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Newsletter EU Law

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German aid for Ukraine crisis, Uniper and renewable energy

On 21 December 2022 the Commission approved under the Temporary Crisis Framework the EUR 49 billion German scheme to support the economy in the context of Russia's war against Ukraine. The measure grants aid via the energy suppliers to companies across sectors which are final consumers of electricity, gas and heat.

The Commission also approved EUR 6.3 billion German aid to recapitalise energy company SEFE Securing Energy for Europe previously known as Gazprom Germania, and EUR 34.5 billion to recapitalise Uniper. Uniper is the largest gas provider of electricity or gas to 420 out of 900 municipal utilities in Germany, and a main European gas trader and storage company.

On 21 December 2022 the Commission approved amendments to a German Act (WindSeeG) to support offshore wind energy generation up to EUR 1.5 billion and the scheme to support electricity from renewable energy sources under its Renewable Energy Act (Erneuerbare Energien Gesetz 2023) with a budget of EUR 28 billion. That scheme aims at achieving a share of 80% of electricity produced from renewable energy sources by 2030 and climate neutrality by 2045.

Amazon's Buy Box and Prime

On 20 December 2022 the Commission accepted commitments by Amazon barring it from using marketplace seller data as well as ensuring equal access to Amazon Buy Box and Prime.

Amazon runs a marketplace where independent sellers can sell products directly to consumers, and at the same time, it sells products on its platform as a retailer in competition with those independent sellers. In 2020 the Commission found Amazon dominant on key EU markets for the provision of online marketplace services to third-party sellers and Amazon's use of marketplace sellers' non-public business data to calibrate its retail decisions. In a second investigation it concluded that Amazon's practices for Buy Box and Prime unduly favour its own retail business, as well as marketplace sellers that use Amazon's logistics and delivery services.

To address the data use concern, Amazon commits not to use non-public data relating to the independent sellers' activities on its marketplace for its retail business. It also commits to treat all sellers equally when ranking the offers for the selection of the

Buy Box winner and to display a second competing offer. Regarding Prime, Amazon commits to set non-discriminatory conditions and allow Prime sellers to freely choose any carrier for their logistics and delivery services and to not use any information for its own logistics services. The Commission market tested Amazon's commitments and consulted interested third parties in 2022 which resulted in Amazon additionally committing to improve the presentation of the second Buy Box offer, to early switching of sellers to independent carriers and to improve carrier data protection.

Commission's objections over Facebook Marketplace

On 19 December 2022 the Commission sent a Statement of Objections to Meta over abusive practices benefiting Facebook Marketplace, its online classified ad services.

Meta owns the personal social network Facebook as well as Facebook Marketplace where users can buy and sell goods. The Commission preliminarily found that Meta abused its dominant positions in two ways. First, Meta ties its ads service with its dominant personal social network Facebook which means users of Facebook automatically have access to Facebook Marketplace, whether they want it or not. The Commission is concerned that competitors of Facebook Marketplace may be foreclosed as the tie gives Facebook Marketplace a substantial distribution advantage that competitors cannot match. Second, Meta unilaterally imposes unfair trading conditions on competing online classified ads services which advertise on Facebook or Instagram.

EUR 157 million fine for styrene purchasing cartel

On 29 November 2022 the Commission fined styrene purchasers EUR 157 million. Styrene is an intermediate chemical product that serves as a key input for chemicals such as plastics and resins.

In 2017 INEOS applied under the Commission's Leniency Notice, revealing that between 2012 and 2018 six buyers of styrene exchanged sensitive commercial information on an industry reference price of styrene (the Styrene Monthly Contract Price or SMCP). Due to the volatility of styrene prices, the industry often used in their supply contracts the SMCP published by a reporting agency. Unlike in most cartels where companies conspire to increase their sales prices, the

companies colluded to lower an element of the price of styrene. They coordinated their price negotiation strategies prior to and during the bilateral SMCP settlement negotiations with styrene sellers to influence the SMCP to their advantage. These practices distort the competitive process, which should be based on individual decisions of market participants.

All parties, except Synbra, cooperated with the Commission under the leniency programme and agreed on a settlement. INEOS received full immunity. Sunpor, Synthomer, Synthos and Trinseo benefited from a 10% to 40% reduction of their fine for their cooperation with the Commission. An additional reduction of 10% was applied in view of their acknowledgment of participation in the cartel.

Acquisition of Activision Blizzard by Microsoft investigated

On 8 November 2022 the Commission opened an indepth investigation into the proposed acquisition of Activision Blizzard by Microsoft, as it may reduce competition in the markets for distribution of consoles, personal computers (PCs) video games and PC operating systems.

Microsoft and Activision Blizzard are US headquartered developers and publishers of games for PCs, game consoles and mobile devices as well as distributors of games for PCs. Microsoft owns the PC operating system Windows and cloud computing service Azure.

The Commission is concerned that Microsoft may have the ability and economic incentive to engage in foreclosure strategies vis-à-vis Microsoft's rival distributors of console video games, such as preventing these companies from distributing Activision Blizzard's successful games on consoles or degrading the terms and conditions. Microsoft may also foreclose access to its own PC and console video games, which are key for the provision of the nascent services of multi-game subscription and cloud game streaming. Finally the Commission is concerned that Microsoft may reduce the ability of rival providers of PC operating systems to compete with Microsoft's operating system Windows, by combining Activision Blizzard's games and Microsoft's distribution of games via cloud game streaming to Windows. This would discourage users to buy non-Windows PCs.

ECJ annuls Commission decision on selective advantage in state aid

On 8 November 2022 in Fiat Chrysler Finance Europe (FFT) versus the Commission, the European Court of Justice (ECJ) held that the General Court was wrong to confirm the reference framework used by the Commission and annulled its decision of 2015 on an alleged state aid granted by Luxembourg to FFT.

In 2012 the Luxembourg tax authorities adopted a tax ruling in favour of FFT, an undertaking of the Fiat group that provided treasury services and financing to the group's companies in Europe. That decision approved a methodology for determining FFT's remuneration for those services and subsequently enabled FFT to determine its corporate income tax liability in Luxembourg. In 2015 the Commission found that that tax ruling constituted state aid incompatible with the internal market and ordered Luxembourg to recover the aid. In 2019, the General Court dismissed the actions brought by Luxembourg and FFT.

For the purposes of assessing the selective nature of a tax measure, the ECJ states it is necessary that the common tax regime or the reference system applicable in the Member State concerned be correctly identified in the Commission decision and examined by the court hearing a dispute concerning that identification. The ECJ concludes that the General Court was wrong to endorse the Commission's approach by applying an arm's length principle different from that defined in Article 164(3) of the Luxembourg Tax Code and Circular No 164/2, confining itself to identifying the abstract expression of that principle in the objective pursued by the general corporate income tax in Luxembourg.

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

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