branches themselves.

The Court considered also that the Commission did not succeed in demonstrating methodological errors, which would have led to a reduction in ASI and AOE's chargeable profits in Ireland. The defects in the rulings identified by the Commission are not in themselves sufficient to prove the existence of an advantage. The Commission did not prove either that the rulings were the result of discretion exercised by the Irish tax authorities and that, accordingly, ASI and AOE had been granted a selective advantage. The Commmission can appeal to the European Court of Justice.

Ethylene producers fined €260m

On 14 July 2020 the Commission fined ethylene purchasers €260m in a cartel settlement. Orbia, Clariant, Celanese and Westlake are global chemical companies, who buy ethylene under supply agreements. In order to reduce the risk caused by extreme price volatility, ethylene supply agreements refer to a pricing formula, which often includes a so-called "Monthly Contract Price" (MCP). The MCP is an industry price reference resulting from individual negotiations between ethylene buyers and sellers. The Commission's investigation revealed that from December 2011 to March 2017 the four ethylene purchasers coordinated their price negotiation strategy vis-à-vis the ethylene sellers to influence the MCP to their advantage. Unlike in most cartels where companies conspire to increase their sales prices, the companies coordinated their price negotiation strategies and exchanged price-related information to buy ethylene for the lowest possible price.

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