

EU Law News

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

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Brexit and competition law

The political guidelines for the Brexit negotiations adopted by the 27 Heads of State or Government on 29 April 2017 contain a statement of relevance for future competition law: “any free trade agreement ... must ensure a level playing field, notably in terms of competition and state aid, and in this regard encompass safeguards against unfair competitive advantages through, inter alia, tax, social, environmental and regulatory measures and practices.” On 3 May 2017 the Commission recommended that the “UK withdrawal agreement should respect ... the role of the Court of Justice of the European Union. ... an alternative dispute settlement should only be envisaged if it offers equivalent guarantees of independence and impartiality to the Court.” The Council will meet on 22 May 2017 to authorise the opening of negotiations. A first meeting between negotiators is likely to be held after the UK election in June. The guidelines refer to competition issues in the context of a potential free trade agreement that would take much time to negotiate and might contain provisions that require the approval of parliaments in each of the remaining 27 member states. It would therefore probably take several years after Brexit for a comprehensive agreement on competition issues to enter into force. Assuming that the parties maintain their current positions, the following seems plausible.

The EU will no longer have competence to rule on mergers, anticompetitive behaviour or the granting of state aid in the UK. While the EU will have the competence to act if measures in the UK have an effect in the EU, it will not be able to enforce its decisions in the UK. The competition law rules that are harmonised and well-working in the European Economic Area (EU plus Norway, Liechtenstein and Iceland) neither will apply to the UK nor will they serve as an acceptable model for the UK government. The competition law rules that apply between the EU and Switzerland, might serve as an acceptable model for both the EU and the UK especially for the exchange of information between the competition authorities in merger control and antitrust cases. Finally, EU state aid law will no longer be applicable in the UK and, while WTO anti-subsidy rules will continue to apply, they provide much less protection for companies that are harmed by subsidies granted to competitors. For more on the impact of Brexit click [here](#).

Strengthening competition authorities and whistleblower tool

On 27 April 2017 the Court of Justice ruled in the Case C-469/15 (banana importer Pacific Fruit) that in proving a cartel the Commission can rely on and use as evidence documents that were legally transmitted by national authorities other than competition authorities. In this case the Commission had received copies of documents from the Italian finance police. The Court agreed that these documents could be used as evidence in proving the cartel, as long as this transmission had not been declared unlawful under national law. The Court confirmed that the rules on coop-

eration between authorities in the European Competition Network would not prevent the Commission from using such information purely on the ground that it was obtained for other purposes.

On 22 March 2017 the Commission proposed new rules to enable Member States' competition authorities to be more effective. Since 2004, the Commission and national competition authorities have adopted over 1,000 decisions and over 85% of all the decisions that applied EU antitrust rules were taken by national competition authorities. The proposal is intended to ensure that national authorities can work independently and impartially, have the necessary financial and human resources and can gather all relevant evidence, such as the right to search mobile phones, laptops and tablets. The proposal includes rules on parental liability and succession so that companies cannot escape fines through corporate re-structuring. Authorities will be able to enforce the payment of fines against infringing companies that do not have a legal presence on their territory. Finally, coordinated leniency programmes are to encourage companies to come forward with evidence of cartels. The proposed Directive will be sent to the European Parliament and Council for adoption.

On 16 March 2017 the Commission introduced an anonymous whistleblower tool to make it easier for individuals to alert the Commission about cartels and antitrust violations. The tool would protect whistleblowers' anonymity through an encrypted messaging system that allows two way communications via an external service provider.

Syngenta's acquisition by ChemChina approved

On 5 April 2017 the Commission approved the acquisition of Syngenta by ChemChina. Syngenta is a leading pesticide supplier worldwide and ChemChina is active in pesticide markets in Europe through Adama. Syngenta produces pesticides based on active ingredients it has developed itself. Adama is the world's biggest producer of generic pesticides.

To obtain approval ChemChina offered a divestment package to ensure that effective competition is preserved in pesticide and plant growth regulator markets. The sale of Adama's products under development also ensures the viability and competitiveness on a lasting basis.

Dow and DuPont merger approved

On 27 March 2017 the Commission approved the proposed merger between US-based chemical companies Dow and DuPont. The Commission believed the merger as notified would have reduced competition on price and choice in a number of markets for existing pesticides. It would also have reduced innovation, which is a key element of competition between companies

in the pest control industry, where only five players (BASF, Bayer, Syngenta and the merging parties) are globally active throughout the entire R&D process. To address this Dow and DuPont will remove the overlap in markets, by divesting the relevant DuPont pesticide businesses. They will also divest almost all of DuPont's global R&D organisation. The Commission concluded that the divestment package enables a buyer to sustainably replace DuPont's competitive position.

Both companies are also important players in certain petrochemical products. The Commission had concerns regarding the acid co-polymer market, where the number of competitors would be reduced from four to three. The Commission also had concerns due to the strengthening of DuPont's dominant position in the ionomer market, which are products used in packaging and adhesive applications. The companies promised to divest relevant assets in Dow's petrochemical business to preserve effective competition.

Deutsche Börse AG and London Stock Exchange merger blocked

On 29 March 2017 the Commission prohibited the proposed merger between the Deutsche Börse AG and the London Stock Exchange Group.

The Commission's investigation concluded in particular that the merger would have created a de facto monopoly in the markets for clearing fixed income instruments. The proposed merger would have combined the two largest European stock exchange operators. Deutsche Börse AG and London Stock Exchange Group own the stock exchanges in Germany, Italy and the United Kingdom, as well as several of the largest European clearing houses. The merger would have combined the Frankfurt based Eurex with clearing houses in London, Paris and Rome. Of the €3.4 trillion worth of bond trades in the European Economic Area last year almost all was cleared by the two groups.

The Commission's second concern was the knock-on effect on downstream markets for the settlement, custody and collateral management of fixed income instruments. Companies that are active in those markets depend on a flow of transactions from the clearing houses – a so-called transaction feed. Deutsche Börse's subsidiary Clearstream competes in those markets and its main competitor, Euroclear, depends on transaction feeds from the London Stock Exchange Group. The merged entity would have diverted feeds to Clearstream, denying Euroclear a flow of transactions that it depends on. A third concern was that the merger would have reduced competition for trading and clearing another type of product, the single stock equity derivatives.

The companies offered to sell off LCH.Clearnet SA, a clearing house based in France. However, the Commission deemed that insufficient because after the merger LCH.Clearnet SA

would have been dependent for business on its main competitor, the merged entity. Although suggested by the Commission as a remedy to meet its concerns, the London Stock Exchange decided not to offer selling MTS, which is a small business in that market. Instead, at a very late stage of the procedure, the companies proposed a complex bundle of behavioural measures in addition to the divestment of LCH.Clearnet SA. However, the Commission decided it would not have made LCH.Clearnet SA a viable competitor in clearing fixed income products in the long term.

€155m fine for suppliers of car air conditioning and engine cooling components

On 8 March 2017 the European fined six companies a total of €155m for taking part in one or more of four cartels concerning supplies of air conditioning and engine cooling components.

The suppliers are Denso, Valeo, Behr, Sanden, Panasonic and Calsonic and are concerned with the supply of main parts to adjust the temperature for the passengers and the engine via air conditioning units, compressors, engine radiators and fans. The companies coordinated prices or markets, and exchanged sensitive information on the sale of the components they supplied to car manufacturers in Europe. Coordination between the six suppliers took place in Europe but also in Asia. The exchanges included discussions on prices and on so-called 'requests for quotations' issued by car manufacturers to source components for their cars. The Commission's investigation revealed the existence of four separate infringements. Denso was not fined for three of the cartels and Panasonic was not fined for one of the cartels as they revealed its existence to the Commission. Other companies obtained reductions of their fines for their cooperation with the Commission investigation.

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

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