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NEWSLETTER - Latest legal updates

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COMPETITION LAW

Commission considers that per transaction multilateral interchange fees (MIF) in SEPA Direct Debit scheme are likely to breach Article 81

On 24 March 2009, the European Commission published a statement, jointly with the European Central Bank, in relation to the SEPA Direct Debit scheme. This statement provides further clarification so as to encourage the European Payments Council (EPC) to launch the SEPA Direct Debit scheme (SDD) on 1 November 2009. The Commission advises that a general per transaction multilateral interchange fee (paid by a creditor bank to a debtor bank) for direct debit transactions may be assumed to breach Article 81(1) EC and is unlikely to meet the conditions for exemption under Article 81(3) EC. It makes clear that a general per transaction multilateral interchange fee (MIF) for direct debit transactions does not seem justified for efficiency reasons and therefore does not appear compatible with EU antitrust rules.

Such collectively negotiated interchange fees set the floor above which banks set charges for their own customers and so distort competition between banks. The Commission is not convinced that such fees are necessary or that they can be justified for efficiency reasons. Therefore, the use of multilateral interchange fees for national and cross-border direct debit transactions should be replaced by other charging mechanisms by the end of a three year transitional period (31 October 2012).

Advocate General's opinion in Austrian banks cartel appeal

On 26 March 2009, Advocate General Bot handed down his opinion on the appeals by four Austrian banks against a judgment of the Court of First Instance (CFI) that dismissed their appeals against a decision of the European Commission in relation to the Austrian banks (Lombard Club) cartel. The Advocate General has concluded that the CFI made two errors of law in relation to the assessment of the gravity of the infringement and the assessment of the basic amount of the fines imposed. These errors vitiate the CFI's judgment.

The Advocate General concluded that the CFI erred in finding that the Commission could infer from the mere implementation of the cartel that the infringement had an actual impact on the market. When relying on the impact of the cartel for the purposes of setting the level of a fine (as opposed to establishing the infringement) that impact must be demonstrated. Further, the CFI erred in finding that the Commission had been entitled to attribute to three of the banks the market shares of certain decentralised banks, even though it did not impute to them the unlawful conduct of those banks. The Advocate General considers that the ECJ should determine the appeals itself and reduce the fines imposed on each of the appellants.

New Regulation giving Commission power to create a block exemption in respect of the application of Article 81(1) EC regarding liner shipping consortia

On 25 March 2009, Regulation 246/2009 on the application of Article 81(3) of the EC Treaty to liner shipping consortia was published in the Official Journal. This repeals and replaces Regulation 479/92, which empowered the European Commission to create a block exemption in respect of the application of Article 81(1) EC in respect of liner shipping consortia. The new Regulation 246/2009 is a codifying measure which merely restates the provisions of Regulation 479/92, as amended by subsequent legislation. It therefore continues to give the Commission the power to adopt a five year block exemption for liner shipping consortia. The Commission consulted on a draft of a new liner shipping block exemption in October 2008.

STATE AID

The Commission endorses the revised privatisation plan for Olympic Airlines and Olympic Airways Services

On 10 March 2009, the Commission has decided that the revised privatisation plan for Olympic Airlines and Olympic Airways Services does not raise State aid concerns. The original privatisation plan, which had been approved by the Commission on 17 September 2008, was based on an open, transparent and non-discriminatory public tender procedure. However, given the financial and economic

crisis, the tender process was not successful. The Greek authorities pursued the sale by direct negotiation with interested parties, in compliance with EC law.

In its previous decision of 17 September 2008, the Commission had found that the plan of the Greek authorities to sell certain assets of Olympic Airlines and Olympic Airways Services prior to the liquidation of the two companies did not involve State aid, provided that certain undertakings given by the Greek authorities were fully complied with.

The Commission had also considered that the planned privatisation would maximise the chances of recovery of illegal and incompatible State aid that had previously been granted to Olympic Airlines and Olympic Airways Services.

In accordance with the Commission decision of 17 September 2008, the Greek authorities launched a public tender procedure. All of the bids were below the minimum values established by an independent valuation, mainly due to the financial and economic crisis.

Given this situation, the Greek authorities informed the Commission that the only way open to implement the Commission decision of 17 September 2008 was to proceed with a direct sale of the assets.

The Commission considered that the revised privatisation plan does not give rise to State aid concerns. Firstly, under State aid rules the Commission and the Member States must work together in good faith to overcome unforeseen or unforeseeable difficulties encountered in executing recovery decisions. Secondly, the Greek authorities have so far complied with the Commission decision of 17 September 2008. Thirdly, the direct sale facilitates a faster conclusion of the sale of the privatisation of Olympic Airlines' and Olympic Airways Services' assets than re-tendering the assets, while ensuring market price for the transactions. Finally, the direct sale is expected to ensure the continued provision of routes subject to public service obligations, thereby protecting residents of outlying islands from possible disruptions to air services.

Following this, the Greek Government has entered into an agreement for the direct sale of the assets of Olympic Airlines with Marfin Investment Group Holdings S.A. MIG has announced that the definitive legal agreements (share sale and purchase

agreement, shareholders agreement as well as all other necessary legal documentation) have been signed between the Company and the Hellenic Republic for the acquisitions of Pantheon Airways S.A (flying operations), MRO NewCo (technical base) and the Ground Handling NewCo (ground handling services) (collectively the "Acquired Entities").

Commission orders Greece to recover €1.4 million of unlawful aid from vehicle producer ELVO

The European Commission has found under EC Treaty state aid rules that certain tax waivers granted by Greece to the vehicle producer ELVO S.A. constitute unlawful state aid. The measures relieved ELVO from taxes that its competitors had to pay, thus giving ELVO an unfair competitive advantage without furthering any public interest goal. The Commission has ordered Greece to recover aid amounting to about €1.4 million, plus interest, from ELVO.

ELVO, with around 672 employees and an annual turnover of about €84 million in 2007, is the main supplier of motor vehicles to the Greek army. In addition to military vehicles, ELVO produces a wide range of civilian vehicles (jeeps, trucks, buses etc.) and spare parts.

Following a complaint, the Commission started an investigation into a number of state measures in favour of ELVO, including a waiver on tax debts accumulated between 1988 and 1998. According to Greece, the aid favoured only the military production of ELVO and would therefore fall under Article 296 of the EC Treaty, which allows exemptions from the general state aid discipline for the production of arms and military material, provided that this is necessary for the protection of a Member State's essential defence interests.

The Commission found that the measures in favour of ELVO constitute state aid which is not covered by the exception provided for by Article 296 of the Treaty. In fact, the effects of the aid were not limited to military production but also favoured ELVO's civilian activities and distorted competition in the civilian vehicle market. Therefore, the Commission concluded that about €1.4 million constitute incompatible state aid and have to be recovered with interest by the Greek authorities from ELVO.

MERGERS & ACQUISITIONS / ENERGY

Commission approves proposed acquisition of Corinthos Power by Mytilineos Holdings S.A. and Motor Oil S.A.

On 31st March 2009 the European Commission cleared under the EU Merger Regulation the proposed acquisition of joint control of Corinthos Power S.A. (an electricity generator) by two Greek companies, Mytilineos Holdings S.A. and Motor Oil (Hellas) Corinth Refineries S.A. (MOH). After examining the operation, the Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

The transaction would give rise to two vertical relationships. First, between the market for the wholesale supply of diesel and fuel oil, where MOH is active, and the market for generation and wholesale supply of electricity; second, between the market for construction, where Mytilineos currently operates, and the market for generation and wholesale supply of electricity. In addition, there is a minor horizontal overlap in the market for generation and wholesale supply of electricity given that Mytilineos currently has limited operations in that market.

The Commission's examination of the proposed transaction showed that the horizontal and vertical relationships between the parties' activities are limited. The Commission also analysed the potential risks of the joint venture's parent companies closing off supplies of fuel or access to construction services to competing existing or potential electricity suppliers. However, the Commission's investigation found that there would be no risk of any of the affected markets being closed off as there are sufficient alternative competing sources of supply on the relevant upstream markets.

TELECOMMUNICATIONS

Agreement reached on mobile roaming regulation

On 24 March 2009, the European Parliament announced that an informal compromise position on the extension of the 2007 Roaming Regulation has been negotiated by the Parliament Industry Committee and the Czech Presidency. The compromise follows a

vote by the Committee to adopt proposals by the Commission for the amendment of the Regulation in March 2009. The Committee voted to adopt the proposals, although it proposed an earlier expiry date for the Regulation (2012, rather than 2013), a lower wholesale price cap for data roaming (EUR0.5 per megabyte, rather than EUR1), and per second billing from the beginning of a call (the Commission had proposed a 30 second minimum charging period). The Committee also modified the Commission's proposals relating to "bill shock".

In the compromise position, maximum prices of EUR0.43 per minute for outgoing and EUR0.19 per minute for incoming calls apply for voice roaming calls from 1 July 2009. These price caps decrease yearly to EUR0.35 per minute for outgoing and EUR0.11 per minute for incoming roaming calls from 1 July 2011. Per second billing will apply from 1 July 2009, although the 30 second minimum charging period proposed by the Commission has been reinstated.

In relation to data roaming, the compromise sets out the maximum price for a roamed text message should be EUR0.11 from 1 July 2009, and a wholesale price cap for other data roaming services will be set at EUR1 per megabyte from 1 July 2009, decreasing yearly to EUR0.5 per megabyte from July 2011. To prevent "bill shock" roaming customers will be able to opt to set a maximum limit from 1 March 2010. The limit would automatically apply to customers who had not made another choice by July 2010. The compromise position also sets out the procedures that would apply once a customer is close to reaching the limit, and once the limit has been reached. As proposed by the Industry Committee, by mid 2011, the Commission has to review the consumer benefit resulting from lower roaming prices, and assess methods of regulation for the roaming market other than price control.

The informal compromise agreement will now have to be endorsed by the Parliament's Industry Committee and representatives of the full Council. It will be tabled for a first-reading by the Parliament at the plenary session on 21 to 24 April 2009.

PUBLIC PROCUREMENT

OECD publishes Guidelines for fighting bid-rigging in public procurement

On 12 March 2009, the Organisation for Economic Co-operation and Development (OECD) Competition Committee published guidelines for fighting bid-rigging in public procurement. The guidelines include two checklists: a checklist for designing the public procurement process to reduce the risks of bid-rigging and a checklist for detecting bid-rigging in public procurement. The guidelines are intended to help procurement officials to identify markets in which bid-rigging is more likely to occur so that special precautions can be taken, and to identify suspicious behaviour by firms that may indicate that bid-rigging is taking place. They explain methods that maximise the number of bids, provide best practices for tender specifications, requirements and award criteria, and suggest procedures that inhibit communication among bidders.

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