

EU Law News

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

Rescuing the Banking Sector

New guidelines on state aid measures for ailing banks

On 25 October 2008, the European Commission published guidance on how Member States can best support financial institutions in the current economic crisis, while respecting EU state aid rules and avoiding distortions of competition. Specific conditions include:

- Non-discriminatory access so that eligibility for a support scheme is not based on nationality.
- State support to be provided only as long as necessary to cope with the current turmoil. It should be adjusted or terminated as soon as improved market conditions allow.
- State support must be clearly defined and limited in scope to what is necessary to address the financial market crisis, while excluding unjustified benefits for shareholders of financial institutions at the taxpayer's expense.
- Contributions by the private sector must cover a significant part of the cost of assistance granted.
- Behavioural rules must be put in place to prevent abuse of state support (such as aggressive expansion or marketing).
- Structural adjustment measures to strengthen the whole financial sector and/or banks that had to rely on state intervention.

State Aid for Public Broadcasters

Proposed new guidelines on funding of broadcast media

Few industries have seen as much change as the broadcast media in the last ten years, with new technologies and numerous private companies moving into a sector that was previously dominated by state-owned bodies. As a vital aspect of democracy and culture, broadcasting needs careful handling, but the use of state money to run on-line video games, dating clubs and similar services distorts the market. In this new media environment, there has been growing pressure from the private sector for reform of

the state aid rules last spelled out by the Commission in 2001. Public broadcasters currently get more than €22 billion annually from licence fees and direct government aid, placing them third, after agriculture and transport, among recipients of state funding. The Commission issued a draft Communication on 9 November 2008, proposing new rules on state aid to this sector. Comments from the public consultation have to be submitted by 15 January 2009.

The new draft builds on the principles laid down by EU law and, in particular, by the Amsterdam Protocol, such as the need for a level playing field and the recognition that Member States have discretion to define what they want their public service broadcasters to do. The draft also suggests increased flexibility for public service broadcasters to build up reserves to help them deliver on their public service mission and to withstand cost fluctuations. At the same time, the proposed rules would require stronger national control mechanisms to avoid overfunding and cross-subsidies for commercial activities.

Tougher Approach to Merger Control

Detailed new Remedies Notice comes into force

On 22 October 2008, the European Commission issued new guidelines for companies engaged in mergers, clarifying the steps that can be taken to address competition concerns and thus secure conditional approval under the EC Merger Regulation. The revised Remedies Notice takes account of recent case law, Commission practice, public consultation and a detailed study of the effectiveness of merger remedies during 1996-2000.

In considering whether a proposed merger or acquisition might damage consumer interests, it has become apparent that the Commission prefers to reduce the risk of unfair competition through structural rather than behavioural changes, favouring divestiture of companies over, for example, access commitments or promises



about prices, product range or intellectual property rights. The new guidelines explain when an up-front buyer should be considered and how to identify a suitable purchaser. The Commission stresses the need to include all the assets and personnel necessary to ensure the stand-alone viability of the business to be divested and its ability to compete effectively in the market. Thus carve-outs are discouraged. A divestiture package that includes only brands and associated production or distribution assets will rarely be acceptable.

Past experience has shown the limited effectiveness of access remedies, so the new guidelines make it clear that the Commission will only accept remedies, such as giving access to infrastructure, technology or networks, if they are equivalent in their effects to divestitures. Other changes include the introduction of "Form RM" for submitting information on remedies and clarification of the role of trustees appointed to monitor the merger process.

In short, remedies are only acceptable if they are viable and effectively eliminate the competition concerns identified by the Commission. In issuing a much more detailed Remedies Notice and placing the onus of proof on the applicant, the Commission has added to the burden on companies undertaking mergers or acquisitions.

Telecoms Reform Package

Compromise solution includes a new regulatory body – BERT

The European Commission has published new legislative texts aimed at bringing together the views of Parliament and Council on the regulation of Europe's fast-changing telecoms market. The underlying objective is creation of a single EU telecoms market in which consumers of fixed and mobile phones and internet services have more rights and better choice. Implementation into law in all Member States is expected by 2010.

Intended consumer benefits include greater transparency and better information about services; wireless high-speed broadband for all; the ability to switch fixed or mobile service provider in one day while keeping the same number; better data protection; greater access for users with disabilities; and a more efficient 112 emergency number.

Industry oversight will be provided by national regulators and independent experts working together in a new "Body of the European Telecom Regulators" (BERT). BERT will be a more compact office than originally envisaged and will have no competence with regard to radio spectrum or network security. These matters will be dealt with separately through existing arrangements.

More Vigorous Anti-trust Enforcement

Record fine for glass cartel and shock raids in cement industry

Fines totalling €1.38bn have been imposed on four leading glass manufacturers, after they illegally fixed the price of glass used in the automotive industry for five years. France's Saint-Gobain will have to pay €896m, well above the €560m reserve it had set aside to cover an adverse finding in the case. The amount is a record fine by European regulators on a single company for price-fixing. Pilkington suffered a €370m penalty, Japan's Asahi Glass €113.5m; and Belgium's Soliver a relatively modest €4.4m. The decision could open the way for buyers of the glass to pursue claims against the cartel companies on the grounds that prices were illegally inflated.

In further efforts to combat anti-competitive behaviour, the European Commission recently carried out unannounced inspections at the premises of cement industry giants Lafarge (France), Cemex (Mexico), Holcim (Switzerland) and HeidelbergCement and Dyckerhoff (Germany). More heavy fines may ensue, bearing in mind that the cement industry has previously been punished for price-fixing and the Commission is especially severe on repeat offenders.

This publication has been carefully prepared but is intended for general guidance only. On any specific matter, reference should be made to the appropriate adviser.

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