

EU Law News

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

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- Merger of Mylan and Upjohn approved
- Extension of block exemption for liner shipping consortia
- Danish public financing of rail-road link with Germany approved, again
- Commission approves acquisition of Raytheon by UTC
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Commission approves German aid for coronavirus relevant products

On 29 April 2020 the Commission approved a further scheme by which Germany reacts to the economic impacts of the coronavirus pandemic, this time a scheme to support research, development, testing and production of coronavirus relevant products. The scheme was approved under the State aid Temporary Framework adopted by the Commission on 19 March 2020, as amended on 3 April 2020. For more information on State aid rules during the corona pandemic click [here](#).

The Temporary Framework allows for a very quick assessment whether the Commission will consider state aid compatible with the internal market on the basis of Article 107(3)(b) TFEU. It will be in place until 31 December 2020. The Commission will then assess if it needs to be extended.

Germany notified to the Commission an “umbrella” scheme supporting: (i) coronavirus relevant research and development (R&D) activities, (ii) investments into testing and upscaling infrastructures relevant to medicinal products, and (iii) investments into production facilities. The scheme aims to enhance and accelerate the development and the production of vaccines, hospital and medical equipment as well as protective clothing and equipment. Federal government, regional and local authorities can provide direct grants, repayable advances and tax advantages. Guarantees to cover losses may also be granted, either in addition to a direct grant, tax advantage or repayable advance, or as an independent aid measure. Undertakings are encouraged to cooperate with each other or with research organisations. They can benefit from a 15% bonus for a cross-border R&D project. Investment projects will have to be completed within six months after the date of granting of the aid.

Merger of Mylan and Upjohn approved

On 22 April 2020 the Commission approved the merger between the global pharmaceutical company Mylan and Upjohn. The decision is conditional on the divestment of Mylan’s business for certain generic medicines.

Mylan is a vertically integrated global pharmaceutical company and one of the top five suppliers of generic medicines. Upjohn is a business division of the global pharmaceutical company Pfizer, which operates Pfizer’s off-patent branded and generic established medicines business. The Commission’s investigation focused on the market for generic medicines, which are sold to pharmacies and hospitals. Mylan and Upjohn overlap in various therapeutic areas such as cardiovascular, genito-urinary, musculoskeletal, nervous system, and sensory organ treatments. Competition for generic medicines takes place between suppliers (i) at the national level, given the differing national regulatory/reimbursement schemes, as well

as (ii) between medicines using the same chemical molecule as an active pharmaceutical ingredient for a specific therapeutic indication. The Commission found that the transaction would only raise competition concerns in some countries and for some molecules, because of the strong position of the two companies.

The companies offered to divest Mylan’s business for certain generic medicines across 20 countries throughout Europe. The offer includes the applicable marketing authorisations, contracts and brands, as well as transitory manufacturing and supply arrangements. The proposed commitments fully address all of the Commission’s competition concerns.

Extension of block exemption for liner shipping consortia

On 24 March 2020 the Commission extended for another four years the regulation outlining the conditions under which liner shipping consortia can provide joint services without infringing EU antitrust rules.

Liner shipping consortia are agreements between shipping companies to operate joint liner shipping services and engage in certain types of operational cooperation leading to economies of scale and a better utilisation of the space on vessels. The Commission’s evaluation has shown that the exemption is still fit for purpose, despite evolutions in the market such as increased consolidation, concentration, technological change and increasing size of vessels. Consortia results in efficiencies for carriers that can better use vessels’ capacity and offer more connections. In recent years both costs for carriers and prices for customers per twenty-foot equivalent unit (TEU) have decreased by approximately 30% and quality of service has remained stable. The exemption only applies to consortia with a market share not exceeding 30% and whose members are free to set prices independently. Therefore these agreements cannot include price-fixing or market-sharing.

Danish public financing of rail-road link with Germany approved, again

On 20 March 2020 the Commission concluded that the public financing model of the Fehmarn Belt coast-to-coast infrastructure between Denmark and Germany is in line with EU state aid rules.

The Fehmarn Belt undersea tunnel is planned as a fixed 19 kilometres long rail and road link, which will complete the route connecting central Europe and the Nordic countries. Denmark will be the sole owner and bear the full risk for the financing thereof. Two public undertakings are entrusted with the planning, construction and operation of the project. In 2015 the Commission approved the public financing model.

Following an appeal by Scandlines and Stena Line, the General Court partially annulled the Commission's decision in 2018 on procedural grounds. The Court found that the Commission should have opened a formal investigation under state aid rules before adopting its decision.

The Commission's in-depth investigation confirmed that the capital injections, the state guarantees on loans and the state loans granted by Denmark constitute state aid in view of the economic character of the infrastructure. The Commission concluded that those measures constitute individual investment aid and that the project qualifies as an Important Project of Common European interest (IPCEI). With respect to the proportionality of the measures the Danish authorities, following discussions with the Commission, implemented changes to the financing structure. These changes limit the use of guarantees and loans up to a maximum debt amount of €9.3bn. The financing should not exceed the first 16 years of operations.

Based on the updated figures and the changes to the financing structure, the Commission concluded that the public measures are proportionate under EU state aid rules. The measures are necessary and the positive effects of the project outweigh any potential distortion of competition, in line with the requirements of the Communication on IPCEI and state aid rules.

Commission approves acquisition of Raytheon by UTC

On 13 March 2020 the Commission approved the proposed acquisition of Raytheon by United Technologies Corporation (UTC) on the condition of divestitures.

UTC provides products and services for the building systems and aerospace industries globally. Raytheon is a defence contractor that supplies defence, civil government and cybersecurity solutions. The transaction combines UTC's aerospace businesses and Raytheon's defence business. The Commission had concerns about competition in the markets for military Global Positioning System (GPS) receivers and airborne radios. UTC and Raytheon are two of the very few suppliers of GPS technology worldwide used in a broad range of military systems. The merged entity would have faced very limited competition from alternative suppliers. UTC and Raytheon are also two major suppliers of military airborne radios worldwide and the only two real options currently available to US military aircraft manufacturers. European armed forces procure a variety of military aircrafts from US manufacturers. The Commission was concerned that the concentration would result in harm to European forces.

UTC and Raytheon offered to divest UTC's entire military GPS receiver and anti-jamming business as well as Raytheon's entire military airborne radios business. They intend to sell both businesses to BAE Systems, the UK-based defence and

aerospace company. The proposed remedies remove the entire horizontal overlap between the companies in both markets. The Commission approved the proposed transaction, conditional upon full compliance with those commitments. It also concluded that vertical links between their activities did not result to harm to competition, and that the merged entity would have neither the ability nor the incentives to shut out competitors through practices such as bundling.

Court annuls Commission's decision on aid to Spanish football clubs

On 12 March 2020 the General Court annulled the Commission's decision on aid measures implemented in favour of the Spanish football clubs Valencia CF et Elche CF.

Between 2009 and 2010, the Instituto Valenciano de Finanzas (IVF), the financial establishment of the Regional Government of Valencia, Spain, granted a number of guarantees to associations linked to three Spanish professional football clubs from the Autonomous Community of Valencia: Valencia CF, Hércules CF and Elche CF. Those guarantees were intended to cover the bank loans taken out by those associations in order to participate in the increase in the capital of the three clubs to which they were linked. In Valencia CF's case, the guarantee granted was increased in 2010 in order to cover the increase of the underlying bank loan. In 2016 the Commission found that those measures constituted unlawful state aid in favour of the three clubs and ordered their recovery.

In the case of Valencia CF, the Court considers that the Commission made a manifest error of assessment by finding that no equivalent guarantee premium could be found either on the market or through comparable facilities from a private investor. The Commission did not sufficiently support its finding that there was no market price for a similar non-guaranteed loan. The Court also stated that the Commission wrongly assessed the value of the counter-guarantees provided by the Fundación Valencia. In the case of Elche CF, the Court similarly criticises the Commission for not sufficiently substantiating its conclusion about the market price of a non-guaranteed loan. In addition, it finds that the Commission made a manifest error of assessment by not taking into account the economic and financial situation of the borrowing association linked to Elche CF, the Fundación Elche. It also failed to take into account the mortgage on land which the Fundación Elche had granted to the IVF and the value of the shares in Elche FC as a counter-guarantee.

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

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