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EU Law News

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

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Newsletter November/December 2016

Facebook and WhatsApp takeover

On 20 December 2016 the Commission sent a statement of objections to Facebook alleging that the company provided incorrect or misleading information during the Commission's 2014 investigation of Facebook's planned acquisition of WhatsApp. The Commission cleared that proposed acquisition in 2014 based on the impact on markets for consumer communications, social networking and online advertising. In its notification and in a reply to a request of information, Facebook indicated to the Commission that it would be unable to establish reliable automated matching between its users' accounts with WhatsApp users' accounts. In August 2016, however, WhatsApp announced the possibility of linking WhatsApp user phone numbers with Facebook user identities. It explained that this was done to improve services by allowing better friend suggestions or displaying more relevant ads.

The Commission takes the view that, contrary to Facebook's statements, the technical possibility of matching users IDs already existed in 2014. It has concerns that Facebook intentionally, or negligently, submitted incorrect or misleading information to the Commission in breach of its obligations under the EU Merger Regulation. The current investigation is limited to the assessment of breaches of procedural rules and is unrelated to neighbouring privacy, data protection or consumer protection issues. The Commission could impose a fine of up to 1% of Facebook's annual turnover. Facebook now has until 31 January 2017 to respond to the Commission's statement.

Commission clears German energy network reserve

On 20 December 2016 the Commission approved German state aid plans to put in place for four years a reserve to ensure sufficient electricity capacity in Southern Germany in order to maintain security of supply without unduly distorting competition in the Single Market. Under the scheme, German transmission system operators pay operators of power plants that have notified their intention to close down but that are relevant to keep the electricity system in balance for remaining available to the network. In addition, foreign power plants located for instance in Austria and Italy can also be contracted to increase or decrease production to keep the grid in balance.

The Commission found that the German intervention is necessary in view of severe congestion in the electricity grid that prevents sufficient power flows from Northern to Southern Germany. Because Germany committed to undertake substantial investment in its grid infrastructure the Commission has approved the scheme as a temporary measure until June 2020. The Commission also found amendments to the German renewable energy scheme to be in line with EU state aid rules. Auctions will promote the steady deployment of renewable energy whilst maintaining competition in the German energy market.

The Commission took eight decisions approving state aid in the energy sector: (i) and (ii) 12 December: French and Danish schemes for renewable energy; (iii) 6 December: Belgian plans to finance electricity generation from offshore renewable energy; (iv) 28 November: installations producing renewable energy built in the Czech Republic between 2006 and 2012; (v) and (vi) 24 and 18 November: Romania's and Poland's plans for closing uncompetitive coal mines by 2018; (vii) 16 November: the renewable electricity and high efficiency cogeneration in Greece; (viii) 8 November: the plans for a capacity mechanism in France.

Battery producers fined €166m in cartel settlement

On 12 December 2016 the Commission fined Sony, Panasonic and Sanyo a total of €166m. The three companies and Samsung SDI coordinated prices and exchanged sensitive information on supplies of rechargeable lithium-ion batteries used in many portable electronic consumer goods.

The cartel contacts took place mainly in Asia and occasionally in Europe between 2004 and 2007. The bilateral and multilateral contracts took place to avoid aggressive competition in the market. The companies agreed on temporary price increases in 2004 and 2007 triggered by the price increase of cobalt, a metal used in the production of lithium-ion batteries. They also exchanged commercially sensitive information such as supply and demand trends, price forecasts or intentions concerning competitive bids organised by manufacturers of phones, laptops or power tools.

Samsung SDI was not fined as it revealed the existence of the cartel to the Commission. All companies acknowledged their involvement and agreed to settle the case. They benefited from reduced fines as a result of their cooperation with the Commission's investigation under the 2006 Leniency Notice.

Commission fines banks €485m for interest cartel

On 7 December 2016 the Commission fined Crédit Agricole, HSBC and JPMorgan Chase €485m for participating in a cartel in euro interest rate derivatives. Interest rate derivatives are financial products such as forward rate agreements, interest rate swaps or options, which are used by companies for managing the risk of interest rate fluctuations or for speculation on financial markets. They derive their value from the level of a benchmark interest rate, such as the Euro Interbank Offered Rate (EURIBOR) and/or the Euro Over-Night Index Average

(EONIA). The EURIBOR rate reflects cost of interbank lending in euros and is based on individual quotes submitted daily by a panel of banks to a calculation agent. This market mechanism is very important not only to banks but also to many companies, which use euro interest rate derivatives to hedge their financing risk.

The cartel operated in the European Economic Area between 2005 and 2008. The participating traders were in regular contact through corporate chat-rooms or instant messaging services. Their aim was to distort the normal course of pricing components for euro interest rate derivatives. They did this by telling each other their desired or intended EURIBOR submissions and by exchanging sensitive information on their trading positions or on their trading or pricing strategies.

The fines took into account the value of sales concerned, how long the banks participated in the cartel and the geographic scope. The three banks cooperated together with Barclays, Deutsche Bank, the Royal Bank of Scotland and Société Générale that had chosen to settle with the Commission in 2013 for an amount of €820m. Over the past three years the Commission has taken six decisions on cartels imposing fines in this matter of more than €2bn in total.

Acquisition of LinkedIn by Microsoft approved subject to conditions

On 6 December 2016 the Commission approved the proposed acquisition of LinkedIn by Microsoft, conditional on compliance with a series of commitments aimed at preserving competition between professional social networks in Europe. For professional social network services, the Commission was concerned that Microsoft would pre-install LinkedIn on all Windows PCs and integrate it with Microsoft Office as well as combining user databases. This could have been reinforced by shutting out LinkedIn's competitors from access to Microsoft's interfaces, which would make it harder for new players in social networks. Microsoft offered three commitments for a five year period which will be monitored by a trustee:

- PC manufacturers and distributors would be free not to install LinkedIn on Windows and allowing users to remove LinkedIn from Windows.
- Competing professional social network service providers would be allowed to maintain interoperability with Microsoft's Office products through the add-in program and Office application programming interfaces.
- Competing professional social network service providers would be granted access to “Microsoft Graph”, a gateway for software developers who can potentially use it to drive subscribers and professional social networks.

On the market for customer relationship management (CRM) software solutions the Commission found that, while the customer base of the two products does overlap, LinkedIn's product is one of several on the market and does not appear to be a “must have” solution. Microsoft is a relatively small player in the CRM market, where it faces strong competitors, such as Salesforce, Oracle and SAP. The companies' activities only overlap in relation to display advertising. The Commission had no concerns regarding the marketing of user data that can be used for advertising purposes.

ECJ dismisses appeal by Philips and Infineon

On 15 December 2016 the European Court of Justice (ECJ) dismissed the appeal by Philips and Infineon and upheld fines imposed by the Commission in the smart card chip market cartel. In 2014 the Commission imposed fines totalling €138m on four companies for having coordinated the smart card chip market through a network of bilateral contacts and exchanges about commercially sensitive price information. Renesas was granted immunity for having informed the Commission of the existence of the cartel. Infineon obtained a reduction of 20% in fines while Samsung obtained a reduction of 30% for having provided information with significant added value. The Commission imposed a fine of €83m on Infineon and €20m on Phillips. Infineon and Philips brought actions before the ECJ to contest the existence of a cartel and the amounts of the fines imposed on them.

The ECJ confirmed that Philips and Infineon had coordinated practices to a sufficient degree of harm to competition, i.e. slowing down the price decrease on the smart card chip market, without there being any need to analyse the effects of the practices on the market. The ECJ stated that the documentary and witness evidence in the Commission´s possession was sufficiently credible. It confirmed that the level of the fines be kept since the companies did not put forward any arguments establishing that the Commission erred. The ECJ found irregularities in the procedure. However, since it was not established that the contested decision would have been different, those irregularities have not led the Court to annul the decision.

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