EVERSHEDS SUTHERLAND

Legal latest

Competition, EU and Regulatory newsletter

July 2017

Investigations

Teva under investigation

The Commission has sent a Statement of Objections to pharmaceutical company Teva regarding its 'pay for delay' pharma agreement with Cephalon.

The Commission's preliminary view is that Teva and Cephalon breached EU anti-trust rules by agreeing that Cephalon would pay Teva in order to keep Teva's cheaper generic version of Cephalon's sleep disorder drug, modafinil, out of the market.

Alleged breaches of EU merger procedural rules

The Commission has sent three separate Statements of Objections alleging breaches of EU merger rules as follows:

- The Commission has informed Merck and Sigma-Aldrich of its preliminary conclusion that the companies have provided incorrect or misleading information in the context of Merck's acquisition of Sigma-Aldrich. The Commission's preliminary conclusion is that Merck and Sigma-Aldrich failed to provide the Commission with important information about an innovation project with relevance for certain laboratory chemicals at the core of the Commission's analysis. Had the project been correctly disclosed to the Commission, it would have had to be included in the remedy package because the innovation at stake was closely linked to the divested business and had the potential to substantially increase its sales.
- General Electric ("**GE**") has allegedly provided incorrect or misleading information during the Commission's investigation of GE's planned acquisition of LM Wind. GE failed to provide information concerning its research and development activities and the development of a specific product. The missing information had consequences not only for the Commission's assessment of GE's acquisition of LM Wind but also for the assessment of Siemens' acquisition of Gamesa, which was being investigated by the Commission at the same time.
- The Commission has informed Canon of its preliminary conclusion that Canon implemented its acquisition of Toshiba Medical Systems Corporation before both notifying to, and obtaining approval by, the Commission. The Commission's preliminary view is that Canon used a "warehousing" two-step transaction structure involving an interim buyer, which essentially allowed it to acquire Toshiba Medical Systems prior to obtaining the relevant merger approvals.

Decision

Google fined €2.42 billion for abusing its search engine dominance

The Commission fined Google a record €2.42 billion for abusing its market dominance as a search engine by giving an illegal advantage to its own comparison shopping service.

Google are required to end the conduct within 90 days or face penalty payments of up to 5% of the average daily turnover of Alphabet, Google's parent company.

The practice in question involved Google giving prominent placement to its own comparison shopping service in search results.

News (Ireland)

Dawn raids in the motor insurance sector

A number of companies active in the motor insurance market in Ireland were subject to dawn raids by the Commission on 4 July 2017. For further information, please see the news bulletin on our website dated 6 July 2017.

State Aid

Irish air travel tax exemption for transit and transfer passengers

The Commission has found that the exemption for transfer and transit passengers from the Irish air travel tax was in line with EU State Aid rules.

This case concerned an excise duty which was in place from March 2009 to April 2014, and applied to airlines operating in Ireland. The tax had to be paid for each passenger flying from an airport located in Ireland. However, departures of passengers in transfer or transit were exempted from the tax.

The Commission concluded that the exemption was in line with the underlying logic of the Irish air travel tax, which was to tax journeys by air originating from Ireland. If a passenger transfers or transits in Ireland they are on a single journey from their airport of origin to their airport of destination, and not on two separate journeys arriving in and originating from Ireland. The exemption prevented double taxation of a single journey.

The exemption did not selectively favour certain airlines and therefore involved no State Aid.

Poland's tax on the retail sector

The Commission has found that a Polish tax on the retail sector is in breach of EU State Aid rules.

Under the Polish measure, companies operating in Poland in the retail sector would pay a monthly tax based on their turnover from retails sales. The tax features a progressive rate structure with three different brackets and rates:

- a tax exemption applies to turnover below approximately €4.02 million;
- a tax rate of 0.8% applies to turnover between approximately €4.02 million and approximately €40.2 million; and
- a tax rate of 1.4% applies to turnover in excess of approximately €40.2 million.

Poland had not demonstrated that the progressivity of the retail tax was justified by the objective of the retail tax to raise revenues, or that companies subject to the higher rates would have a higher ability to pay.

The Commission concluded that the tax would give companies with low turnover an advantage over their competitors.

Practice Note

Turnover of intermediaries

For the purposes of calculating turnover for merger control purposes, based on the "Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings", there is an exemption where services are sold through intermediaries.

Under the exemption, for merger control purposes, even if the intermediary invoices the entire amount to the final customer, the turnover of the undertaking acting as an intermediary consists of the amount of its commission only.

Merger Determination

UPS/Eirpost

This transaction involved the acquisition of Eirpost Group Unlimited Company (the "**Target**") by the UPS Group.

The UPS Group is a package delivery company operating globally and a provider of global supply chain management solutions.

The Target operates a packets and parcels delivery business in Ireland and the UK, principally the island of Ireland, and focuses on deliveries, primarily next day delivery of track and traced items.

Given that there was a horizontal overlap between the parties in relation to providing a packets and parcels delivery service to customers in the State and in light of ComReg's 2015 report entitled "The packets and parcels sector in Ireland", the CCPC considered the potential market for the provision of packets and parcels delivery services in the State.

The CCPC considered that post-transaction, the fact that the merged entity would become the second largest player in the potential market did not of itself, give rise to competition concerns. Also, there was evidence of a large and varied (in size) number of competitors in the potential market for the provision of packets and parcels delivery services within the State, who would continue to provide a competitive constraint on the merged entity post transaction. An Post and DHL being two significant players.

In light of the above, the CCPC considered that the proposed transaction would not substantially lessen competition in any market for goods or services in the State.

Sean Ryan
Partner

+353 1 6644207
seanryan@eversheds-sutherland.ie

Lisa Devanny
Solicitor

+353 1 6644296
lisadevanny@eversheds-sutherland.ie

EDUB.1339 07/17