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News

Antitrust

The Commission sends Statements of Objections to General Electric and Merck and Sigma-Aldrich for allegedly providing misleading information during EU merger review

The Commission has addressed two separate Statements of Objections ("SO") to General Electric ("GE") and to Merck and Sigma-Aldrich for a potential breach of EU Competition procedural rules. According to the Commission, the companies would have provided incorrect or misleading information during the merger review carried out by the Commission.

The first SO concerns GE's proposed acquisition of LM Wind, which was notified for the first time to the Commission on 11 January 2011. In the Commission's view, this notification included incorrect or misleading data. The Commission believes that GE did not submit information on its R&D activities and the development of a concrete product. This had an impact not only on the assessment of GE/LM Wind's transaction but also on the analysis of Siemens' acquisition of Gamesa, which was a separate transaction concerning the wind turbines' market that was being scrutinized by the Commission at the same time. The missing information was crucial for (i) the assessment of the competition structure of the wind turbines' market and (ii) the future position held by GE in such market. This first notification was withdrawn by GE on 2 February 2017 and; on 13 February 2017, GE submitted a second notification which included the information that was missing in the first one. Both the re-notified transaction and Siemens' acquisition of Gamesa were approved by the Commission in March 2017 without commitments.

As for the second SO, it concerns Merck's proposed acquisition of Sigma Aldrich, which was notified to the Commission on 21 April 2015, and subsequently cleared on 15 June 2015 subject to divestments related to a series of laboratory chemicals. The Commission has preliminarily found that during the EU merger review of this transaction the companies failed to provide relevant information concerning an innovation project relating to specific laboratory chemicals that was crucial for the Commission's assessment. Indeed, if this project had been reported, it would have been included in the remedies imposed by the Commission. The fact that the said project was not part of the remedy package has compromised the viability and competitiveness of the divested business. Even if, in the meantime, the buyer of the divested business has been licensed the necessary technology by Merck, the buyer should have received such technology at the moment of the divestment.

If the Commission's investigation shows that the companies actually supplied incorrect or misleading information for the purposes of the merger review, they could be fined up to 1% of their annual worldwide turnover.

These are not the first precedents in which the Commission investigated a failure to provide correct and accurate information during the EU review of a proposed transaction. By way of illustration, Facebook was recently fined EUR 110 million for this conduct regarding its acquisition of WhatsApp in 2014, as reported in the GA_P Alert of May 2017.

The Commission sends a Statement of Objections to Canon for presumably disregarding its obligation to notify a transaction prior to its implementation

The Japanese company Canon Inc. ("Canon") has received a Statement of Objections ("SO") from the Commission for allegedly implementing its acquisition of Toshiba Medical Systems Corporation ("Toshiba") without obtaining prior approval from the Commission.

Although the transaction was notified in August 2016 and subsequently cleared in September 2017, the Commission's view is that Canon made use of a so-called "warehousing" transaction structure. First, Canon involved an interim buyer which purchased 95% of Toshiba's share capital for EUR800. Then, Canon paid EUR5.28 billion for acquiring (i) the outstanding 5% of Toshiba and (ii) share options over the interim buyer's shares in Toshiba. These transactions took place prior to obtaining the Commission's approval. Once the Commission had cleared the acquisition, Canon exercised the share options, which resulted in Canon holding 100% of Toshiba's share capital.

If the investigation confirms that the transaction was completed before notifying it or before the Commission had adopted a decision on the acquisition, Canon could be fined up to 1% of its annual worldwide turnover.

In May 2017, the Dutch telecommunications company Altice also received a SO for an alleged breach of EU merger procedural rules consisting in the failure to notify its acquisition of PT Portugal. The investigation is currently on-going.

Case-law & Analysis

Advocate General Wahl concludes that luxury goods' suppliers may prevent their authorized retailers from selling their products through on-line platforms such as Amazon or eBay *(Opinion of Advocate General Wahl of 26 July 2017 in Case C-230/16 Coty Germany GmbH v Parfümerie Akzente GmbH)*

Advocate General Wahl has concluded that, under certain conditions, a prohibition that is intended to protect the luxury character of the goods concerned is not contrary to EU Competition Law in so far as it may boost competition on the basis of qualitative criteria.

The case concerns a preliminary ruling referred to the Court of Justice of the EU by a German court regarding a dispute between the German supplier of luxury cosmetics “Coty Germany” and one of its authorized retailers “Parfümerie Akzente”.

Coty Germany operates a selective distribution scheme through authorized retailers. In order to protect the luxury image of its products, these retailers are required to comply with certain requirements linked to decoration, environment and furnishing. As of 2012, Coty Germany’s authorized retailers are allowed to engage in on-line sales of the licensed products provided that (i) the sales are performed through an electronic platform of the retailer in question and (ii) the luxury image of the goods is preserved. The discernible use of third party platforms to sell on-line the licensed products is prohibited. Parfümerie Akzente did not accept to include these clauses in its distribution contract with Coty Germany. As a result, the latter brought an action before the German courts to seek an order to prohibit Parfümerie Akzente from distributing the licensed goods via “Amazon.de”.

The German Court competent for the adjudication of the case decided to stay proceedings and referred to the European Court of Justice of the EU the question of whether such a prohibition is in line with EU Competition Law.

Advocate General Wahl has declared that a prohibition, which is aimed at protecting the luxury image of the products at issue, is compatible with EU Competition Law provided that: (i) its application depends on the nature of the product; (ii) it is uniformly determined and applied without distinction; and (iii) it does not go beyond what is necessary.

Additionally, the Advocate General has assessed the legitimacy of such a provision. In this regard, he has observed that such a prohibition is likely to have positive effects on competition. Indeed, it is likely to improve the luxury image of the products and to protect both the supplier and the authorized retailers against parasitism; in other words, it ensures that the efforts and investments made by the latter do not benefit other operators outside the authorized network.

Moreover, according to the Advocate General, the provision at issue does not amount to a total prohibition of on-line sales. This is mainly explained by two facts: (i) the prohibition only concerns those sales performed through third party platforms, which is justified by the fact that these platforms are not bound by the quality requirements imposed on the authorized distributors; and (ii) it does not prevent the non-discernible use of third party platforms.

Regarding the proportionality of the measure, the Advocate General has not found any element that would lead to the conclusion that the provision is disproportionate to its ultimate objective.

Finally, Advocate General Wahl has also analyzed a potential scenario where the measure at issue was found to fall under the scope of Article 101(1) of the Treaty of the Functioning of the European Union (“TFEU”). In this regard, he has tackled the issue of whether the clause would benefit from an

exemption under the Block Exemption Regulation 330/2010 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices. In his view, the prohibition in question is not a serious restriction within the meaning of the said regulation. Therefore, the application of Regulation 330/2010 to it is not automatically excluded and, provided that certain conditions are met, the exemption could apply to the prohibition concerned.

Advocate Generals' opinions are not binding on the Court of Justice of the EU. Thus, it is to be seen whether the Court upholds Advocate General Wahl's Opinion.

The Court of Justice of the EU dismisses AGC Glass' claim that cartel details on the car-glass market should not be published *(Judgement of the Court of Justice of the EU of 26 July 2017 in Case C-517/15 AGC Glass Europe and Others v Commission)*

The Court of Justice of the EU has dismissed AGC Glass' appeal against a General Court judgment whereby AGC Glass' claim that the Commission is not entitled to publish further details regarding the extent of the car-glass cartel was rejected.

The dispute behind this case started in November 2008, when the Commission fined certain car-glass manufacturers for its participation in a cartel. A provisional non confidential version of the Commission's decision was published in February 2010. In April 2011, the Commission reviewed the published version of the said decision and decided that more information on the infringements committed by the cartelists Pilkington, Saint-Gobain, Soliver and AGC Glass should be made public.

AGC Glass appealed this decision before the hearing officer of the Commission, who is an independent Commission official in charge of adjudicating administrative disputes arising from antitrust investigations. The hearing officer rejected, almost in its entirety, the claims of confidential treatment brought by the applicant and decline competence to assess certain objections related to the principles of the protection of legitimate expectations and equal treatment. Ultimately, the hearing officer authorized the publication of further details by the Commission.

AGC Glass appealed the hearing officer's decision before the General Court of the EU. The General Court's judgment confirmed the hearing's officer decision and dismissed AGC Glass' appeal.

AGC Glass then filed an appeal against this judgment before the Court of Justice of the EU on the grounds that, *inter alia*, the General Court had erred in interpreting the scope of the powers of the hearing officer, namely, by holding that the said officer was not competent to examine AGC Glass' requests for confidential treatment in light of the principles of the protection of legitimate expectations and equal treatment. In the view of AGC Glass, the hearing officer is competent to hear complaints on the fact that disclosure of cartel information in the Commission's decisions may be in breach of the said principles.

The Court of Justice of the EU has acknowledged that the General Court erred in law by holding that the hearing officer had been correct to decline competence to answer theapplicant's objections to the publication on the basis of the principles of the protection of legitimate expectations and equal treatment. However, according to the Court of Justice of the EU, this error is not of such a nature so as to justify overturning the General Court's judgment. In fact, in its judgment, the General Court also pointed out that in this case the hearing officer had, in any event, examined the claims regarding the breach of the principles of legitimate expectations and equal treatment. According to the Court of Justice of the EU this mention suffices to justify the dismissal of the claim brought by AGC Glass and, consequently, the General Court's judgment cannot be annulled on this ground.

Currently at GA_P

Mind the GA_P at Rock and Law Barcelona

On 29 June, our band (Mind the GA_P) participated in the annual event Rock & Law, this time hosted in Barcelona. This initiative was created in Lisbon in 2009 and has been held in Spain since 2010. The concert has included 8 bands formed by lawyers of different top law firms and institutions in Spain. All profit will be donated to a charity cause, in this case, to the Multiple Sclerosis Foundation (FEM), a foundation that aims to improve the quality of life of individuals suffering from this disease and to boost research on the field. More info at: www.rockandlaw.org