EVERSHEDS

Legal latest

Competition, EU and Regulatory newsletter

May 2016

Investigation

Commitments offered by Paramount Pictures in pay-TV investigation
The Commission has concerns relating to contractual clauses in certain bilateral agreements between six major film studios, including Paramount Pictures ("**Paramount**") and Sky UK, under which the studios license their output of films over a certain period of time for pay-TV to Sky UK. The competition concerns relate to the contractual clauses preventing the cross-border provision of pay-TV services.

Paramount has offered the following commitments:

1. When licensing its film output for pay-TV to a broadcaster in the EEA, Paramount would not (re) introduce contractual obligations, which prevent or limit a pay-TV broadcaster from responding to unsolicited requests from consumers within the EEA but outside of the pay-TV broadcaster's licensed territory ("**Broadcaster Obligation**");
2. When licensing its film output for pay-TV to a broadcaster in the EEA, Paramount would not (re)introduce contractual obligations, which require Paramount to prohibit or limit pay-TV broadcasters located outside the licensed territory from responding to unsolicited requests from consumers within the licensed territory ("**Paramount Obligation**");
3. Paramount would not seek to bring an action before a court or tribunal for the violation of a Broadcaster Obligation in an existing agreement licensing its film output for pay-TV; and
4. Paramount would not act upon or enforce a Paramount Obligation in an existing agreement licensing its film output for pay-TV.

Decisions

Commission prohibits Hutchinson's proposed acquisition of Telefónica UK
The Commission has blocked the proposed acquisition of O2 by Hutchinson under the EU Merger Regulation. It had strong concerns that UK mobile customers would have had less choice and paid higher prices as a result of the takeover, and that the deal would have harmed innovation in the mobile sector.

The acquisition would have combined Telefónica UK's "O2" and Hutchinson 3G UK's "Three", creating a new market leader in the UK mobile market. The takeover would have removed an important competitor, leaving only two mobile network operators, Vodafone and BT's Everything Everywhere, to challenge the merged entity.

Commission fines Pometon €6.2 million for participation in steel abrasives cartel
The Commission has found that Italian abrasives producer Pometon S.p.A. breached EU anti-trust rules by participating in a cartel to coordinate steel abrasives prices in Europe for almost four years. The Commission has imposed a fine of €6,197,000.

In April 2014, the Commission adopted a settlement decision concerning the participation in the same cartel of Ervin, Winoa, Metalltechnik Schmidt and Eisenwerk Würth. Pometon S.p.A. chose not to settle and consequently the investigation continued under the normal cartel procedure.

State aid appeals dismissed
The General Court has dismissed several appeals against a Commission decision of 2005 finding that exemptions from excise duty on mineral oils used for alumina production granted by France, Ireland and Italy gave the beneficiaries an undue advantage over their competitors, in breach of EU state aid rules.

Alumina is a white powder extracted from bauxite, principally used in smelters to produce aluminium and additionally in chemical applications.

News (Ireland)

CCPC lodges appeal in case against CRH plc
The CCPC has lodged an appeal against the High Court judgment delivered on 5 April 2016 prohibiting the CCPC from accessing or reviewing certain electronic documents seized by the CCPC during a dawn raid conducted in May 2015.

The High Court judgment resulted from a court action taken by CRH plc ("**CRH**") against the CCPC following the seizure of hard copy and electronic documents by the CCPC during a dawn raid at the premises of CRH's subsidiary, Irish Cement Limited. The Orders made by the High Court following the judgment prevent the CCPC from accessing or reviewing material in the mailbox of one Irish Cement Director which was seized during the search unless and until an agreement is put in place between the CCPC and CRH which would allow for an independent third party to sift the seized documents to identify material relevant to the CCPC's investigation.

Notwithstanding the High Court's judgment, the CCPC's investigation into alleged anti-competitive practices by Irish Cement Limited in the supply of bagged cement continues.

Practice Note

What is the HHI?
The Herfindahl-Hirschman Index (the "**HHI**") is a measure of market concentration that takes account of the differences in sizes of firms in the market. The HHI is calculated by adding the sum of the squares of the market shares of each firm in the market.

The post-merger HHI gives an indication of the level of market concentration while the change in the HHI (or 'delta') reflects the change in market concentration resulting from the merger. Together, the post-merger level and the change in the HHI are used to form a threshold of market concentration. The CCPC have regard to the following thresholds:

- A post-merger threshold below 1,000 is unlikely to cause concern.
- Any market with a post-merger HHI greater than 1,000 may be regarded as concentrated and highly concentrated if greater than 2,000.
- Except as noted below, in a concentrated market a delta of less than 250 is unlikely to cause concern and in a highly concentrated market a delta of less than 150 is unlikely to cause concern.

However, a merger that falls below the HHI thresholds above may still raise competition concerns in certain circumstances, such as, for example, where one or more of the following factors are present:

- If the products of the merging parties are considered by customers to be close substitutes.
- Where one of the merging parties is a maverick firm or has recently experienced a rapid increase in market share, has driven innovation or has been charging lower prices than its competitors in the market under review.
- If a merger involves a significant potential entrant or recent entrant.
- Where there are particularly significant regulatory barriers to entry.
- Where there are high customer switching costs.
- Where indications of past or on-going coordination are present.
- Where one of the merging parties has a pre-merger market share of 50% or more.

Sean Ryan
Partner
+353 1 6644207
seanryan@eversheds.ie

Lisa Devanny
Solicitor
+353 1 6644296
lisadevanny@eversheds.ie

EDUB.740 05/16