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EU Law News

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

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Newsletter May/June 2020

Commission, again, eases state aid rules due to coronavirus pandemic

On 2 July 2020 the Commission prolonged state aid rules and adopted adjustments to mitigate the impact of the coronavirus outbreak. On 29 June 2020 the Commission also expanded the Temporary Framework to support micro, small and start-up companies and incentivise private investments.

The Commission, after consulting Member States, decided to adopt a new regulation amending the General Block Exemption Regulation (GBER) and extended the de minimis regulation by three years. It also published a Communication amending seven sets of state aid guidelines and prolonging those which would otherwise expire on 31 December 2020. These changes will affect, in particular, undertakings in financial difficulty, which may continue receiving certain types of aid and remain eligible to receive aid under the GBER and other sets of rules. The Commission also acknowledged that, due to the coronavirus outbreak, it may not be possible for companies to avoid job losses. These would not be considered as a relocation and hence a breach of the commitments previously undertaken.

The Commission adopted a third amendment to extend the scope of the state aid Temporary Framework adopted on 19 March 2020 to support the economy in the context of the coronavirus outbreak. The main purpose is to provide targeted support to otherwise viable companies that are experiencing financial difficulty as a result of the coronavirus outbreak. The Guidelines set conditions according to which companies must devise sound restructuring plans that will allow them to achieve long-term viability. Member States may provide public support to all micro and small companies, even if they were already in financial difficulty in 2019. The amendment also effectively increases the range of opportunities to support start-up companies.

Investigation into merger of Refinitiv and LSEG

On 22 June 2020 the Commission opened in-depth investigation into the proposed acquisition of Refinitiv by London Stock Exchange Group (LSEG).

LSEG, headquartered in London, is a global financial markets infrastructure embracing both the London Stock Exchange and Borsa Italiana. It operates other equity-like exchanges and is active in post-trading clearing houses, settlements and custody services. Refinitiv, headquartered in New York, is a main provider of financial markets data, consolidated real-time datafeeds, indices for foreign exchange, and electronic trading venues.

The Commission's investigation concerns four markets.

1. The transaction would result in a very large market share in the electronic trading of European Government Bonds. It would be difficult for a new trading venue to become a real alternative.
2. Regarding the trading and clearing of over-the-counter interest-rate derivatives, the combined entity would have significant market power both upstream (trading) and downstream (clearing). The barriers to entry are high and customers rarely switch trading venues or clearing houses.
3. Refinitiv offers consolidated real-time financial datafeeds to traders, asset managers and other data users. LSEG commercialises trading data generated on its venues, which are unique and significant inputs for datafeeds and desktop services. Together it would create a vertical market constraint.
4. Refinitiv and LSEG are large suppliers of foreign exchange indices and real-time datafeeds, which are significant inputs for index providers. Competitors in index licensing could be shut out from accessing Refinitiv's necessary input data. The Commission has until 27 October 2020 to make a decision.

White Paper on foreign subsidies in the Single Market

On 17 June 2020 the Commission adopted a White Paper dealing with the distortive effects caused by foreign subsidies in the EU's Single Market. The Commission asks for input from all stakeholders through a public consultation by 23 September 2020 and will then prepare legislative proposals.

The Commission states that there is a growing number of instances in which foreign subsidies seem to have facilitated the acquisition of EU companies or distorted the investment decisions, market operations or pricing policies of their beneficiaries, or distorted bidding in public procurement, to the detriment of non-subsidised companies. The Commission considers ways to address the regulatory gap between the EU competition rules, trade defence instruments, public procurement rules and state aid rules.

Module 1 proposes the establishment of a general market scrutiny instrument to capture market situations in which foreign subsidies may cause distortions in the Single Market. Module 2 aims at ensuring that companies would need to notify their acquisitions of EU companies to the Commission as the competent supervisory authority. The notification suspends the acquisition, and the Commission could eventually even could prohibit it. Module 3 addresses foreign subsidies, which may enable bidders to gain an unfair advantage, for example by submitting bids below market price or even below cost. Bidders would have to notify financial contributions received from non-EU countries to the contracting authority, which would then assess whether the bidder may be excluded from the procurement procedure. The White Paper also sets out ways to address the issue of foreign subsidies in the case of applications for EU financial support.

Investigations into Apple's App Store and Apple Pay

On 16 June 2020 the Commission opened investigations into Apple's App Store rules and into Apple's practices and conduct regarding Apple Pay.

The investigations into the App Store are a follow-up on separate complaints by Spotify and by a distributor on the impact of the App Store rules on competition in music streaming and e-books/audiobooks. The Commission's focus is on the mandatory use of Apple's own proprietary in-app purchase system "IAP" for the distribution of paid digital content. Apple charges developers a 30% commission on all subscription fees through the IAP. In addition, the IAP obligation also appears to give Apple full control over the relationship with customers of its competitors subscribing to the app, thus dis-intermediating its competitors from important customer data while Apple may obtain valuable data about the activities and offers of its competitors.

While Apple allows users to consume content purchased elsewhere (e.g. on the website of the app developer) also in the app, its rules prevent developers from informing users about such purchasing possibilities, which are usually cheaper. Apple's competitors have either decided to disable the in-app subscription possibility altogether or have raised their subscription prices in the app and passed on Apple's fee to consumers.

The Commission also opened a separate investigation concerning Apple's terms, conditions and other measures for integrating Apple Pay in merchant apps and websites on iPhones and iPads. The Commission is in particular concerned that Apple Pay is the only mobile payment solution that may access the NFC "tap and go" technology embedded on iOS mobile devices for payments in stores. The investigation will also be concerned with alleged restrictions of access to Apple Pay for specific products of rivals on iOS and iPadOS smart mobile devices.

Acquisition of Bayer's animal health division by Elanco approved

On 8 June 2020 the Commission approved the acquisition of Bayer's animal health division by Elanco. The decision is conditional on the divestment of otitis products and several types of parasiticides.

Elanco Animal Health and Bayer's animal health division both develop, manufacture and market products for pets and livestock worldwide. The transaction would lead to the creation of the second largest animal health company globally. The Commission's investigation focused on the market for pharmaceuticals products for pets and livestock, which are sold to vets, farmers and pet-owners.

The Commission found that the transaction, as originally notified, would have raised competition concerns in a number of countries in the EEA/UK in markets where both companies have strong positions and/or face a limited number of competitors. To address these concerns, Elanco and Bayer offered to divest to one or more suitable purchasers, Elanco or Bayer's products and/or pipelines including all the necessary assets such as applicable licenses, contracts, and brands, as well as relevant studies and data. The Commission concluded that the transaction, as modified by the commitments, would no longer raise competition concerns.

Consultation for a new competition tool

On 2 June 2020 the Commission published an inception impact assessment as well as an open public consultation inviting comments on exploring the need for a possible new competition tool that would allow addressing structural competition problems in a timely and effective manner.

The Commission reflected on the role of competition policy and how it fits in a world that is increasingly digital and globalised, and must become greener. Against this background, the Commission concluded that ensuring the contestability and fair functioning of markets across the economy is likely to require a holistic and comprehensive approach, with an emphasis on three particular aspects: (1) the continued enforcement of the existing competition rules making full use of Articles 101 and 102 of the Treaty; (2) possible post-ante regulation of digital platforms, including additional requirements for those that play a gatekeeper role; and (3) a possible new competition tool to deal with structural competition problems across markets which cannot be tackled in the most effective manner on the basis of the current competition rules (e.g. preventing markets from tipping).

Stakeholders can submit their views until 30 June 2020 and respond to the open public consultation until 8 September 2020. Subject to the outcome of the impact assessment, a legislative proposal is anticipated by the end of 2020.

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