

EU COMMISSION ENDS ANTITRUST PROCEEDING AFTER AREVA AND SIEMENS AGREE TO LIMIT SCOPE OF NON-COMPETE AND CONFIDENTIALITY OBLIGATIONS

June 29, 2012

To Our Clients and Friends:

On June 18, 2012, the European Commission (“Commission”) announced its decision to accept commitments offered by Areva SA (“Areva”) and Siemens AG (“Siemens”) limiting the scope and duration of non-compete and confidentiality obligations agreed to in the context of a nuclear technologies joint venture (the “JV”).

KEY TAKEAWAYS:

- This case serves as an important reminder that parties entering into a joint venture capable of having an effect within the EU must define any restrictions on their behaviour in a manner which ensures that any non-compete clause (or other provision that is restrictive of competition between the parties) is directly related to and reasonably necessary for its implementation, or risk investigation and potential fines.
- It also serves to clarify that non-compete obligations can be enforced against the jointly controlling shareholders not only for the duration of the joint venture but also (in so far as a withdrawing shareholder is concerned) for a period of up to three years following such withdrawal, at least in those cases where such withdrawing shareholder has had access to the confidential business information of the joint venture, provided that its scope is confined strictly to products and services constituting the core economic activity of the joint venture.

PREVIOUS COMMISSION GUIDANCE

Since the 2005 modernization of the Commission’s enforcement practices, it is the responsibility of the parties to self-assess and ensure that any non-compete clause (or other provision which is restrictive of competition between the parties) entered into in connection with a concentration is directly related to and necessary for its implementation. If the non-compete provision meets that test, it will not be caught by Article 101 of the Treaty on the Functioning of the EU (“TFEU”).

The Commission, in its 2005 Notice on restrictions directly related and necessary to Concentrations (the “Ancillary Restraints Notice” or “Notice”), provided that, in the context of a concentration involving the acquisition of control by one undertaking of another, a non-

compete obligation imposed on the vendor is justified for a period of up to three years when the transfer of the undertaking involves customer loyalty in the form of know-how as well as goodwill and for a period of up to two years when only goodwill is involved. In addition, the Notice stipulates that both the subject matter (products and services covered) and the geographic scope of the non-compete must not exceed what is reasonably necessary to implement the concentration.

The Ancillary Restraints Notice also notes that non-compete obligations entered into between the controlling parents of a joint venture and the joint venture itself can be regarded as directly related and necessary to the implementation of the concentration for the lifetime of the joint venture. The Notice is silent, however, on the issue of a non-compete obligation applicable to a parent which withdraws from a joint venture.

SIEMENS/AREVA INVESTIGATION

In 2001, Framatome SA (which later in 2001 was merged with Cogema and another entity to form Areva) and Siemens created the JV in which they combined their respective activities in relation to nuclear power plants. The transaction was approved by the Commission following an in-depth merger control review. The Shareholders' Agreement between the parent companies included a non-compete obligation that applied not only for the life of the JV but also continued to apply to a withdrawing shareholder for up to 11 years following its withdrawal. The non-compete obligation covered both the core products and services of the JV and also other products in relation to which the JV was not active and/or acted only as a re-seller of Siemens' products. In addition, the Shareholders' Agreement contained a confidentiality clause with the same duration as the non-compete. In 2009, Siemens unilaterally decided to withdraw from the JV in order to pursue other activities in the field of nuclear technology.

Following a complaint filed by Siemens in October 2009, the Commission opened an investigation over competition concerns that the non-compete obligation and confidentiality clause could infringe Article 101 TFEU, which prohibits anti-competitive agreements. The Commission decided to initiate antitrust proceedings in May 2010. (The validity of the non-compete was also the subject of an arbitration proceeding between Siemens and Areva. By an arbitral decision issued in April 2011, the post-JV duration of the non-compete was reduced to four years, ending in September 2013.)

The Commission adopted a preliminary assessment in December 2011 that expressed concern that these arrangements could constitute an infringement of the competition rules due to their excessive product scope and duration. The preliminary assessment concluded that the post-JV non-compete clause, and the confidentiality clause in so far as the latter had the same effect as a non-compete clause, could be considered anti-competitive to the extent that:

- they prevented competition by Siemens on the markets of the JV's core products and core services for a period exceeding three years following Siemens' withdrawal from the JV in 2009; and
- they prevented competition by Siemens on markets where the JV was not active with its own products and services and on markets where Areva had allowed sales by Siemens during the life of the JV.

In February 2012, Areva and Siemens executed and delivered to the Commission a set of Commitments, under Council Regulation 1/2003, whereby they agreed to limit the duration of the non-compete and confidentiality obligations of Siemens to the period ending October 16, 2012 (corresponding to three years following the withdrawal of Siemens from the JV) and also agreed to limit the scope of such obligations to the JV's Core Products and Services as identified in a detailed list annexed to the Commitments. Following market testing, the Commission announced in its June 18, 2012 press release that the Commitments were adequate and that it had decided both (i) to accept them and thereby make them binding on the parties, and (ii) to end its investigation.

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Please do not hesitate to contact us if you have any questions.

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