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Antitrust and Competition

Substantial assets divestiture needed to secure clearance for the creation of a company that will control more than a quarter of the world's seed and pesticides market

On 21 March 2018, the European Commission announced it had cleared, after in-depth review and under conditions, the acquisition by a pharmaceuticals, consumer health, agriculture and animal health company headquartered in Germany (the "Acquirer") of an agriculture company headquartered in the United States (the "Target"). The proposed acquisition was notified to the Commission on 30 June 2017. The Commission opened its in-depth investigation in August 2017 because of concerns that the proposed transaction could significantly reduce competition in a number of markets.

The Commission identified competition concerns with regard to seeds and traits (modifications to a seed genome, making it resistant to pests or tolerant to certain herbicides), pesticides and digital agriculture. The assessment of more than 2,000 product markets and 2.7 million internal documents led to the conclusion that competition would be reduced on a number of different markets and raised the concern that the Target's dominant position would be strengthened on certain markets, post-transaction.

The Commission was also initially concerned about innovation in biological pesticides and bee health. In addition, since the company would hold the largest portfolio of pesticides products and the strongest global market positions in seeds and traits, the Commission was concerned about potential bundling of seeds and pesticides. These initial concerns were not confirmed by the in-depth investigation.

In order to address the remaining competition concerns, the parties had to offer a number of commitments to which the Commission approved. These commitments aim, in particular, to keep the same number of global players. Specifically, the Acquirer should divest the entirety of its vegetable seed business together with its research and development ("R&D") organization, almost its entire global broadacre seeds and trait business together with its R&D organization, and its glufosinate assets and three lines of research for non-selective herbicides. Additional commitments were subsequently modified to include a divestment of certain seed treatment assets and products of the Acquirer and its global digital agriculture assets and products.

For the main part of the remedy package, the commitments identified a buyer. For the remaining remedies, a buyer was not indicated in the commitments but, subsequently, the same one has been proposed. It is interesting to note that during its review, the Commission cooperated with several other competition authorities worldwide, such as the US Department of Justice and the Australian, Brazilian, Canadian, Chinese, Indian, and South African competition authorities.

The fight against cartels remains a top enforcement priority for the European Commission

On 21 March 2018, the Commission also announced it had imposed fines totaling approximately EUR 254 million on eight producers of capacitors for their involvement in a cartel spanning 14 years.

The Commission found that the companies exchanged commercially sensitive information, such as future prices, pricing intentions, future supply and demand information. The anticompetitive conduct was made possible through multilateral meetings, bilateral or trilateral contacts, and price agreements.

The investigation was triggered by the application for immunity of one of the cartelists under the leniency program. Under the Commission's leniency policy, a company involved in a cartel can come forward and inform the Commission about it and, as a result, receive a full or partial immunity from fines. In this case, one company was awarded immunity, while others who cooperated with the Commission received reduced fines.

This case provides helpful examples of incriminating language, which are likely to attract the competition authorities' scrutiny and expose the company to breaches of competition rules. The Commission indicates the following examples of language used in communications: "Discard after reading", "After reading this email, please destroy it without stowing it away" and "Since the gathering should not be disclosed to the public, please be careful when handling the contents of the present report".

In addition, the cartel involved Japanese companies, which met and were in contact mainly in Japan. However, it was implemented globally, including in the European Economic Area. It is a useful reminder for companies that, even if their anticompetitive contacts take place outside the European Union, their behavior may still be caught by EU competition rules if the collusion has effects on the EU territory. This was confirmed by the EU Competition Commissioner, Margrethe Vestager, who stated that: "[W]e will not tolerate anti-competitive behavior by companies that may affect European consumers, even if the coordination takes place outside Europe."

Trade

An arbitration clause in a bilateral investment agreement between the Netherlands and Slovakia is not compatible with EU law – Case C-284/16, Slovak Republic v Achmea BV

On 6 March 2018, the Court of Justice of the European Union, the EU's highest court, ruled that a clause removing from the EU's judicial review investment disputes related to the application or interpretation of EU law is incompatible with EU law.

The CJEU's ruling referred to a bilateral investment treaty ("BIT") between the former Czechoslovakia and the Netherlands of 1991. Under the BIT, disputes between one contracting state and an investor from the other contracting party had to be settled amicably or before an arbitral tribunal. Challenging a measure of the Slovak government as an infringement against the BIT, Achmea brought arbitration proceedings against that state in 2008. In 2012, the arbitral tribunal, based in Frankfurt am Main (Germany), ruled that Slovakia's new legislation was contrary to the BIT and ordered the Slovak state to pay Achmea damages in amount of around EUR 22.1 million. Since Frankfurt am Main was chosen as the place of arbitration, German law applied to the arbitration proceedings.

Slovakia brought an action before the Higher Regional Court of Frankfurt am Main to request the annulment of the tribunal's award. Slovakia claimed that the arbitration clause in question was contrary to Article 18 TFEU (prohibition of any discrimination on grounds of nationality), Article 267 TFEU (exclusive competence of the CJEU to give preliminary rulings on the interpretation of the EU Treaties and acts of EU's institutions), and Article 344 TFEU (obligation of Member States to submit any dispute concerning the interpretation or application of the EU treaties to the CJEU). As the action was dismissed by the Higher Regional Court, the Slovak state brought an appeal before Germany's Federal Court of Justice which referred the matter to the CJEU. Germany's highest court focused on the application of Article 344 TFEU in this case and asked whether the EU treaties preclude an arbitration clause. It also asked the CJEU whether the provisions of the arbitration clause are contrary to the principle of non-discrimination on grounds of nationality.

In its ruling, the CJEU pointed first that the arbitral tribunal concerned was called on to rule on the basis of the law in force of the contracting state concerned by the dispute, as well as on other agreements between Slovakia and the Netherlands. The CJEU added that since EU law forms part of every Member State's legislation and derives from an international agreement between those states, the arbitral tribunal may be called on to interpret or apply EU law.

The CJEU further found that the arbitral tribunal is an exception to the jurisdiction system of both the Netherlands and Slovakia and that such arbitration tribunals cannot be considered as courts "of a Member State" within the meaning of EU law. Therefore, they have no power to refer a matter subject to their decision to the CJEU for a preliminary ruling.

The CJEU further noted that under the BIT, the arbitral tribunal's decision is final and that the arbitral tribunal may determine its own procedure as well as its seat and, consequently, the national law applicable to judicial review of the validity of the award it makes. However, according to the CJEU, judicial review may be exercised by national courts only to the extent allowed by national law. The CJEU stressed that this requirement was not fulfilled in this case. The CJEU accepts that in the context of commercial arbitration it is accepted that the review of arbitral awards by national courts may be limited in scope. But this cannot be applied in the case of investment arbitration. As the CJEU reasoning goes, while commercial arbitration is the result of the freely expressed will of the parties, investment arbitration is derived from a treaty by which two EU Member States agreed to remove from the jurisdiction of their own tribunals disputes related to the application or the interpretation of EU law. Consequently, Slovakia and the Netherlands established a mechanism of investment disputes settlement that failed to ensure the full effectiveness of EU law.

Furthermore, the CJEU emphasized that the BIT, which was concluded not by the EU but by two Member States, provides for the possibility of submitting investment-related disputes to a body which is not a part of the judicial system of the Member States and, thus, the EU. As a result, the provisions of the BIT questioned not only the principle of mutual trust between the Member States but also the preservation of the specific nature of EU law. The CJEU found that the arbitration clause in question was incompatible with the principle of sincere cooperation, providing that the EU and its Member States should "assist each other in carrying out tasks which flow from the Treaties" (Article 4(3) TEU).

The CJEU ruling has binding effect on all Member States. However, its impact is still not clear as the judgment refers only to investment arbitration, rather than to arbitration proceedings in general. The impact of this ruling on other pending proceedings is not clear. It is also unclear whether this ruling suggests that BIT between Member States must be renegotiated and arbitration clauses have to be deleted.

Economic and Financial Affairs

European Commission unveiled its Action Plan on FinTech

On 8 March 2018, the European Commission released its FinTech Action Plan (the " FinTech Action Plan") addressing issues ranging from licensing, authorization and standardization in FinTech to potential regulatory approaches to cryptocurrencies, cloud services, blockchain technology and cybersecurity. The FinTech Action Plan is part of the Commission's efforts to build the Capital Markets Union and its agenda to create a Digital Single Market. The proposed initiatives can be categorized under three overarching policy objectives designed to grasp opportunities and limit risks associated with the new technologies.

First, the Commission seeks to create enabling conditions for the scaling up of innovative business models in the EU. Therefore, together with the FinTech Action Plan, the Commission put forward a proposal for a Regulation that will establish a European passporting regime for crowdfunding service providers. To foster competition and cross-border operations of FinTechs, the FinTech Action Plan also includes policy steps towards consistent licensing requirements and common standards. In terms of standardization, the FinTech Action Plan highlights in particular standardized application programming interfaces that would provide a basis for an open banking ecosystem in the EU. The Commission also intends to assess the suitability of existing regulation in light of emerging trends in the use of cryptocurrencies and Initial Coin Offerings.

Second, the Commission aims to boost the uptake of new technologies in the financial sector. The policy actions will target, *inter alia*, switching between cloud services providers as well as the development of standard contractual clauses for cloud outsourcing. With respect to distributed ledger technology ("DLT") and blockchain, the Commission plans to develop a comprehensive strategy addressing its applications in all sectors of the economy, as well as to foster the interoperability and standardization efforts. Furthermore, the Commission will also consider the use of DLT to collect and share information from public companies in the so-called European Financial Transparency Gateway. The Commission efforts will be supported by the already-established EU Blockchain Observatory and Forum.

Third, to enhance the security and resilience of the financial sector, the Commission will look into possible barriers hampering information sharing on cyber threats among financial market participants. The FinTech Action Plan also foresees a cost-benefit analysis of a potential EU cyber-resilience testing framework for the financial sector's largest players.

European Commission's strategy on green finance

On 8 March 2018, the Commission adopted an Action Plan on Sustainable Finance (the "Sustainable Finance Action Plan") setting out its strategy towards a financial system that supports the EU's climate and sustainable development agenda. The Sustainable Finance Action Plan includes 10 key initiatives broadly based on the recommendations of the Commission's High-Level Expert Group on sustainable finance published in January 2018.

Among the legislative initiatives, the Sustainable Finance Action Plan foresees the establishment of a unified EU classification system for environmentally and socially sustainable activities. Embedded in the EU law, such common taxonomy would provide the basis for other non-legislative actions, such as sustainability standards, labels and benchmarks.

Furthermore, the Commission intends to adjust the fiduciary duty of asset managers and institutional investors in order to incorporate sustainability considerations in the investment process. Insurance distributors and investment firms are also going to be encouraged to acknowledge sustainability factors in their product selection processes and suitability assessments for their clients. Moreover, the Commission plans to explore the merits of including environmental, social and governance aspects in credit ratings and market research.

To incentivize financial institutions' participation in the fight against climate change, the Sustainable Finance Action Plan also proposes the recalibration of capital requirements for green investments. The so-called "green supporting factor" would enable financial institutions to hold less capital for sustainable financial products.

Various Sustainable Finance Action Plan initiatives focus on increased transparency in corporate reporting and sustainability disclosure. The Commission has already launched a "fitness check" of the existing legislation on public corporate reporting and aims to evaluate certain aspects of the International Accounting Standards Regulation as well as the standards' impact on sustainability. Inspired by the recommendations of the Financial Stability Board's Task Force on Climate-related Financial Disclosures, the Commission will also revise its guidelines on non-financial information.

European Commission proposes to tax digital giants

On 21 March 2018, the Commission published two directives establishing new taxation rules for digital companies virtually active in the EU and large digital services providers relying on their users in value creation. The legislative package includes a long-term, permanent solution introducing the concept of "significant digital presence" and a short-term quick fix to deal with the issue pending agreement among EU Member States on the former. The Commission acknowledges that ideally the issue must be addressed at a global level. Due to the lack of progress in finding international consensus in the framework of the Organization for Economic Cooperation and Development, the Commission decided to move ahead and take the lead in this agenda.

Under the long-term proposal, businesses will be deemed to have a taxable digital presence if they fulfil at least one of the three criteria listed in the directive. A business will be liable to pay tax if it has, in the territory of an EU

Member State, over 100 000 digital users; and/or generates annual revenues exceeding EUR 7 million; and/or closes more than 3,000 business contracts for digital services in one year. As such, the proposed Directive does not imply a new tax but rather re-allocates corporate taxation rights by marking a shift in the way profits are allocated to the Member States. It is suggested that the proposed principles are incorporated into the scope of the Common Consolidated Corporate Tax Base currently negotiated in the Council of the EU.

This long-term solution does not cover situations where businesses are tax residents of third countries, which have concluded double-taxation treaties with the EU Member State concerned. The Commission therefore also puts forward a recommendation on the adaptation of the Member States' double-taxation treaties with non-EU jurisdictions. To ensure consistent application at the international level, the Commission recommends that double-taxation treaties take into account the rules on profit attribution and digital presence introduced in the "long-term solution" directive.

The quick fix, designed to prevent a proliferation of unilateral measures at national level, introduces the so-called Digital Services Tax ("DST"). A 3% DST on gross revenues (rather than profits) will primarily affect businesses selling online advertising space, data generated by users or intermediating peer-to-peer sales. The Commission estimated that out of the 180 companies that would fall under the scope of the directive, half are based in the United States and a third in the EU. This is a result of the proposed annual global revenue threshold of EUR 750 million at the level of the multinational group, and a European threshold on revenues derived from digital services set at EUR 50 million.

Brexit

Brexit negotiators agree in full on transition and citizens' rights

The European Union and United Kingdom Brexit negotiators jointly published the first version of the "Withdrawal Agreement" setting out the terms of the UK's exit from the EU. In a visible three-color document, the text highlights the issues formally agreed between the negotiators (in green), the points agreed at political level but still requiring clarifications (in yellow) and the provisions on which discussions are ongoing (in white).

The green text includes agreed legal provisions for the transition period and citizens' rights. The transition phase will start on the date of entry into force of the Withdrawal Agreement (presumably on the Brexit date – 29 March 2019) and end on 31 December 2020. During this time, EU rules will continue to apply to the UK as if it were a Member State. In what has been read as a concession, the UK will be able to negotiate, sign and ratify trade agreements with non-EU countries. However, those agreements will not be implemented before the end of the transition period.

One important clarification refers to residence rights for citizens and their timing: EU27 citizens, UK nationals and their family members who resided in the UK or in the remaining Member States before the end of the transition period will be able to claim a permanent residency status from the beginning of the transition.

The most difficult issue to reach agreement on remains the issue of how to avoid a hard border between Ireland and Northern Ireland once the UK exits the EU Single Market. The situation remains open on this point, which stays highlighted in yellow in the Draft Treaty, pending the UK proposals for alternative options to those proposed by the EU, which have been labelled as unacceptable for now.

The Withdrawal Agreement should ideally be finalized by October 2018 in order to allow enough time to obtain the endorsement of the EU and UK parliaments before the exit date in March 2019. As it is known, this agreement must be differentiated from the agreement setting out provisions for the future EU–UK relations, a free trade agreement or an association agreement. Such a text can only be signed once the UK withdraws from the EU. The idea is to have some political declaration including the main lines of this future agreement, to be approved by both parties at the time of the final approval of the Withdrawal Agreement. This is accepted in principle, but the UK expects to see a high level of detail on that declaration, while the EU has repeatedly anticipated that such a text will not go into a detail that is impossible for the time being. Six months remain to see who is right.

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