Newsletter EU Law

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

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Acquisition of Swedish Match approved

On 25 October 2022, the Commission approved the proposed acquisition of Swedish Match by Philip Morris International (PMI).

PMI is a leading supplier of combustible tobacco, including factory-manufactured cigarettes, and roll-your-own tobacco, as well as heated tobacco products. The Commission determined that Swedish Match holds a de facto monopoly on distribution of tobacco and nicotine products in Sweden through its subsidiary SMD Logistics. The transaction could have led to foreclosure effects in Sweden. To address the Commission's competition concerns, PMI offered to divest SMD Logistics and become a stand-alone business, which fully removes the vertical links between the manufacture of tobacco and nicotine products and their distribution in Sweden. This will enable a purchaser to run the divested business as a viable competitive force in the market.

Commission approves acquisition in aluminium recycling industry

On 19 October 2022 the Commission approved the proposed acquisition of Evergreen Holding Germany and Real Alloy Europe by a fund managed by US based KPS Capital Partners (KPS) through its subsidiary Speira.

KPS controls manufacturing companies across multiple industries. Its subsidiary Speira produces recycled aluminium and manufactures flat rolled aluminium products. Real Alloy Europe has a significant market position in recycled aluminium and recycling services to third parties for hazardous products resulting from the aluminium recycling process, such as dross and salt slag. There are only a few alternative suppliers, and competitors of Speira for flat rolled products rely on those inputs currently provided by Real Alloy. At the same time, hazardous waste needs to be recycled as it is subject to stringent regulations in relation to storage and recycling requirements. The Commission was concerned that the parties might have the incentive and ability to restrict the competitors' access to necessary products and services in the aluminium recycling chain. In response to the Commission's concerns KPS offered to divest Real Alloy's recycled aluminium production and dross recycling facility in Swansea (UK) as well as Real Alloy's salt slag recycling plant in Sainte-Menehould (France) enabling a stand-alone business consisting of two plants.

New Communication on State Aid for Innovation

On 19 October 2022 the Commission adopted a revised Communication on State aid rules for research, development and innovation (RDI Framework). It sets out the rules under which Member States can grant State aid to companies for RDI activities, while ensuring a level playing field.

The revised RDI Framework includes adjustments to reflect regulatory, economic and technological developments, and to align the rules to the current EU policy priorities, such as the European Green Deal and the Industrial and Digital Strategies. It updates the existing definitions of research and innovation activities eligible for support and clarifies their applicability with respect to digital technologies. The Framework enables public support for testing and experimentation infrastructures required to develop and upscale deployment of cutting edge and breakthrough technologies. The new rules introduce a simplified mechanism to determine the indirect costs of research and development projects that are eligible for support under State aid rules. The provisions of the revised RDI Framework are complemented by the General Block Exemption Regulation, which lays down ex ante compatibility conditions on the basis of which Member States can implement State aid measures without prior notification to the Commission.

EUR 10 billion Polish scheme for energy-intensive companies

On 17 October 2022 the Commission approved a EUR 10 billion a Polish scheme to partially compensate energy-intensive companies for higher electricity prices resulting from indirect emission costs under the EU Emission Trading System.

Similar to schemes that were recently approved for Germany and other member states, the Polish scheme covers prices arising from the impact of carbon prices on electricity generation costs (so-called 'indirect emission costs') incurred between 2021 and 2030. The measure is aimed at reducing the risk of 'carbon leakage', where companies relocate their production to countries outside the EU with less ambitious climate policies, resulting in increased greenhouse gas emissions globally. The maximum aid amount per beneficiary will be equal to 75 % of the indirect emission costs incurred. The aid amount is calculated based on electricity consumption efficiency benchmarks, which ensure that the beneficiaries are encouraged to save energy. Beneficiaries have to either (i) implement certain energy audit recommendations, or (ii) cover at least 30% of their electricity consumption with renewable energy sources or (iii) invest at least 50 % of the aid amount in projects leading to substantial reductions of their installations' greenhouse gas emissions.

Views by Advocate General widens merger control

On 13 October 2022 Advocate General Kokott issued her Opinion in the Towercast case C-449/21 stating that the Commission and national competition authorities of the 27 Member States may take action against a concentration even if its implementation is permitted without prior merger control proceedings. Should the European Court of Justice follow the Opinion, it would mean that the Commission and member state authorities can intervene against anti-competitive mergers even if the turnover of one of the undertakings concerned is below the notification thresholds of either the European Merger Regulation or those of a Member State. That outcome would be highly relevant to non-notifiable cases where the concentration would strengthen a dominant position. Uncertainty for merging parties would be increased. For details see **[link]**.

Celanese's acquisition of a DuPont business approved

On 11 October 2022 the Commission approved Celanese's acquisition of DuPont's Mobility and Materials Business.

Celanese is a global chemicals and specialty materials company. DuPont's Mobility and Materials Business produces thermoplastics among other high-performance engineering materials. The Commission's investigation concluded that the companies compete in the supply of engineering thermoplastics to customers in the automotive, industrial and commercial, electric and electronic, and consumer-end markets. The combined entity would become the largest producer of thermoplastic copolyester (TPC) with only a few alternative suppliers remaining. To address the Commission's concerns Celanese offered to divest its global TPC business, including its production facility in Ferrara (Italy), and the Pibiflex and Riteflex brands to Taro Plast S.p.a., an Italian producer of engineering plastics. The commitments remove the overlap between the parties' activities.

General Court confirms decision on Google

On 14 September 2022 the General Court largely confirmed the July 2018 Commission decision that Google imposed unlawful restrictions on manufacturers of Android mobile devices and mobile network operators in order to consolidate the dominant position of its search engine.

The General Court considers it appropriate however to lower the fine on Google by EUR 218 million to EUR 4.125 billion, its reasoning differing in certain respects from that of the Commission. The court identified errors of reasoning relating to the assessment of essential variables of the AEC (as efficient competitor) test applied by the Commission, i.e. the estimate of the costs attributable to a competitor; the assessment of the competitor's ability to obtain pre-installation of its app; and the estimate of likely revenues on the basis of the age of mobile devices in use. The Commission also infringed some of Google's rights of access to files and deprived Google of the opportunity better to ensure its defence by developing its arguments in a hearing.

The General Court concluded that the portfolio-based revenue share agreements with manufacturers are in themselves abusive and that partial annulment does not affect the overall validity of the finding of an infringement, in the light of the exclusionary effects arising from the other abusive practices implemented by Google during the infringement period. Regarding the level of the fine, the General Court took account of the intentional nature of the implementation of the unlawful practices and of the value of relevant sales made by Google in the last year of its full participation in the infringement.

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