

EU Law News

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

- Investigation into merger of shipbuilders
- Interim measures on Broadcom in TV and modem chipset markets
- €380m temporary aid to charter airline Condor approved
- Investigation into joint ventures by Boeing and Embraer
- Fines for vegetables processing companies
- European Court annuls Commission decision in Starbucks case

Investigation into merger of shipbuilders

On 30 October 2019 the Commission opened an in-depth investigation into the proposed acquisition of Chantiers de l'Atlantique by Fincantieri.

The companies are global leaders in building cruise ships. Fincantieri is Europe's largest shipbuilder. It provides services to ship owners and designs and manufactures mechanical equipment. The Italian State holds the major share of Fincantieri's capital. Chantiers de l'Atlantique's shipyard is located in France and the French Government Shareholding Agency holds the bulk of its capital. In early 2019 the transaction was initially notified for regulatory clearance to France and Germany.

The Commission is concerned that the proposed transaction removes Chantiers de l'Atlantique as an important competitive force in an already concentrated and capacity constrained market. The high barriers to entry are due to the very complex nature of cruise shipbuilding, which requires specific infrastructure, engineering and design capabilities as well as project management skills to coordinate hundreds of suppliers and sub-contractors. It is deemed unlikely that a timely and credible entry from other shipbuilders would counteract the possible negative effects of the transaction. The Commission preliminarily concluded that large customers would not have sufficient buyer power to counteract any risk of price increases. The companies decided not to submit commitments during the initial investigation. The Commission has until 17 March 2020 to make a decision.

Interim measures on Broadcom in TV and modem chipset markets

On 16 October 2019 the Commission ordered Broadcom to stop applying provisions contained in agreements with six of its main customers.

Broadcom is the world leader in the supply of chipsets for TV set-top boxes and modems, including so-called systems-on-a-chip, which combine electronic circuits of various components in a set-top box or modem. They are essential to bring the television signals and connectivity to consumers' premises. Broadcom entered into agreements with six manufacturers of TV set-top boxes and modems. The agreements included obligations and commercial advantages, such as rebates and other benefits, which are conditional on buying systems-on-a-chip for cable modems exclusively from Broadcom.

The Commission concluded that, if Broadcom's ongoing conduct was allowed to continue, it would be likely to affect a number of tenders that would be launched, and also in relation to the upcoming introduction of the WiFi 6 standard for modems and

TV set-top boxes. This could lead to other chipset suppliers being unable to compete with Broadcom. The Commission ordered Broadcom to unilaterally cease the anticompetitive provisions within 30 days and refrain from agreeing the same provisions in other agreements with these customers. The interim measures apply for the earlier of three years, either on the date of adoption of a final decision or the closure of the Commission's investigation.

€380m temporary aid to charter airline Condor approved

On 14 October 2019 the Commission approved Germany's plans to grant a temporary €380m loan to charter airline Condor.

The grant via the German public development bank KfW is a €380m rescue loan to Condor. The airline faces an acute funding shortage following the entry into liquidation of its parent company, the Thomas Cook Group. Condor also had to write off significant claims against other Thomas Cook Group companies. The loan will contribute to ensuring the orderly continuation of air transport services and avoid disruptions for passengers, without unduly distorting competition in the Single Market.

In line with its Guidelines on rescue and restructuring aid the Commission took into account that the loan will be paid out in instalments under stringent conditions. Condor has to demonstrate its liquidity needs on a weekly basis and new instalments will only be paid when all existing liquidity has been used. Germany's bank committed to ensure that after six months the loan will either be fully repaid, or Condor will carry out a comprehensive restructuring. The Commission concluded that the measure helps the orderly continuation of flight services and is compatible with EU state aid rules.

Investigation into joint ventures by Boeing and Embraer

On 4 October 2019 the Commission opened an in-depth investigation into the creation of two joint ventures by aircraft manufacturers Boeing and Embraer.

Boeing designs and manufactures large commercial aircraft and defence, space and security systems and also provides after sales services and support in respect of these activities. Besides Airbus it is one of the two leading manufacturers of single-aisle and twin-aisle large commercial aircraft. Embraer focuses on regional and small commercial aircraft, executive jets and military aircraft. One joint venture is solely controlled by Boeing taking over Embraer's global commercial aircraft business. The second is jointly controlled by the two companies for the marketing of the Embraer KC-390 military aircraft.

The Commission is concerned that the proposed transaction may remove Embraer as the third largest global competitor in the already highly concentrated commercial aircraft industry. Potential entrants from China, Japan and Russia face high barriers to entry. The transaction may therefore result in higher prices and less choice in the segment for small single-aisle commercial aircraft (100-150 seats) in Europe. For the overall single-aisle market (100-225 seats), Embraer has been steadily expanding its customer base and commercial capabilities to sell new aircraft models. Despite Embraer's comparatively small market share it also seems to exert some price constraint on the market leaders Boeing and Airbus even beyond the boundaries of the lower 100-150 seats segment. The transaction may therefore eliminate a small but important competitive force in the concentrated overall single-aisle market. Boeing and Embraer decided not to submit commitments during the initial investigation. The Commission has until 20 February 2020 to make a decision.

Fines for vegetables processing companies

On 27 September 2019 the Commission fined companies Coroos and Groupe CECAB a total of €31.7m for participating in a canned vegetables cartel.

Bonduelle, Coroos and Groupe CECAB participated from 2000 to 2013 in a cartel for canned vegetables. The Commission also opened proceedings against Conserve Italia but this is not covered by this settlement. The companies' aim was to preserve or strengthen their position in the market, to maintain or increase prices, to reduce uncertainty for their future commercial conduct and to formulate and control marketing and trading conditions. They set prices, agreed on market shares and volume quotas, allocated customers and markets, coordinated their replies to tenders, and exchanged commercially sensitive information. The cartel comprised three separate agreements: the first covering private label sales to retailers in the EEA; the second covering canned sweetcorn; and the third covering both own brands and private label sales of canned vegetables to retailers and to the food service industry in France.

Bonduelle received immunity for revealing the cartel and avoided a fine of €250m. Coroos was fined €13.7m and Groupe CECAB €18m (the total of €31.7m). Both benefited from reductions for their cooperation with the investigation under the Leniency and Settlement Notices. One company invoked its inability to pay the fine. The Commission granted a reduction on the basis of the company's financial ratios measuring its financial strength, profitability, solvency, liquidity, and relations with outside financial partners and shareholders. In 2014 the Commission fined Bonduelle, Lutèce and Prochamp €32m in the canned mushrooms cartel and in 2016 it fined Riberebro €5.2m.

European Court annuls Commission decision in Starbucks case

On 24 September 2019 the General Court annulled the Commission's decision on the aid measure implemented by the Netherlands in favour of Starbucks.

In 2008 the Netherlands tax authorities concluded an advance pricing arrangement (APA) with Starbucks Manufacturing EMEA BV (SMBV), part of the Starbucks group, which roasts coffees. The objective of that APA was to determine SMBV's remuneration for its production and distribution activities and its taxable profit in the Netherlands. The arrangement also involved the amount of royalty paid by SMBV to Alki, another Starbucks entity, for the use of Starbucks' roasting intellectual property. In 2015 the Commission found that the APA constituted aid and ordered the recovery.

The Court first clarified that the arm's length principle is a tool that allows it to check that intra-group transactions are remunerated as if they had been negotiated between independent companies under market conditions. The Court therefore rejects the claim that the Commission erred in identifying that principle as a criterion for assessing the existence of state aid.

However, the Court then stated that the Commission wrongly found that the mere choice of the transactional net margin method (TNMM) in the present case, conferred an advantage on SMBV. The Commission would have had to demonstrate that the methodological errors identified in the APA did not allow a reliable approximation of an arm's length outcome to be reached and that they led to a reduction of the tax burden. The Court also found that the Commission failed to demonstrate that the level of the royalty should have been zero or that it resulted in an advantage within the meaning of the Treaty. The Court concluded that the Commission has not managed to demonstrate the existence of an economic advantage within the meaning of Article 107 of the Treaty and annulled the Commission's decision.

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

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