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EU Law News

A bi-monthly review of EU legal developments

affecting business in Europe

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Newsletter November/December 2019

Acquisition of GE's Biopharma by Danaher approved

On 18 December 2019 the Commission approved the proposed acquisition of General Electric's Healthcare Life Sciences Biopharma Business (GE Biopharma) by Danaher.

Danaher is based in the US and designs, manufactures and markets professional, medical, industrial and commercial products and services. GE Biopharma is part of General Electric's Healthcare Life Sciences. Danaher and GE Biopharma are both active in the manufacturing of products and services used in the bioprocessing industries, such as single-use technology products, cell culture media and sera, microcarriers, bioprocessing filtration and chromatography products. The companies are also competitors in other life sciences areas. Their products and services are used for academic research and applied research in industry.

The Commission was concerned that the acquisition would have reduced competition, caused less innovation and enhanced the risk of discontinuation of certain product markets. It included markets such as microcarriers, bioprocess filtration, chromatography and molecular characterisation analyses. In order to address these concerns, Danaher agreed to divest five of its businesses in China, France, the UK and the US. Danaher committed to sell these businesses to a purchaser with experience in the supply of biotech equipment and/or consumables. The final sales of these businesses are conditional upon the Commission's approval of the buyer and that the divested businesses will operate as a viable and competitive force.

The Commission did not find competition concerns in other markets and approved the transaction as modified by the commitments.

Court rules on compensation claims for losses caused by cartels

On 12 December 2019 the European Court of Justice (ECJ) provided in its judgment in the Case C-435/18 Otis important clarifications concerning the link between EU law and national law when regulating actions for compensation for loss caused by a cartel.

The case pending before the Supreme Court of Austria followed an action for compensation brought inter alia by the Land Oberösterreich ('the applicant') against five companies active in the market for the installation and maintenance of lifts and escalators, whose participation in in a cartel had already been established. The applicant had not suffered loss as a purchaser of the products covered by the cartel. However, increased construction costs caused by the cartel led it to grant subsidies in the form of promotional loans for the purpose of financing construction projects affected by the cartel, and in a higher amount than would have been the case in the absence of that cartel. It deprived the applicant of the opportunity to use that difference more profitably. Under Austrian law principles, compensation for purely material losses restrict compensation to losses, which the infringed rule was intended to prevent.

The ECJ considered that effective protection against the negative consequences of an infringement of EU competition rules would be seriously undermined if the right to compensation for losses caused by a cartel was, from the outset, restricted to suppliers and customers in the market affected by the cartel. Subject to the possibility of the participants to a cartel not being held liable to compensate all the losses they could have caused, it is not necessary that the loss suffered by the person affected present a specific connection with the objective of protection pursued by Article 101 of the EU Treaty. Article 101 must be interpreted as meaning that a public body which granted promotional loans to purchasers of products covered by a cartel may request compensation. It is for the national court to determine whether the applicant had the opportunity to make more profitable investments and whether the applicant had established the existence of a causal connection between that loss and the cartel at issue.

Aid for broadband networks approved

In three decisions the Commission approved schemes for high speed and broadband networks in Spain, Bavaria and Ireland, which improve internet connectivity necessary to support the European Digital Single Market.

On 10 December 2019 the Commission approved €400m of public support for new high-speed networks in Spain. It supports areas where no high-speed network is available offering download speeds of at least 30 megabits per second (Mbps). Public consultations will be carried out to ensure that distortions of competition are limited. All networks funded under the measure will offer wholesale access to all operators on an open, transparent and non-discriminatory basis.

On 29 November 2019 the Commission approved German scheme for very high capacity broadband networks in Bavaria. The new network will be capable of offering speeds of 200 Mbps for households and 1 gigabit per second (Gbps) for companies and public institutions. It is in line with the strategic objectives of the Gigabit Communication for public investment and protects incentives for private investments. The aid will be awarded based on open, transparent and non-discriminatory tenders, with all technologies being able to compete.

On 15 November 2019 the Commission approved €2.6bn of public support for the Irish National Broadband Plan. The plan aims to address connectivity deficits across Ireland and to achieve 100% high-speed coverage. The new network will be capable of supporting download speeds of at least 150 Mbps and upload speeds of at least 30 Mbps.

Commission launched €3.2bn support for battery manufacturing

On 9 December 2019 the Commission approved €3.2bn public support by seven Member States for a pan-European research and innovation project in all segments of the battery value chain.

The Important Project of Common European interest ("IPCEI") was jointly notified by Belgium, Finland, France, Germany, Italy, Poland and Sweden to support research and innovation in the common European priority area of batteries. These Member States will provide €3.2bn in funding, which is expected to unlock an additional €5bn in private investments by 2031. The project will involve 17 direct participants, mostly industrial concerns and including small and medium-sized enterprises. There are 70 external partners, such as public research organisations. The Commission launched at the end of 2017 a "European Battery Alliance" with interested Member States and industrial concerns and adopted a Strategic Action Plan for Batteries in May 2018. The IPCEI project is part of these efforts and supports the development of highly innovative and sustainable technologies for lithium-ion batteries such as advanced materials, cells and modules, battery systems and repurposing, recycling and refining.

The Commission has found that the proposed IPCEI on batteries fulfils all the required conditions set out in its Communication, which allows Member States to jointly fill the gap to overcome market failures and boost the realisation of innovative projects. The battery value chain is strategic for the future clean and low emission mobility. The project has a wide scope and its results will be shared with the European scientific community and industry.

Acquisition in portable battery market approved

On 3 December 2019 the Commission approved Varta AG as a suitable purchaser of assets divested by Energizer in order to acquire Spectrum Brands' batteries and portable lighting business.

Varta is based in Germany and active in the development, production, sale, research and development of microbatteries and energy storage solutions for use within a variety of applications and end-user markets. Energizer, based in the US, manufactures and markets consumer batteries sold under the Energizer and Eveready brands, as well as branded portable battery chargers and lighting products. In December 2018, the Commission approved the acquisition of Spectrum Brands' batteries and portable lighting business by Energizer, subject to conditions. In follow up Energizer offered to divest Spectrum's entire activities in Varta-branded and unbranded household and specialty batteries, chargers and portable lighting in Europe, the Middle East and Africa. The Commission concluded that Varta is a suitable purchaser of these Energizer assets.

Energizer also committed to enter into an exclusive supply and license agreement with Varta concerning the sale of Rayovac-branded hearing aid batteries to mass retailers. However, the Commission found that commitments were necessary because Varta is also active in the upstream market for the manufacturing and wholesale of these products. Varta proposed to globally supply hearing aid batteries to any company currently or potentially active in the wholesale supply of such batteries under their own brand for a set period. The Commission also cleared this part of the acquisition.

Investigation into collusion by two French retailers

On 4 November 2019 the Commission opened a formal antitrust investigation to assess whether Casino and Intermarché have coordinated their conduct in the market.

Casino and Intermarché are two of the largest chains of groceries retail shops active in France. They set up a joint venture for the joint procurement alliance of their branded products in 2014. In 2017 and 2019 the Commission carried out unannounced inspections at Casino and Intermarché, as part of its inquiry into possible collusion between retailers through purchasing alliances.

In its Guidelines on horizontal cooperation agreements, the Commission notes that buying alliances usually aim at the creation of purchasing power, which can lead to lower prices or better quality products or services for consumers. However, the multiple contacts between retailers can lead them to collude on their retail sales activities. Market developments in recent years, such as the growth in number of alliances and the changes in partners in alliances, have enhanced the opportunities and risks of such collusion. The Commission is concerned that Casino and Intermarché went beyond the purpose of their alliance and engaged in an anticompetitive conduct, especially whether they coordinated their activities on the development of shop networks and pricing policy.

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