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EU Law News

A bi-monthly review of EU legal developments

affecting business in Europe

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Newsletter May/June 2018

Commission investigates Qatar Petroleum and concludes Gazprom case

On 21 June 2018 the Commission opened a formal investigation to assess whether supply agreements between Qatar Petroleum companies exporting liquefied natural gas (LNG) and European importers have hindered the free flow of gas within the European Economic Area (EEA).

Qatar Petroleum is the largest exporter of LNG globally and to Europe, controlling several companies that produce and export LNG to Europe. It is the largest supplier accounting for around 40% of the EU's overall LNG imports and significantly higher import shares in certain Member States. The Commission's concerns focus on the long-term agreements for the supply of LNG. Certain clauses contained in these agreements appear to, directly or indirectly, restrict the EEA importers' freedom to sell the LNG in alternative destinations within the EEA. This may unduly limit the free flow of LNG, segmenting the EU's internal gas market.

On 24 May 2018 the Commission adopted a decision imposing on Gazprom a set of obligations that address the competition concerns and enable the free flow of gas at competitive prices in Central and Eastern European gas markets.

In 2015 the Commission set out its preliminary view that Gazprom breached EU antitrust rules by pursuing an overall strategy to partition gas markets along national borders in eight Member States: Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia. The Commission's decision imposes four obligations to address the competition concerns. It requires Gazprom to remove any restrictions placed on customers to re-sell gas cross-border and to enable gas flows to and from parts of Central and Eastern Europe that are still isolated due to the lack of interconnectors, namely the Baltic States and Bulgaria. Relevant Gazprom customers must be given an effective tool to make sure their gas price reflects the price level in competitive Western European gas markets. Gazprom cannot act on any advantages concerning gas infrastructure which it may have obtained from customers by having leveraged its market position in gas supply.

Luxembourg tax benefits for Engie

On 20 June 2018 the Commission found that Luxembourg allowed two Engie group companies to avoid paying taxes on almost all their profits for about a decade. Luxembourg must recover about €120m in unpaid tax.

Engie, former GDF Suez, is a French electric utility company. In 2008 and 2010 Engie implemented two complex intra-group financing structures for Engie LNG Supply and Engie Treasury Management in Luxembourg. These involved a triangular transaction between these two respective companies and two other Engie group companies in Luxembourg. Following an in-depth investigation launched in 2016 the Commission concluded that Luxembourg's tax treatment of these financing structures did not reflect economic reality and endorsed an inconsistent treatment of the same transaction both as debt and as equity. According to the Commission these tax rulings granted a selective economic advantage to Engie by allowing the group to pay less tax than other companies subject to the same national tax rules. As a result, Engie paid an effective corporate tax rate of 0.3% on certain profits in Luxembourg for about a decade without any valid justification.

In the case of LNG Supply, all income that has been transferred to Engie LNG Holding should have been taxed either as profits of Engie LNG Supply or as profits of Engie LNG Holding at the standard Luxembourg corporate tax rate of around 29%. As indicated above this means that Luxembourg must recover about €120m in unpaid tax from Engie, plus interest. In the case of Engie Treasury Management, its profits will have to be taxed in line with standard Luxembourg tax rules, as soon as the intercompany loan is converted and they are paid to the holding company.

Commission clears Comcast's proposed acquisition of Sky

On 15 June 2018 the Commission approved unconditionally the proposed acquisition of Sky by Comcast, a US based global media, technology and entertainment company.

Sky plc is the leading pay-TV operator in Austria, Germany, Ireland, Italy and the UK. Comcast Corporation is a US cable operator active in Europe through NBCUniversal, owner of six major Hollywood film studios, and an operator of TV channels and on-demand services. The Commission found that the proposed transaction would lead to only a limited increase in Sky's existing share of the markets for the acquisition of TV content, as well as in the market for the wholesale supply of TV channels in the relevant Member States. Pay-TV distributors would continue to have access to content from Comcast's competitors and multiple alternative channels with comparable programming and audiences in the relevant Member States. The merged companies' ability to shut out Comcast's rivals is significantly mitigated by existing regulations in the UK, Germany and Austria. In addition, competitors that could have been targeted for exclusion are either contractually protected for a sufficient period of time or are not dependent on Sky's retail platform in the relevant Member States.

Comcast's offer to acquire Sky comes as a counter-bid to an offer by Twenty-First Century Fox of the US. On 7 April 2017 the Commission also cleared unconditionally Fox's offer for Sky.

In a parallel development, Disney could be buying the majority of the Fox assets being sold. The acquisitions are therefore not conclusive at the time of writing.

Approval of Fortum acquiring Uniper

On 15 June 2018 the Commission approved unconditionally the acquisition of Uniper by Fortum. Fortum, based in Finland, is active in power and heat generation in European countries as well as in Russia and India. Uniper, based in Germany, is active in Europe and Russia comprising the former conventional power utility and commodities businesses of E.ON.

The Commission's assessment took into account generation activities in Finland, financial trading of electricity in the Nordic countries and the fact that Sweden is the only country where both companies have generation assets, their retail supply of electricity and district heating, as well as energy production-related services. The Commission found that the transaction is unlikely to hinder effective competition given the combined moderate market share of the parties in Sweden of around 30%, the high level of interconnectivity with neighbouring countries, the significant spare capacity available in Sweden and the likely reaction of other producers to any price increases by the merged entity. The Commission concluded that the transaction would raise no competition concerns in any of the affected markets.

Commission investigates telecom sector in the Netherlands

On 12 June 2018 the Commission opened an in-depth investigation to assess the proposed acquisition of Tele2 NL by T-Mobile NL.

The proposed transaction would combine Deutsche Telekom's subsidiary T-Mobile NL with Tele2's subsidiary Tele2 NL which are respectively the third and fourth largest operators in the Dutch retail mobile telecommunications market. This would reduce the number of mobile network operators in the Netherlands from four to three. The merged entity would be the third largest player on the Dutch market after KPN and Vodafone-Ziggo. The Commission is concerned that the merger could lead to higher prices, and reduce choice and innovation for customers in the Netherlands through a reduction in the number of players and by limiting the merged entity's incentives to compete effectively with the remaining operators.

The Commission intends to investigate if the merger would increase the likelihood that operators would coordinate their competitive behaviour and if existing mobile virtual network operators may face more difficulties in obtaining favourable wholesale access terms from mobile network operators. The Commission has until 17 October 2018 to make a decision.

European Court clarifies standstill obligation in EY-KPMG case

On 31 May 2018, the European Court of Justice (ECJ) issued an important judgment clarifying that the standstill obligation in mergers only applies to actions which contribute to the change of control of the target.

In 2013 EY and KPMG Denmark entered into a merger agreement. KPMG Denmark sent a termination notice in accordance with the terms of its membership of KPMG International, the international network of independent auditing firms. KPMG International publicly announced, even though termination of the cooperation agreement was not yet effective, its intention to maintain a presence on the Danish market. The Danish Competition Council declared that the KPMG DK companies, by giving notice to terminate the cooperation agreement, in accordance with the merger agreement, that is to say, before the Competition Council approved the merger, had disregarded the Danish Law on competition containing the prohibition of implementing a concentration prior to that approval. This is also known as gun jumping in violation of the standstill obligation. EY appealed the decision before the Danish courts, which referred the case to the ECJ for a preliminary ruling.

The ECJ ruled that the termination of a cooperation agreement, in circumstances such as those in the main proceedings, may not be regarded as bringing about the implementation of a concentration, irrespective of whether that termination has produced market effects. Article 7(1) of Regulation No 139/2004 must be interpreted as meaning that a concentration is implemented only by a transaction which, in whole or in part, in fact or in law, contributes to the change in control of the target undertaking.

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