SLAUGHTER AND MAY

Competition & Regulatory Newsletter

14 - 27 March 2018 / Issue 7

European Commission conditionally clears Bayer's acquisition of Monsanto

On 21 March 2018 the European Commission **announced** that it had approved the proposed $66 billion acquisition of Monsanto Company by Bayer AG after a Phase II investigation. This acquisition will be the latest in a series of large-scale consolidations within the global agricultural sector.

The proposed transaction and market context

Bayer, headquartered in Germany, is a global seeds supplier and the second largest supplier of pesticides worldwide with a particularly strong presence in Europe. Monsanto, headquartered in the US, is the world's largest supplier of vegetable seeds and a producer of market-leading pesticides and herbicides. The proposed transaction was formally notified to the Commission on 30 June 2017 and a Phase II investigation was opened on 22 August 2017.

This acquisition comes after a series of recent consolidations last year in the agrochemicals industry (see this previous **edition** of our newsletter), with the merger of **Dow and DuPont** and **ChemChina's acquisition of Switzerland-based Syngenta** conditionally cleared on 27 March 2017 and 5 April 2017 respectively. Against the backdrop of these recent mergers, clearing this proposal to create the world's largest pesticides and seeds company required Bayer to put forward a significant remedy package.

Commission's concerns

The Commission's preliminary investigation identified concerns over higher prices and reduced quality, choice and innovation in pesticides, seeds and plant traits markets. Competition between certain pesticides and non-selective herbicides is rather limited and the Commission was concerned about these two competitors merging products and innovations on new formulations and weed resistance.

Both companies hold high market shares in oilseed rape seeds and are key licensors of cotton seeds to their competitors in Europe. They have both also funded research into developing alternative herbicide tolerance traits – again an already restricted field with significant barriers to entry. The Commission put forward a theory of harm in relation to the need for competition to ensure companies innovate and develop new products that meet European regulatory

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

standards, advancing the same theory of harm used in *Dow/DuPont*. Bayer is one of very few companies to produce an alternative to Monsanto's glyphosate, which is the most used herbicide worldwide. The overarching concern for the Commission in the agrochemical sector is ensuring farmers have access to a variety of innovative seed varieties, pesticides and herbicides at affordable prices.

Phase II investigation

The investigation launched by the Commission looked at over 2,000 product markets. It concluded that the transaction would significantly reduce competition on price and innovation in Europe as well as globally on a number of different markets. Monsanto has a dominant position on certain markets and in certain cases Bayer is a critically important challenger. In particular:

(i) **Seeds and traits** – the transaction as notified would effectively eliminate competition in several markets for seed varieties, in particular vegetable seeds, oilseed rape seeds and cotton seeds. Noting that many GM traits are not allowed in Europe, the Commission noted the effects on the global market for the licensing of traits and trait stacks for European parties. The Commission concluded it would eliminate competition between Monsanto and Bayer's respective trait stack families, strengthen brand dominance and reduce both GM and non-GM innovation competition.

(ii) **Pesticides and herbicides** – the transaction as notified would eliminate competition between Bayer and Monsanto on key branded non-selective herbicides and future seed treatment products. It would also eliminate innovation competition in herbicides and herbicide systems.

(iii) **Digital agriculture** – in relation to the use of public and private data collected and analysed from agricultural land, the transaction would result in the loss of potential competition between Bayer's recently launched technical platform in Europe and Monsanto's world-leading platform about to be launched in Europe.

The investigation did not confirm initial concerns raised regarding innovation in biological pesticides and bee health.

Bayer's accepted remedy package

Bayer offered a series of divestment commitments worth over €6 billion as a remedy package, which the Commission has approved on the basis that they will address the above concerns in full. The majority of these divestments are expected to go to BASF who have agreed to buy €5.9 billion of Bayer's assets. BASF already owns a large global pesticide business, however there are limited horizontal overlaps in the above areas which should make them a suitable buyer. Specifically, Bayer has committed to the following:

(i) **Vegetable seeds** – divesting the entirety of Bayer's vegetable seed business, including its R&D organisation, to a buyer not currently active in that sector. This will ensure the number of global vegetable seeds competitors remains the same.

(ii) **Broadacre seeds and traits** – divesting to BASF almost the entirety of its global broadacre seeds and traits business, including oilseed rape, cotton, soybean and rape. This will include Bayer's entire trait business, including R&D sections. The divesture will remove horizontal overlaps between the parties and ensure the number of global players remains the same.

(iii) **Pesticides and herbicides** – divesting to BASF its glufosinate assets, seed treatments and lines of research for non-selective herbicides to ensure competition in these markets and research into new ‘challenger products’.

(iv) **Digital agriculture** – licensing a copy of its current platform worldwide to BASF, ensuring competition in the European Economic Area as BASF replicates Bayer’s current offering.

As Commissioner Margrethe Vestager noted in her **statement**, such broad divestments and the licensing of the digital farming portfolio will help maintain “effective competition and innovation” in the relevant markets by ensuring there will still be six global competitors in broadacre seeds and four in integrated traits. Bayer and Monsanto cannot yet implement the transaction until the Commission formally assesses and prejudges the divesture of the package of assets to BASF. The proposed divestment has also resulted in a separate ongoing European merger notification (Case M. 8851, *BASF/Bayer Divestment Business*, notified on 7 March 2018).

Future outlook

The Commission worked with a number of competition authorities worldwide in this case and the proposed transaction has been cleared by the relevant authorities in Brazil, China, Russia, Australia, Columbia, South Africa, Ukraine, the Philippines and Ecuador. Notably, clearance is still outstanding in India, Mexico, Canada and the US. In particular, US regulators are still looking at the proposed transaction with the Department of Justice (DoJ) reportedly pushing for additional divestments.

In conclusion, the acceptance of this extensive remedy package shows a pragmatic approach taken by the Commission as key competition concerns appear to have been addressed. The acquisition is likely to go ahead, although it will be interesting to see the outcome of the DoJ investigation which could significantly delay Bayer closing the transaction.

Other developments

Merger control

Apple notifies Shazam acquisition to the European Commission, amidst debate over adequacy of jurisdictional tests

On 14 March 2018 Apple **notified** the European Commission of its planned $400 million acquisition of Shazam, the UK-based developer and distributor of music recognition applications. The notification was prompted by the Commission’s **acceptance** on 6 February 2018 of a request from seven Member States to assess the deal under the EU Merger Regulation (EUMR).[1] The provisional deadline for a Phase I decision is set for 23 April 2018.

The notification comes amidst debate over whether the current EUMR jurisdictional tests, which are based on the parties' turnover, remain sufficient to ensure that important mergers which may threaten competition are not slipping through the cracks. Both Apple and Shazam respectively boast of large numbers of users. However, the acquisition was caught by the Commission only after upward referral from the Austrian national competition authority as Shazam's turnover did not meet the EUMR thresholds.

The fact that the deal has reached the Commission regardless should provide some comfort that the upward referral mechanisms within the EUMR mean mergers continue to be assessed by the best placed authority. Indeed, this case echoes Facebook's $19 billion acquisition of WhatsApp in 2014, which landed with the Commission following referral by the social-media company itself after WhatsApp's turnover figures fell below the EUMR thresholds despite having millions of users worldwide. Nevertheless, this relies upon deals being snared initially by thresholds at the national level and means that national authorities and merger parties effectively become gatekeepers to review.

The Commission is still reflecting on whether its jurisdictional tests require adaptation, in order to give it *prima facie* scrutiny of such deals[2], or whether the current referral route is sufficient. Apple/Shazam will certainly provide it with food for thought.

General competition

China announces consolidation of three antitrust agencies

On 13 March 2018 the State Council of China **announced** its plan to establish a new State Market Supervisory Bureau (SMSB), which will consolidate China's three existing antitrust law enforcement bodies under one unified supervisory authority. According to Xinhua (the official news agency in China), the SMSB was **established** on 21 March 2018.

Currently, the Price Supervision and Anti-Monopoly Bureau of the National Development and Reform Commission (NDRC) and the Anti-unfair Competition Bureau of the State Administration of Industry and Commerce (SAIC) deal with price-related and non-price related antitrust issues respectively, whereas the Anti-Monopoly Bureau of the Ministry of Commerce is responsible for merger control. The Anti-Monopoly Commission of the State Council, which is responsible for developing antitrust policy and conducting market investigations, will be retained but its functions will be undertaken by SMSB. The organisational reform will not change the Anti-Monopoly Law itself, but new guidance is expected to be issued by the SMSB.

---

[1] The request was submitted by Austria, joined by France, Iceland, Italy, Norway, Spain and Sweden. Article 22 EUMR allows Member States to request that the Commission examine a merger that does not meet the EUMR jurisdictional thresholds but affects trade within the Single Market and threatens to significantly affect competition within the territory of the Members States making the request.

[2] Germany and Austria have already amended their jurisdictional thresholds to include a 'deal value' element.

These changes are part of wider institutional reforms to the Chinese governmental organisation structure. Chinese State Councillor Wang Yong explained that the reform is aimed to streamline and strengthen national market supervision and antitrust law enforcement. Details concerning the new enforcement body, such as its ranking within the Chinese government, the reshuffle of personnel and SMSB's management structure, are yet to be announced. However, Xinhua **reported** on 23 March 2018 that the former chief of SAIC, Zhang Mao, has been appointed as the head of SMSB.

The reform is a welcome change and will help to address the existing potential for inconsistencies across the three competition bodies, including avoiding the difficult distinction between price-related and non-price related conduct between the NDRC and SAIC. It should also make antitrust compliance easier and streamline the process for leniency applications.

Regulatory

New CMA guides and methodology for assessing rail franchise awards

On 15 March 2018 the Competition and Markets Authority (CMA) published new guidance on its competition assessments of rail franchise awards, following the conclusion in December 2017 of its consultation on the draft guidance. The guidance aims to assist franchise bidders and other stakeholders by explaining the CMA's approach to assessing the award of rail franchises under its merger control duties.

Entering into a rail franchise agreement constitutes an acquisition of control of an enterprise under the merger control provisions of the Enterprise Act 2002. The CMA therefore has a statutory role in reviewing the award of rail franchises. The CMA states that its aim is to complete a Phase I review of the franchise award prior to the start of operations under the franchise agreement. The CMA assesses any competition concerns that may arise from the franchise award; for example, potential fare increases or degradation of services if the successful bidder already operates rail, bus or coach services on the same routes.

Most recently, the CMA investigated the award of the South Western rail franchise to FirstGroup plc and MTR Corporation, and raised concerns that the franchise award could reduce competition and lead to higher fares or worse service for passengers on the route between London and Exeter, given that FirstGroup plc already operated the Great Western Railway franchise, which runs the only other train service on that route. The CMA **granted Phase I clearance** in exchange for undertakings by FirstGroup and MTR.[3] The parties offered to cap the price of unregulated fares between London and Exeter on both Southwestern and Great Western Railway services and to link ticket prices with comparable services.

The guidance is not intended to overhaul the CMA's process or assessments carried out for awards. Instead, the documents build on previous commentary and experience in rail franchise mergers, reframing the established approach into consolidated documents. The new guidance comprises a **short summary document**, which answers common questions about the CMA's process and approach. The summary document supersedes the CMA's Q&As on rail franchises from April 2014. It is accompanied by a more **detailed technical document**, which describes the methodology applied by the CMA in assessing

[3] First Group and MTR/South Western (ME/6664/16), CMA decision of 24 August 2017.

competition issues in this context and the theories of harm that are relevant to the award of rail franchises. This guidance supersedes the Competition Commission **Review of methodologies in transport inquiries** in relation to rail franchise mergers, which had been adopted by the CMA. However, the new CMA guidance may not apply to other transport mergers outside of rail franchises. The Competition Commission's paper should still be consulted in these instances.

Brussels	London	Hong Kong	Beijing
T +32 (0)2 737 94 00	T +44 (0)20 7600 1200	T +852 2521 0551	T +86 10 5965 0600