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

- Canon fined €28m for gun-jumping
- Investigation into Broadcom’s exclusivity practices
- Tata Steel and ThyssenKrupp joint venture prohibited
- Over €1bn fine for five banks
- AB InBev fined €200m for restricting cross-border sales
- General Court annuls decision in Hungarian advertising case
The fine of €28m is to be both proportionate and deterrent and the Commission concluded that the first and second steps in the transaction structure formed together a single notifiable merger. The first step initiated the acquisition of final control over TMSC, whereas Canon paid €5.28bn for the remaining 5% of the shares and share options over the interim buyer’s stake. This first step was carried out prior to notification to or approval by the Commission. As a second step, following approval of the merger by the Commission, Canon exercised its share options, acquiring 100% of the shares of TMSC.

Companies are required to notify planned mergers for review by the Commission prior to their implementation and also not implement them until they are notified to and have been cleared by the Commission. The latter obligation prevents the potentially irreparable negative impact of transactions on the market. On 12 August 2016 Canon notified its plan to acquire TMSC from Toshiba. The transaction was unconditionally cleared by the Commission on 19 September 2016. Canon used a two-step transaction structure. As a first step, an interim buyer acquired 95% in the share capital of TMSC for €800, whereas Canon paid €5.28bn for the remaining 5% of the shares and share options over the interim buyer’s stake. This first step was carried out prior to notification to or approval by the Commission. As a second step, following approval of the merger by the Commission, Canon exercised its share options, acquiring 100% of the shares of TMSC.

The Commission concluded that the first and second steps in the transaction structure formed together a single notifiable merger. The first step initiated the acquisition of final control over TMSC, which occurred with the second step. By carrying out the first step Canon partially implemented its acquisition before both the notification and the Commission’s approval. The Commission considered Canon was aware of its obligations. The fact that the transaction was cleared unconditionally was taken into account. The fine of €28m is to be both proportionate and deterrent and has no impact on the authorisation of the transaction.

Investigation into Broadcom’s exclusivity practices

On 26 June 2019 the Commission opened a formal antitrust investigation to assess whether Broadcom may be restricting competition through exclusivity practices.

Broadcom is the world’s largest designer, developer and provider of integrated circuits for wired communication devices. It leads a number of markets for chips which bring television signals to consumers’ premises, translates analogue inputs into digital outputs, enables set-top boxes to deploy wireless local area networks or to provide high speed data connections. The Commission’s investigation will focus on a range of exclusionary practices which may include (i) setting exclusive purchasing obligations, (ii) granting rebates, (iii) product bundling, (iv) abusive IP-related strategies and (v) deliberately degrading interoperability between Broadcom products and other products.

The Commission also issued a Statement of Objections imposing interim measures. It stated that Broadcom is likely to hold a dominant position in various markets for the supply of systems-on-a-chip. Certain agreements between Broadcom and its main customers manufacturing TV set-top boxes and modems contain exclusivity provisions which may affect competition and stifle innovation. The interim measures are to ensure effectiveness of any final decision by the Commission.

Tata Steel and ThyssenKrupp joint venture prohibited

On 11 June 2019 the Commission prohibited a joint venture by Tata Steel and ThyssenKrupp because it would have reduced competition and increased prices for different types of steel.

ThyssenKrupp is Europe’s second largest producer of flat carbon steel with production hubs in Germany. Tata Steel is the third largest producer with main production hubs in the UK and the Netherlands. Both companies are significant producers of metallic coated and laminated steel for the packaging industry and of galvanised flat carbon steel for the automotive industry.

The Commission had serious concerns that the proposed joint venture would have created a market leader in a highly concentrated industry, particularly in tinplate, which is the most important packaging steel product. For automotive galvanised steel products the proposed merger would have eliminated an important competitor in a market where only a few suppliers can offer significant volumes of this steel. The Commission also found that the competitive pressure from remaining players and from imports from third countries would not have been sufficient to ensure effective competition.

In the view of the Commission the remedies offered by the companies did not adequately address competition concerns. Regarding packaging steel the proposed divestment would only have covered a small part of the overlap between the companies activities in the joint venture and included no divestment of production assets. The Commission stated that the offer regarding automotive steel products did not include adequate finishing assets.

Over €1bn fine for five banks

On 16 May the Commission fined five banks for taking part in two cartels in the Spot Foreign Exchange market.

The cartels covered 11 currencies: Euro, British Pound, Japanese Yen, Swiss Franc, US, Canadian, New Zealand and Australian Dollars, and Danish, Swedish and Norwegian crowns. When companies exchange large amounts of a certain currency against another, they usually do so through a Foreign Exchange Trade,
The Commission’s investigation revealed that some individual traders exchanged sensitive information and trading plans, and occasionally coordinated their trading strategies through various online chatrooms. The traders, who were direct competitors, typically logged in to multilateral chatrooms on Bloomberg terminals for the whole working day, and had extensive conversations about a variety of subjects, including recurring updates on their trading activities. The tacit understanding reached by the participating traders enabled them to make informed market decisions on whether to sell or buy the currencies they had in their portfolios and when. Occasionally traders would temporarily refrain from trading activity to avoid interfering with another trader.

The Commission identified two separate cartels. In the so-called “Forex - Three Way Banana Split” cartel, running from December 2007 to January 2013 it imposed a total fine of €811m on Barclays, The Royal Bank of Scotland (RBS), Citigroup and JPMorgan. In the second so-called “Forex - Essex Express” cartel, running from December 2009 to July 2012 it imposed a total fine of €257m on Barclays, RBS and MUFG Bank (formerly Bank of Tokyo-Mitsubishi). UBS was not fined as it revealed the existence of the cartels to the Commission thereby avoiding a fine of €285m. Other banks received a 10% reduction, except MUFG which did not apply for leniency.

AB InBev fined €200m for restricting cross-border sales

On 13 May 2019 the Commission fined AB InBev €200m for abusing its dominant position on the Belgian beer market by hindering cheaper imports of its Jupiler beer from the Netherlands into Belgium.

AB InBev is the world’s biggest beer brewer. Its Jupiler brand represents 40% of the Belgian beer market. Based on its investigation the Commission concluded that AB InBev is dominant on the Belgian beer market, based on its constantly high market share, its ability to increase prices independently from other beer manufacturers, the barriers to entry and expansion, and the limited countervailing buyer power of retailers given the essential nature of some beer brands sold by AB InBev.

The Commission found that AB InBev abused its dominant market position in Belgium between 2009 and 2016 by pursuing a deliberate strategy to restrict the ability of supermarkets and wholesalers to buy Jupiler beer at lower prices in the Netherlands and to import it into Belgium. AB InBev changed the packaging of some of its Jupiler beer products supplied to retailers and wholesalers in the Netherlands by removing the French information from the label and changing the design and size of beer cans. The company also limited the volumes of Jupiler beer supplied to a wholesaler in the Netherlands. AB InBev refused to sell some of its popular products to one retailer unless the retailer agreed to limit its imports of less expensive Jupiler beer from the Netherlands. Finally, it made customer promotions for a retailer in the Netherlands conditional upon the retailer not offering it to its customers in Belgium.

AB InBev cooperated with the Commission and agreed a remedy to provide mandatory food information in both French and Dutch on the packaging of its products of all existing and new products in Belgium, France and the Netherlands for the next five years. The Commission granted AB InBev a 15% fine reduction.

General Court annuls decision in Hungarian advertising case

On 27 June 2019 the General Court annulled the Commission’s decision finding that the Hungarian advertisement tax was incompatible with the EU state aid rules.

In 2014 Hungary introduced an advertisement tax which constitutes a special tax applied on turnover derived from the broadcasting or publication of advertisements. Hungary introduced two rates: a 0(zero)% rate for the part of the taxable amount below approximately €312,000 and a rate of 5.3% for the part of the taxable amount above that sum. On 4 November 2016 the Commission decided that the tax system included, first, progressive tax rates and, secondly, provisions prescribing a reduction in that tax in the form of deduction of losses carried forward for undertakings that were not profit making in 2013, and thereby constituted state aid measures.

The General Court found that the Commission’s characterisation of the advertisement tax as a measure entailing a selective advantage solely because of its progressive structure is unfounded. As regards whether the 50% deductibility of the losses of undertakings which were not profit making in 2013 was compatible with the internal market, the General Court found that that reduction in the taxable amount is established according to objective criteria irrespective of the choices of the undertakings concerned and is not, therefore selective.

This publication is intended for general information only. On any specific matter, specialised legal counsel should be sought.

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