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Post-Facebook: the standard of care in merger control proceedings

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New Wave, New Standard?

The legal standard of care has not changed

- Parties to a concentration having a Union dimension may not implement the transaction without Commission approval
- Submission of incorrect information by notifying parties or third parties contravenes the EUMR

However, recent developments suggest a change in practice

- SO's for possible gun-jumping by Canon (July 2017) and Altice (May 2017)
- SO's for submission of incorrect information by GE and Merck-Sigma-Aldrich (July 2017)
- Facebook fined for submission of incorrect information (May 2017)

The flurry of activity suggests an effort to tighten standards of care in EU merger review procedures, while the Commission also steps up its demands for information and documents under tight timelines

Misleading or Incorrect Information

Under the 1989 EUMR, the Commission adopted six infringement decisions for submission of incorrect information

- Tetra Laval (2004; €90,000; “grossly negligent”; no mitigating factors)
- Deutsche BP (2002; €35,000; “negligent”; no mitigating factors)
- Mitsubishi (2000; €50,000 plus €900,000 periodic penalty; refusal by third party to provide information)
- Deutsche Post (1999; €100,000; infringement “intentional”; no mitigating factors)
- KLM (1999; €40,000; “at the very least, grossly negligent”, no mitigating factors)
- Sanofi/Synthelabo (1999; €50,000 each; “at the very least, gross negligence”; no mitigating factors; original authorization revoked)

Under the 2004 EUMR, no such decisions adopted until May 2017

- Munsjö/Ahlstrom (2014 SO, but no infringement decision)
- Facebook (May 2017; €110 million)
 - The Commission says Facebook was “at least negligent” but took Facebook’s cooperation into account in setting the fine
- GE and Merck-Sigma-Aldrich (July 2017); Commission SO’s warning of fine if incorrect information is found to be intentional or negligent
 - Both cases relate to innovation competition

Misleading or Incorrect Information (cont'd)

Takeaways from the Facebook decision and new SO's

- The Commission is sending a signal that they intend to scrutinize submissions more closely and aggressively pursue infringements
 - Cases so far relate to hot-button issues (data protection and innovation competition), but enforcement risk not necessarily limited to such cases
 - Three year statute of limitations
- Greatly increased financial exposure
 - Facebook fine almost six times past gun-jumping fines (€20 million)
- *Mitsubishi* suggests that enforcement risk extends to third parties (although that was an extreme case of refusal to provide information)
- Immateriality is not a defense or even a mitigating factor
- Ever-increasing RFI's and short deadlines increase the risk of error
- Front-loaded, analytic EU approach may increase risk of error compared to jurisdictions that rely more heavily on internal documents (e.g., U.S.)

Gun-jumping

More consistent practice of Commission finding gun-jumping violations, but cases still rare and mainly relate to failures to file

- Marine Harvest/Morpol (2014; €20 million; “negligence”, but Marine Harvest self-reported)
- Electrabel/Compagnie Nationale du Rhone (2009; €20 million; “negligence”, but Electrabel self-reported)
- A.P. Møller (1999; ECU 219,000; “gross negligence”, but lack of enforcement history was a mitigating factor)
- Samsung/AST (1998; ECU 32,000; “negligent”, no damage to competition, Samsung self-reported)

Investigations of possible early implementation have not led to fines

- Ineos/Kerling (2007; dawn raid but investigation closed)
- Yara/Kemira Growhow (2007; “creeping merger” challenged, but no finding of infringement)
- Kirch/Bertelsmann (1997; partial implementation halted by undertaking at Commission request)

Gun-jumping (cont'd)

Ongoing investigations address more complex situations

- Canon (July 2017 SO; challenge to “two-step” or “warehousing” structure)
- Altice (May 2017 SO; purchase agreement may have given Altice decisive influence over PT Portugal before EU approval, and Altice may have actually exercised such influence)
 - The French authority fined Altice and SFR €80 million for gun-jumping in 2016

Takeaways on gun-jumping cases

- The Commission has a clearer enforcement history on failures-to-file than on submissions of misleading or incorrect information, but fines have traditionally been much lower than in Facebook
 - Query whether higher fines will be imposed in future cases
- Immateriality is not a defense or even a mitigating factor (except *Samsung*)
- The Commission seems to be taking a more aggressive approach to more ambiguous early implementation cases, where the Commission has previously not imposed fines
 - Whether the Commission will fine Canon and Altice, and if so how much, remains to be seen
 - The Altice case will draw attention to overly detailed pre-closing “ordinary course” covenants in merger agreements
 - The Canon case is likely to chill the use of warehousing structures, which have been suspect, but never found illegal, since *Tetra Laval* (2003)

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