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EU Law News

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

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Newsletter January/February 2018

Commission clears merger between Essilor and Luxottica

On 1 March 2018 the Commission unconditionally approved the proposed merger between Essilor and Luxottica, two leaders in the optical industry.

Essilor, headquartered in France, mainly manufactures and sells ophthalmic lenses. Luxottica, headquartered in Italy, designs, manufactures and distributes prescription frames and sunglasses. The companies operate worldwide and mainly sell complementary optical products to opticians who then sell finished spectacles and sunglasses to consumers. The Commission opened an in-depth investigation to assess whether the merged company might use Luxottica's powerful brands to make opticians buy Essilor lenses and exclude other lens suppliers from the markets.

The investigation found that Luxottica's strongest brands in frames and sunglasses are generally not essential products for opticians. This conclusion is consistent with Luxottica's market share of less than 20% in frames in Europe. The merged company would not be able to exploit any market power in sunglasses to shut out competing suppliers of lenses from the market. Sunglasses are mostly sold without visual correction and account for a small portion of opticians' revenues. The merged company would have limited incentives to engage in practices such as bundling and tying because of the risk of losing customers. Essilor has also insufficient market power and incentives to shut out Luxottica's competitors.

Commission fines car carriers and parts suppliers €546m

On 21 February 2018 the Commission decided to fine cartels covering three car supply industries.

From 2006 to 2012 five carriers formed a cartel in the market for deep sea transport of new cars, trucks and other large vehicles. The Commission's investigation revealed that the carriers' sales managers met at each other's offices, in bars, restaurants or social gatherings and by phone. They coordinated prices, allocated customers and exchanged commercially sensitive elements of pricing, such as charges and surcharges. The carriers agreed to maintain the status quo in the market and to respect each other's traditional business. Carrier MOL received full immunity for revealing the cartel, thereby avoiding a fine. The carriers CSAV, "K" Line, NYK and WWL-EUKOR cooperated fully with the Commission and were fined a total of €395m.

The Commission found that from 2000 until 2011 Bosch, Denso and NGK participated in a cartel concerning the supplies of spark plugs to car manufacturers in Europe. The cartel aimed at avoiding competition by respecting each other's traditional customers and maintaining the status quo. The three companies in some instances agreed on the prices to be quoted, the share of supplies to specific customers and the respect of historical supply rights. The Commission imposed a total fine of €76m. Denso received full immunity for revealing the cartel.

In a third decision the Commission fined two cartels covering car braking systems that operated between 2007 and 2011. For the supply of hydraulic braking systems the cartel involved TRW, Bosch and Continental and for the supply of electronic braking systems Bosch and Continental. In both cartels, the three car part suppliers aimed at coordinating their market behaviour by exchanging price information via bilateral meetings, phone conversations or emails. The Commission imposed a total fine of €75m taking into account immunity for TRW in the first and Continental in the second cartel.

Investigation into proposed merger of Praxair and Linde

On 16 February 2018 the Commission opened an in-depth investigation to assess the proposed merger between Praxair and Linde, both global suppliers of industrial and medical gases.

Linde is headquartered in Germany and Praxair in the United States. They are two of the four largest worldwide suppliers of industrial, medical and speciality gases as well as related services, including engineering and surface-coating technologies. They supply, for example, carbon dioxide to the carbonated drinks industry, oxygen for steel production and helium for the functioning of MRI scanners.

The Commission will investigate risks of price increases due to the market power of the merged entity or the higher likelihood of coordination between remaining players in the markets. Other players only have regional, national or local presence and lack the technical and financial capabilities. New entrants face high investments necessary to establish a meaningful position in the market. The Commission will now carry out an in-depth investigation and has until 4 July 2018 to make a decision.

State aid approved for six electricity capacity mechanisms

On 7 February 2018 the Commission approved electricity capacity mechanisms in Belgium, France, Germany, Greece, Italy and Poland to help safeguarding security of electricity supply. The approval concerns more than half of the EU population and covers different ways to address the specific need in each Member State, namely strategic reserves, market-wide mechanisms and measures specifically promoting demand response.

The Commission authorised temporary strategic reserves in Belgium and Germany for use only in case of emergencies. Both markets are undergoing transitions and reforms, exemplified by Belgium's high reliance on an ageing nuclear fleet and the phase-out of nuclear electricity generation in Germany. In the cases of Italy and Poland the Commission approved market-wide capacity mechanisms. Italy demonstrated that a significant amount of capacity risks exiting the market and new investments are unlikely to take place. Poland proved that it is faced with market failures in the electricity supply that prevent prices from incentivising power generators to keep existing capacity or to invest in new capacity. For France and Greece the Commission authorised temporary measures promoting demand response schemes. These schemes pay customers to reduce their electricity consumption in hours when electricity is scarce, thereby allowing operators to react quicker than electricity generators. Moreover, it is generally more environmentally friendly in case of extreme demand peaks during cold weather.

The Commission's approvals of the state aid mechanisms require that the allocation of support will be done by tenders open to all types of capacity providers. As part of its Energy Union Strategy the Commission took into account the 2016 inquiry on capacity mechanisms as well as the clean energy and market design package to create investment incentives and enable development of renewables.

Commission fines Qualcomm almost €1bn; approves acquisition of NXP

On 24 January 2018 the Commission fined Qualcomm €997m for abusing its market dominance in chipsets.

Baseband chipsets enable smartphones and tablets to connect to cellular networks and are used both for voice and data transmission. Qualcomm is by far the world's largest supplier of chipsets that comply with the 4G Long-Term Evolution (LTE) standard. Intel, the largest supplier for chipsets used in computers, tried to challenge and compete with Qualcomm. However between 2011 and 2016 Qualcomm prevented rivals from competing in the market by making significant payments to its key customer Apple on the condition it would not buy from rivals for its iPhone and iPad devices. Apple would have had to return to Qualcomm a large part of the payments if it decided to switch suppliers. Internal Apple documents show that Qualcomm's exclusivity condition was a material factor in Apple's decision not to switch. Just before the expiry of the agreement in September 2016, Apple started to source part of its chipsets from Intel. The Commission concluded that Qualcomm abused its market dominance and its behaviour denied consumers and other companies choice and innovation in a sector with a huge demand and potential for innovative technologies. Qualcomm did not demonstrate that the exclusivity condition created any efficiencies.

On 18 January 2018 the Commission gave conditional approval of Qualcomm's proposed acquisition of NXP. Both firms are important players in the semiconductor industry with highly complementary products and a significant amount of intellectual property. NXP is known for near-field communication (NFC) and secure element chips for smartphones. These chips are used for secure payment transactions on smartphones as well as several transport and automotive applications. To address the Commission's concerns Qualcomm committed to offer licenses to NXP's MIFARE technology and trademarks for an eight-year period on terms that are at least as advantageous as those available today. It also committed to providing interoperability between its own baseband chipset and products it acquires from NXP with the corresponding products of other companies. Qualcomm offered to not acquire NXP's standard essential NFC patents. Qualcomm would still acquire certain other NXP's non-standard essential NFC patents. However, Qualcomm committed, for as long as it owns these patents, not to enforce its rights against other companies; and to grant worldwide royalty-free licenses to these patents.

UPS lodges claim against the Commission

On 26 February 2018 it became public that United Parcel Service (UPS) had filed in December 2017 a case with the European General Court to recover €1.7bn from the Commission. UPS claims the compensation over the Commission's 2013 decision to block the €5bn takeover of TNT Express by UPS. In the 2013 decision the Commission stated that the take-over would have restricted competition in 15 Member States for the express delivery of small packages to other European countries. The acquisition would have reduced the number of significant players in that market to only three, or even two, sometimes leaving DHL as the only alternative to UPS.

On 7 March 2017 the General Court annulled the Commission's decision on the ground of a procedural irregularity. The Commission had infringed UPS's rights of defense by relying on a different econometric model in its analysis than that used in previous exchanges of views and arguments. UPS claims these breaches in turn caused the applicant's loss because, had they not taken place, UPS would have acquired TNT. Meanwhile, the Commission has appealed to the European Court of Justice against the annulment of its decision by the General Court. The two courts may decide to consider each case in parallel. Alternatively the General Court may delay its decision on UPS' compensation claim until the Commission's appeal is concluded.

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

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