



Luther.

Newsletter EU Law

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

Issue May/June 2021

Commission investigates acquisition of Air Europa by IAG

On 29 June 2021 the Commission opened an in-depth investigation into the proposed acquisition of Air Europa by the International Airline Group (IAG).

IAG is the holding company of Iberia, Vueling, British Airways, Level and Aer Lingus. IAG is the third largest airline group in Europe and the largest airline group in Spain. Air Europa belongs to Globalia, a Spanish tourism group. Before the COVID-19 crisis, Air Europa served 62 destinations, primarily in Europe and South America. It is a member of the SkyTeam alliance.

IAG and Air Europa compete on domestic routes, routes between Spain and other European destinations, as well as long-haul routes between Spain and the Americas. The Commission is concerned that the proposed acquisition may significantly reduce competition on 70 origin and destination city pairs on which both airlines offer direct services. On some routes IAG and Air Europa are the only two airlines operating. Air Europa is the only other network carrier having hub-and-spoke operations in Madrid. The Commission fears that competition from other airlines, including from European low-cost carriers would be unlikely to provide sufficient constraint on the merged entity. Without Air Europa's feeder traffic, some airlines may decide to terminate their services to international destinations also served by IAG.

Google advertising investigated

On 22 June 2021 the Commission opened an investigation into possible anticompetitive conduct by Google in the online advertising technology sector.

Google collects data to be used for targeted advertising purposes and is present at almost all levels of the supply chain for online display advertising. Many publishers rely on online display advertising to fund free online content for consumers. In 2019, display advertising spending in the EU was estimated to be approximately €20bn.

The Commission's investigation will focus on display advertising where Google offers services to both advertisers and publishers and assess whether Google has violated competition rules by favouring its own online tools. The Commission will examine the obligation to use Google's services Display & Video 360 and/or Google Ads to purchase online display advertisements on YouTube. Google also

places restrictions on the ability of third parties, such as advertisers, publishers or intermediaries, to access data about user identity or user behaviour which is available to Google's own advertising intermediation services. Google also announced plans to prohibit the placement of third party 'cookies' on Chrome and replace them with its "Privacy Sandbox" set of tools. Finally, Google plans to stop making the advertising identifier available to third parties on Android smart mobile devices.

Facebook anticompetitive conduct under scrutiny

On 4 June 2021 the Commission opened an investigation into possible anticompetitive conduct of Facebook.

Facebook is a social networking service which also offers an online classified advertising service, called Facebook Marketplace. It is a platform for Facebook users where they can buy and sell goods from and to each other. When advertising their services on Facebook, companies, which also compete directly with Facebook, may provide it commercially valuable data. The Commission wants to assess whether Facebook violated competition rules by using advertising data gathered from advertisers in order to compete with them in markets where Facebook is active such as classified ads. Facebook could, for instance, receive precise information on users' preferences from its competitors' advertisement activities and use such data in order to adapt Facebook Marketplace.

The Commission will also examine whether the way Facebook Marketplace is embedded in the social network constitutes a form of tying which gives it an advantage in reaching customers and forecloses competing online classified ads services. The UK's Competition and Markets Authority (CMA) also launched its own investigation into Facebook's use of data.

Investment banks fined €371m

On 20 May 2021 the Commission fined investment banks €371m for participating in a European Governments Bonds trading cartel.

European Government Bonds (EGB) are debt securities issued by the Eurozone Member States. EGB are first issued on the primary market where a limited number of investment banks, the 'primary dealers' can bid for the bonds in auctions. The primary dealers then place and trade the bonds on the

secondary market with investors including other banks, asset managers, pension funds, hedge funds and major companies.

Between 2007 and 2011 seven investment banks participated in a cartel through a group of traders working on their EGB desks and operating in a closed circle of trust. The traders were in regular contact with each other mainly in multilateral chatrooms on Bloomberg terminals in which they exchanged commercially sensitive information. They updated each other on their prices and volumes and provided each other on their bidding strategy in the run-up to the auctions on the primary market, and on trading parameters on the secondary market.

Fines totalling €371m are imposed on Nomura, UBS and UniCredit. NatWest was not fined as it revealed the cartel to the Commission. Bank of America and Natixis are not fined either because their infringement falls outside the limitation period for imposition of fines. Portigon, the successor of WestLB, received a zero fine as it did not generate any net turnover in the last business year.

General Court judgments on Engie and Amazon state aid

On 12 May 2021 the General Court of the European Court of Justice confirmed the Commission's 2018 decision that Luxembourg granted state aid to Engie through selective tax breaks. On the same day it annulled the Commission's 2017 decision that Luxembourg granted state aid to Amazon.

Between 2008 and 2014, the Luxembourg tax authorities adopted tax rulings for the intra-group financing structures of Engie in Luxembourg. The rulings approved transactions which constitute a system for implementing, in a circular and interdependent fashion, the transfer of a business activity and its financing between three companies belonging to the same group. The General Court found that the Commission did not err in law by looking at the combined effect, at the level of the holding companies, of the deductibility of income at the level of a subsidiary and the subsequent exemption of that income at the level of its parent company.

From 2006, the Amazon group pursued its commercial activities in Europe through two companies established in Luxembourg, namely Amazon Europe Holding Technologies SCS and its subsidiary Amazon EU Sàrl (LuxOpCo). In 2017 the Commission found that the method of calculating the royalty to be paid by LuxOpCo to the holding company constituted state aid. The General Court concluded that the Commission did not prove to the requisite legal standard that

there was an undue reduction of the tax burden of the European subsidiary. Firstly, elements put forward by the Commission are not capable of establishing that LuxOpCo's tax burden was artificially reduced as a result of an overpricing of the royalty. Secondly, the Commission failed to establish that the methodological errors identified had necessarily led to an undervaluation of the remuneration that LuxOpCo would have received under market conditions.

Fine for providing misleading information in merger control

On 3 May 2021 the Commission fined Sigma-Aldrich €7.5m for providing misleading information during the Merck takeover investigation.

In 2015 Merck notified the Commission of its plan to acquire Sigma-Aldrich. The Commission approved the proposed acquisition subject to the divestiture of certain Sigma-Aldrich assets, which would address the competition concerns identified in markets for specific laboratory chemicals. In the context of the divestment process, the Commission was made aware that an innovation project, called iCap, was specifically developed for products included in the divestment business. Not only was the iCap project not disclosed to the Commission, but information about it was also withheld in replies to specific requests for information. Moreover, the Commission found indications that Sigma-Aldrich intended to avoid the transfer of the relevant project to the purchaser of the divestment business.

The Commission considered these infringements particularly grave. The Commission can impose fines of up to 1% of the aggregated turnover of companies and concluded that an overall fine of €7.5m is both proportionate and deterrent. The decision has no impact on the Commission's decision to authorise the transaction.

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

Photo credits: Cover, Grecaud Paul/Adobe Stock

**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**

Luther.

Bangkok, Berlin, Brussels, Cologne, Delhi-Gurugram, Dusseldorf, Essen, Frankfurt a.M., Hamburg, Hanover, Kuala Lumpur, Jakarta, Leipzig, London, Luxembourg, Munich, Shanghai, Singapore, Stuttgart, Yangon

You can find further information at:

www.luther-lawfirm.com

www.luther-services.com

