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European Commission fines Sigma-Aldrich for providing incorrect and misleading information during merger investigation

On 3 May 2021 the European Commission announced that it had fined Sigma-Aldrich Corporation €7.5m for providing "incorrect or misleading" information during an investigation into Merck KGaA's takeover of the company. The decision marks the end of an investigation opened in July 2017.

BACKGROUND

On 21 April 2015 Merck (a science and technology company) notified the Commission of its intention to acquire Sigma-Aldrich (a life sciences company). In June 2015 the Commission conditionally approved the proposed acquisition subject to the parties divesting certain Sigma-Aldrich assets (the divestment business) to address concerns in relation to the supply of certain laboratory chemicals.

THE INFRINGEMENT

During the divestment process, the Commission was made aware by a third party complaint of a Sigma-Aldrich innovation project (iCap) which was closely linked to the divestment business and which had been specifically developed for products included in the divestment business. The Commission had not previously been made aware of iCap, and it had not been included in the scope of the divestment business.

In July 2017 the Commission informed Sigma-Aldrich and Merck of its preliminary decision that the companies negligently provided the Commission with "incorrect and misleading" information and issued a Statement of Objections to the parties. In particular, the Commission alleged that the parties failed to provide it with information about iCap. The Commission stated that the project was closely linked to the divestment business and had the potential to substantially increase its sales. Therefore, had the project been disclosed, it would have formed part of the divestment business and by not including the project in the remedies package the viability and competitiveness of the divestment business was impaired.

In July 2020, having heard from the parties, the original Statement of Objections was replaced with a supplementary Statement of Objections directed at Sigma-Aldrich only, preliminarily concluding that only Sigma-Aldrich provided incorrect and misleading information (intentionally or negligently). The objections against Merck were dropped.

On 3 May 2021 the Commission confirmed that Sigma-Aldrich committed "*three distinct infringements*" by virtue of (deliberately or negligently) providing incorrect or misleading

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information in the explanatory statement describing the remedies package and in the replies to two requests for information. Furthermore, the Commission found indications that the supply of incorrect or misleading information was intended to avoid the transfer of the relevant project to the purchaser of the divestment business. As a result, the Commission was unable to assess properly the scope of Sigma-Aldrich's commitments.

THE PENALTY

Under Article 14 of the EU Merger Regulation (EUMR), the Commission can impose fines of up to 1 per cent of the aggregated turnover of companies that intentionally or negligently provide incorrect or misleading information (having considered the nature, gravity and duration of the infringement).

The Commission considered that the infringements committed by Sigma-Aldrich were particularly serious due to: (i) accurate information being crucial to the effective functioning of the EU merger control system; (ii) the considerable importance of iCap to the divestment business; and (iii) Sigma-Aldrich being the only source of information relating to iCap (given that iCap was a secret project). Consequently, the Commission fined Sigma-Aldrich €7.5m.

Although the Commission has the power under Article 6(3) of the EUMR to revoke the conditional clearance to the extent it was based on incorrect or misleading information, in this case the Commission did not do so, but simply issued a fine.

CONCLUSION

The decision against Sigma-Aldrich is the third instance of the Commission imposing a fine on a company for providing incorrect or misleading information since the EUMR was adopted. It is also the last of three decisions relating to investigations opened in July 2017 for other potential administrative infringements of EU merger procedures: in April 2019 General Electric was fined €52m for providing incorrect information in relation to its planned acquisition of LM Wind, and in June 2019 Canon was fined €28m for gun-jumping for use of a so-called warehousing structure.

These decisions should be viewed against a global trend for tougher enforcement of merger control rules (see for example, recent fines issued by the UK's CMA[1] and China's SAMR (for details, see a previous edition of our Newsletter and below)) and should serve as a reminder of the importance of supplying accurate and complete information to the Commission (and other merger control authorities) during merger control reviews.

OTHER DEVELOPMENTS

MERGER CONTROL

CHINA'S FOCUS ON GUN-JUMPING AND SCRUTINY OF INTERNET PLATFORMS CONTINUES

Regulatory focus on gun-jumping and other anti-competitive conduct by internet platforms is continuing apace in China with several further fines issued recently and numerous internet companies being warned about potentially abusive conduct.

On 30 April 2021 the Chinese competition authority, State Administration for Market Regulation (SAMR), announced that it had fined 13 tech-related companies a total of RMB 6.5m (approximately £721,000) for failing to notify transactions that met the merger control thresholds in China. The maximum penalty of RMB 500,000 (approximately £55,000) was imposed in each case. Some of these cases involved acquisitions of minority investments (including a 6.67 per cent stake) and multiple transactions involving the same parties or groups (e.g. Tencent, Didi). It is likely that these companies proactively drew SAMR's attention to these transactions (noting that none of these transactions had any anti-

[1] *Just Eat/Hungryhouse* (ME/6659/16), CMA decision of 24 November 2017; *Rentokil/MPCL Limited (formerly Mitie Pest Control Limited)* (ME/6784/18), CMA decision of 7 August 2019; *Sabre/Farelogix* (ME/6806/19), CMA decision of 27 September 2019; *Amazon/Deliveroo*, CMA decision of 26 August 2020.

competitive effects), and demonstrates SAMR's continued focus on gun-jumping (as discussed in our previous newsletter).

On 7 May 2021 SAMR had a meeting with its local branches in relation to its previous warning to internet platforms to self-correct their anti-competitive misconducts within a month. The Chinese regulator is prepared to follow up with inspections and investigations.

It is not just the SAMR that is involved in ensuring competition compliance by internet platforms. On 29 April 2021 a number of Chinese regulators, including the People's Bank of China, the China Banking and Insurance Regulatory Commission, the China Securities Regulatory Commission and the State Foreign Exchange Administration, met 13 leading Chinese internet platform operators, including Tencent and ByteDance. The regulators asked platforms to rectify any anti-competitive behaviour and urged the companies to improve their corporate governance and carefully handle users' personal information. The regulators will closely supervise these companies going forward.

ANTITRUST

EUROPEAN COMMISSION ISSUES STATEMENT OF OBJECTIONS AGAINST APPLE IN RESPECT OF ITS APP STORE RULES FOR MUSIC STREAMING PROVIDERS

On 30 April 2021 the European Commission announced that it had sent a Statement of Objections to Apple, taking the preliminary view that Apple had abused the dominant position its holds in the market for the distribution of music streaming apps through its App Store in such a way as to distort competition in the music streaming market. This comes after the Commission formally opened two investigations in June 2020 into the impact of the App Store rules on competition in the markets for music streaming and e-books/audiobooks, though the Statement of Objections relates solely to the market for music streaming apps and follows up complaints made by Spotify (a sizeable player in the music streaming market).

The Commission stated it has two primary concerns with how Apple operates its App Store, which is the only means by which iPhone and iPad users can downloads apps for their mobile devices.

First, Apple mandatorily requires music streaming app developers to use its own in-app purchase system in order to have access to, and distribute their app via, its App Store. Apple takes a 30 per cent fee on subscriptions bought via its payment technology. This harms consumers, the Commission alleged, as this cost is ultimately passed on to end users in most cases by the raising of prices.

Second, the Commission took issue with certain "anti-steering provisions" which app developers must also agree to in order to distribute their apps via the App Store. These provisions limit the ability of app developers to advertise to iPhone and iPad users alternative purchasing possibilities for music streaming services outside of the relevant app (e.g. on separate websites). As these alternatives are usually cheaper than subscribing via the app, the Commission has expressed concerns that app users are paying higher prices for their music subscription services, or at least are being prevented from buying certain subscriptions directly in the relevant apps.

EUROPEAN COMMISSION FINES THREE MAJOR INVESTMENT BANKS FOR PARTICIPATION IN BOND TRADING CARTEL

On 28 April 2021 the Commission announced that it had fined Bank of America Merrill Lynch, Crédit Agricole and Credit Suisse a total of €28,494,000 for their part in a cartel in the secondary trading market within the EEA of supra-sovereign bonds (issued by supranational institutions such as the European Investment Bank), sovereign bonds (issued by central

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governments under law and/or currencies other than their domestic law and/or currencies) and agency bonds (issued by governmental agencies and public authorities below the level of national government) denominated in US Dollars (together, SSA Bonds), drawing a close to an investigation it began in August 2015. Deutsche Bank, which also took part in the cartel, received full immunity from being fined under the Leniency Notice, thereby avoiding a potential fine of approximately €21,500,000.

The cartel was carried out primarily via a core group of traders working in the SSA Bonds division of the four banks. Notwithstanding that they were in direct competition with one another, these traders communicated via chatrooms on Bloomberg terminals and over a five year period "*provided each other with recurring updates on their trading activities, exchanged commercially sensitive information, coordinated on prices shown to their customers, or to the market in general and aligned their trading activities on the secondary market for these bonds*". In addition, the Commission found that the traders at times agreed to refrain from bidding when to do so might come into competition with another trader to the cartel, as well as splitting trades between themselves. Overall, the Commission found that this conduct constituted collusion which "*restricted competition in a market in which investment and pension funds regularly buy and sell bonds on behalf of their investors and pensioners*" and was therefore in breach of Article 101 TFEU.

The Commission imposed the following fines: Bank of America Merrill Lynch (€12,642,000); Crédit Agricole (€3,993,000); and Credit Suisse (€11,859,000).

Margrethe Vestager, Executive Vice-President of the Commission and in charge of competition, remarked that the decision "*sends a clear message that the Commission will not tolerate any type of collusive behaviour*", including in the financial sector. Credit Suisse has already announced that it intends to appeal the decision to the European courts, stating that it "*continues to believe that the single former employee whom the European Commission criticized did not engage in anti-competitive conduct*".

GENERAL COMPETITION

UK NATIONAL SECURITY AND INVESTMENT BILL RECEIVES ROYAL ASSENT

On 29 April 2021 the UK Department for Business, Energy and Industrial Strategy (BEIS) announced that the UK National Security and Investment (NSI) Bill had received Royal Assent. The new regime enables the UK Government to scrutinise transactions involving entities and assets on national security grounds, and to impose remedies on, or even block, these transactions. The new Act catches investment in both UK companies and non-UK companies, provided that the latter carry on activities in the UK or otherwise supply goods or services to people in the UK. It also captures investment in assets, including land and intellectual property.

The new legislation will (amongst other changes) require investors and businesses to mandatorily notify - and seek the approval of - a dedicated Investment Security Unit within BEIS if, as a result of a transaction, a person's stake or voting rights in an entity which operates in certain sensitive sectors such as civil nuclear, data infrastructure, artificial intelligence, quantum technologies, military or dual-use tech and satellite and space tech exceeds 25 per cent. It also creates a voluntary notification system for sectors outside the "core" list to encourage notifications from parties who consider that their deal may raise national security concerns. Additionally, the regime allows the Secretary of State to "call in" other transactions or events in the wider economy (with no materiality thresholds) which nonetheless may raise national security concerns.

The regime is expected to formally commence towards the end of this year but, unusually, the rules have retrospective effect, applying to all transactions taking place from 12 November 2020. For more detail on the NSI regime and its potential implications, see Slaughter and May's blog post which contains links to our previous, more detailed coverage of the subject.

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