SLAUGHTER AND MAY/

NEWSLETTER

28 OCTOBER - 10 NOVEMBER 2020

ISSUE 21

COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS

Main article
Other developments
Antitrust

European Commission publishes results of its fitness check of the State aid modernisation package

On 30 October 2020 the European Commission published a Commission Staff Working Document presenting the results of a fitness check on the State aid rules adopted as part of the State aid modernisation package (SAM). The Commission concluded that the State aid rules are broadly fit for purpose, though certain specific rules may need to be revised and updated, in particular in order to contribute to the European Green Deal and Digital and Industrial Strategies.

BACKGROUND

The SAM involved a reform of EU State aid policy and was launched by the Commission in 2012, with the following objectives: (i) to foster sustainable, smart and inclusive growth in a competitive internal market; (ii) to focus the Commission's ex-ante scrutiny on cases with the biggest impact on the internal market; and (iii) to streamline the rules and provide for faster decisions. Under the SAM, the Commission adopted new legislation and guidelines in 2013 and 2014.

In January 2019 the Commission announced that it would be evaluating the fitness for purpose of the instruments that cover the substantive State aid rules under the SAM[1], including, *inter alia*, the General Block Exemption Regulation (GBER), the *de minimis* Regulation, and the Energy and Environmental Aid Guidelines. Additionally, the review covered the Railway Guidelines (2008/C 184/07) and the Short Term Export Credit Communication (2012/C 392/01), which were not adopted under the SAM but also required evaluation. The fitness check took into account the original SAM objectives, and examined performance against five criteria: effectiveness, efficiency, relevance, coherence, and EU added value. The exercise involved internal analyses by the Commission and public consultations, in addition to studies prepared by external consultants and stakeholders' consultations.

A number of instruments adopted as part of the SAM were due to expire by the end of 2020. In the interests of predictability and legal certainty, the Commission prolonged the validity of these State aid rules (some until the end of 2021, others until the end of 2023), pending the outcome of this evaluation.

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

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

[1] General Block Exemption Regulation No. 651/2014, *de minimis* Regulation No.1407/2013, Regional Aid Guidelines (2013/C 209/01), Research, Development and Innovation Framework (2014/C 198/01), Important Projects of Common European Interest Communication (2014/C 19/04), Risk Finance Guidelines (2014/C 19/04), Aviation Guidelines (2014/C 99/03), Energy and Environmental Aid Guidelines (2014/C 200/01), and Rescue and Restructuring Guidelines (2014/C 249/01). The procedural rules which were revised under the SAM are not object of the current evaluation exercise.

FINDINGS

Overall, the Commission found that the State aid rules are fit for purpose. There is no need for an overhaul, though certain specific rules may need revision, including clarifications, further streamlining and simplification, as well as adjustments to reflect recent legislative developments, current priorities, market and technology developments.

The Commission's conclusions on the overall effects of the SAM against its five fitness check criteria are as follows:

- Effectiveness: The SAM largely met its objectives and is therefore effective as State aid architecture. To give a specific example, when GBER was revised in 2014 under the SAM, the Commission increased exemption thresholds for many measures to allow Member States to grant higher amounts of aid without prior notification. The Working Document reports that Member States are now increasingly using GBER measures, meaning that Commission investigations focus on the most distortive cases, thereby achieving objective (ii) above. Respondents to the public consultation considered that the notification thresholds in GBER were largely appropriate.
- Efficiency: The SAM rules have decreased administrative burden to some degree, though there is still more that could be done, especially around the clarification of certain definitions and concepts. The SAM allows for more efficient State expenditure, which is for the good of public authorities, undertakings and consumers, and so the benefits of the SAM outweigh the associated costs.
- Relevance: State aid rules have broadly been appropriate for meeting needs within the EU to date, but do not fully reflect Commission priorities for the future. This particularly includes the Green Deal, as well as the Digital and Industrial Strategies. For example, the Energy and Environmental Aid Guidelines, together with the relevant provisions of the GBER aimed at creating a stable and appropriate framework for public investments across the EU, support Member States in reaching their 2020 climate targets while maintaining a level playing field. Those objectives are in line with the Green Deal, though the latter is more ambitious and covers a full range of objectives and priorities contributing to the 2050 climate neutrality goal. The evaluation further suggests that additional adaption and flexibility may be needed in future to address market developments and technological advances. For example, the current State aid rules may be insufficient in particular for the challenge of the circular economy.
- Coherence: The SAM rules are broadly coherent but some adjustments may be necessary. Some provisions, such as on the requirement for transparency and ex-post evaluation of the implemented national measures, diverge somewhat. Also, the report indicates that new EU policies and legislation stemming from the Commission's priorities, in particular the Green Deal and the Digital and Industrial Strategies, are not yet reflected in the SAM.
- EU added value: The rules evaluated under the fitness check add value since they have led to similarities in the design of Member States compensation schemes, reduced administrative costs, and provided clarity, stability and predictability.

The Working Document recommends that the instruments which need to be revised in the short term include: the Environmental and Energy Guidelines; relevant provisions of the GBER; the Regional Aid Guidelines; Important Projects of Common European Interest Communication; the Research, Development and Innovation Framework; and the Risk Finance Guidelines. The Railway Guidelines need a complete revision. The other instruments that were part of the fitness check will be revised in the medium term. Public consultations on these rules are taking place between the second half of 2020 and the beginning of 2021.

CONCLUSION

The Commission has indicated that there is no need to reform the State aid system of the SAM, since the overall architecture is still fit for purpose. The Commission believes that the SAM is largely effective in meeting its objectives, channelling resources to where they are needed. Individual rules, however, are in need of revision; a particular weakness is that some rules are not sufficiently future-proof or adaptable to changes in technology and markets. The Commission views this fitness check as an opportunity to harness State aid rules to contribute to the Green Deal and the Digital agenda.

Main article
Other developments
Antitrust

OTHER DEVELOPMENTS

ANTITRUST

CMA SIGNS MEMORANDUM OF UNDERSTANDING WITH SERIOUS FRAUD OFFICE

On 21 October 2020 the UK's Competition and Markets Authority (CMA) and Serious Fraud Office (SFO) signed a Memorandum of Understanding (MoU) which provides for cooperation in respect of cartel investigations and the prosecution of individuals involved in cartel activity in the UK. The MoU updates an agreement concluded between the CMA and the SFO in 2014 and provides greater detail on the mechanism for cooperation between the agencies in practice.

The MoU aims to ensure the efficient and effective investigation and prosecution of criminal cartel offences in the UK. In particular, the MoU enables the criminal cartel offence to be investigated by the CMA or the SFO, or by way of a joint investigation between the agencies. In certain circumstances, the CMA may conduct a civil investigation alongside an SFO criminal investigation.

The MoU envisages that the CMA and SFO will cooperate and support each other in cases of mutual interest by sharing know-how including technical expertise, training and secondments of employees and by disclosing intelligence and confidential information, subject to wider data protection laws. The CMA will undertake any necessary initial criminal enquiries where it receives information that criminal cartel activity may have occurred and the SFO will refer any information suggestive of criminal cartel activity to the CMA in the first instance. Following any necessary initial enquiries and informal discussions with the SFO, the CMA may refer a criminal cartel case to the SFO if it considers that the investigation would be more appropriately dealt with by the SFO. The agency that leads the investigation will be responsible for all the costs of the investigation and the costs of any joint investigation will be agreed upfront.

The MoU is a likely response to the low number of cartel convictions by the CMA over the last few years and also hints at the SFO's willingness to use its enforcement powers in criminal cartel cases going forward.

COURT OF JUSTICE CONFIRMS PARENTAL LIABILITY IN PIRELLI CABLE CARTEL CASE

On 28 October 2020 the European Court of Justice (CJ) rejected Pirelli & C. SpA's (Pirelli) appeal against a judgment of the General Court (GC) in which the GC found that parental liability was to be imputed to Pirelli for the involvement of its former subsidiary, PirelliCS, in a power cables cartel. Pirelli sold PirelliCS to a subsidiary of Goldman Sachs in 2005 and PirelliCS now operates as Prysmian.

On 3 February 2009 the European Commission carried out dawn raids on manufacturers of high voltage underground cables and, on 6 July 2011, issued a statement of objections (SO) to 12 parties suspected of participating in a submarine and underground power cables cartel. On 2 April 2014 the Commission published an infringement decision in which it found that the addressees of the SO had engaged in certain practices including market sharing and customer allocation between 1999 and 2009, and imposed fines on 11 undertakings totalling €301.6 million. This included a fine of €104.6 million for Prysmian, of which Pirelli was held jointly and severally liable for €67.3 million. The Commission found that Pirelli's liability stemmed from the presumption that it exercised 'decisive influence' over PirelliCS by holding all, or almost all, of the shares in PirelliCS between 1999 and 2005. Pirelli lodged an appeal against the Commission's decision on 17 June 2014. On 12 July 2018 the GC upheld the Commission's decision and dismissed Pirelli's appeal in its entirety. On 21 September 2018 Pirelli lodged an appeal against the GC's decision.

The CJ dismissed the appeal in its entirety and rejected Pirelli's argument that it should not bear parental liability. In dismissing the appeal, the CJ relied on established case-law to conclude that competition law violations by subsidiaries can be imputed to the parent company and that the Commission does not need to prove that parent companies were involved in the criminal activities themselves. In finding Pirelli liable, the CJ confirmed that parental liability for an infringement may be imputed even where a subsidiary has changed legal ownership. The CJ stressed that the principal

goal of imposing fines for parental liability is not to ensure that higher fines are paid but rather to ensure that parent companies take responsibility for ensuring that their subsidiaries are not engaging in anti-competitive activity.

WAVE OF SETTLEMENT DECISIONS IN HONG KONG

Hong Kong saw three settlement decisions from the Competition Tribunal and the Competition Commission (HKCC) over the past two weeks: (i) the city's first director disqualification order in antitrust enforcement; (ii) fines imposed on a case of exchanging competitively sensitive information; and (iii) acceptance of commitments concluding a two-year probe into the Hong Kong Seaport Alliance.

Hong Kong's first director disqualification order was granted on 30 October 2020 in the HKCC's fourth cartel case. The director was among the six decorator firms and three individuals who admitted to cartel conduct in contravention of the First Conduct Rule. The Competition Tribunal imposed a 22-month disqualification order against the director (reduced from the HKCC's proposed 24 months), in consideration of the 'lower-medium' severity of the case, the director's early admission of liability and delay caused by the coronavirus and another respondent's objection to the consent procedure (i.e. the disqualification order could have started and ended earlier).

On 3 November 2020 the Competition Tribunal imposed HK$37,702.26 (approximately £3,700) in fines on Quantr Ltd, a local IT product reseller, for discussing pricing information in connection with a tender for an IT project by a local amusement park. Proceedings were originally lodged in January 2020 after Quantr refused to comply with the conditions required in the HKCC's Infringement Notice, which would have allowed Quantr to admit liability in lieu of the HKCC bringing enforcement proceedings before the Tribunal. However, shortly after the commencement of the proceedings, Quantr and its director admitted liability, which allowed the Tribunal proceedings to be significantly streamlined. Aside from being the first leniency case resulting in Tribunal proceedings, and the case with the lowest fines so far, this has been the quickest enforcement case concluded, with proceedings first lodged in January 2020 and concluded within 10 months.

The HKCC formally accepted commitments from members of the Hong Kong Seaport Alliance on 30 October 2020. The final commitments were only slightly revised from the draft commitments published for consultation in August 2020, with most of the changes being clarifications to protect the interests of customers. These are the first commitments accepted by the HKCC requiring a monitoring trustee to monitor compliance with the conditions of the commitments.

These decisions reinforce the HKCC's trend of achieving quick enforcement outcomes by settling cases both before and after enforcement proceedings are lodged. This trend of settling cases is expected to continue in Hong Kong, as two other cartel cases before the Tribunal are currently in final stages of settlement, and more local precedents allow parties to better weigh the cost of fighting the HKCC in the Tribunal against settling cases with the HKCC.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650