

Competition & Regulatory Newsletter

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European Commission prohibits two mergers in one day

On 6 February 2019 following in-depth investigations, the European Commission prohibited two separate transactions, namely [Siemens's proposed acquisition of Alstom](#) and [Wieland's proposed acquisition of Aurubis Rolled Products and Schwermetall](#). This is the first time in the Commission's history that it has prohibited two transactions on the same day, and brings the total number of transactions blocked by the Commission in the last ten years to nine.

Siemens's proposed acquisition of Alstom

Siemens is a German company whose global activities include rolling stock and rail automation and signalling solutions. Alstom, a French company, is also active worldwide in the rail transport industry. The companies are considered to be the two largest suppliers of various types of signalling systems and rolling stock in Europe, as well as having a leading global presence.

The particular areas of concern identified by the Commission related to: (i) signalling systems (which ensure the safety of railway and metro transportation); and (ii) very high-speed trains (i.e. those operating at speeds in excess of 300 KPH).

The Commission's investigation showed that:

- In respect of signalling systems, the proposed transaction would have removed a "very strong competitor" from several mainline and urban signalling markets, and the merged entity would have assumed the position of an "undisputed market leader" in several mainline signalling markets. The merged entity would also have become the market leader in Communication-Based Train Control metro signalling systems.
- In terms of very high-speed trains, the proposed transaction would have removed one of Europe's two largest manufacturers of such trains. The merged entity would have held very high market shares in the EEA (as well as in a wider market covering the rest of the world (excluding South Korea, Japan and China)), and would have reduced competition significantly.

During its review of the proposed transaction, the Commission also considered the possible entry of Chinese suppliers of both signalling systems and very high-

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speed trains. It nevertheless concluded that such potential entry did not represent a credible competitive constraint in the foreseeable future.

The proposed remedies package

The Commission did not consider that the remedies offered by the parties adequately addressed its concerns. In particular:

- In respect of mainline signalling systems, the proposed remedy comprised a “complex mix” of the parties’ assets. As such, it did not constitute a stand-alone business which would have enabled a purchaser to compete effectively against the merged entity.
- In respect of very high-speed trains, the parties offered to divest Alstom’s existing “Pendolino” train, which was not yet capable of running at very high speeds. A licence for Siemens’ “Velaro” high-speed technology, which was offered by the parties in the alternative, was subject to restrictions which would have detracted from a purchaser’s ability and incentive to develop a competing very high-speed train.

Wieland’s proposed acquisition of Aurubis Rolled Products and Schwermetall

Wieland and Aurubis Rolled Products are both German companies which manufacture and supply a range of semi-finished products made of copper and copper alloys, including rolled copper products. Schwermetall is a 50/50 joint venture between Wieland and Aurubis which manufactures pre-rolled copper and copper alloy strips. These are sold to Wieland and Aurubis, as well as to other copper manufacturers. The proposed transaction would have combined Wieland and Aurubis, with Wieland also taking full control over Schwermetall.

The Commission was concerned that, by removing Aurubis as a key competitor for rolled copper products, the proposed transaction would have reduced the number of large suppliers in the EEA from three to two. Further, as European customers cannot rely on suppliers outside the EEA, the transaction would have left customers with limited choice post-transaction. With regards to pre-rolled strip, the Commission was concerned that the transaction would enable Wieland to raise input costs for smaller competitors, as well as potentially gain access to their competitively sensitive information.

The proposed remedies package

Like Siemens/Alstom, the remedies package offered by the parties was not deemed sufficiently far-reaching. While Wieland did offer to divest two Aurubis plants which manufacture rolled copper products, its unwillingness to divest Aurubis’s 50 per cent stake in Schwermetall proved fatal to the transaction.

Conclusion

These landmark decisions have generated considerable debate around whether the EU merger control rules should be reformed to enable the creation of “European champions”, in the face of increasing competition from China and elsewhere. Joe Kaeser, President and CEO of Siemens AG, has said that “*Europe urgently needs structural reform*” and that protecting local customer interests “*must not mean that Europe cannot be on a level playing field with nations like China and the USA*”. He is joined by France’s Finance Minister, Bruno Le Maire, who considers the current rules “*stop us from confronting the*

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challenges of the 21st century". Meanwhile, EU Commissioner Margrethe Vestager is **standing firm** in defending the current rules, noting that European business champions cannot be built "*with mergers that harm competition, or by looking the other way when Europe's businesses break our rules*".

Other developments

Antitrust

Hotel booking sites to make major changes after CMA probe

The Competition and Markets Authority (CMA) **confirmed** that it has reached an agreement with some of the biggest online hotel booking websites to end practices that were causing the CMA concern under present consumer protection legislation. The CMA **investigation** into hotel booking sites began in October 2017 and proceeded to **enforcement action** in June last year.

Expedia, Booking.com, Agoda, Hotels.com, ebookers and trivago have cooperated with the CMA's investigation and have voluntarily agreed to:

- Make it clear to the consumer when the ranking of search results has been affected by commission;
- Not give an incorrect impression of the availability or popularity of a hotel or rush consumers into making a booking decision based on incomplete information;
- Be clearer about discounts and only promote deals that are actually available at that time (for example, not comparing a weekend rate with a weekday tariff or comparing the price of a luxury suite with a standard room); and
- Display all compulsory charges such as taxes, booking or resort fees in the headline price to ensure there are no "hidden charges".

The sites now have until 1 September 2019 to implement changes. The CMA intends to actively monitor compliance and to contact other major online travel agencies, meta-search engines and hotel groups to set out clear expectations for how they should be complying with consumer protection law, with an intention to take further enforcement action if it finds sufficient evidence that other industry participants are non-compliant with the undertakings provided by these parties.

This was a high profile investigation for the CMA, as it is leading the way in Europe by being the first competition authority to agree a set of detailed rules governing the presentation of information on hotel search and booking sites under EU consumer protection legislation.

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Hong Kong Pharmaceutical Industry Association applies to the Hong Kong Competition Commission for exemption of its proposed market sales survey

On 1 February 2019 the Hong Kong Competition Commission (HKCC) **announced** that it has received an **application** from the Hong Kong Association of the Pharmaceutical Industry (the Association) for a decision that its proposed market sales survey is excluded from the application of the First Conduct Rule of the

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Competition Ordinance (the equivalent of Article 101 of the Treaty on the Functioning of the European Union) (the Application). The HKCC has invited representations on the Application until 29 March 2019.

The Association comprises 38 full members who are companies active in the supply of prescription and over-the-counter pharmaceutical products and/or medical devices in Hong Kong. It also has associate members who are academics, educational institutions or non-governmental organisations. It aims to provide members with information relating to the development of the healthcare sector in Hong Kong.

The subject of the Application is the Association's proposed market sales survey to collect and distribute aggregated, non-price sales data regarding prescription and over-the-counter pharmaceutical products in Hong Kong and Macau. Data collected from such survey will be distributed on a quarterly basis, available for purchase. The Association argues that the market sales survey does not contravene the First Conduct Rule, as the data collected will not contain information on prices, sales volumes, stock keeping units or patient numbers, but merely sales data by value and by pharmaceutical product. The data will be aggregated and categorised by sectors, distribution channel and type.

The Association also argues that the economic efficiency exclusion provided in Section 1 of Schedule 1 to the Competition Ordinance applies. It considers that the market sales survey would enhance competition by improving production or distribution or promoting economic progress in the supply of pharmaceutical products in Hong Kong, as well as bringing new treatments for patients in Hong Kong, and that consumers will receive a fair share of the efficiencies generated.

This is the second application for a decision under Section 9 of the Competition Ordinance, after the application by the Hong Kong Association of Banks for a decision in respect of the Code of Banking Practice (the subject of an October 2018 HKCC decision, as reported in [Issue 23](#) of the Slaughter and May newsletter).

UK CMA publishes competition disqualification order guidance

On 6 February 2019 the CMA [published](#) new guidance on competition disqualification orders (CDOs) aimed at directors, businesses, legal communities and other interested parties. The publication follows a [consultation](#) from July to September 2018 on proposed changes to the previous version of the guidance, which was published by the Office of Fair Trading in 2010. The new guidance provides an overview of: (i) the legal framework for the CMA's powers to seek CDOs from a court or accept competition disqualification undertakings (CDUs) from directors; and (ii) the CMA's approach to the exercise of those powers. The CMA updated the guidance primarily to reflect the experience that it has gained in exercising its powers and the judicial nature of the director disqualification process as well as to embed efficient investigative and decision-making practices.

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