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EU Law News

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

European Commission adopts several decisions in major energy sector competition inquiries

The European Commission has adopted nine major decisions since 2007 in the energy sector regarding infringement of EU competition rules on the abuse of dominant market positions. The cases of E.ON and RWE in Germany and GDF Suez in France represent the latest anti-trust investigations in the energy sector.

The Commission opened anti-trust proceedings against RWE in 2007, following on from its concerns that RWE abused its dominant position by a possible refusal to supply gas transmission services to other companies and to behavior aimed at lowering the margins of RWE's downstream competitors in gas supply ("margin squeeze"). RWE offered to divest its entire Western German high-pressure gas transmission network. The Commission welcomed the offer and adopted a decision that renders legally binding the commitments offered by RWE.

In the investigation on E.ON, the Commission expressed concern that E.ON excluded competitors from the market by booking almost the entire capacity at the key entry point into the gas network on a long-term basis. This could potentially mean abuse of its dominant position in the markets for the supply of gas in Germany as it could limit the access of new entrants to the gas networks and thereby to the gas markets. Such an abuse would entail a breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU). E.ON offered remedies and proposed commitment to a significant and structural reduction of its long-term gas capacity reservations. The Commission has adopted a decision that makes the commitment offered by E.ON legally binding.

The French GDF Suez offered similar structural reductions in its long-term reservations in its gas import infrastructure capacity, after the Commission expressed concern that GDF Suez might have excluded competitors from access to gas import capacity into France. The Commission closed the investigation by adopting a decision that renders legally binding the commitments offered by GDF Suez to boost competition on the French gas market.

New regulation for distribution of goods and services

The Commission has updated its regulation and accompanying guidelines concerning the application of competition rules to supply and distribution agreements. The new rules govern most distribution and supply agreements at different levels of the production and distribution chain. The current rules on such "vertical" agreements are 10 years old and do not take into account the development of the internet as a force for online sales and its effects on cross-border commerce. The promotion of these developments increases consumer choice and price competition according to the Commission, while especially producers of high quality goods fear that the Commission policy does not sufficiently adress the problem of free-riding.

Under the revised competition rules, manufacturers remain free to decide how they distribute their products. If manufacturers want to benefit from block exemption as provided by the new rules, neither their market share, nor the market share of their customers should be more than 30% and their distribution or supply agreements should not contain any price-fixing or other hardcore restrictions.

The revisions aim to benefit small and medium sized enterprises, by preventing exclusion from the distribution market, but do not limit agreements between companies with higher market shares. These companies should assess however, whether their agreements contain any clauses that are restrictive to competition.

New in the guidelines is the issue of online sales. Authorised distributors must be as free to sell on their websites as they do in their traditional shops and other physical points of sale. This change will allow dealers to take full advantage of the internal market as they have all tools available to reach, and be reached, by customers in the EU.

The revised competition rules will come into force in June this year and are valid until 2022.

ECOFIN decides on highly disputed measures to restore confidence in Euro to alleviate solvency problems

The European Council, the European Commission and the European Central Bank (ECB), have agreed on a loan package of more than €500b to provide to Euro area governments financial support in case they face solvency problems and to restore confidence in the Euro. The so-called European Stabilization Mechanism will consist of two parts with separate legal bases.

The €60b extension of the EU's existing aid facility to balance of payments – used to help Hungary, Latvia and Romania – to members of the eurozone will be based on Article 122.2 of the EU treaty which allows for support for governments during "exceptional circumstances". It thus circumvents the eurozone's no bailout principle and has the EU's own resources set as a guarantee.

Sweden and Poland have also decided to take part in the €440b loan guarantee which is supplied on an inter-governmental basis between the 16 eurozone Member States.

The International Monetary Fund (IMF) has committed to providing funds with a value of at least half of the EU's contribution.

The debt crisis in Greece has inflated the costs of its national debt and insurance to record levels. The problems in Greece have started to cause problems to other eurozone members who have limited public finances, such as Portugal, Spain and Ireland. The announced measures add to the €110b that the EU members and the IMF have already granted to Greece. Spain and Portugal have reacted to the measures by announcing they will present specific measures shortly and increase their efforts towards fiscal adjustment.

In addition, the ECB set up the Securities Market Programme to enable interventions in public and private debt markets and to facilitate liquidity in troubled markets. The ECB will do so by buying eurozone government bonds on the secondary market to help support the fractured markets.

Agreement on EU hedge fund rules closer

The EU finance ministers met in Brussels at the April ECOFIN Council to discuss the final wording of the Alternative Investment Fund Managers Directive (AIFMD) with the European Parliament scheduled to vote on the law later this year.

The draft text of the proposal stipulates that hedge funds from outside the EU will need to meet specific standards on tax, money laundering and regulatory information to be allowed to access the EU's investors. The rationale behind the hedge fund rules is to ensure that smaller funds can be exempt from burdensome rules. More specifically, the provision of the Directive on private equity funds will not apply to companies with fewer than 50 employees.

The proposal came after public scrutiny of hedge funds and private equity funds bearing partial responsibility for the financial crisis. Once the new Directive is in place, the EU hopes to have tighter control over such funds. This EU proposal created tension with the Obama administration; Washington has indicated that plans to regulate hedge funds and private equity in the EU could harm the US economy with the EU closing its doors to US funds.

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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