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News

Antitrust

Competition Compliance is encouraged by major EU business group

The European lobby, Business Europe, has published a new guide for European companies in order to encourage them to align to EU Competition Law.

Business Europe has acknowledged the value of having a Competition Law compliance program in place. This type of programs can help (i) identifying competition issues, which are sometimes difficult to detect due to their often secret nature, and (ii) preventing new ones from arising. In this regard, the guide highlights the fact that most leniency applications take place as a result of a compliance program or audit.

The guide qualifies compliance training as crucial. For example, some employees might wrongly believe that certain aggressive business practices are illicit when they are actually not, which may result in significant competitive disadvantages for companies.

Even if at the EU level, the Commission does not directly reward companies for putting this type of schemes into place, a number of National Competition Authorities currently do so.

Finally, regarding litigation for damages, the guide emphasizes the importance of alternative methods to settle disputes in this field.

Mergers

The Commission blocks HeidelbergCement and Schwenk's proposed acquisition of Cemex Croatia

The proposed acquisition of Cemex Croatia by the German companies HeidelbergCement and Schwenk has been prohibited by the European Commission on the basis of the EU Merger Regulation. The transaction, which was notified on 5 September 2016, consisted in acquiring Cemex's assets in Croatia through the notifying parties' joint venture Duna Dráva Cement (DDC).

The decision has been adopted following an in-depth investigation of the proposed deal. During this investigation, the Commission analyzed competition between the parties in the Croatian cement markets. Cemex Croatia is the largest cement producer in the country and operates



three profitable and valuable plants in southern Croatia. DDC and HeidelbergCement are the largest cement importers in Croatia.

As a result of the analysis of the overlaps in the Croatian cement markets between the parties, the Commission had serious concerns that the proposed takeover would have reduced competition in the Croatian markets for grey cement currently served by Cemex's cement plants in Split, resulting in higher prices for cement customers. In addition, the takeover would have reduced competition between companies, which were direct competitors in the market, and could have led to a dominant position in view of the market shares the companies held in the country, i.e. 45-50%, reaching even 70% in certain parts of the country.

Moreover, the Commission's assessment showed that, post-transaction, the remaining domestic cement suppliers and importers would not have been able to compete effectively with the merged company, which would have had the possibility to hinder market entry for competitors.

Although the parties offered remedies to the Commission, they did not include any divestment in the existing cement business. Instead, they proposed granting access to a cement terminal in southern Croatia. This was found to be inadequate to allow suppliers to compete effectively, and on a lasting basis, with the merged company. The proposed remedies were also considered to be insufficient in terms of scale due to the limited capacity of the terminal and its location.

In view of the circumstances, the Commission adopted the prohibition decision based on its concerns that the transaction would have significantly reduced competition in the Croatian market of grey cement, resulting in an increase of prices in Croatia.

New EU initiative

The EU is developing a certification program that may allow companies to include safety labels on products used in the "Internet of Things"

The EU is currently developing a certification scheme whereby companies may be able to affix safety labels to products used in the "Internet of Things" ("IoT"), where machines can connect to other machines via internet. Developing a system to certify safe IoT products has been on the agenda of the Commission for at least half a year.

The aim of the EU is to dismantle obstacles affecting technologies used to link different devices on the internet, as part of the strategy to facilitate the internal market. In particular, the EU's intention is to speed up the deployment of the IoT and to ensure that consumers are fully informed of the security and safety of an IoT device.



The Commission's intention is to start by putting into place a certification framework and then to consider how to best address the possibility to affix labels on devices to guarantee their safety and trustworthiness. This may be included in the EU's cybersecurity strategy package, which is likely to be disclosed by the Commission in September.

Whereas the intricacies of how the IoT label would work are still unknown, it is likely that it follows certain initiatives of the industry that are already in place.

Other subjects that are currently under consideration by the Commission include how to attribute liability resulting from issues in automated decision-making processes and the type of networks and frequencies that should be allocated for connecting devices.

Case-Law & Analysis

Advocate General Kokott concludes that only full function joint ventures need to be subject to the Commission's approval (*Opinion of Advocate General Kokott of 27 April 2017 in Case C-248/16 Austria Asphalt GmbH & Co OG v. Bundeskartellanwalt*)

Advocate General Kokott has concluded that a change from sole to joint control in a non-full function joint venture should not be subject to control by the European Commission. Non-full function joint ventures do not act independently in the market. Therefore, according to Advocate General Kokott, any change in its control structure will not have a major impact in the structure of the market.

This case has been referred by the Austrian Supreme Court to the Court of Justice of the EU via preliminary ruling. The underlying dispute concerned whether a proposed agreement between Austrian Asphalt and one of its competitors in road building market, Teerag-Asdag, fell under the review of Austrian or EU Competition Authorities. The proposed agreement included sharing the output of the asphalt plant and not the offer of services to other companies.

According to Austria Asphalt, the proposed purchase of half of an asphalt-mixing plant from Teerag-Asdag would be subject to control by the Austrian Competition Authority and not by the European Commission. In Austria Asphalt's view, EU clearance would have only been required if the parties had created a full-function joint venture, *i.e.* an independent legal entity, which was not the case.



The Commission did not agree with this approach and held that changes in ownership are subject to the obligation to notify to the Commission, regardless of the full-function nature of the entity. Otherwise an enforcement gap could be created, according to the Commission.

Hence, the question was whether changes from sole to joint control in non-full function joint ventures must be notified to the Commission.

Advocate General Kokott has upheld Austria Asphalt's view and declared that joint ventures are only subject to the Commission's control if they are full-function entities. In this sense, she has dismissed the Commission's argument concerning the creation of an enforcement gap and said that subjecting this type of entities to EU merger control would blur the concept of "concentration" and divert the Commission resources from cases that do really require assessment.

The Court of Justice of the EU will have now to decide whether to follow Advocate General's view, since the latter is not binding for the Court's judgment.

Currently at GA&P

GA&P's Competition Law partner, Mário Marques Mendes, included as "leading individual" in 2017 Legal 500

Our Lisbon-based Competition Law partner Mário Marques Mendes has been included in the "leading individuals" selection of the 2017 Legal 500 for Portugal. The Legal 500 identifies GA&P Portugal as "professional, meticulous and dedicated" and refers to Mário Marques Mendes and, GA&P's Competition Lawyer, Alexandra Dias Henriques as key names. The Legal 500 Guide can be consulted on the following link: <http://www.legal500.com/c/portugal/eu-and-competition>

For further information please visit our website at www.gomezacebo-pombo.com or send us an e-mail to info@gomezacebo-pombo.com.

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