Luther.

EU Law News

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

- Gazprom: Commission attacks
- Hungarian advertising tax and state aid
- General Electric – Alstom merger talks
- EU - Switzerland tax transparency agreement
- Google received statement of objections
- Doubling the number of European Court judges

Newsletter March/April 2015

Gazprom: Commission attacks

On 22 April 2015 the European Commission sent a statement of objections to Gazprom alleging that some of its business practices in the Central and Eastern European gas markets constitute an abuse of its dominant market position in breach of EU competition rules. The charges, accusing the Russian company of overcharging customers, were delayed from summer 2014 by politics surrounding the Ukraine crisis.

The Commission's preliminary view is that Gazprom is breaking EU antitrust law, for example, by reducing its customers' ability to resell the gas cross-border, or by making the supply of gas dependent on obtaining unrelated commitments from wholesalers concerning the gas transport infrastructure. Gazprom wholesale contracts include clauses regarding territorial restrictions which prevented the cross-border flow of gas within the EU; such clauses are lowering the liquidity and efficiency of gas markets. The Commission also states that Gazprom raises artificial barriers to trade between Member States, which result in higher gas prices as well as hindering the competition in 8 Member States where it is a main supplier: i.e. Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia. Gazprom has market shares well above 50% in most, and up to 100% in some countries.

Commissioner Margrethe Vestager said her decision was purely based on law enforcement, the same as for any other company even if Gazprom made some moves to settle the case. Gazprom now has until late July to reply to the Commission's statement.

Hungarian advertising tax and state aid

On 12 March 2015 the European Commission opened an in-depth investigation into whether Hungary's advertisement tax introduced in June 2014 complies with EU state aid rules. The Commission is concerned that the progressive tax rate on turnover is ranging from 0% to 50%. The reason is that a progressive tax based on turnover places larger players at a disadvantage, unlike a progressive tax based on profits. In order to ensure a level playing field in media markets the Commission will study in detail both as to how the advertisement tax is applied currently as well how it is amended; this is to make sure that there is no unfair discrimination against certain media companies.

The Commission also doubts that the provisions which allow the deduction of previous losses from the taxable advertisement turnover might only favour companies that were not profit-making in 2013 and hence appears to grant a selective advantage to these companies. Separately, the Commission is assessing the compatibility of the tax with other aspects of EU law, especially with the freedom of establishment as guaranteed by Article 49 TFEU (Treaty on the Functioning of the European Union). It is concerned that the regime primarily affects Hungarian companies linked to companies with registered headquarter offices in other Member States.

General Electric - Alstom merger talks

On 18 March 2015 the Commission gave General Electric (GE) an additional 20 days until the middle of August to find a common solution in respect of its merger with Alstom. On 23 February 2015 the Commission had expressed its concerns over the restriction of competition in the European gas turbine manufacturing market. The GE-Alstom merger would affect the wider European energy industry as the heavy duty turbines are producing electricity at power stations. Whilst the number of turbines sold in Europe each year is currently very small, the Commission is studying the potential for a longer term surge in demand for turbines, as coal-fired stations are progressively decommissioned.

In addition, the Commission is concerned that the $17bn deal might not only lead to higher prices but also result in less choice for customers and less innovation in the sector. Technology will continue to assist the EU in meeting its environmental commitments. The Commission also argues that the market's small size does not make any price rise or reduction in choice insignificant as the merged entity would have some 50% of the market for 50 Hertz frequency turbines in Europe and the rest of the world, excluding China.

The Commission considers that the deal is not likely to raise concerns in relation to power generation equipment for nuclear, coal-fired, wind and hydro power plants, as well as in relation to electricity transmission equipment. Given the worldwide scope of the merger parties' activities, the Commission is cooperating closely with the Department of Justice in the US.

EU - Switzerland tax transparency agreement

On 19 March 2015 the Commission concluded negotiations on the new tax transparency agreement with Switzerland. From 2018 Member States will automatically exchange information on a full range of financial accounting information. This includes the names, addresses, tax identification numbers and dates of birth of their residents with accounts in Switzerland, as well as a broad set of other financial and account balance information. Thus EU residents will no longer be able to hide undeclared income in Swiss accounts in order to evade paying tax. The exchange will be on an annual basis starting with the fiscal year 2017.

The agreement is based on the Common Reporting Standard (CRS) which is the global protocol for automatic exchange announced by the OECD last year and is a major step forward in the fight against tax evasion since the treaty of 2005. That treaty's withholding tax exemption for cross-border payments of dividends, interest and royalties between related entities is being carried over into the new agreement.

The Commission hopes that Liechtenstein, Monaco, Andorra and San Marino will adopt similar agreements soon. The agreement also includes improved access for Swiss banks to EU markets. It requires the Swiss parliament's approval, and may also be part of a referendum.

Google received statement of objections

On 15 April 2015 the Commission issued a "statement of objections" to Google stating that the firm's promotion of its own shopping links amounted to an abuse of its dominance in internet search. In a separate investigation the Commission will now look at the way Google bundled apps and services for its mobile telephone Android operating system and as to how that might have breached competition law.

Google has a market share of around 90% in general internet search in most EU Member States. Based on its 5-year investigation the Commission is concerned that Google has artificially boosted its presence in the comparison shopping market. The Commission's preliminary view is that to remedy this conduct, Google should treat its own comparison shopping service the same way in its general search results as its rivals. As a result, consumers would see the best comparison shopping results.

The new investigation is concerned with Google requiring or incentivising smartphone and tablet manufacturers to exclusively pre-install Google's own applications or services, in particular Google's search engine. It will also look into the alleged bundling of certain Google products with other apps and services and also if Google is hindering the ability of manufacturers who want to use the Android operating system from being able to use and develop other open-source versions of Android.

Doubling the number of European Court judges

The number of judges at the European Court of Justice (ECJ) is set to double from 28 to 56 over the next few years. In 2014 the ECJ had proposed an additional 12 judges. It then appeared that the Member States could not agree on the allocation of judges only coming from some of the 28 countries and it was eventually decided that every country would get to appoint one additional judge. However, the number of clerks who prepare cases was not increased. Recently, the number of European Commissioners was also kept at 28, highlighting the disagreements between Member States on anything but "keeping numbers equal".

The idea is to accelerate the decision making at the General Court of the ECJ, which deals with cases brought by companies and individuals against EU bodies, including competition cases which are currently taking on average four years to complete. The ECJ normally hears cases with panels of three, five or thirteen judges. It acts as a collegiate body where decisions are those of the court rather than of individual judges.

Luther, EU Law Center
Avenue Louise 326, B-1050 Brussels
Phone +32 2 6277 760, Fax +32 2 6277 761
helmut.janssen@luther-lawfirm.com
gabrielle.williamson@luther-lawfirm.com

Luther Rechtsanwaltsgesellschaft mbH advises in all areas of business law. Our clients include medium-sized companies and large corporations, as well as the public sector. Luther is the German member of Taxand, a worldwide organisation of independent tax advisory firms.

Berlin, Brussels, Cologne, Dresden, Dusseldorf, Essen, Frankfurt a. M., Hamburg, Hanover, Leipzig, London, Luxembourg, Munich, Shanghai, Singapore, Stuttgart

Your local contacts can be found on our website www.luther-lawfirm.com