SLAUGHTER AND MAY

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European Commission unconditionally clears Luxottica/Essilor merger after Phase II review

The European Commission announced on 1 March 2018 that it has unconditionally approved the €48 billion proposed merger of Luxottica Group S.p.A and Essilor International S.A. after a Phase II investigation.

The parties and their products

Luxottica is a global manufacturer of prescription frames and sunglasses. The company owns several proprietary brands, such as Ray-Ban and Oakley, along with over 15 licensed brands, including Armani and Chanel. Luxottica also operates optician retail businesses, which include Sunglass Hut.

Essilor is a supplier of ophthalmic lenses, both worldwide and in Europe, and owns brands such as Varilux, Crizal and Transitions.

Both companies sell their products to opticians before the finished spectacles and sunglasses are sold to consumers.

The Commission's investigation

The transaction was notified to the Commission on 22 August 2017. The Commission announced its decision to open a Phase II investigation on 26 September 2017 following initial concerns.

The Commission's preliminary competition concerns

The Commission's preliminary investigation found that Essilor's strong market position in lenses and Luxottica's strong market position in eyewear raised competition concerns. In particular, the Commission was concerned that sales of Essilor lenses may be bundled or tied to purchases of Luxottica's products given the market strength of Luxottica's brands, and that this may limit consumer choice and raise prices. In addition, the Commission was concerned that the merger would remove important emerging competition from both Luxottica in lenses and Essilor in eyewear.

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

The Phase II investigation and its outcome

The Phase II investigation, which gathered feedback from almost 4,000 European opticians, did not confirm the Commission's initial concerns. In particular, the Phase II investigation indicated that:

(i) Even Luxottica's strongest brands in frames and sunglasses (e.g. Ray-Ban) are generally not essential products for opticians. This was supported by Luxottica's market share for frames being below 20 per cent in Europe and the fact that a significant number of opticians do not sell its products.

(ii) The merged entity would not be able to exploit its market power in sunglasses to exclude competing lens manufacturers. The Phase II investigation indicated that sunglasses are largely sold without any visual correction and do not provide a major source of revenue for opticians.

(iii) The risk to the merged entity of losing customers would mean that there was little incentive to engage in bundling or tying practices. Indeed, the Commission found that, even if such practices were to occur, it would be unlikely for them to foreclose competing lens suppliers and harm effective competition.

(iv) There was no justification for concerns that the merged company would be able to foreclose rival eyewear makers. Essilor's market influence and ability to offer incentives were found to be insufficient to shut out competitors of Luxottica.

(v) Finally, the limited activities of both Luxottica and Essilor in the other's respective product markets meant that they were unlikely to play an important competitive role in the foreseeable future.

The Commission therefore concluded that the transaction would not raise competition concerns within the European Economic Area or any substantial part of it.

Commissioner Vestager has overseen 25 completed Phase II investigations since her appointment in November 2014, only three (12 per cent) of which have received unconditional approval. A further three (12 per cent) have been prohibited and 14 (56 per cent) approved with conditions. Five (20 per cent) of the notifications were withdrawn.

A global scope

Given the global scope of the transaction, the Commission has cooperated closely with other competition authorities. These include those of Australia, Brazil, Canada, Chile, China, Israel, New Zealand, Singapore, South Africa, Turkey and, in particular, the US Federal Trade Commission (FTC). The FTC granted unconditional approval to the proposed merger on the same date as the Commission.

Other developments

Merger Control

PCC raises thresholds for merger notifications

On 5 March 2018 the Philippine Competition Commission (PCC) announced its decision to raise the jurisdictional thresholds for transactions requiring notification. The new thresholds are: (i) PHP 5 billion (approximately €88 million) for the 'size of person' test[1]; and (ii) PHP 2 billion (approximately €35 million) for the 'size of transaction' test.[2] The new thresholds will take effect 15 days after publication on 5 March 2018 of the information memorandum that accompanied the PCC's press release, and will apply to definitive agreements executed after that date. The thresholds will be adjusted automatically every year on 1 March, based on the official estimate of the nominal GDP growth of the previous calendar year rounded up to the nearest hundred million.

Since the 2015 Philippine Competition Act took effect, the PCC has received 152 notifications and approved 125 transactions, worth a total of PHP 2.25 trillion (approximately €39 billion), with others at differing stages of the review process. PCC Chairman Arsenio M. Baliscan noted that the decision to adjust the thresholds was based on various considerations, including the size of actual notifications to date, the country's economic growth, overall inflation and efficient use of the PCC's limited resources.

Last month, in its first gun-jumping decision, the PCC declared a transaction between Udenna Corporation and KGL Investment Cooperatief U.A. to be void and fined the parties 1 per cent of the value of the transaction. Further information about this decision is available in this previous edition of our newsletter. Whilst it is not clear whether this transaction would have been caught under the new thresholds, this move will be welcomed by the business community as it will lead to fewer transactions being subject to mandatory merger review in the Philippines.

Antitrust

UK household fuel suppliers agree £3.4 million cartel settlement fine

On 2 March 2018 the Competition and Markets Authority (CMA) announced that CPL and Fuel Express, two of the largest UK supermarket and petrol station suppliers of bagged household fuels such as coal and

[1] The 'size of person' test refers to the value of the assets in the Philippines or the gross revenues in, into or from the Philippines of the ultimate parent entity of at least one of the parties.

[2] The 'size of transaction' test refers to, amongst other things, the value of the assets in the Philippines and/or the gross revenues generated in, into or from the Philippines by the assets acquired.

barbeque charcoal, have admitted to participating in an illegal market sharing cartel. As a result, both companies will contribute to a settlement fine of £3.4 million.

The CMA raided the suppliers' premises after it received a tip-off about the cartel activities, with it transpiring that the companies were rigging competitive tenders in respect of Sainsbury's and Tesco supply contracts.[3] For each of these tenders, CPL and Fuel Express agreed that one company would submit an artificially high bid specifically devised to lose, so that the other could keep its existing customer. CPL and Fuel Express engaged in the illegal activities between June 2010 and February 2011.

The CMA will now publish a formal infringement decision imposing the fine and to show its findings. The fine will be payable once the decision has been issued, with CPL to pay £2,816,514 and Fuel Express to pay £627,867. These penalties were reduced by 20 per cent because the companies admitted that they had participated in the illegal activities and agreed to follow a streamlined procedure going forwards.

Regulatory

UK PSR opens first competition case

In a **speech** on 28 February 2018 Carole Begent, Head of Legal at the UK's Payment Systems Regulator (PSR), disclosed that the PSR has commenced its first case under the Competition Act 1998.[4] The case has not yet been formally announced and the alleged conduct and identity of the defendants is still unknown, but Begent revealed that court warrants had been granted allowing "a significant number" of UK site visits to take place. She stated that the case has involved working closely with the UK's primary competition authority, the CMA. Begent also highlighted that these types of cases are "significant operations", especially for the PSR which she described as "small and fairly new".

The PSR was fully established in 2015 (under the Financial Services (Banking Reform) Act 2013) to regulate payment systems. One of its statutory objectives, the 'competition objective', is to promote effective competition in the markets for payment systems and services, between operators, payment service providers and infrastructure providers.[5] It has concurrent competition powers with the CMA, which mean that it can enforce competition law in relation to participation in payment systems.

In its relatively short existence to date, the PSR has been **active** in pursuing its objective to promote competition. It has issued a number of directions aimed at improving the ability of entrants to gain direct access to payment systems by requiring open and fair access terms and conditions, as well as regular reporting. It has also conducted two market reviews into the supply of indirect access to payment systems and the provision of payments infrastructure, exploring whether existing arrangements promote competition or whether changes are needed. The PSR is also considering the payment cards market, in light of the EU Interchange Fee Regulation, to ensure that it is operating in the best interests of users.

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[3] The companies were also sharing competitively-sensitive pricing information.

[4] Begent was speaking at the Berwin Leighton Paisner and British Institute of International and Comparative Law 'Competition in Financial Services' Conference in London.

[5] S.50 Financial Services (Banking Reform) Act 2013.

The new competition case is noteworthy as it is the first of its kind for the PSR. It demonstrates that, whilst so far the PSR's work has been achieved without the use formal powers, it is prepared to enforce against breaches of the law when appropriate. It also serves as a reminder that the CMA is not the UK's only regulator with the ability to enforce competition law. It will be interesting to see how this case progresses.

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