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COMPETITION LAW

Neelie Kroes speech on future of Motor Vehicle Block Exemption

European Commissioner for Competition Neelie Kroes held a roundtable discussion on 9th February at the European Commission's Brussels headquarters to discuss the future of the Block Exemption Regulation (BER) that applies to motor vehicle sales and service. Participants included leading figures from all the main stakeholder groups, including consumers, car manufacturers, dealers, roadside assistance operators and independent repairers. The current Regulation is due to expire in 2010 and Commissioner Kroes organised this roundtable to have an informal discussion about the issues and how any change or maintenance of the current Regulation would affect the different categories of operators in the car sector.

Competition Commissioner Neelie Kroes reacted positively to the discussion, saying "It is clear that there are divergent views as to whether general or specific rules should apply to the sector, and as to what the content of those rules should be. I believe that today's meeting exposed the key issues, both as regards the need to respond to the immediate crisis, and the need to lay down a clear and solid framework for the medium-term. We will now design our future policy to take account of the contributions from stakeholders, with a view to releasing a Commission Communication on the subject."

Commission decision on E.ON for Germany

The European Commission has adopted a decision that renders legally binding commitments offered by E.ON to address concerns raised in the course of an investigation under EC Treaty rules prohibiting the abuse of a dominant market position (Article 82 EC). The European Commission closed the case against E.ON and accepted the German energy giant's commitment to selling a fifth of its power generation capacity along with its extra-high voltage distribution network. In a press release, the Commission stated that it adopted a decision that renders legally binding a commitment by E.ON to divest around 5,000 MW of its generation capacity to address concerns regarding the electricity generation market. Furthermore, the Commission had concerns that E.ON may have favoured its own production affiliate for the provision of balancing services, while passing the resulting costs on to

final consumers and preventing other power producers from exporting balancing energy into its transmission zone.

Commissioner Neelie Kroes welcomed the solution to the long-standing problem by stating that this unprecedented set of remedies will fundamentally change the landscape of German electricity markets and bring the prospect of more competition and more customer choice.

STATE AID

CFI annuls Commission decision to approve Belgian state aid to La Poste

On 10 February 2009, the Court of First Instance (CFI) annulled European Commission's decision approving €297.5m injection for the Belgian public postal services operator, La Poste. Commission's decision followed its preliminary examination of the measure which, it concluded, did not involve the grant of illegal state aid.

In its 2003 decision, the Commission found that the increase in La Poste's capital did not, in itself, constitute state aid, and that since becoming an autonomous public undertaking, the Belgian postal service had not benefited from any illegal state aid. The aid was given after a number of meetings between the Commission and Belgian authorities. Deutsche Post and DHL contested this decision before the Court of First Instance. The CFI has decided that, although the applicants in the case did not have standing to challenge the Commission's assessment of the aid, they could challenge the decision not to open a formal investigation into the aid measure.

The CFI concluded that the Commission should have opened a formal investigation because of the serious difficulties it had in assessing the aid. If a formal investigation had been carried out, the applicants would have had an opportunity to put their views to the Commission (they were not given the chance to do so during the preliminary examination of the aid). The CFI, therefore, annulled the Commission's decision.

Commission opens in-depth state aid investigation into privatisation and restructuring of Austrian Airlines

The European Commission on the 10th of February decided to open the formal investigation procedure into the privatization and restructuring of Austrian Airlines whereby it will be taken over by Lufthansa.

Following a privatization procedure Lufthansa has been selected to buy the Austrian State's stake (41.56%) in Austrian Airlines. The deal comprises three elements:

- Lufthansa pays a purchase price of €366.268,75
- the State receives a debtor warrant, which may lead to an additional payment
- the State pays a grant of €500 million, which Lufthansa shall use for a capital increase in Austrian Airlines.

The Commission has decided to open the State aid investigation procedure as it has doubts concerning the existence of State aid and whether this State aid can be declared compatible with the common market. In particular, it doubts whether the price paid (including the debtor warrant) reflects the market price for Austrian Airlines at the time it was sold. Furthermore, it has doubts also whether the sale was truly open, transparent and unconditional and whether the State really acted in conformity with the market economy investor principle.

With regard to the compatibility of the aid the Commission has doubts on whether the amount of the aid has been kept to a minimum and whether the restructuring plan submitted by Austria will restore the long-term viability of the company in the shortest possible time and without the need for additional aid in the future. Therefore, having examined this restructuring plan, the Commission questions certain elements of this plan as regards their compatibility with the Commission's Guidelines for rescue and restructuring of firms in difficulty. Furthermore, the Commission has doubts if the compensatory measures proposed are sufficient to remedy the market distortion of the aid vis-à-vis the competing airlines and whether Austrian Airlines and Lufthansa will contribute sufficiently to the restructuring.

CFI dismisses appeal against Commission decision making approval of aid conditional on repayment of earlier unlawful aid

On 11 February 2009, the Court of First Instance (CFI) dismissed an appeal against a decision of the European Commission assessing state aid provided by Italy to cover

stranded costs of an energy company to be compatible with the common market but suspending its approval pending the repayment of earlier unlawful aid.

The CFI held that the Commission had not erred in finding that the measure at issue was financed through state resources and conferred an economic advantage and thus constituted state aid within the meaning of Article 87(1) EC. Further, the Court found that the Commission had been entitled to decide that the aid could not be approved unless and until Italy provided the Commission with proof that the recipient had not received the unlawful aid or had repaid any such aid.

MERGERS & ACQUISITIONS

Commission publishes full text of British Energy/EdF merger decision

The European Commission has approved under the EU Merger Regulation the proposed acquisition of British Energy (BE) by Electricité de France (EdF). The Commission's decision is conditional upon EdF's commitment to divest the power generation plant at Sutton Bridge in the UK (owned by EdF) and at Eggborough (owned by BE), to sell certain minimum volumes of electricity in the British wholesale market, to unconditionally divest a site potentially suitable for building a new nuclear power station located at either Dungeness or Heysham in the UK at the purchaser's choice and to end one of the merged entity's three grid connection agreements with the National Grid at Hinkley Point in the UK. The Commission concluded that the transaction, as modified by these commitments, would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

TELECOMMUNICATIONS

Commission Comments on Dutch regulator's proposal to increase competition in broadcasting markets

The European Commission, taking into account the specific situation of the Dutch market, cleared, in a letter published today, the Dutch telecoms regulator's proposal to

impose regulatory obligations on the four largest cable operators in the Netherlands, Ziggo, UPC, Delta and CAIW. These obligations will allow alternative providers of radio and TV ('RTV') signals to compete more effectively with the broadcasting offers over cable. In addition, Ziggo and UPC will have to allow other market parties to sell the formers' analogue radio and TV package, allowing the latter to service consumers. At the same time, the Commission is inviting OPTA to avoid prolonging analogue transmission services as this could lead to inefficient investments and limit the development of innovative digital services and infrastructures. OPTA should implement swiftly and effectively the detailed terms and conditions of the remedies required in order to generate a market structure which is more prone to competitive dynamics.

The Commission therefore, in its letter with comments published on the 11th of February, clears OPTA's proposal to open up the cable networks to increase competition in the Dutch broadcasting market. The Commission took into account that at present the Dutch RTV market is characterised by the importance of analogue RTV signals, provided by strong cable infrastructures, together having nationwide coverage. At the same time, the Commission asked the regulator to ensure that analogue RTV transmission is not unnecessarily prolonged, as this could hamper efficient investments in digital infrastructures and the development of innovative services. The Commission also invited the regulator to implement the resale obligation as well as the detailed terms and conditions thereof, in the shortest delay possible so as to swiftly generate a market structure that is more prone to competitive dynamics. Once such a structure has been achieved, the proposed obligation should be withdrawn as soon as possible.

PUBLIC PROCUREMENT

Advocate General's opinion on exclusion of bidders from public service contracts

On 10 February 2009, the opinion of Advocate General Mazak handed down his opinion in a preliminary ruling following a request by an Italian court and addressed the question on whether the list of grounds for excluding public services contractors contained in Article 29 of Directive 92/50 (the old Public Service Contracts Directive) is exhaustive.

AG Mazak held that the aforementioned list is non-exhaustive and that Member States can add to the grounds of exclusion provided that this is intended to ensure transparency and equal treatment in the procurement process as well as is proportionate to the achievement of these objectives.

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