

## EU Law News

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

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- Commission approves German rescue aid for Air Berlin
- Polish motorway operator to repay €210m
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## General Court must reconsider Intel case

Intel appealed against the Commission's 13 May 2009 decision to fine it €1.06bn. By judgment of 12 June 2014 the General Court of the European Court of Justice (ECJ) dismissed Intel's action in its entirety. However, on 6 September 2017 the Grand Chamber of the ECJ ruled that the General Court was required to examine all of Intel's arguments concerning the "as-efficient-competitor" test and instructed the General Court to consider whether the Commission has correctly applied that test in the case of Intel's loyalty rebates.

In 2009 the Commission had decided that Intel abused its dominant position on the worldwide market for x86 CPUs from 2002 to 2007 by implementing a strategy aimed at foreclosing competitor Advanced Micro Devices from the market. It considered that Intel was in a dominant position because it held a market share of 70% or more and that it was extremely difficult for competitors to enter the same market. Intel granted rebates to four major computer manufacturers on the condition that they purchased from Intel all, or almost all, of their x86 CPUs. Intel similarly awarded payments to retailer Media-Saturn on the condition of exclusively selling computers containing Intel's x86 CPUs. The Commission found that those rebates and payments induced the loyalty of the four manufacturers and of Media-Saturn, leading to its decision to fine Intel.

Some 40 years ago the ECJ ruled in the case Hoffmann-La Roche that exclusivity rebates are deemed abusive by nature. In the Intel case the ECJ now seems to request a more robust economic analysis when dominant companies offer rebates to customers.

## Commission approves German rescue aid for Air Berlin

On 4 September 2017 the Commission endorsed the plan by German public credit institution KfW to grant Air Berlin a €150m bridging loan.

Air Berlin's main shareholder, Etihad, which is the second-largest airline of the United Arab Emirates, stopped its financial backing in summer 2017. According to the Commission, the German measure will allow for the orderly wind-down of the insolvent Air Berlin without unduly distorting competition in the Single Market. The purpose of the loan is to allow Air Berlin to continue operations in the coming months, with the aim of maintaining its services while it concludes negotiations to sell its assets. At the end of the process, Air Berlin is expected to cease operating and exit the market.

The Commission has taken account of the fact that the loan will be drawn down in instalments. Air Berlin 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 committed to ensure that either the loan will be fully repaid or Germany will submit a winding down plan for Air Berlin. The Commission therefore concluded that the aid measure will help to protect the interests of air passengers and that it is compatible with state aid rules.

## Polish motorway operator to repay €210m

On 25 August 2017 the Commission concluded that Autostrada Wielkopolska S.A. (AWSA), the operator of the Polish A2 motorway, was overcompensated for a change in Polish law on toll motorways. AWSA has to repay around €210m to the Polish State.

In 2005 the Polish authorities exempted heavy goods vehicles with a valid vignette from the obligation to pay motorway tolls as it was in breach of EU transport rules (Directive 1999/62/EC). Previously these vehicles had been liable to pay both tolls and vignette fees. At the same time the authorities decided to compensate motorway operators for their resulting loss in revenue. This compensation was agreed with each motorway operator individually.

In the case of AWSA the terms of the compensation were set out in an annex to its original concession agreement. Poland notified the Commission in 2012 that they had overcompensated AWSA. Instead of using the most up-to-date study from 2004 AWSA relied on a study from 1999, which estimated a significantly higher level of traffic and revenue and thus led to higher expected profitability. The Commission confirmed that AWSA was entitled to receive compensation but that the difference between the compensation paid and the estimates based on the updated 2004 figures amounted to an undue economic advantage to AWSA. The compensation actually paid to AWSA went beyond the direct effects of the legislative change and improved its expected financial situation.

## In-depth investigation into Bayer's acquisition of Monsanto

On 22 August 2017 the Commission opened an in-depth investigation to assess the proposed acquisition of Monsanto by Bayer. The Commission is concerned that the merger, making it the largest integrated company in the industry, may reduce competition in key agricultural markets.

The transaction would take place in industries that are already globally concentrated, as illustrated by the recent mergers of Dow and Dupont and Syngenta and ChemChina, in which the Commission intervened to protect competition. The Commission

is concerned that the acquisition could lead to higher prices, lower quality, less choice and less innovation in three areas. Monsanto's pesticide product glyphosate is the most sold non-selective herbicide in Europe. Bayer produces glufosinate ammonium, one of the very few alternatives to glyphosate. They are two of few competitors capable of discovering new active ingredients and developing new formulations, including addressing the growing problem of weed resistance to existing products. The Commission will also assess the competition in biological pesticide products.

The companies have high combined market shares in a number of vegetable seeds markets. They are active in the breeding and licensing of seeds for several field crops such as rape seeds in Europe. Both parties are important licensors of cotton seeds to their competitors in Europe and are investing in research and innovation programs for wheat.

A trait is a characteristic of a plant, such as height, herbicide tolerance and insect or disease resistance. Monsanto has a dominant position in several traits markets worldwide. Bayer is one of its few competitors. The Commission will investigate whether the merger could lead to a reduction of competition in these markets.

Finally, the Commission will investigate whether competitors' access to distributors and farmers could become more difficult as a result of the merger. Both Bayer and Monsanto are currently investing in the emerging technology of digital agriculture with the aim of providing tailored advice or aggregated data to farmers. The Commission is co-operating closely with other competition authorities worldwide and has until 8 January 2018 to take a decision.

## Objections to Visa's inter-regional interchange fees

On 3 August 2017 the Commission sent a supplementary statement of objections to Visa Inc. and Visa International concerning fees charged on payments made by travellers with cards issued outside the European Economic Area (EEA) for purchases in the EEA.

The statement is a further step in the Commission's ongoing investigation into the collective setting of the fees that merchants are charged by the Visa card holder's bank for each Visa card payment carried out at their shops. The cost increase caused by these fees is not charged directly to the Visa card user but is spread across all consumer transactions at different merchants (shops). It could potentially lead to higher prices for consumer goods and services.

In 2014 the Commission adopted a decision that rendered legally binding commitments from Visa Europe and closed the

proceedings against it. The current supplementary statement of objections covers inter-regional interchange fees which represent an important part of the total fees within the Visa scheme. These fees are charged on purchases made in the EEA with cards issued outside the EEA. The Commission will analyse the procedures that were not already addressed by the Visa Europe commitments of 2014. Its focus will be on inter-regional fees applied on transactions with consumer credit cards as well as debit cards. The Commission takes into account the fact that in June 2016 Visa Europe became a subsidiary of Visa Inc. and ceased to exist as a separate undertaking.

## Commission approves public support for Frankfurt-Hahn airport

On 31 July 2017 the Commission approved public support by the State of Rhineland-Palatinate for Frankfurt-Hahn airport in Germany.

Frankfurt-Hahn airport is a regional airport located about 120 kilometers west of Frankfurt airport. In 2016, the airport's traffic was around 2.6 million passengers and 72,600 tonnes of cargo. It is currently loss-making. Since 2009, it has been controlled by the State which on 1 March 2017 signed a share purchase agreement with the Chinese HNA Group for the sale of its 82.5% of shares in the airport. The measure aims to cover the airport's expected operating losses over the period 2017-2021 of up to €25.3m. Less state aid will be paid out if the operating losses turn out to be lower than that amount.

According to the 2014 Aviation Guidelines public funding is allowed to cover the operating losses of smaller regional airports until 2024 on the condition that a credible business plan is presented. The Commission found that public funding to the Frankfurt-Hahn airport will cover the operating losses whilst the HNA Group makes the necessary private investment to enable the airport's return to viability, which is due in 2023. The airport is also located in an economically weaker area within Germany and is responsible for providing 11,000 jobs. There are no other airports located in a radius of 100 km, which reduces the potential negative effects of the support on competition and trade. On this basis the Commission approved the operating aid.

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

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