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Possible breach of merger control standstill obligation

On 20 August 2021 the Commission started an investigation for a possible breach of the merger control standstill obligation.

Illumina is a leading global supplier of next generation sequencing (“NGS”) systems for genetic and genomic analysis. In Europe, Illumina commercialises its products both directly and via distributors. GRAIL is a customer of Illumina, and develops cancer detection tests relying on NGS systems. GRAIL was founded by Illumina in 2016. While spun off later, Illumina remained GRAIL’s largest shareholder. In April 2021 GRAIL initiated a limited commercialisation and has two pipeline products.

On 22 July the Commission opened an in-depth investigation in the emerging market for cancer detection tests based on NGS. The combined company could engage in vertical input foreclosure strategies causing an adverse impact on GRAIL’s rivals as well as European patients, doctors and health systems. Transactions falling under the Commission’s jurisdiction need to be notified and approved by before they can be implemented. On 18 August 2021 however, i.e. during the Commission’s investigation of the merger Illumina announced that it had decided to complete its acquisition of GRAIL. The Commission’s new and separate investigation will therefore assess whether Illumina’s decision constitutes a breach of the “standstill obligation”.

Investigation acquisition of Kustomer by Facebook

On 2 August 2021 the Commission opened an in-depth investigation into the proposed acquisition of Kustomer by Facebook.

Facebook is a social network, messaging service and online ads service provider. Facebook’s messaging channels include WhatsApp, Messenger and Instagram. Kustomer is a Customer Relationship Management (CRM) software provider offering businesses solutions to manage communications with consumers across different channels in a single tool.

The Commission is concerned that Facebook may foreclose access to its business-to-consumer messaging channels, which are an important input for the supply of CRM services. Facebook’s foreclosure strategies may prevent Kustomer’s rivals from using Facebook’s messaging channels or degrade access to these channels.

The Commission also considers that Facebook may hold a dominant market position on the markets for the supply of online display advertising services. By acquiring Kustomer it could more easily obtain data from businesses making use of Kustomer’s CRM software, including customer transaction data and other event data, such as customer’s website views, adds to wishlist and store visits. Facebook’s ability to better personalise and target the ads it provides would make it more difficult for rivals to match Facebook’s online advertising services.

Approval of €30.5bn French scheme for renewable energy

On 27 July 2021 the Commission approved the French scheme to support production of electricity from renewable energy sources. The new scheme aims to grant support to operators via competitive tenders for a total of 34 gigawatt of new renewables capacity until 2026, through a premium on top of the electricity market price.

The Commission assessed the measure under the 2014 Guidelines on state aid for environmental protection and energy. The aid is necessary to further develop and incentivise the renewable energy generation and will contribute to the European objective of achieving climate neutrality by 2050. As a part of the ‘fit for 55’ legislative proposals adopted on 14 July 2021, the Commission presented an amendment to the Renewable Energy Directive, which sets the target to produce 40% of EU energy from renewable sources by 2030. The aid is deemed proportionate and limited to the minimum necessary, and the positive environmental effects outweigh any possible negative effects in terms of distortions to competition. France committed to carry out an ex-post evaluation to assess the features and implementation of the scheme.

Jurisdiction over actions for antitrust damages

On 15 July 2021 the European Court of Justice (ECJ) clarified the member states’ courts jurisdiction over actions for damages.

In 2016 the Commission fined international truck manufacturers which had formed a cartel. RH is an undertaking in Cordoba, a city in Spain. RH had purchased five trucks from a dealer of the Volvo Group España, and brought an action before the Commercial Court in Madrid, claiming to have suffered a loss due to the cartel. Volvo did not challenge the

territorial jurisdiction of the Spanish court, but contested its international jurisdiction.

The ECJ noted that the concept of the 'place where the harmful event occurred', within the meaning Article 7(2) of the regulation on jurisdiction, is intended to cover both the place where the damage occurred and the place of the event giving rise to it. A company may sue in the courts of either of those places. In this case, the infringement giving rise to the alleged damage covered the EU of which Spain forms part. The regulation confers directly and immediately both international and territorial jurisdiction on the courts for the place where the damage occurred. However the delimitation of the court's jurisdiction is, as a rule, a matter for the organisational competence of the member state. In the absence at the national level of a specialised court for that type of action, an undertaking which made its purchases in several places, may bring an action before the court within whose jurisdiction its registered office is situated.

Acquisition of Willis Towers Watson by Aon cleared subject to commitments

On 9 July 2021 the Commission cleared the acquisition of Willis Towers Watson (WTW) by Aon, subject to conditions.

Aon and WTW are global leading players in the markets for commercial risk brokerage services, reinsurance brokerage and the provision of retirement, health & welfare and investment services to commercial customers. The Commission had concerns that the transaction, as initially notified, would have harmed competition in the market for the provision of commercial risk brokerage services in Europe. It considered that only a limited number of brokers with a credible presence in Europe have the necessary capability to handle large and complex risks of such customers and a suitable network to provide services internationally. The merger would have hampered competition in particular in the risk classes Property & Casualty, Financial and Professional services and Cyber.

To address the Commission's competition concerns, Aon offered a substantial remedy package including the divestment of central parts of WTW's business to the international brokerage company Arthur J. Gallagher. The commitments will strengthen Gallagher in its capabilities in reinsurance and commercial risk brokerage and improve its footprint in France, Germany, Spain, the Netherlands and the UK. Gallagher will also obtain a substantial set of additional customer contracts and personnel as well as WTW's entire global treaty reinsurance

and facultative reinsurance brokerage organization. Aon also promised to divest its German retirement benefits consulting and pension administration businesses, as well as Aon's German investment solutions business.

Car makers fined for collusion on technical development

On 8 July 2021 the Commission fined car manufacturers €875m for restricting competition in emission cleaning for new diesel passenger cars.

The Commission found that Daimler, BMW and Volkswagen group held regular technical meetings to discuss the development of the selective catalytic reduction (SCR)-technology which eliminates harmful nitrogen oxide (NOx)-emissions from diesel passenger cars through the injection of urea ("AdBlue") into the exhaust gas stream. During these meetings, and for over five years, the car makers colluded to avoid competition on cleaning better than what is required by law despite the relevant technology being available. They reached an agreement on AdBlue tank sizes and ranges as well as the average estimated AdBlue-consumption. They removed uncertainty about their future market conduct concerning NOx-emissions cleaning beyond and above the legal requirements and AdBlue-refill ranges.

It is the first time that the Commission concluded that collusion on technical development amounts to a cartel. In view of this novelty, the Commission provided the parties with guidance on aspects of their SCR-system related cooperation which raise no competition concerns, such as standardisation of the AdBlue filler neck, the discussion of quality standards for AdBlue, or the joint development of an AdBlue dosing software platform. For the same reason the Commission also applied a reduction of fines for all parties. Daimler received full immunity, because it revealed the cartel to the Commission, thereby avoiding a €727m fine. All parties acknowledged their involvement and agreed to settle.

This publication is intended for general information only. On any specific matter, specialised legal counsel should be sought.

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