Main developments between 1 September and 31 December 2010

by John Gatti (1)

1. Introduction

Between 1 September and 31 December 2010 the Commission received 102 notifications. This represents an increase of 12% over the previous four months and an increase of 21% over the corresponding period of 2009. The Commission adopted a total of 94 first phase decisions, of which 92 were unconditional clearances. Decisions adopted under the simplified procedure accounted for 55 of the first phase total (i.e. 59%). Two first phase decisions were cleared conditionally. Two decisions were adopted under Article 8 after an in-depth second phase investigation. Both were conditional. One decision was taken under Article 4(4) to refer a case with a Union dimension back to a Member State, while Member States accepted 12 requests from parties for cases to be referred to the Commission and refused none under Article 4(5). Lastly, the Commission referred one case to Member States following requests made under Article 9. Part of the case was referred to one Member State and the remainder to another. The Commission also refused one request under Article 9. Two cases were abandoned in Phase I and one case, SCJ/Sara Lee, in Phase II.

2. Summaries of decisions taken in the period

2.1 Summaries of decisions taken under Article 6(2)

Reckitt Benckiser/SSL International

On 25 October 2010 the European Commission approved the proposed acquisition of SSL International by Reckitt Benckiser, both of which are British pharmaceutical companies. The decision is conditional upon Reckitt Benckiser’s commitments to divest SSL’s brands for mouth pain relief products in the UK and Ireland, where the merged entity would have had a very strong market position.

Reckitt Benckiser manufactures and sells household products, health and personal care products, food and pharmaceutical products, including over the counter pharmaceutical products (“OTC”). SSL is primarily active in the personal care sector with Durex products and Scholl foot care and footwear. It also manufactures and sells OTC pharmaceutical products.

The Commission investigated a number of OTC pharmaceutical products in which both parties are active in the UK and Ireland, namely analogesics, mouth pain relief products, throat preparations, upper gastrointestinal treatments and antipruritics. The Commission also examined the parties’ activities in manufacturing OTC pharmaceuticals for third parties.

The Commission found that the proposed transaction, as initially notified, would have raised competition concerns with regard to products for the treatment of mouth ulcers and other mouth infections or pains in adults and infants in the UK, as well as the same mouth pain relief products for adults in Ireland. This is due to the high combined market shares of the parties, the strength of their brands on these markets and the fact that Reckitt Benckiser’s and SSL’s products are close competitors.

To address the Commission’s concerns, Reckitt Benckiser offered to divest SSL’s brands for adult and infant mouth pain relief products in the UK and SSL’s brand for adult mouth pain relief products in Ireland.

In view of these commitments, and following a market test, the Commission concluded that the transaction would no longer give rise to competition concerns and it authorised the concentration.

BASF/Cognis

On 30 November the European Commission cleared the proposed acquisition of Cognis by BASF, both of which are German chemical companies. The decision is conditional upon the divestment of activities in the sector of hydroxy monomers, a chemical product used in coatings and adhesives. The proposed transaction, as initially notified, would have created a very strong player in a market where concentration is already high. To address the Commission’s concerns, BASF offered to divest activities in the sector in question.

BASF is the world’s largest chemical company. It is mainly active in the supply of chemicals, crude oil and natural gas, including specialty chemicals,

(1) The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.
plastics, performance products, functional solutions and agricultural solutions. Cognis is a supplier of specialty chemicals, nutritional ingredients and functional products.

The Commission's investigation revealed that the proposed transaction would not significantly alter the structure of the majority of the relevant markets, as a number of credible and significant competitors would continue to exercise a competitive constraint on the merged entity.

However, the Commission found that the proposed transaction, as initially notified, would have raised competition concerns in the market for hydroxy monomers, where the merged entity would have had a strong position in a market where the concentration level is already high. Hydroxy monomers are chemical products used in coatings and adhesives.

To resolve these competition concerns, BASF proposed to divest Cognis’ entire hydroxy monomers production business, thus eliminating any overlap. BASF will also divest the multifunctional methacrylates and adducts businesses operating on the Hythe site. In addition, BASF will grant intellectual property rights that will allow the buyer to produce Polyalkylene Glycols (PAG) and PAG based lubricants, which are mainly used in industrial formulations and household products, exclusively for BASF for a transition period and thereafter in its own right.

In the light of these commitments, the Commission concluded that the proposed transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. The Commission's investigation showed that the divested businesses would be viable and that the commitments would resolve all of the competition concerns identified. The proposed operation was therefore approved.

2.2 Summaries of cases taken under Article 8

Unilever’s/Sara Lee Household and Body Care business

The European Commission cleared the planned acquisition subject to conditions of the body and laundry care businesses of Sara Lee Corp of the US by the Anglo-Dutch consumer goods company Unilever on 17 November 2010. The Commission’s in-depth investigation confirmed competition concerns in a number of deodorants markets. To remedy these concerns, the merging parties offered to divest Sara Lee’s Sanex brand and related business in Europe.

Unilever supplies a wide range of branded consumer goods. In the personal care sector, where there were overlaps with Sara Lee, it is particularly strong in deodorants with its leading brands Axe, Dove and Rexona, which are present across Europe. Sara Lee supplies deodorants under the Sanex brand in a number of European countries. Its personal care business also includes other brands such as Radox, Duschdas, Badedas and Monsavon.

The Commission’s in-depth investigation has shown that the merger would give Unilever a very strong leadership position in a number of deodorants markets by combining the parties’ brands, in particular Sanex with Dove and Rexona. The Commission found that the merger, as initially notified, would raise competition concerns in Belgium, The Netherlands, Denmark, the United Kingdom, Ireland, Spain and Portugal, where it would remove an important competitive force and would have been likely to lead to price increases.

With a view to addressing the Commission’s concerns, the merging parties made a commitment to divest Sara Lee’s Sanex brand and related business in Europe. This is a clear and workable remedy, sufficient to restore competition in all markets where the Commission had concerns.

The Commission concluded that the proposed transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. The Commission’s decision is conditional upon full compliance with the commitments.

Syngenta’s / Monsanto’s sunflower seed business

On 17 November 2010 the European Commission cleared the acquisition of the global sunflower seed business of the US company Monsanto by Syngenta, a Swiss company. The notified transaction combines two leading sunflower seed suppliers in Europe that have significant breeding activities. The decision is conditional upon the divestment of Monsanto’s sunflower hybrids, commercialized or under official trial in Spain and Hungary, as well as the parental lines used in the creation of these hybrids or currently under development for the creation of hybrids for Spain and Hungary. The in-depth investigation confirmed the Commission’s concerns with respect to the commercialization of sunflower seeds in Spain and Hungary, where the transaction would have removed a significant and innovative competitor to Syngenta, reinforcing the latter’s market leader position. The transaction also raised concerns with regard to the activities of exchange and licensing of sunflower varieties, insofar as the merging parties would be in a position to
restrict the access of competitors to inputs necessary for the commercialization of sunflower seeds.

The proposed transaction combines two leading sunflower seed suppliers in Europe. Both are strong in the breeding and trading of new sunflower varieties (that is, sunflower hybrid seeds and parental lines) and in the commercialization of sunflower hybrid seeds. Hybrids are the result of controlled pollination (as opposed to natural pollination by insects, birds or wind), through the breeding and crossing of parental lines. This ensures that all seeds descend from parents with known traits and have specific desired characteristics, such as disease-resistance or drought-resistance. Seed companies are constantly striving to develop new sunflower hybrid seeds that are more resistant and produce better yields. In order to do so, most companies exchange and license parental lines with other breeders (“trading of varieties”) with the aim of speeding up the long and complex breeding process. Sunflower hybrid seeds are then multiplied and sold to distributors and cooperatives (“commercialization of sunflower seeds”). Sunflower seeds are ultimately purchased and sown by farmers every year. Syngenta is also a significant producer of seed treatment products (fungicides and insecticides), which are applied to sunflower seeds in the early stage of their development to protect them from pests and diseases.

The Commission’s investigation showed that the transaction, as initially notified, would have resulted in high market shares combined with limited prospects of entry and expansion in both the Spanish and the Hungarian markets for the commercialization of sunflower hybrids. It would also have increased the ability and incentives for the merged entity to significantly reduce its activities in the exchange and licensing of sunflower varieties in the EU, leading in particular to a reduction in innovation, a foreclosure of competitors in the markets for the commercialization of sunflower seeds and ultimately to a reduction of choice of sunflower seed hybrids for customers. The investigation dispelled the initial concerns regarding the exclusion of competitors from the markets for sunflower seed treatment products.

With a view to removing the Commission’s concerns with regard to sunflower seeds, Syngenta offered to divest Monsanto’s hybrids commercialized in Hungary and in Spain in the last two years, as well as the hybrids that were already under official trial for registration in those countries. Additionally, Syngenta offered to divest Monsanto’s parental lines used to develop these hybrids, as well as the pipeline parental lines currently under development, with the aim of producing hybrids for the markets in Spain and Hungary. The commitments include the right to use, cross, breed and license the offered parental lines, and to commercialize and license the resulting hybrids. The geographic scope of the rights to commercialize the hybrids varies according to whether the hybrid has already been commercialized, is already under official trials or will be the result of further crossing and breeding by the acquirer of the divested businesses. These rights may extend to Spain and/or Hungary, the EU or the EU plus Russia and the Ukraine or Turkey, which are the most significant European sunflower growing countries outside the EU. The extension of the rights to commercialize some types of hybrids to Russia, the Ukraine and Turkey was necessary, among other things, in order to fully ensure the long term viability of the divested businesses.

The scope of the remedy package thus ensures that the businesses to be divested can be run in a viable and sustainable manner and that the purchaser will be able to take over the competitive role played by Monsanto in the markets for the trading of sunflower varieties in the EU and for commercialization of sunflower seeds in Spain and Hungary. The Commission therefore concluded that the commitments given were adequate to remedy its concerns and authorised the proposed transaction subject to full compliance with the commitments.

The transaction did not originally qualify for review under the EU Merger Regulation, as it did not meet the turnover thresholds. It was initially notified to the Spanish and Hungarian competition authorities, who subsequently requested the Commission to examine the transaction.

2.2 Summaries of cases taken under Article 9

ProSiebenSat.1/RTL/Joint Venture

On 24 September 2010 the European Commission referred the assessment of the joint venture between the German private broadcasters ProSiebenSat.1 and RTL to the competition authorities of Austria and Germany, at their request. The purpose of the joint venture is to create an internet platform on which consumers can watch repeats of television programmes in the seven days following the broadcast on free-to-air TV. After a preliminary investigation, the Commission found that the proposed transaction would affect competition in national online TV and advertising markets in Austria and Germany. These markets will now be examined by the Austrian and German competition authorities under national law.

RTL and ProSiebenSat.1 are the two most important private free-to-air broadcasting companies in Austria and Germany. RTL provides primarily...
free-to-air TV and encompasses the TV-related activities of Bertelsmann, an international media group based in Germany. ProSiebenSat.1 is an international media company headquartered in Germany and primarily active in free-to-air TV. RTL and ProSiebenSat.1 hold significant viewer and advertising shares in linear TV in both Austria and Germany.

Austria and Germany requested the Commission to refer the parts of the planned joint venture concerning the Austrian and German national markets to their respective competition authorities, arguing that the transaction affects competition in their domestic markets.

The Commission’s investigation confirmed that the proposed transaction would affect competition in the national markets for online “catch-up” TV and advertising in Austria and Germany. The Austrian and German competition authorities were well placed to investigate the effect of the transaction on their respective national markets.

The proposed transaction did not raise competition concerns in other EU Member States.

Crédit Agricole/ Cassa di Risparmio della Spezia/ Agences Intesa SanPaolo

On 10 November 2010 the European Commission approved the acquisition of the retail bank Cassa di Risparmio della Spezia SpA of Italy and a number of other retail bank branches of Intesa SanPaolo in Italy by Crédit Agricole of France, as the Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it. It considered that there was no need for the matter to be examined by the Italian competition authority, which had asked for the case to be referred under Article 9 of the Merger Regulation.

Under the proposed transaction Crédit Agricole would acquire: (1) Cassa di Risparmio della Spezia SpA, an Italian bank which is currently indirectly controlled by Intesa SanPaolo SpA; and (2) a network of 96 branches belonging to Intesa SanPaolo SpA or undertakings within the same group (referred to collectively as the “Target”). Crédit Agricole is already active in retail banking services in Italy through a number of subsidiaries.

The two banking networks are complementary to a significant extent in terms of their geographic distribution. The Target’s branches are mainly located in Northern and Central Italy, in particular in the regions of Liguria, Lombardy, Tuscany, as well as in Latium. The Target also has a small number of branches in Emilia Romagna and Veneto, whilst Crédit Agricole has a bigger presence in Emilia Romagna.

The Commission’s investigation has shown that the acquisition will not raise any competition concerns, in particular because Crédit Agricole currently has only a relatively limited share of the retail banking market in Italy and the transaction will lead to only minor overlaps in certain regions or provinces.