SLAUGHTER AND MAY

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European Commission orders Luxembourg to recover illegal State aid from Engie

After an in-depth **investigation launched** in September 2016, the Commission has found that Luxembourg flouted State aid rules by giving Engie an unfair tax advantage over other companies for around a decade. The Commission has **announced** that Luxembourg allowed Engie to treat the same financial transaction as both debt and equity, enabling a tax treatment unavailable under standard Luxembourg tax law. By doing so, Commissioner Margrethe Vestager explained that Luxembourg had "*artificially reduced the company's tax burden*".[1]

Background

In 2008 and 2010 Engie (formerly GDF Suez) implemented two complex intra-group financing structures for two of its subsidiaries based in Luxembourg: Engie LNG Supply and Engie Treasury Management. Luxembourg endorsed the financial structures in two tax rulings in 2008 and 2010 respectively.

The Commission began an in-depth investigation into the tax rulings in late 2016 on the basis of concerns that they afforded Engie an unfair advantage over other companies, contrary to the EU State aid rules. The investigation came in the midst of a slew of other Commission investigations (both concluded and ongoing) into so-called "sweetheart" tax deals entered into between large multinationals and certain Member States. These included the rulings granted by Luxembourg in favour of Fiat and Amazon, by the Netherlands in favour of Starbucks, and by Ireland in favour of Apple.[2]

For further information on any competition related matter, please contact the **Competition Group** or your usual Slaughter and May contact.

[1] State aid: *Commission finds Luxembourg gave illegal tax benefits to Engie; has to recover around €120 million*, European Commission Press release of 20 June 2018.
[2] For details, see the Commission's dedicated **webpage**.

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Decision

In September 2008 Luxembourg approved a hybrid convertible loan structure between three Engie group companies. The triangular finance structure supported the purchase of a gas trading business by Engie LNG Supply. In essence, Engie LNG Holding used an intermediary to provide Engie LNG Supply with the finances to fund the transaction. This was treated as a debt by Engie LNG Supply, which deducted amounts from its taxable profits as if they were interest payments owing under a loan. However, instead of paying those amounts to Engie LNG Holding as interest (which would have attracted tax at the level of Engie LNG Holding), Engie LNG Supply retained them, eventually providing them to Engie LNG Holding in the form of shares. Engie LNG Holding then cancelled the shares in return for a cash payment which, consistent with Luxembourg tax law, was not taxed at all.

The structure meant that the same financial transaction was treated as both (i) debt, in its provision by Engie LNG Holding to Engie LNG Supply; and (ii) equity, in its provision as shares by Engie LNG Supply to Engie LNG Holding. This allowed Engie LNG Supply to avoid paying tax on 99 per cent of its profits, and Engie LNG Holding to avoid paying tax on the receipt of interest payments. The same structure was used again in 2010 between Engie Treasury Management and Compagnie Européenne de Financement (CEF), and was again affirmed by Luxembourg. As a whole, the Commission estimates that these structures allowed Engie to benefit from an effective corporate tax rate of 0.3 per cent for approximately a decade.

State aid investigations often turn on the issue of “selective advantage”; that is, whether the investigated aid measure conferred an economic advantage on one or more undertakings that it/they would not have obtained under normal market conditions. In this case, the Commission found that the tax rulings endorsed an inconsistent tax treatment of the same structure which led to non-taxation at all levels. In particular, the rules allowed Engie LGN Holding (and CEF in the context of the second ruling) to avoid paying tax as shareholders in Engie LNG Supply and Engie Treasury Management respectively, while at the same time avoiding paying tax at the subsidiary level. This, in the Commission’s assessment, is a more favourable treatment than under the standard Luxembourg tax rules, which exempt from taxation income received by a shareholder from its subsidiary, provided that income is in general taxed at the subsidiary level.

On this basis, the Commission concluded that the tax rulings gave a selective advantage to the Engie group which could not be justified, and were therefore illegal under EU State aid rules. It has required Luxembourg to recover the unlawful aid from Engie; an amount of approximately €120 million plus interest. The Commission emphasised that the role of EU State aid control in this area was to protect against selective tax treatment. Member states are not to use any means, tax rulings or otherwise, to provide such treatment.

Comment

This case serves as yet another reminder of how strictly the Commission is prepared to enforce the State aid rules, especially in the area of tax. This is the second time within a year that Luxembourg’s tax rulings have been ruled illegal by the Commission. In October 2017, the Commission found that Luxembourg had given Amazon unwarranted tax benefits of more than €200 million, and the Commission is still to issue its decision on another Luxembourg tax ruling in favour of McDonalds.

The Commission’s policy in this area has a clear focus on complex tax arrangements which overwhelmingly benefit multinational organisations, consistent with its general enforcement policy of “big on big, small on small”. The Commission’s pursuit of these schemes is not limited to individual rulings; in late 2017 it

opened a formal investigation into the UK's tax rules for overseas subsidiaries of UK-based multinationals, again on the basis that those rules may enable multinational companies to escape tax on certain foreign profits.

These cases should give pause both to tax authorities considering granting individual rulings (and their prospective beneficiaries), and to Member States with domestic regimes which could be seen as going "light" on the foreign tax affairs of multinational companies.

Other developments

Merger control

Competition Commission of India publishes its order approving the acquisition of Monsanto by Bayer, subject to conditions

On 21 June 2018 the Competition Commission of India (CCI) published its **order** approving the acquisition of Monsanto Company (Monsanto) by Bayer AG (Bayer), subject to conditions. The order (dated 14 June 2018) sets out a number of restrictive conditions. CCI approval was among the last regulatory hurdles to the deal, which had already received merger clearances from the competition authorities in Europe, China and the US, among others. The conditional approval of the deal had been announced by the CCI on Twitter on 22 May 2018, and the deal **completed** shortly thereafter on 7 June 2018.

In a **press release** announcing the publication of the order, the CCI noted that, based on its investigation, the CCI was of the opinion that the proposed combination was likely to have an appreciable adverse effect on competition in some markets in India but these could be addressed by way of modifications to the proposed combination. The CCI approved the transaction, subject to the following structural remedies (the first of which is broadly consistent with the divestments required by the European Commission, Chinese MOFCOM and the US Department of Justice):

- divestment of the following businesses of Bayer: glufosinate ammonium (a non-selective herbicide); crop traits of cotton and corn; and hybrid seeds of vegetables; and
- divestment of the shareholding of Monsanto in Maharashtra Hybrid Seed Company Limited (26 per cent).

In addition, the CCI imposed a number of behavioral commitments for a period of seven years from the closing of the transaction, including the licensing of their genetically modified (GM) and non-GM traits on a fair, reasonable and non-discriminatory (FRAND) basis, as well as to provide FRAND access to certain data and digital platforms and applications (for up to 10 years from closing of the transaction). The combined entity is also barred from bundling two or more products which may potentially have the effect of exclusion of any competitor and from commercial dealings capable of causing exclusivity in the supply of agricultural products.

The remedies imposed in this case are some of the most far reaching seen in India to date. In particular, the wide-ranging behavioral commitments are in contrast to the CCI's general aversion to such remedies. The CCI also focused heavily on access to data and innovation/R&D, as well as conglomerate effects. The CCI coordinated extensively with other competition authorities in this global transaction and this decision follows the conditional clearances in 2017 of three other agro-chemical mergers by the CCI (*Dow/DuPont*, *Agrium/Potash* and *ChemChina/Syngenta*), which were cleared subject mainly to structural remedies.

Antitrust

CMA consults on updated guidance on antitrust investigation procedures

On 21 June 2018 the UK Competition and Markets Authority (CMA) published a **consultation** on its **draft revised guidance** on investigation procedures under the Competition Act 1998. The CMA has reviewed the current guidance (published in 2014) with a view to: (i) getting procedural efficiencies in order to conclude investigations as quickly as possible, while maintaining its commitment to due process and robust decision making; and (ii) updating the guidance to reflect the CMA's current practices, which have developed since 2014. It has not identified a need for significant change to its fundamental procedural and decision-making arrangements in antitrust investigations.

In summary, the main proposed changes are as follows:

- *Complaint handling*: The CMA proposes to have a single approach for complaints and therefore no longer grant Formal Complainant status to certain complainants. The draft revised guidance also reflects current processes for complainants to contact the CMA, including how to make complaints anonymously.
- *Information handling*: The draft revised guidance outlines a streamlined approach to accessing the CMA's file whereby parties are given key documents referred to in the Statement of Objections, without limiting their ability to request access to non-key documents on file.
- *Interim measures*: The CMA proposes to clarify the process for applying for interim measures and the matters the CMA will have regard to before exercising its discretion.
- *Engagement with the parties*:
  - (i) The CMA suggests amendments to make oral hearings on draft penalty statements as efficient as possible, including conducting them by telephone or video-conference.
  - (ii) The CMA proposes greater flexibility around the setting of appropriate deadlines, for example, around responding to information requests or providing written representations on a Statement of Objections, depending on the circumstances of the case.
  - (iii) The draft revised guidance clarifies arrangements for state of play meetings in light of the CMA's current practice.
  - (iv) The CMA proposes to update the guidance to reflect how complainants and other third parties may be involved at various stages of an investigation.
- *Commitments*: The draft revised guidance clarifies the approach to commitments given by a business regarding its future conduct, including the process for offering and accepting commitments and the procedure once commitments have been accepted.

The CMA invites comments on the draft revised guidance by 2 August 2018.

General Court upholds European Commission's investigation in České dráhy case

On 20 June 2018 the General Court of the European Union (GC) handed down two judgments on appeal from České dráhy (CD), the main railway operator in the Czech Republic, concerning two decisions by the European Commission in 2016 that ordered CD to submit to unannounced inspections (dawn raids)

concerning suspected participation in anti-competitive conducts. The cases are referred to as the Falcon and Twins investigations respectively.

Falcon Case – ***Case T-352/16***

In April 2016 the Commission adopted a decision ordering CD to submit to a dawn raid as part of its investigation into suspected predatory pricing on the route from Prague to Ostrava. In the Falcon judgment, the GC partially upheld CD's appeal. The GC concluded that the Commission had reasonable grounds for suspecting an infringement as regards predatory pricing on the Prague-Ostrava line from 2011 and was therefore entitled to order the dawn raid in this regard. However, the GC held that the Commission's decision should be annulled with regards to: routes other than the Prague-Ostrava line; other forms of infringement under Article 102 of the Treaty on the Functioning of the European Union (TFEU); and the period prior to 2011.

Twins Case - ***Case T-621/16***

In June 2016 the Commission adopted a decision ordering CD to submit to a dawn raid as part of an investigation into suspected anti-competitive agreements under Article 101 TFEU. The Commission based this decision on information gathered in the Falcon dawn raid. CD appealed to the GC to annul this decision on a number of grounds, in particular, alleging that the contested decision was adopted on the basis of materials which were illegally obtained during the Falcon dawn raid and obtained outside the scope of the investigation. The GC dismissed the appeal and upheld the Commission's decision.

The GC noted that, following the *Deutsche Bahn*[3] judgment, the use of information obtained during a dawn raid which falls outside the scope of that dawn raid is prohibited. One exception to this rule concerns discoveries which are truly fortuitous (i.e. information found while conducting a search in good faith for information which relates to the subject matter of that dawn raid, rather than as part of a "fishing expedition"). In the Twins case, the Commission made its decision based on three documents seized in the Falcon raid pertaining to CD's costs, assessment of costs and strategy, which the GC found to be clearly relevant to an investigation into predatory pricing. The GC concluded that the Commission obtained the documents legally and could use them to order the Twins dawn raid. The GC further noted that it was perfectly possible for a document to contain information about various subjects (i.e. information relating to potential breaches of both Article 102 TFEU (*Falcon*) and Article 101 TFEU (*Twins*)). The GC also found that the partial annulment of the Falcon decision did not affect the validity of the documents obtained during that investigation.

This case shows that documents seized legally in one dawn raid (i.e. documents which relate at least to some extent to evidence the Commission would seek in an investigation of that particular type) may be used as the basis of a dawn raid in an entirely unrelated investigation.

US Supreme Court upholds American Express merchant rules

On 25 June 2018 the US Supreme Court handed down a **judgment** finding that provisions used by American Express (Amex) which forbid merchants from persuading customers to use cheaper cards (so-called "anti-steering rules") do not violate antitrust laws. The Supreme Court held that the claimants (the US Department of Justice (DoJ) and several States) did not offer enough evidence to prove anti-competitive effects in the relevant market.

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[3] Case C-583/13P *Deutsche Bahn and Others* v *Commission*.

The claimants sued Amex in 2010, alleging that Amex's anti-steering rules were anti-competitive, namely, that the rules had the effect of raising the fees payable by merchants for accepting credit cards. In 2015, a federal judge held that the rules violated antitrust law, having found that the credit card market should be treated as two separate markets (one for merchants and one for cardholders). This decision was subsequently overturned by an appeals court which held that the credit card market was one market, not two, and that on this market Amex's anti-steering rules were not anti-competitive.

Speaking for the majority in the Supreme Court, Justice Clarence Thomas agreed with the appeal court, holding that the relevant market was a single, two-sided market for credit card transactions, and that the claimants had failed to consider the impact on both sides of the market (i.e. cardholder and merchant) when assessing the potential anti-competitive effects of Amex's anti-steering rules. An increase in prices on the merchant side of the market had to be analysed alongside the impact on the cardholder side of the market, with Thomas noting: "*That Amex allocates prices between merchants and cardholders differently from Visa and MasterCard is simply not evidence that it wields market power to achieve anti-competitive ends*".

Furthermore, the claimants failed to demonstrate that higher merchant fees had been caused by Amex's anti-steering rules, nor that those fees: (i) had restricted output; (ii) were set above the competitive level; or (iii) had otherwise stifled competition. On the contrary, the evidence before the court suggested that, during the period in question, the output of credit card transactions had increased by 30 per cent and the credit card market experienced expanding output and improved quality.

This case marked the second high-profile loss for the DoJ in June after a court judgment on 12 June 2018 approved AT&T's proposed merger with Time Warner.

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