



Luther.

Newsletter EU Law

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

Issue July/August 2022

Legal and Tax Advice | www.luther-lawfirm.com



Compensation for energy-intensive companies approved

On 19 August 2022 the Commission approved Dutch, Finnish and German schemes to partially compensate energy-intensive companies for higher electricity prices resulting from indirect emission costs under the EU Emission Trading System (ETS).

The scheme notified by Germany with an estimated budget of EUR 27.5 billion will cover part of the higher electricity prices arising from the impact of carbon prices on electricity generation costs, so-called 'indirect emission costs', incurred between 2021 and 2030. The support 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 increased greenhouse gas emissions globally. The measure will benefit companies active in sectors listed in Annex I to the ETS guidelines.

The maximum aid amount will be equal to 75 % of the indirect emission costs incurred. In some instances the maximum aid amount can be higher to limit the remaining indirect emission costs incurred to 1.5 % of the company's gross added value. The beneficiaries bear a certain share of their indirect emission costs, corresponding to 1 GWh of electricity consumption per year. No aid will be granted for the consumption of self-generated electricity from installations put into operation before 1 January 2021, for which the beneficiary is entitled to remuneration under the German Renewable Energy Act. As of 2023 companies must invest at least 50 % of the aid amount to implement economically feasible measures identified in the energy management system or decarbonize their production process.

Glass repair merger approved after divestment in France

On 2 August 2022 Commission approved D'leteren's acquisition of PHE in France.

D'leteren's subsidiary Belron is active in the repair and replacement of vehicle glass in a number of Member States, including in France. The brands of workshops under its control include Carglass, Safelite and Autoglass. PHE is in the same business in France, through a network of workshops under the brand Mondial Pare-Brise and through the Glass Auto Service label. Insurance companies account for approximately 80-90% of the demand for vehicle glass repair and replacement and aim towards subscribing framework agreements with networks of specialised glass repairers.

The Commission's investigation showed that the transaction would have resulted in an entity combining the market leader and an unavoidable trading partner for many insurers (Carglass) with its closest competitor. Post transaction, insurers would not be able to redirect a significant portion of their business to other specialist networks. In addition, this market is characterised by high barriers to entry. D'leteren offered to divest Mondial Pare-Brise and the Glass Auto Service label in their entirety. These commitments fully remove the overlap between D'leteren and PHE in France.

EUR 3 billion German scheme for green district heating

On 2 August 2022 the Commission approved a EUR 3 billion German scheme to promote green district heating.

The measure will contribute to the implementation of Germany's National Energy and Climate Plan and the EU's 2050 climate neutrality target. The scheme will run until 2028 for district heating network operators. The aid will take the form of direct grants to support feasibility studies and transformation plans respectively for the construction and the decarbonisation of district heating networks, for example via renewable energy, waste heat and solar thermal generation facilities.

Based on the 2022 Guidelines on state aid for climate, environmental protection and energy the Commission found that the aid is appropriate for the decarbonisation of the district heating sector in Germany and that it has a incentive effect. Positive effects of the aid on the decarbonisation of district heating systems in Germany outweigh any potential negative effects on competition and trade between Member States.

Acquisition of Grail by Illumina: the story continues

Illumina is an American company specialising in genomic sequencing. Grail is also an American biotechnology company and relies on genomic sequencing to develop cancer screening tests. In 2020 the two undertakings made public a proposal on the acquisition of exclusive control of Grail by Illumina. Since turnover did not exceed the relevant thresholds, the concentration did not have a European dimension, according to Article 1 of the Merger Regulation, and was accordingly not notified to the Commission.

On 13 July 2022 the General Court upheld the decisions of the Commission accepting a referral request from France, asking it

to assess the proposed acquisition. The court stated that under Article 22 of the Merger Regulation, the Commission correctly acknowledged its own authority to examine the concentration in accordance with the procedural rules. On 19 July 2022 the Commission sent a Statement of Objections alleging that Illumina and Grail breached the standstill obligation by implementing the acquisition while the Commission's in-depth investigation into the proposed transaction was still ongoing. The Commission was concerned that the transaction could allow Illumina, a company well established in Europe, to block access to Grail's competitors to the next generation sequencing systems required for the development of cancer screening tests. On 6 September 2022 the Commission prohibited the merger. Illumina announced to take legal action.

Metal packaging producers fined EUR 31.5 million

On 12 July 2022 the Commission fined the metal packaging producers Crown and Silgan EUR 31.5 million for participating in a cartel concerning sales of metal cans and closures.

Metal closures coated with BPA-free lacquers or BPA-containing lacquers are predominantly used to close glass jars containing foods. Metal cans coated with BPA-free lacquers are used to pack, transport and stock sterilised foods. Due to the risks to public health related to the presence of BPA in foodstuffs, the use of BPA on materials intended to come into contact with foods was severely restricted and led in practice to the use of BPA-free lacquers.

The Commission's investigation started upon request of the German Competition Authority. The German law applicable at the time did not allow it to sanction Crown and Silgan's subsidiaries, which had been dissolved or reorganised prior to the conclusion of the Bundeskartellamt's investigation. The Commission found the existence of one infringement by Crown and Silgan between 2011 and 2014 consisting firstly of regular exchanges of most recent annual sales volumes of metal closures to their individualized customers in Germany and secondly, coordination to impose a surcharge and apply shorter minimum durability recommendation concerning metal cans and closures coated with BPA-free lacquers. The actions allowed parties to keep each other informed of their commercial strategies and adapt their market behaviour for metal cans and closures coated with BPA-free lacquers in Germany.

Both companies admitted their involvement in the infringement and agreed to settle the case. The Commission applied a

reduction of 10% to the fines in view of their acknowledgment of their participation in the cartel. Crown benefited from a 50% reduction for its cooperation.

Foreign Subsidies Regulation creates clearance requirement

On 30 June 2022 political agreement was reached between the European Parliament and Member States on the Foreign Subsidies Regulation (FSR). The FSR is a new tool for the Commission to address distortions caused by foreign subsidies and ensure a level playing field for all companies operating in the EU. It creates an additional clearance requirement for companies acquiring other companies (or substantial participations).

The FSR sets out the obligation for companies to notify concentrations where the acquired company, one of the merging parties or the joint venture generates an EU turnover of at least EUR 500 million and the transaction involves a foreign financial contribution of at least EUR 50 million within three years before the merger. The same procedure applies to tenders in public procurement, where the estimated contract value is at least EUR 250 million and the bid involves a foreign financial contribution of at least EUR 4 million per third country. The Commission can impose fines on companies that breach this obligation, which may reach up to 10 % of their aggregated turnover. Even below the thresholds, the Commission may intervene ex officio against a concentration before and after its implementation if the third country subsidy distorts competition in the internal market. The Commission can issue information requests and carry out fact-finding inspections and market investigations. It may conduct a balancing test to take into account the positive and negative effects and may impose redressive measures on companies, for example the divestment of certain assets. Once it is published the FSR will come into force and become directly applicable across the EU six months later.

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, Ho Chi Minh City, Jakarta, Kuala Lumpur,
Leipzig, London, Luxembourg, Munich, Shanghai, Singapore, Stuttgart, Yangon**

You can find further information at:

www.luther-lawfirm.com

www.luther-services.com

