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European Commission takes strict approach as regards non-compliance with EU merger rules

On 18 May 2017 the European Commission announced that it has imposed a €110 million fine on Facebook for providing misleading information in relation to its takeover of WhatsApp. On the same day the Commission issued a Statement of Objections to Altice, a Portuguese telecoms company, alleging that it had breached the 'standstill' obligation in the EU Merger Regulation (EUMR) by implementing its acquisition of PT Portugal prior to gaining the Commission's approval.

The Competition Commissioner, Margrethe Vestager, cited these two cases in a **speech** to the Romanian Competition Council, signalling that the Commission will take a strict approach where it considers that merger parties are not adequately complying with their procedural obligations under the EUMR. The Commission's Deputy Director General for Mergers, Carles Esteva Mosso, has further **commented** that "*investigating and sanctioning the provision of misleading information and gun-jumping practices are a pre-requisite to effective and timely merger control*", highlighting the need for merger parties to be mindful of their procedural obligations under the EU merger rules when implementing transactions.

Providing false or misleading information

Under the EUMR the negligent or intentional supply of incorrect or misleading information in a merger notification, or in response to subsequent information requests, may expose the parties to fines of up to 1 per cent of their worldwide group turnover and the possibility of a clearance decision being revoked (Article 14 of the EUMR). In his speech, Mr. Mosso emphasised the importance of the merger parties providing "complete, true and timely information" in order for the Commission to conduct an in-depth analysis within the strict deadlines prescribed by the EUMR.

The Commission's **decision** to impose a fine on Facebook of €110 million for providing misleading information relates to its 2014 takeover of WhatsApp, and is

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the first such decision since the entry into force of the 2004 EUMR.[1] The Commission considered that Facebook committed two separate infringements: (i) the provision of incorrect and misleading information in the merger notification form and (ii) then again in a reply to a request for information. In both instances, Facebook had stated that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. However, in August 2016 WhatsApp announced updates to its terms of services that included the possibility of linking WhatsApp users' phone numbers with Facebook users' identities. Having learnt of this development, the Commission issued a Statement of Objections in December 2016 and has since concluded that, contrary to Facebook's previous statements, the technical possibility of automatically matching Facebook and WhatsApp users' identities already existed in 2014 and that Facebook's staff had been aware of such a possibility.

The Commission considered that Facebook was at least negligent in breaching its procedural obligations and deemed the infringements to be serious because they prevented the Commission from having all relevant information for the assessment of the transaction. Mitigating factors taken into account by the Commission included Facebook's cooperation during the investigation and its acknowledgment of the infringement. The Commission has also stressed that the fining decision has no impact on its 2014 clearance decision. Indeed, the clearance decision was based on a number of elements going beyond automated user matching. The Commission at the time also carried out an 'even if' assessment that assumed user matching as a possibility. The Commission therefore considers that, although relevant, the incorrect or misleading information provided by Facebook did not have an impact on the outcome of the case.

The Facebook decision is unlikely to be the only case dealing with the provision of inaccurate information in the near future. In a speech given to the American Bar Association in March 2017, Ms. Vestager indicated that the Commission is looking at a number of other recent merger cases where the parties may have provided misleading information. It has been reported in the press that General Electric has recently **confirmed** that the Commission is investigating the possible provision of misleading information by General Electric in relation to its proposed takeover of LM Wind Power.

Gun-jumping

Concentrations with an EU dimension must be formally notified to the Commission (Article 4(1) of the EUMR). Transactions cannot be implemented until the Commission has taken a formal clearance decision (Article 7(1) of the EUMR, known as the 'standstill' obligation). The Commission can impose fines of up to 10 per cent of worldwide group turnover for intentional or negligent breach of the notification and standstill requirements. The Commission has so far imposed significant fines on parties who have failed to notify a transaction prior to completion.[2]

On 18 May 2017 the Commission **announced** that it had issued a Statement of Objections to telecoms company Altice concerning alleged gun-jumping infringements in relation to its acquisition of PT Portugal

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[1] In *Munksjö/Ahlstrom* (2014) the Commission investigated the alleged provision of misleading information (regarding the size of affected markets), but closed its proceedings without imposing a fine.

[2] The largest fines imposed to date have been the €20 million fine imposed on Marine Harvest in relation to its acquisition of Morpol (2014) and the €20 million fine imposed on Electrabel for acquiring control of Compagnie Nationale du Rhône (2009).

in 2015. The Commission was notified of the transaction in February 2015 and adopted a conditional clearance decision in April 2015. The Commission is investigating whether the purchase agreement between the companies contained provisions enabling Altice to exert decisive influence over the target, and whether Altice had in fact exercised decisive influence over PT Portugal, before notification and before clearance of the transaction. In her speech to the Romanian Competition Council, Ms. Vestager indicated that the Commission's suspicions were raised by press reports that Altice's executives had been visiting PT Portugal. She further suggested that the Commission is investigating whether Altice may have given instructions to PT Portugal regarding how to handle commercial negotiations and the exchange of commercially sensitive information.

Mr. Mosso has also emphasised the importance of the standstill obligation, stating that the Commission "*cannot ensure that competition problems will not materialise if the parties do not respect the standstill obligation of the Regulation and do not implement the merger before they have received the final approval from the Commission*". Indeed, gun-jumping has been a hot topic for competition authorities in recent years, both at national level within the EU (for example in France, where the national competition authority imposed a record €80 million fine on Altice in 2016 in relation to its acquisition of SFR), as well as globally, where authorities in the US, Brazil and China have also been active in this area.

Comment

The Commission takes these procedural obligations very seriously. According to Ms. Vestager, the Commission does not "*see these cases as a distraction from our work reviewing mergers. Quite the opposite. Because these obligations are what makes it possible to do our job*". These cases serve as a reminder that in addition to the substantive analysis and engagement with the Commission entailed by the merger review process, merger parties must properly consider their compliance with the procedural aspects of the merger rules.

Other developments

Antitrust

European Commission launches investigation into Aspen Pharma over excessive pricing for cancer medicines

The European Commission announced that it has opened a formal investigation into concerns relating to Aspen Pharma's pricing practices on 15 May 2017. The Commission is investigating whether Aspen abused its dominant position by charging excessive prices for five medicines used for cancer treatment, in breach of Article 102 of the Treaty on the Functioning of the European Union. Aspen acquired the relevant drugs from GlaxoSmithKline (GSK) in 2009 after their patent protection expired. Aspen is alleged to have imposed very significant and unjustified price increases for these "niche" products that are sold in low volumes. The Commission alleges that Aspen imposed such prices by threatening to withdraw these medicines in some Member States, and has actually done so on certain occasions.

The investigation covers all of the European Economic Area except Italy, where Aspen was already **fined** €5 million by the national competition authority in September 2016 for abusing its dominant position by charging unfair prices for four cancer medicines.

This is the Commission's first investigation into excessive pricing in the pharmaceutical industry. Such cases are generally rare and, in recent years, competition authorities have tended to focus on agreements between patent owners and their generic rivals, who are accused of delaying the entry of cheaper drugs.[3] However, there have been several recent cases in the UK where excessive pricing was at issue: the Competition and Markets Authority (CMA) (i) **fined** Pfizer and Flynn Pharma nearly £90 million for excessive pricing in relation to an epilepsy treatment drug in December 2016[4], (ii) in the same month **provisionally found** that Actavis had charged excessive prices to the NHS for hydrocortisone tablets and (iii) is currently **investigating** Concordia in relation to suspected excessive pricing in the supply of certain pharmaceutical products, including to the NHS. Whilst Competition Commissioner Margrethe Vestager has recently signalled that the Commission is considering scrutinising excessive drug pricing, she has, since the launch of the probe into Aspen, also sought to clarify that the competition agency's role is not to be a price regulator.

Claimant withdraws UK's first opt-out class action application

The National Pensioners Convention's general secretary Dorothy Gibson has withdrawn her application to launch an opt-out class action against mobility scooters manufacturer Pride Mobility Products Limited. This is the first class action to be brought following the reforms to the UK's collective damages regime introduced by the Consumer Rights Act 2015.[5]

The proposed collective proceedings would have combined follow-on actions for damages based on an infringement **decision** by the Office of Fair Trading (OFT) (the predecessor of the CMA) in March 2014. The OFT found that Pride had breached the Chapter I prohibition in the Competition Act 1998 by requiring eight retailers not to advertise certain of its products online below its recommended retail prices. The class on behalf of which Ms. Gibson sought to bring the claim was defined as comprising any person who bought a new mobility scooter from Pride in the UK between February 2010 and February 2012.

The action could only proceed after approval by the Competition Appeal Tribunal (CAT) in the form of a collective proceedings order (CPO). The CAT may only make a CPO if (i) it considers that the claims raise common issues and are suitable to be brought in collective proceedings and (ii) it authorises the proposed class representative on the basis that it is just and reasonable for that person to act in the proceedings.[6]

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[3] For example, in February 2016 the Competition and Markets Authority **fined** a number of pharmaceutical companies £45 million for conduct and agreements under which GSK made payments and other value transfers to suppliers of generic versions of paroxetine aimed at delaying the potential entry of generic competitors into the UK market for the anti-depressant medicine. In addition, in 2014 the Commission **fined** Servier and five producers of generic medicines a total of €428 million for delaying market entry of generic versions of perindopril, a blood pressure medicine.

[4] See further Slaughter and May's **Competition & Regulatory Newsletter (7 – 20 December 2016).**

[5] For further information on the reforms brought about by the Consumer Rights Act 2015 and the application for a CPO in this case, see Slaughter and May's **UK Competition & Regulatory Newsletter (21 June – 4 July 2016).**

[6] The criteria that the CAT must consider when deciding whether to grant a CPO is set out in section 47B of the Competition Act 1998 and the Tribunal Rules.

In its **judgment** of 31 March 2017 the CAT objected to the proposed class of purchasers, holding that Ms. Gibson could only pursue damages on behalf of customers that purchased Pride scooters from the eight infringing retailers, not from other retailers whose prices were affected by Pride's restrictive pricing arrangements with those eight companies. The CAT was unable to assume how many other infringements took place as a result of the policy and, moreover, *"[t]his would be to allow the Applicant to circumvent the boundaries of a follow-on action, and in effect recover for the represented class by the back door what she could not recover by the front"*.[7] The CAT adjourned the application for a CPO and invited Ms. Gibson to reformulate her claim and definition of sub-classes and to provide further expert evidence to justify the quantum of loss. The CAT subsequently reported in an **order** on 11 May 2017 that Ms. Gibson had withdrawn her application for a CPO. Her counsel has said that the costs of proceeding with the litigation would outweigh any potential damages.

This first application for a collective action shows that the CAT is willing to see such claims advance but will be rigorous in demanding sufficient evidence to justify class certification, in particular where it is proposed that stand-alone claims are included in a follow-on class action.

In addition, the CAT noted that the approach to certification of class actions in the UK is intended to be "very different" to the approach in the US, notably because the US regime involves extensive discovery, deposition, cross-examination and long hearings, whereas the UK system should involve no or only very limited disclosure and shorter hearings held soon after the claim form is served. The CAT considered that it could derive more appropriate guidance from the position in Canada.[8]

A second application to commence a class action was filed in September 2016 seeking damages for losses resulting from Mastercard's multilateral interchange fees.[9]

State aid

EU simplifies State aid rules on public investment in ports and airports, culture, sports arenas and the outermost regions

On 17 May 2017 the European Commission announced **new State aid rules** for certain public support measures for ports, airports, culture, sports arenas and the outermost regions by simplifying and widening the scope of the General Block Exemption Regulation (GBER). The GBER sets out the conditions under which Member States can implement certain State aid measures without prior notification to the Commission because these measures are unlikely to distort competition.

[7] Para. 112, *Dorothy Gibson v Pride Mobility Products Limited* [2017] CAT 9.

[8] Paras. 102-105, Ibid.

[9] *Walter Hugh Merricks CBE v MasterCard Inc and Others.*

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The new rules provide that:

(i) Investment aid to regional airports with average annual passenger traffic of up to 3 million passengers, and aid covering the operating costs of small airports handling up to 200,000 passengers per year will automatically be exempted from notification;[10]

(ii) Aid to ports will be exempted from the notification requirement for (i) public investments of up to €150 million in sea ports and up to €50 million in inland ports and (ii) the costs of dredging in ports and access waterways;

(iii) The threshold for investment aid for culture and heritage conservation is raised from €100 million to €150 million per project, and from €50 million to €75 million per undertaking per year; and

(iv) The notification threshold for investment aid for sport and multi-functional recreational infrastructure is also increased (i.e. total costs of €100 million per project).

In addition, the criteria for exemption of aids to compensate companies operating in the EU's outermost regions for their additional costs are clarified.

The initiative is designed to reduce administrative burdens for public authorities and other stakeholders in the context of the Commission's Regulatory Fitness and Performance of EU Legislation (REFIT) agenda. It forms part of the Commission's efforts to focus its State aid control on bigger cases that significantly impact competition in the internal market.

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[10] These new exemption conditions complement the Commission's Guidelines on State aid to airports and airlines, which apply to notified cases.