

## EU Law News

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

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## Support for renewable energy in Lithuania and cogenerated electricity in Poland

On 23 April 2019 the Commission approved a scheme to support electricity production from renewable energy sources in Lithuania. The scheme will be applicable until 1 July 2025 or, alternatively, until a 38% target share of renewable energy is reached. The budget of €385m will be open to all renewable energy installations and be disbursed in the form of a premium, which will be set through a competitive bidding process. The final premium will not be set at a level greater than the difference between the electricity market price and the average production costs of the most cost-efficient renewable energy technology in Lithuania. The Commission found that the aid has therefore an incentive effect and the beneficiaries will have to apply for the aid before the generating installations start operating. The aid is proportionate, is limited to the minimum necessary, and promotes renewable energy without unduly distorting competition.

On 15 April 2019 the Commission approved a Polish scheme to support high-efficiency combined heat and power installations connected to district heating networks in Poland. The annual budget of €500m will run until 31 December 2028 and support will be granted to new and refurbished installations. It will also be open for application to generators in other Member States. The Polish cogeneration support scheme is financed through a surcharge levied on final electricity consumers, based on their electricity consumption. The Commission also found that the proposed reductions in surcharges for energy-intensive users are in line with state aid rules. However, it opened an in-depth investigation into capacity mechanism surcharge reductions.

## Commission fines GE €52m for providing incorrect information in a merger control case

On 8 April 2019 the Commission fined General Electric (GE) €52m for providing incorrect information during the Commission's investigation of GE's planned acquisition of LM Wind.

The EU Merger Regulation obliges companies to provide correct information that is essential for the Commission to review mergers and takeovers in a timely and effective manner. On 11 January 2017 GE notified its proposed acquisition of LM Wind and stated that it did not have any higher power output wind turbine for offshore applications in development beyond its existing 6 megawatt turbine. However, through information collected from a third party, the Commission found that GE was simultaneously offering a 12 megawatt turbine to potential customers. On 2 February 2017 GE withdrew its notification of the acquisition. On 13 February 2017 GE re-notified the

same transaction, this time including complete information. On 20 March 2017 the Commission approved the proposed acquisition. On 6 July 2017 the Commission addressed a Statement of Objections to GE alleging that it had breached its procedural obligations under the Merger Regulation.

The Commission's investigation now confirmed that, contrary to GE's statements in its first notification in January 2017, GE had indeed been offering a higher power output offshore wind turbine. GE's statement in the first notification was therefore incorrect. The decision has no impact on the Commission's approval of the transaction as this was based on the complete and correct information provided in the second notification.

## ECJ rules against Commission on renewable energy State Aid in Germany

On 28 March 2019 the European Court of Justice (ECJ) annulled the decision in which the Commission had stated that the German law on renewable energy of 2012 (EEG) involved state aid.

In 2012 Germany introduced a scheme to support undertakings producing electricity from renewable energy sources and mine gas. It guaranteed those producers a price higher than the market price. In order to finance that support measure it imposed an 'EEG surcharge' on the suppliers of energy to final customers. However, certain electricity-intensive undertakings in the manufacturing sector were eligible for a cap on that (passed on) surcharge in order to maintain their international competitiveness.

On 25 November 2014 the Commission found that, while the support for undertakings producing EEG electricity constituted state aid, this aid however was compatible with EU law. It also classified the reduction of the EEG surcharge for electricity-intensive undertakings as state aid but ordered recovery in respect of a limited part of the reductions only. Germany brought an action before the General Court which dismissed this action on 10 May 2016.

Germany appealed to the ECJ. The ECJ found that the EEG surcharge could not be qualified as a public levy since the EEG did not require suppliers of energy to final customers to pass on the amounts paid in respect of the EEG surcharge to those customers. The ECJ also found that the General Court failed to establish that Germany held a power of disposal over the funds generated by the EEG surcharge or even that it exercised public control over the management of those funds. The ECJ concluded that the Commission failed to establish that the advantages provided for by the EEG involved state resources and therefore constituted state aid. It not only set aside the judgment of the General Court but also annulled the Commission's decision.

## Commission fines Nike €12.5m for restricting cross-border sales

On 25 March 2019 the Commission fined Nike €12.5m for banning traders from selling licensed merchandise to other countries in Europe. It concerned merchandising products of some of Europe's best-known football clubs and federations for which Nike held the license.

Nike designs and sells athletic footwear and apparel. Its products generally feature Nike's registered trademarks such as its name or the "Swoosh" logo. Other products, so-called "licensed merchandise", only feature the brands of a football club or a federation. Nike grants licenses to third parties who can manufacture and distribute those products.

The Commission's investigation found that Nike imposed direct measures restricting out-of-territory sales by licensees, obligations to refer orders for out-of-territory sales to Nike and double royalties for out-of-territory sales. Nike also enforced indirect measures, for instance threatening licensees with ending their contract if they sold out-of-territory, refusing to supply "official product" holograms and carrying out audits. Nike prohibited licensees from selling to retailers who could be selling outside the allocated territories. Nike obliged licensees to pass on these prohibitions in their contracts and intervened to ensure that retailers stopped purchasing products from licensees in other territories.

The Commission concluded that Nike's practices between 2004 and 2017 partitioned the Single Market. It granted Nike a 40% fine reduction in particular because Nike provided information that allowed the Commission to extend the scope of the case.

## Commission fines Google €1.49bn for abusive practices in online advertising

On 20 March 2019 the Commission fined Google €1.49bn for breaching EU antitrust rules. According to the Commission, Google abused its market dominance by imposing a number of restrictive clauses in contracts with third-party websites which prevented its rivals from placing their search adverts on these websites.

Through AdSense for Search, Google provides search adverts to owners of publisher websites. Google acts as an intermediary between advertisers and these website owners that want to profit from the space around their search results pages. Google is dominant in the European market for online search advertising intermediation since at least 2006 with market shares exceeding 85% for most of the period.

The market is characterised by high barriers to entry. It is impossible for competitors in online search advertising such

as Microsoft and Yahoo to sell advertising space in Google's own search engine results pages. Therefore, third-party websites represent an important entry point for competitors of Google to grow their business. However, Google's contracts for its intermediation services with these important publishers included, since 2006, exclusivity clauses through which publishers were prohibited from placing any search adverts from competitors on their search results pages. As of 2009 Google gradually began replacing the exclusivity clauses with "Premium Placement" clauses. These required publishers to reserve the most profitable space on their pages for Google's adverts and request a minimum number of Google adverts. Google also required publishers to seek written approval before making changes as to how any rival adverts were displayed.

In the Commission's view, Google did not demonstrate that the clauses created any efficiencies capable of justifying its practices. The Commission concluded that Google has abused this market dominance by preventing rivals from competing in the online search advertising intermediation market.

## Commission launches online tool for leniency and settlements

On 19 March 2019 the Commission launched "eLeniency", an online tool designed to make it easier for companies and their legal representatives to submit statements and documents as part of leniency and settlement proceedings in cartel cases as well as non-cartel cooperation cases. The new tool allows companies to file statements and submissions online as part of leniency applications to receive immunity or a reduction of fines. They are no longer obliged to come to the Commission's premises to provide oral statements.

Users of eLeniency can directly provide statements and documents on a dedicated secure server provided by the Commission. eLeniency can be used for providing replies to requests for information. The same applies for cartel settlement procedures or when a company cooperates in non-cartel proceedings with a view to acknowledging an infringement of Article 101 or 102 of the Treaty. According to the Commission, corporate statements under the Leniency Notice that are made via eLeniency are protected against discovery in civil litigation in the same way as oral submissions.

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

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