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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 2017

Commission approves acquisitions of Air Berlin assets

On 21 December 2017 the Commission approved Lufthansa's acquisition of certain Air Berlin assets through the entity Luftfahrtgesellschaft Walter GmbH ('LGW'). The Commission's decision only concerns LGW because Lufthansa decided to drop its acquisition of NIKI Luftfahrt GmbH during the course of the Commission's merger review process. The Commission concentrated on the impact of the additional Air Berlin aircraft, crew and slots on competition. Especially, the increase in Lufthansa's slot portfolio at Düsseldorf airport was likely to adversely affect passenger fares and choice of services. Lufthansa put forward improved remedies, including the commitment that its slot holding at Düsseldorf airport would only increase by 1%, as compared with a scenario without the transaction. As a result half of all the slots would be held by Lufthansa's competitors.

On 12 December 2017 the Commission approved the acquisition of assets of Air Berlin by easyJet. The Commission examined whether the slot portfolio to be acquired by easyJet in Berlin Tegel and at destination airports would allow easyJet to shut out competitors from the market for passenger air travel to and from Berlin. Its investigation found that the increase in the slot portfolio enables easyJet to grow its presence at Berlin airports and start competing on new routes. In addition, easyJet will face strong competition from Lufthansa and Ryanair on routes to and from Berlin. The Commission concluded that the transaction would not adversely affect competition in the EU Single Market.

Commission investigations regarding Italy's largest steelmaker ILVA

On 21 December 2017 the Commission completed its in-depth investigation of support measures to Italian steelmaker ILVA S.p.A. It concluded that two loans granted by Italy in 2015 to support ILVA involved illegal state aid. Meanwhile, the Commission is still investigating the sale of ILVA's assets to ArcelorMittal.

ILVA is a significant producer of flat carbon steel and its plant in Taranto is the EU's largest integrated steel factory. Italy granted support to ILVA in 2015 around the time the company entered into insolvency proceedings. The Commission's investigation confirmed that two of the five measures gave ILVA an undue advantage in breach of EU state aid rules. It found that the government guarantee on a €400m loan and a €300m public loan were granted on terms below market conditions. ILVA needs to adjust the future terms and repay €84m. The Commission also decided that €1.1bn funds transferred from ILVA's owners to the company in June 2017 to remedy environmental shortcomings of the Taranto plant do not qualify as state aid.

In June 2017 Italy decided to award most of ILVA's assets to ArcelorMittal Invest Co., a consortium led by ArcelorMittal, which is the world's leading manufacturer of steel. The Commission has concerns that the merger may reduce competition for a number of steel products in sectors ranging from construction to car manufacturing, household appliances and tubes. Companies in these sectors compete with imported products or export their products. On 8 November 2017 the Commission considered ArcelorMittal's initial commitments insufficient and opened an in-depth investigation into the sale. It has to take a decision by April 2018.

Commission opens in-depth investigation into IKEA's tax treatment

On 18 December 2017 the Commission opened an in-depth investigation into tax rulings granted by the Dutch tax authorities in 2006 and 2011. The rulings significantly reduced IKEA's taxable profits in the Netherlands and may have allowed IKEA to pay less tax compared to other companies.

In the 1980s IKEA split into two independent groups: Inter IKEA and INGKA. Inter IKEA operates the franchise business. All IKEA shops worldwide pay a franchise fee of 3% of their turnover to Inter IKEA Systems, a Dutch subsidiary of the Inter IKEA group. The Commission's investigation concerns the tax treatment of Inter IKEA Systems in the Netherlands since 2006. It will assess whether the annual license fee paid by Inter IKEA Systems to another company of the Inter IKEA group called I.I. Holding in Luxembourg reflects economic reality. That payment made up a significant part of Inter IKEA Systems' revenue and was endorsed in the 2006 Dutch tax ruling. It also remained untaxed from corporate taxation in Luxembourg because I.I. Holding was part of a special tax scheme.

In July 2006 the Commission concluded that the Luxembourg special tax scheme was illegal under EU state aid rules, and required it be repealed by 31 December 2010. In 2011 Inter IKEA changed the way it was structured. Inter IKEA Systems bought the intellectual property rights formerly held by I.I. Holding. It financed this acquisition through an intercompany loan from its parent company in Liechtenstein. The Dutch authorities then issued a second tax ruling in 2011, which endorsed the price paid by Inter IKEA Systems for that acquisition. It also endorsed the interest to be paid under the intercompany loan and the deduction of these interest payments from Inter IKEA Systems' taxable profits in the Netherlands. As a result a significant part of Inter IKEA Systems' franchise profits after 2011 was shifted to its parent in Liechtenstein. The Commission will assess if the acquisition price adequately reflects the contribution made by Inter IKEA Systems to the value of the franchise business, and also the level of interest deducted from Inter IKEA Systems' tax base in the Netherlands.

International Skating Union's penalties found restrictive on athletes

On 8 December 2017 the Commission decided that International Skating Union (ISU) rules imposing severe penalties on athletes participating in speed skating competitions that are not authorised by the ISU are in breach of competition law.

The ISU is the sole body recognised by the International Olympic Committee to administer the sports of figure skating and speed skating on ice. The ISU and its national associations organise and generate revenues from competitions such as the Winter Olympic Games, World and European championships. Under the ISU eligibility rules since 1998 speed skaters participating in competitions that are not approved by the ISU face severe penalties up to a lifetime ban from all major international speed skating events. The ISU can impose these penalties at its own discretion even if the independent competitions pose no risk to legitimate sports objectives, such as the integrity and proper conduct of the sport or the health and safety of athletes.

The ISU introduced changes to its eligibility rules in June 2016. However, the Commission found that the ISU eligibility rules restrict competition and enable the ISU to pursue its own commercial interests to the detriment of athletes and organisers of competing events. The Commission considers that the rules restrict the commercial freedom of athletes who are prevented from participating in independent skating events. As a result athletes may be deprived of additional sources of income during their relatively short speed skating careers. In addition the rules prevent independent organisers from organising their own speed skating competitions because they are unable to attract top athletes.

Court rules on limitations that supliers of luxury goods impose on distributors

On 6 December 2017 the European Court of Justice (ECJ) ruled that Coty Germany, as a supplier of luxury goods, can prohibit its authorised distributors from selling those goods on a third-party internet platform such as Amazon.

In its judgment in Case C-230/16 Coty Germany GmbH versus Parfümerie Akzente GmbH the ECJ found that EU law does not preclude a prohibition clause if it is appropriate and does not, in principle, go beyond what is necessary to preserve the luxury image of the goods as in this case. The clause prohibits authorised distributors from using in a discernible manner third-party platforms for internet sales. The ECJ rules that the following conditions must be met: (i) the clause has the objective of preserving the luxury image of the goods; (ii) it is laid down uniformly and not applied in a discriminatory fashion; and (iii) it is proportionate in the light of the objective pursued.

It will be for the Oberlandesgericht to determine whether those conditions are met. In the event that the Oberlandesgericht should conclude that the clause at issue is caught by the prohibition of agreements, decisions and concerted practices laid down in EU law, the ECJ pointed out that it is possible that that clause might benefit from a block exemption.

Court clarifies application of competition law and agricultural policies

On 14 November 2017 the ECJ ruled that concertation on price and quantities between several organisations of agricultural producers and associations may constitute an agreement, decision or concerted practice for the purposes of competition law.

In 2012 the French Competition Authority imposed sanctions on practices that, implemented by producer organisations, associations of producer organisations and various bodies and companies, consisted of concertation on the price of endives and the quantities placed on the market as well as the exchange of strategic information. The producer organisations contested the fine of €4m arguing that their practices did not fall within the scope of the prohibition of anti-competitive agreements, in so far as they come under the Common Agricultural Policy (CAP) with the aim of stabilising producer prices and adjusting production to demand.

In its judgment in Case C-671/15 President of the Autorité de la concurrence versus Association des producteurs vendeurs d'endives (APVE) the ECJ clarified that under the Treaty on the Functioning of the European Union (TFEU) the CAP has precedence over the objectives of competition law. This applies in particular to the necessary practices for producer organanisations in the fruit and vegetables sector to achieve one or more of the objectives assigned to them. The ECJ stated that practices applied by an organisation must be duly recognised by a Member State, remain solely within that organisation and be actually and strictly connected to the pursuit of the objectives assigned to the organisation concerned. However, the collective fixing of minimum sale prices within a organisation cannot be considered proportionate if it does not allow producers selling their own products themselves to do so at a lower price than those minimum prices and has the effect of reducing the already low level of competition in the markets for agricultural products. In other words, under EU competition law, farmers co-operatives should therefore be considered similar to “undertakings”.

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