SLAUGHTER AND MAY

Competition & Regulatory Newsletter

23 August - 5 September 2017 / Issue 18

The European Court of Justice is due to publish its judgment in the *Intel* abuse of dominance appeal today, 6 September 2017. For a detailed analysis, please see our upcoming briefing on the topic.

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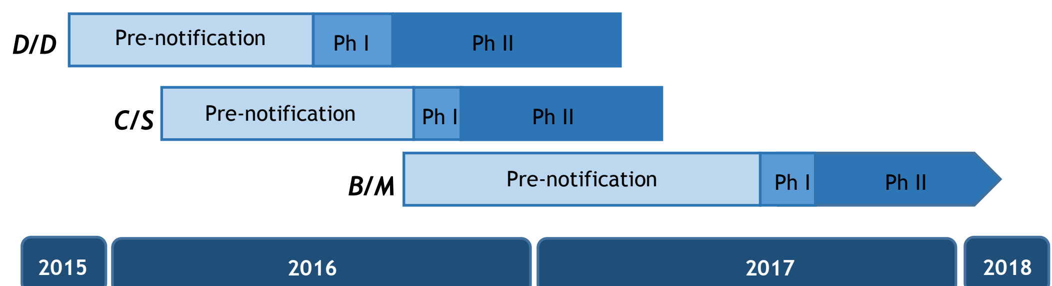
Trending this season at the European Commission: agrochemical mergers

On 22 August 2017 the European Commission opened a **Phase II investigation** into the proposed acquisition of Monsanto Company by Bayer AG for US $66 billion. Bayer is a German-headquartered diversified pharmaceuticals, consumer health, agriculture and animal health company. Monsanto is a US-headquartered agriculture company, involved in the production of seeds, pesticides and herbicides. Both companies are active in digital agriculture[1] as well as research and development (R&D) of crop protection products. The proposed concentration would create the world's largest integrated pesticides and seeds company, at a time of significant consolidation within the agrochemicals industry.

The agrochemicals industry: all change

Bayer/Monsanto is the last of three transformative concentrations within the agrochemicals sector, preceded by ***Dow/DuPont*** and ***ChemChina/Syngenta***, both conditionally cleared by the Commission at Phase II on 27 March 2017 and 5 April 2017, respectively. Each transaction was assessed on its own merits, but also subject to the 'priority' rule: the transaction that is notified first is assessed first. *Bayer/Monsanto* will therefore be assessed in light of the market structure created after the *Dow/DuPont* and *ChemChina/Syngenta* mergers.

Timeline of European Commission merger assessments



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

[1] This involves the collection of data about farms in order to provide tailored advice or aggregated data to farmers.

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The Commission's in-depth Phase II investigations of *Dow/DuPont* and *ChemChina/Syngenta* both resulted in remedies to alleviate competition concerns; the same can be expected for ***Bayer/Monsanto***. *Bayer/Monsanto* – like *Dow/DuPont* and *ChemChina/Syngenta* – is a global concentration being investigated by competition authorities worldwide; the Commission's assessment will necessarily focus on European competition concerns, but assessments (and potential remedies) in other jurisdictions may cover different aspects of the acquisition.

The Commission has found the agrochemicals sector to be characterised by: (i) expensive and time-consuming R&D processes; (ii) the importance of innovation and pipeline products; (iii) high barriers to entry; (iv) highly segmented markets (based on the target crop, method of application, etc) leading to numerous, narrowly defined innovation spaces; and (v) a concentrated market structure, with a limited number of globally integrated players. These attributes have influenced the **competition analysis** of these recent industry consolidations, with *Dow/DuPont* principally being guided by the protection of product and innovation competition, while *ChemChina/Syngenta* focussed on the companies' positions within the many affected markets.

Dow/DuPont: innovation and market concentration

Dow/DuPont concerns the US $130 billion merger of equals between the Dow Chemical Company and E. I. du Pont de Nemours and Company, both US-based chemicals companies active in the crop protection sector. The transaction was announced on 11 December 2015 and notified to the Commission on 22 June 2016. The Commission **opened a Phase II investigation** on 11 August 2016 and conditionally cleared the merger on 27 March 2017. The deal was finally closed on 31 August 2017 after receipt of all required merger clearances around the world.

Recognising the importance of innovation to the industry, the Commission was primarily concerned with product and innovation competition in relation to crop protection products. At the time, Dow and DuPont were two of only five global integrated players (i.e. active at all levels of the value chain, from discovery to R&D to distribution) in the agrochemicals industry. In assessing the crop protection product portfolios (including both existing and pipeline products), the Commission considered that competition from generic companies (involved in the development and sale of off-patent products, rather than innovation and discovery of new molecules) was limited for both herbicides and insecticides. Given the introduction of successful pipeline products, recently for insecticides and imminently for herbicides, the Commission recognised the strength of the parties' combined crop protection portfolio. As a result of these factors, the Commission concluded that the proposed transaction significantly impeded competition in numerous markets.

The Commission was also concerned that Dow and DuPont were two of only a few global R&D companies with the capability to innovate in certain narrowly defined innovation spaces. The Commission considered that Dow and DuPont were both important innovators and close innovation competitors, and that alternative R&D companies were unlikely to offset the reduction of innovation brought about by the proposed transaction, particularly given the concentrated market structure with high barriers to entry.

The remedy required the divestment of DuPont's R&D organisation and aspects of DuPont's herbicides and insecticides business. FMC, a US-based generic player in the agrochemicals industry, has agreed to purchase the DuPont divestment business in an **asset-swap deal**, whereby DuPont will acquire FMC's health and nutrition business. On 27 July 2017 the Commission **conditionally cleared** both parts of the

asset-swap deal. The need for remedies in this spin-off transaction is a further indication of the nature of the agrochemicals industry, with a limited number of players competing in highly segmented markets identified by the Commission.

ChemChina/Syngenta: guided by market structure

ChemChina/Syngenta concerns the US $43 billion acquisition of Syngenta AG, a Swiss-headquartered global integrated R&D agrochemicals company, by China National Chemical Corporation (ChemChina), a Chinese State-owned enterprise primarily active through its subsidiary, Adama, as a generic agrochemicals supplier. The deal was announced on 3 February 2016 and formally notified to the Commission on 23 September 2016; a Phase II investigation was opened on 28 October 2016 and conditional clearance was given on 5 April 2017.

The Commission's assessment was shaped by the differences in company profile and position of Syngenta and ChemChina: Syngenta is active throughout the value chain of crop protection products whereas ChemChina, through Adama, is a generic player. Therefore, unlike *Dow/DuPont*, loss of innovation concerns were not central to the assessment.

The Commission focussed on off-patent crop protection products, where Syngenta and Adama compete in many product and geographical markets. Given the number and extreme heterogeneity of the affected markets, the Commission's assessment involved a case-by-case analysis of the closeness of competition in each market. In some markets, there were marginal market share increases but the evidence on closeness of competition indicated significant competitive constraints between the parties' products; conversely, some markets with high market shares exhibited limited competitive constraints. The Commission considered that over 100 overlaps were problematic due to a lack of alternatives post-merger and the close competition between Syngenta and Adama. Accordingly, the Commission accepted a comprehensive remedy proposal, which involved the divestiture of either Syngenta's or Adama's products in all these problematic markets, but did not require the inclusion of any production facilities.

Bayer/Monsanto: next steps

Bayer and Monsanto announced their proposed concentration on 14 September 2016. After extended pre-notification discussions, the merger notification was formally filed with the Commission on 30 June 2017. On 31 July 2017 the parties submitted commitments to address the Commission's initial concerns; however, the Commission considered these commitments insufficient to alleviate its serious doubts, and did not market-test them. Instead, it opened Phase II proceedings. It provisionally has until 8 January 2018 to clear or prohibit the proposed concentration. In parallel, the Commission is cooperating closely with other competition authorities assessing this transaction, including those of the US, Australia, Brazil, Canada and South Africa.

The Commission's initial market investigation revealed concerns in relation to pesticides, seeds and traits (characteristics of plants, such as herbicide tolerance or disease resistance, which can be developed in laboratories and introduced in certain plant varieties). In these areas, Bayer and Monsanto are two of a limited number of competitors and both companies have invested heavily in relevant R&D. Additionally, as the merged entity would be the largest integrated company in the agrochemicals industry, the Commission has concerns regarding whether competitors' access to distributors or farmers would become

more difficult if Bayer/Monsanto were to bundle or tie their products or through the use of digital agriculture.

The deal has also come under significant scrutiny and criticism from third parties, who have expressed concerns about food safety, consumers, the environment and the climate. Margrethe Vestager, the European Commissioner for Competition, has made clear that the Commission's mandate is to assess the merger solely and impartially from a competition perspective.

Conclusion

The *Bayer/Monsanto* merger review comes at an interesting time, given the market structure and recent industry consolidation. The Commission's analysis is likely to be informed by the companies' profiles and positions within the industry: Bayer is one of the global integrated players in the agrochemicals sector, whereas Monsanto is considered to be a generic player. In this sense, the pair follows a similar structure to *ChemChina/Syngenta*. Nonetheless, Monsanto is active in R&D for pesticides, seeds and traits, areas in which the Commission has already expressed preliminary concerns. Considerations of product and innovation competition, as employed in the *Dow/DuPont* case, are also likely to be of significance in the Commission's assessment, especially given both companies' investment in digital agriculture.

Other developments

Merger control

CMA clears merger between Birmingham hospitals on the basis of patient benefits

On 30 August 2017 the Competition and Markets Authority (CMA) cleared the merger between Heart of England NHS Foundation Trust (HEFT) and University Hospitals Birmingham NHS Foundation Trust (UHB) at Phase I. Although the CMA considered that the merger could give rise to competition concerns across 25 elective specialties, it found that these would be significantly outweighed by the expected substantial improvements to the quality of patient care. This is the first case in which the CMA has cleared an NHS hospital merger at Phase I on the basis of patient benefits outweighing potential competition concerns.

The main competitive concern in this case was the reduction of the number of competing hospital trusts in Birmingham from three to two, thereby limiting patient choice. The CMA found that in 25 elective specialty services the merger could reduce quality for patients by removing the incentives for competing trusts to attract patient referrals from each other.

In reaching its decision not to refer the merger for an in-depth Phase II investigation, the CMA relied in part on the advice of NHS Improvement,[2] the sectoral regulator, which supported the proposed merger. The CMA was advised that the HEFT management had been unable to address difficulties that HEFT had

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[2] Pursuant to section 79 of the Health and Social Care Act 2012, the CMA must notify NHS Improvement where it decides to carry out an investigation of an NHS merger. Once notified, NHS Improvement is under a duty to provide (non-binding) advice to the CMA on: (i) relevant customer benefits arising from the merger for people who use healthcare services provided for the purposes of the NHS, that is, any patient benefits, and (ii) any other matters relating to the proposed merger as NHS Improvement considers appropriate.

faced in relation to governance, finances and quality of care since 2012. The appointment of UHB management to HEFT's executive team in October 2015 had resulted in some improvements, including the introduction of substantial patient benefits such as reduced waiting times and an increased quality and safety of patient care. Absent the merger (and by extension the presence of UHB's management at HEFT), it was likely that these improvements as well as some other longer term benefits would disappear. The CMA also found that absent the merger HEFT would be a relatively weak competitor to UHB and that both parties faced capacity constraints.

Antitrust

CMA fines golf club manufacturer Ping for banning online sales

On 24 August 2017 the CMA issued an **infringement decision** against Ping Europe for its breach of both UK and EU competition law by banning online sales of its golf clubs by two UK retailers. In addition to imposing a £1.45 million fine on Ping, the CMA also ordered Ping to bring the online sales ban to an end and not to impose the same or equivalent terms on other retailers.

In this case the CMA has decided to impose a fine only on the supplier entering into the infringing agreements and not on the retailer counterparties, applying Rule 10(2) of the Competition Act 1998 Rules which allow it to address an infringement decision to only some of the participants in a relevant agreement. The CMA nonetheless warns that retailers should be aware that they can be fined for entering into agreements containing anti-competitive restrictions. When it issued its statement of objections in 2016, the CMA **noted** that bans on internet trading may be problematic if they prevent retailers from reaching a significant proportion of customers and if no justifications can be put forward for such bans.

Ping has released a **statement** expressing its disagreement with the CMA's decision. Ping's position is that the ban on online sales is necessary to ensure that customers are custom fitted in-store for a product that is right for them. The CMA, however, considered that such an aim could have been achieved through means that were less restrictive of competition, although in setting the level of the fine it took into account the fact that the breach of competition law occurred within the context of the genuine commercial aim of promoting in-store custom fitting.

Ping also indicated in its statement that it intends to appeal the CMA's decision before the Competition Appeal Tribunal, and that it will seek a stay to keep the online ban in place during the appeal process.

Korea Fair Trade Commission fines Gore KRW3.67 billion (approx. €2.7 million) for unfair trade practices

On 25 August 2017 the Korea Fair Trade Commission (KFTC) imposed a fine of KRW3.67 billion (approx. €2.7 million) and corrective order on W.L. Gore & Associates for engaging in unfair trade practices in Korea in violation of Article 23 of the Monopoly Regulation and Fair Trade Act. Gore is a US company which supplies waterproof, windproof and breathable fabric called GORE-TEX for the manufacture of outdoor clothing and footwear.

The KFTC found that, during the period between March 2009 and December 2012, Gore prohibited its customers (outdoor wear companies) from distributing outerwear and shoe products made of GORE-TEX

through large retailers, including E-Mart and Lotte Mart. Gore monitored compliance with this policy by deploying undercover shoppers to conduct inspections at large retailers. Where GORE-TEX products were sold at large retailers, Gore ordered a recall of the stock and, in some cases, unilaterally suspended GORE-TEX fabric supplies to such customers. With Gore having a share of around 60 per cent of the relevant market, the KFTC considered this restriction on distribution channels to undermine price competition in violation of the Monopoly Regulation and Fair Trade Act.

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