EU & Competition Law Update

March 2014

€8 Billion Spanish-German Telecoms Merger Comes Under EU Scrutiny

Late last year, the EU Commission opened an in-depth investigation into the €8 billion merger between the German arm of Telefonica, the Spanish telecoms giant and owner of the O2 network in the UK, and E-Plus, a German network.

Telefonica in Germany and E-Plus together represent two of the four major telecoms providers in Germany. Their proposed merger has raised competitive concerns in Germany where telecoms prices are already high in comparison to other EU Member States.

In its initial market investigation, the EU Commission had concerns that the merger would raise prices in both the retail and wholesale markets. The four major players in Germany also sell through branded resellers and a loss of competitors would likely raise wholesale telecoms prices and reduce competition.

The merger is being seen as a test case in a market which is hungry for cross-border consolidation. If it goes ahead without concession, the merged entity will become Germany’s top operator. Similarly, Hutchinson in Ireland is purchasing Telefonica’s Irish mobile business and potentially facing similar objections to the German deal as again the market will be reduced from four major competitors to three.

Interested parties are curious as to how the Commission will treat the parties and what, if any, assets the parties will have to dispose of to obtain regulatory clearance. Examples of such forced divestitures could be the sale of mobile bandwidth, otherwise known as Spectrum or instigating measures to protect competition in the wholesale market.

Believed to be of central concern to the Commission is that fact that the major market players would be falling from four competitors to three. In the Commission’s eyes, a consolidation such as this could result in more price
co-ordination and resulting higher prices at a consumer level due to the increased level of transparency from having fewer competitors to watch.

The Commission’s decision is due on 14 May 2014. The coming months and regulatory decisions could define the European telecoms market for years to come if companies are either encouraged, or discouraged to merge.

**Italian Competition Authority opens investigation into two leading pharmaceutical companies**

On 29th January 2014, the Italian Competition Authority (“ICA”) opened an in-depth investigation into two leading Italian companies in the pharmaceutical sector for an alleged infringement of Article 101 TFEU; the prohibition of anti-competitive agreements or concerted practices.

The investigation stemmed from a complaint filed by Agenzia Regionale Centrale Acquisti (“ARCA”) a public entity owned by the Italian region Lombardy, entrusted to collate invitations made by pharmaceutical companies for medicines supply. The decision considers an alleged anti-competitive strategy between the pharmaceutical companies Novartis Farma S.p.A (“Novartis”) and Italfarmaco S.p.A (“Italfarmaco”) (also the “Companies”).

The Companies are accused of avoiding competing with each other for tenders. In particular, the ICA focused its attention on tenders in three Italian regions: Lombardy, Emilia Romagna and Veneto from 2010 to 2013. The tenders were aimed at supplying regional hospitals with a particular medicine produced only by the Companies.

The Companies decided not to make independent tenders but instead asked for permission to make a joint bid through a joint venture. The Lombardy and Emilia Romagna regions denied them permission but permission was granted by the Veneto region. The Companies therefore submitted a joint bid only in Veneto and as two independent companies in Lombardy and Emilia Romagna. In Emilia Romagna however, the two companies offered the same supply price.

The ICA alleged that such conduct could constitute a concerted practice aimed at allocating markets and customers. In particular, the ICA pointed out that Novartis and Italfarmaco can count on the fact that they were and are the only producers of the medicine at issue.

The ICA also held that the Companies did not provide reasonable grounds justifying the abovementioned behaviour. In particular, the ICA alleged:

i. The quantity of medicines required by tenders was in line with the productive capacity of the Companies.

ii. In each case, the mentioned quantity was reduced by 30% in order to meet the Companies’ request.

iii. All tenders regulations provided for the appointment of a third party should any problem with the quantity required arise.
In light of the above, the conduct of the Companies could raise serious issues regarding its compatibility with European Union competition rules and specifically with Article 101 TFEU. The alleged agreement between Novartis and Italfarmaco not to compete with one another is likely to fall within the prohibition in Article 101 TFEU as it amounts to undertakings allocating markets and customers amongst themselves.

If wrongdoing is found, the ICA’s investigation and subsequent enforcement action could help make the pharmaceutical sector more competitive and provide Italian healthcare sector with high cost savings.

**Düsseldorf Higher Regional Court Confirms Liability of A Legal Successor**

On 11 February 2014, the Düsseldorf Higher Regional Court decided that Melitta Europa GmbH & Co. KG as the legal successor of Melitta Kaffee GmbH, was liable for the fines the German Federal Cartel Office (“Bundeskartellamt”) had imposed on the latter on 21 December 2009. The importance of the case is that it confirms it is difficult to restructure a company to avoid regulatory fines.

In 2009 the Bundeskartellamt accused four coffee roasters for agreeing price increases from at least early 2000 until July 2008. The Cartel Office imposed fines totalling €159.5m on Alois Dallmayr Kaffee oHG, Melitta Kaffee GmbH and Tchibo GmbH while Kraft Foods Deutschland GmbH was not fined due to its application for leniency.

Melitta Kaffee GmbH had appealed against its fine and was then merged by its partners into one of its affiliates, Melitta Europa GmbH & Co. KG, by way of a process known as universal succession. The Bundeskartellamt assumed that the partners of Melitta Kaffee GmbH carried out the restructuring in order to avoid liability for the fines.

Before the 8th amendment of the Act Against Restraints of Competition - ARC (“GWB”) in June 2013, there was no provision in German legislative law which regulated the liability of legal successors for fines imposed in anti-trust proceedings. According to the case law of the German Federal Supreme Court, fines could only be imposed on legal successors provided that, from an economic point of view, the assets of the original entity and the legal successor were almost identical. The courts had stated that further clarifications could only be made by the legislator.

In 2013, the German legislator created an explicit legal basis for determining fines to be imposed on legal successors by amending section 30 of the German Regulatory Offences Act (“OWiG”). The provision now clarifies that fines can be imposed on legal successors when succeeded by way of universal succession. To ensure fairness, no fine imposed on a legal successor may exceed the value of the assets taken over or the amount of the fine that would have been imposed on the legal predecessor.
Section 30 OWiG does not apply to forms of successions other than 'universal succession', e.g. it does not apply to singular successions or spin-offs or carve-outs where the original legal entity remains existent. The Bundeskartellamt therefore claimed that the amendments of the law were still inadequate and that the legislator still needed to provide further clarity in order to prevent companies from trying to escape liability for cartel violations by carrying out reorganisations.

In the current case of Melitta, the restructuring measures were even taken prior to the amendment of section 30 of the German Regulatory Offences Act. The Düsseldorf Higher Regional Court still however held Melitta Europa GmbH & Co. KG as the legal successor of Melitta Kaffee GmbH. The former would be liable for the fines imposed on the latter because, from an economical perspective, Melitta Kaffee GmbH and Melitta Europa GmbH & Co. KG could be assumed to be identical. The companies fulfilled the criteria set up by the case law of the German Federal Supreme Court which was applicable prior to the legislative amendments.

This decision is however, not yet final. Melitta Europa GmbH & Co. KG has appealed against the decision to the Federal Court of Justice on points of law. Whatever the outcome, German Court’s are likely to take a dim future view of any companies who restructure to try and avoid regulatory fines.

---

French Competition Authority fines pharmaceutical laboratory EUR 15.3 million for hindering the launch of generic equivalent

In an important decision of December 18, 2013, the French Competition Authority ("FCA") fined Schering-Plough and its parent companies a total of EUR 15.3 million for impeding the launch of a generic drug destined to compete with its pain-killer Subutex®.

Schering-Plough (the "Laboratory") acquired in 1997 the exclusive commercialisation rights for Subutex® (a medicine prescribed in case of opiate addiction) in France from its manufacturer, the English company Reckitt Benckiser.

In January of 2006 the French Authority in charge of the safety and commercialisation of medicines ("ANSM") granted Arrow Génériques ("Arrow") an authorisation to commercialise high dose buprenorphine ("HDB"), the main molecule of Subutex®.

In November of 2006 Arrow complained to the FCA that the Laboratory had abused its dominant position on the French pharmaceutical market for HDB in order to try to drive out Arrow’s generic.

In its investigation, the FCA found that both Reckitt Benckiser and the Laboratory had elaborated a number of strategies to delay and discourage the use of generics, notably a Powerpoint action plan referred to by the Laboratory as the “French plan against generics”. In the document, the Laboratory set out three angles of attack:

1. raise barriers to entry of the generics by actions vis-à-vis the ANSM;

2. limit the penetration of the generics by inciting pharmacies to conserve 3-month Subutex® stocks; and

3. prepare the brand name transitions to Subutex FDT ® and Suboxone®.
The Laboratory was found to have implemented the plan by denigrating Arrow’s generic and by granting pharmacists loyalty and volume discounts and favourable payment terms so that they could build a sizeable stock of Subutex®.

The denigration in question consisted of the Laboratory’s organising seminars, conference calls and other communications for medical and pharmaceutical representatives to deliver a scaremonger message to doctors in regard to the risks of Arrow’s generic. Without relying on any specific medical studies, the Laboratory simply called attention to the fact that the excipients used by Subutex® and Arrow were not similar, and that the excipients used in the generic were more readily soluble and therefore could more easily be misused by users trying to inject the product, which is not meant to be injected. Doctors were also encouraged when prescribing Subutex® to note expressly on their prescriptions that the latter was not substitutable.

The FCA held that the Laboratory impeded fair competition precisely at the two key stages relating to the substitutability of the medicine (i) at the prescription stage, by encouraging doctors to write “not substitutable” and (ii) at the stage of the issuance of the medicine, by inciting pharmacists not to substitute Subutex® even if the doctor did not expressly prescribe that Subutex® was not substitutable.

The FCA also found that the Laboratory and Reckitt Benckiser had entered into an agreement the purpose of which was to hinder the arrival of Arrow’s generic on the HDB market by saturating the pharmacists’ stocks with Subutex®.

Accordingly the FCA fined the Laboratory and its parent companies Financière MSD and Merck & Co. 15.3 million euros for disparagement and unjustified rebates granted to pharmacists and 414,000 euros for collusion. Reckitt Benckiser Healthcare Ltd. (UK) and Reckitt Benckiser plc were fined 318,000 for cartel practices.

The Laboratory and its mother company did not challenge FCA’s objections and instead, proposed commitments to avoid such practices being repeated in the future. They notably committed to implement a whistle-blowing and a training program within the group based on competition rules. They also committed to implement a specific procedure for brand-name medicines at the time such medicines are about to fall into the public domain including a scrutiny of the commercial strategy envisaged for the arrival of generics and training programs for salespersons so as to prohibit denigration.

UK Consumer Rights Bill Proposes “Opt-Out” Class Action for UK Competition Claims

On Thursday 23 January 2014, the UK Government introduced the Consumer Rights Bill to Parliament.

In a major policy shift the UK Government has committed itself to reforming the competition litigation landscape to make it easier for businesses and individuals to claim compensation against anti-competitive behaviour. If passed, the Bill’s provisions are likely to make the UK the most favoured jurisdiction for bringing competition law claims in Europe.
The UK reforms go much further than those proposed by the EU in its draft Directive on encouraging private rights of action for breaches of competition law. The draft Directive is currently going through the EU legislative process.

The UK Bill includes proposals for a new form of collective action for competition claims, together with a number of other proposals for reforming the UK regime for competition law private actions. This follows the announcement of the UK Government’s proposals in January 2013 and the publication of the draft Bill in June 2013.

The Bill proposes to create a new “opt-out” collective action for competition law claims on behalf of both consumers and businesses. Proceedings can be brought before the UK specialist competition court, the Competition Appeal Tribunal (“CAT”). Under detailed certification rules yet to be published, the CAT will need to decide whether an action should proceed on an opt-in or an opt-out basis.

In an opt-in action, claimants need to opt in if they wish to become a member of the class. In an opt-out action, the claim is brought by a representative on behalf of a defined class without the need to identify each individual class members. Those class members can be consumers or businesses which have suffered loss and damage by reason of a breach of competition law occasioned by the defendants.

Any one of the defined class can act as representative for the purposes of bringing the action. The legislation also allows trade, industry and consumer representative bodies to commence class actions as a representative on behalf of the members they represent. All those falling within the opt-out class will be bound by the judgement in the case unless they opt-out. The opt-out class action procedure is open to UK domiciled claimants although individuals and companies domiciled outside the UK can apply to opt-in to the class.

Also included in the Bill are proposals for a new opt-out collective settlement regime. This based on the Dutch mass settlements regime. Under this procedure, parties will be allowed seek the CAT’s endorsement of an agreed settlement on an opt-out basis without the need for the parties to actually commence an action.

Funding is also an important part of encouraging competition law claims. Damage based agreements (“DBAs”) also known as contingency fee arrangements will be permitted for damages actions brought by individual businesses or other claimants. However, in reaction to the fear of encouraging unmeritorious class action claims, DBAs will not be permissible in the context of collective actions. Conditional fee arrangements will be permitted in collective actions. These are agreements between a lawyer and a litigant under which the lawyer recovers its fees and expenses with usually a small success fee contingent upon a successful settlement or outcome at trial. However, the uplift will not be recoverable from the losing party.
FCA validates public service monopoly

In a decision of December 30, 2013, the French Competition Authority (“FCA”) confirmed the validity of practices by the French authorities regarding the digital publication of companies’ legal information.

In March of 2008, Mercure, a service provider of on-line corporate formalities, complained to the FCA that “Infogreffe” had allegedly abused its dominant position and Mercure’s economic dependence by preventing the latter from offering its clientele paperless services similar to those offered by Infogreffe.

Infogreffe is an economic interest group (“GIE”) whose purpose is essentially to develop and administer IT tools to manage and circulate legal information to the public. Infogreffe is made up of the clerks of all French commercial courts whose public service mission is to collect data to be registered on legal publicity registers and provide information and copies of the data.

Practically speaking, Infogreffe centralises the communication of French companies’ and branches’ economic and legal information. The service is widely used by companies and legal professionals.

In March of 2008, two other companies, Coface-Services (“Coface”) and Altares-D&B Holding (“Altares”), engaged in the use and processing of data issued from legal publicity registers in order to publish analysis of the financial status and solvency of companies, complained to the FCA that the creation of Infogreffe reflected an alleged cartel among the clerks of the Commercial Courts. The plaintiffs argued that Infogreffe had immediate exclusive access to the relevant information for free without the need to obtain a commercial use license from the INPI. Coface and Altares also contended that the prices charged to them by Infogreffe were excessive, and that Infogreffe and the National Intellectual Property Institute entered into an deal in April 2009 to rationalise the production and communication of corporate economic and legal information.

The FCA rejected the complainants’ arguments on the existence of a cartel among the clerks of the commercial courts and on the alleged excessive prices applied. It held that the remuneration of the clerks and fees for each transmission of document were fixed by statute as a direct consequence of legal provisions (Annex 7.5 of Article R.743-140 of the French Commercial Code et seq.).

The FCA also examined the potential restrictive competitive practices which could arise from the contract entered into between Infogreffe and the INPI. It held notably that the participation of Infogreffe members in the INPI license committee was not per se a violation of competition law, since the purpose of the INPI license committee was only to verify whether information acquired was destined to be used internally or to be processed and sold, and found further that no business-sensitive detailed information was shared.

---

1 Legal publicity registers in France include notably the local Commercial Registries managed by Infogreffe (notices of registrations, modifications, removal of companies, acts of the companies and the like), and the National Commercial Registry managed by the French National Institute of the Industrial Property (“INPI”) which centralizes the documents compiled by the clerks of the Commercial Courts.
Italian Competition Authority opens investigation into the concrete sector

On 22nd January 2014, the Italian Competition Authority ("ICA") opened an in-depth investigation into eleven Italian companies in the concrete sector for alleged infringements of Article 101 TFEU, the prohibition against anti-competitive agreements.

The investigation stemmed from an anonymous complaint which alleged a collective anticompetitive strategy among the abovementioned eleven companies (the "Companies") in the concrete market of the Italian North-East region of Friuli Venezia Giulia.

The Companies are accused of coordinating invitations for tenders, monitoring prices and allocating customers since June 2011. It is alleged that the Companies organized periodical meetings among their managers and set a general monitoring system run by a third party which was entrusted to share the information gathered with all the Companies participating in the alleged cartel.

The ICA pointed out that the behaviour could potentially affect not only the local market but also the European Union market as the alleged cartel would impact neighbouring areas in two other European Union member states (Austria and Slovenia).

In light of the above suspicions, the ICA decided to open an in-depth investigation into the Companies for alleged infringements of Article 101 TFEU.

The alleged behaviour raises serious potential issues regarding its compatibility with European Union competition rules and specifically with Article 101 TFEU. Indeed, any agreement or concerted practice aimed at allocating customers and fixing output would cause a serious detriment to competition.

In our view, the investigation and scrutiny is welcome. If wrongdoing is found, the ICA investigation and subsequent enforcement action could be considered an effective deterrent for this kind of behaviour.

In particular, the ICA decision shows that even a regional cartel can cause harm to trade between member states and therefore triggers a violation of European Union competition rules rather than the national ones. However, the alleged wrongdoing is not proven at this stage and the investigation continues.