SLAUGHTER AND MAY

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Commission fines Sanrio €6.2 million for restricting cross-border sales of merchandising products

On 9 July 2019 the European Commission announced its **decision** to fine Sanrio Company, Ltd. €6.2 million for entering into anti-competitive licensing agreements restricting cross-border sales. The Commission granted a 40 per cent reduction in the fine to reflect the fact that Sanrio cooperated beyond its legal obligation to do so.

Background

Sanrio is a Japanese company that designs, licenses, produces and sells merchandising products featuring popular characters. Hello Kitty, for example, has become a global icon.

On 14 June 2017 the Commission **opened** three separate antitrust investigations into whether certain licensing and distribution practices of Sanrio, Nike and Universal Studios restricted the ability of traders to sell licensed merchandise cross-border and online within the EU. The Commission **fined** Nike €12.5 million on 25 March 2019. Its investigation into Universal Studios is ongoing.

The Commission's findings in respect of Sanrio

The Commission found that Sanrio's licensing arrangements, which were in force from 1 January 2008 to 21 December 2018, were in breach of EU competition rules. In particular, the arrangements "*partitioned the Single Market and prevented licensees in Europe from selling products cross-border*". According to the Commission:

- Sanrio directly restricted out-of-territory sales by licensees. For example, it included clauses prohibiting such sales, as well as obligations to refer orders for such sales to Sanrio. It also limited the languages used on the merchandising products.
- Sanrio also implemented indirect measures to encourage compliance with the direct restrictions. These included conducting audits and refusing to renew licensing agreements if licensees did not respect the restrictions on out-of-territory sales.

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

Speaking about the decision, EU Competition Commissioner Margrethe Vestager noted that such licensing arrangements lead to "*less choice and potentially higher prices*".

Cooperation and fine

In its press release, the Commission stated that Sanrio's fine reflects a 40 per cent reduction for cooperating with the investigation "*beyond its legal obligation to do so*". Sanrio expressly acknowledged the facts and infringements of EU competition rules, and provided evidence with "significant added value". Importantly, Sanrio also provided the Commission with information that allowed it to establish the extended duration of the infringement.

The Commission has rewarded such cooperation in a number of recent non-cartel antitrust investigations. When the Commission fined **Guess** for anti-competitive agreements to block cross-border sales in December 2018, it granted a 50 per cent reduction in the fine to reflect Guess's cooperation.[1] The Commission also issued **informal guidance** on cooperation in non-cartel antitrust investigations. **Nike** was also rewarded with a 40 per cent reduction in its fine earlier this year.

Conclusion

It is clear that the Commission continues to take a hard-line approach to restrictions on cross-border sales, which - according to Margrethe Vestager - prevent customers taking "*full advantage of one of the main benefits of the Single Market: the ability to shop around Europe for the best deals*".

Nevertheless, it looks likely that the Commission will continue its recent practice of rewarding cooperation with its non-cartel antitrust investigations through the grant of significant reductions in the fines imposed.

Other developments

Merger control

CMA penalises acquirer for breaches of initial enforcement order

On 16 July 2019 the CMA **imposed** a £146,000 penalty on Nicholls' Fuel Oils Limited (Nicholls) for breach of an initial enforcement order (IEO) in relation to its completed acquisition of DCC Energy Limited's Northern Irish oil distribution business. The acquisition, which completed on 30 April 2018, was not originally notified to the CMA but the CMA's mergers intelligence function later flagged the transaction as warranting an investigation. On 8 June 2018 the CMA served an **IEO** on Nicholls that required Nicholls to continue to operate the acquired DCC business separately from its own and to refrain from making any substantive changes to either the DCC business' organisational structure or the management

[1] The Commission had also previously made reductions of 30 per cent in the 2016 **Altstoff Recycling Austria (ARA)** case and 40-50 per cent in the four 2018 **RPM Consumer Electronics** cases.

responsibilities within the acquired DCC business or the Nicholls business (except as in the ordinary course of business).

The CMA found that Nicholls had breached the IEO without reasonable excuse by relocating former DCC business staff to Nicholls' premises and by using Nicholls' vehicles and drivers to support DCC business operations without first securing CMA consent. Nicholls had also failed to deliver compliance statements by deadlines imposed by the IEO - again without any reasonable excuse.

The CMA deemed the penalty appropriate "*in the interests of general deterrence and because of the serious and in some respects flagrant nature of the breaches*". The decision follows the publication of the CMA's new **guidance on interim measures** last month and is the latest in a series of cases by the CMA focusing on breaches of merger interim measures (e.g. see the cases against ***Electro Rent***, ***Ausurus*** and ***Vanilla Group***). The CMA cases fit within a wider trend towards tougher enforcement of procedural rules by competition agencies (e.g. see also *European Commission fines Canon for gun-jumping* in our **newsletter issue 14**).

Chinese SAMR approves Cargotec/TTS Group deal with hold-separate conditions

On 5 July 2019 the State Administration for Market Regulation (SAMR) **conditionally** approved Cargotec's proposed acquisition of certain businesses of TTS Group. Cargotec is a Finnish company listed on the Helsinki Stock Exchange, engaged in product sales and services in relation to ocean transportation, ocean engineering freight and load processing. TTS Group is a Norwegian company listed on the Oslo Stock Exchange, and the target businesses mainly relate to hatch covers, roll-on equipment, cargo lifters and anchor winches for merchant ships.

SAMR found that the parties overlap in both the product and after-sales service markets for: (i) hatch covers; (ii) roll-on equipment; (iii) cargo lifters; and (iv) anchor winches. The relevant geographic market for the sale of the products is China-wide, due to their large size and heavyweight nature, which make long-distance transportation very costly, whereas the relevant geographic market for after-sales services is global as most companies (including the parties) provide such services to shipping companies that operate worldwide. SAMR concluded that the acquisition is likely to eliminate or restrict competition in three Chinese markets, namely for: (i) hatch covers (with a combined share of 55-60 per cent); (ii) roll-on equipment (with a combined share of 50-55 per cent); and (iii) cargo lifters (with a combined share of 55-60 per cent).

Despite the market shares exceeding 50 per cent, SAMR imposed only behavioural remedies, which appears to be a proportionate approach (given that the transaction had already been cleared unconditionally in Germany and South Korea). Cargotec and TTS Group must hold the relevant businesses separate in China for two years after the decision, including maintaining independent management, finance, personnel, pricing, research and development, design, production sales, and purchases. In addition, Cargotec cannot increase its prices of the relevant products in China for five years, and is prohibited from refusing, restricting, or maliciously delaying, without justification, the supply of the relevant products to Chinese customers for five years.

This is the first time SAMR has imposed a hold-separate order since the consolidation of the Chinese competition authorities in 2018. The Ministry of Commerce, the former authority responsible for merger reviews, last imposed such an order in its **clearance** of the acquisition of Siliconware Precision Industries by Advanced Semiconductor Engineering in 2017.

Antitrust

European Court of Justice dismisses Commission appeal in cartel facilitator's case

On 10 July 2019 the European Court of Justice (CJ) **dismissed** an appeal brought by the European Commission that sought to overturn an annulment by the European General Court (GC) of a fine that the Commission had imposed on interdealer broker, ICAP, in 2015.[2] In 2013, the Commission imposed **fines** of over €1.71 billion on various banks for their participation in price fixing arrangements relating to the yen interest rates derivatives market. ICAP were also investigated by the Commission for their role in facilitating these bilateral cartels between the banks and were subsequently **fined** €14.9 million.

In setting ICAP's fines, the Commission departed from its **2006 Fining Guidelines**, which provide that the basic amount of a fine will be set using the value of sales of the products related to the infringement in question. Since ICAP was an interdealer broker and not active on the interest rate derivatives market, the Commission deemed it appropriate to depart from the guidelines and set the basic amount of the fines using an alternative methodology. The GC subsequently annulled ICAP's fines. While the GC did not object to the imposition of fines against ICAP in principle, it concluded that the Commission had not provided sufficient reasons for its methodology in setting the fines. The Commission appealed the judgment but the CJ agreed with the GC. It ruled that "*where the Commission departs from the 2006 Guidelines and applies another methodology specifically adapted to the particularities of the situation of undertakings that have facilitated a cartel, it is necessary, in view of the rights of the defence, that that methodology be disclosed to the interested parties, so that they can be put in a position to make their views known on the factors on which the Commission intends to base its decision*". Simply referring to the gravity, duration and nature of the participation in an infringement was insufficient in a situation where the Commission departed from its own Fining Guidelines.

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[2] ICAP was renamed NEX International Limited in 2016.