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EU Law News

A bi-monthly review of EU legal developments affecting business in Europe

- Commission investigates €400m loan to Alitalia
- Commission fines Meliá Hotels €6.7m for discriminating against certain customers
- ECJ rules on pharma patent settlement agreement
- Commission fines NBC-Universal €14.3m for restricting merchandise sales
- Commission approves ZF's acquisition of WABCO
- AbbVie's acquisition of Allergan conditionally approved

Newsletter January/February 2020

Commission investigates €400m loan to Alitalia

On 28 February 2020 the Commission opened an in-depth investigation to assess whether Italy's €400m loan granted to Alitalia constitutes state aid.

Alitalia is owned by the consortium Compagnia Aerea Italiana (51%) and Etihad Airways (49%). The company has been in financial difficulty for several years. In 2017, following the rejection by the company's staff of a cost-cutting plan, shareholders decided not to provide additional financing. Alitalia was placed under extraordinary administration according to Italian bankruptcy law. Eventually the Italian authorities decided to sell Alitalia's assets. In January 2020 the Italian Parliament approved a decree for a new loan of €400m to Alitalia to facilitate the streamlining of the company prior to an attempt to sell its assets. The decree requires that the sales procedure will be carried out by 31 May 2020. The Commission has received a number of complaints, alleging that the loan constitutes state aid that is not compatible with EU rules.

The Commission had opened a separate investigation in April 2018 to assess whether a bridge loan of €900m granted by Italy to Alitalia in 2017 to enable the company to continue its operations constituted state aid. It concerned in particular the compliance with the Commission's Rescue and Restructuring Aid Guidelines. This Commission investigation, too, is still ongoing.

Commission fines Meliá Hotels €6.7m for discriminating against certain customers

On 21 February 2020 the Commission fined Spanish hotel group Meliá €6.7m for including restrictive clauses in its agreements with tour operators. The Commission closed proceedings against four tour operators involved.

In 2017, the Commission opened an investigation into hotel accommodation agreements concluded by Meliá and the four largest European tour operators (Kuoni, REWE, Thomas Cook, TUI). The investigation showed that Meliá restricted active and passive sales for hotel accommodation. Its standard terms and conditions with tour operators contained a clause whereby contracts were valid only for reservations by consumers who were resident in specified countries. These agreements may have partitioned the Single Market by restricting the ability of the tour operators to sell freely the accommodation in all countries and to respond to direct requests from consumers who were residents outside these defined countries. The Commission stated that it welcomes hotels developing and introducing innovative pricing mechanisms to maximise room usage. In this case however, it concluded that Meliá's practices deprived European consumers of the possibility of having more choice than non-European consumers and getting a better deal when shopping.

The Commission granted Meliá a 30% fine reduction in return for its cooperation beyond its legal obligation. Following an assessment of all evidence and circumstances, the Commission decided not to further pursue the antitrust investigation it had opened in parallel against the four tour operators.

ECJ rules on pharma patent settlement agreement

On 30 January 2020 the European Court of Justice (ECJ) in Case C-307/18 Generics (UK) clarified the criteria governing whether a settlement agreement with respect to a dispute between the holder of a pharmaceutical patent and a manufacturer of generic medicines is contrary to EU competition law.

The UK Competition Appeal Tribunal addressed to the ECJ a request for a preliminary ruling about the lawfulness of a decision imposed by the Competition and Markets Authority. The case concerns settlement agreements with respect to patent disputes between GlaxoSmithKline ('GSK') and various manufacturers of generic medicines. GSK was the holder of a patent for the active pharmaceutical ingredient of the anti-depressant medicine paroxetine and of secondary patents protecting some processes for the manufacture of that ingredient.

When GSK's principal patent expired in 1999, a number of manufacturers of generic medicines contemplated introducing generic paroxetine on the UK market. GSK brought infringement proceedings against the manufacturers, which in turn challenged the validity of one of GSK's secondary manufacturing patents. Thereafter, they concluded settlement agreements with GSK to refrain, for an agreed period, from entering the market, in return for payments made by GSK. The Court held that it is necessary to assess whether a manufacturer of generic medicines concerned has a firm intention and an inherent ability to enter the market. No patent right constitutes in itself such barriers, since its validity can be contested.

As regards the potential restriction of competition 'by object', the Court states that an appreciable fall in the sale price of the medicines following the market entry of the generic version can be taken into consideration. The Court also required that any pro-competitive effects arising from agreements at issue be taken into consideration, provided that those effects are demonstrated. Regarding a potential restriction of competition 'by effect', the Court states that it is necessary to determine how the market will probably operate and be structured in the absence of the concerted practice.

Regarding the 'abuse of a dominant position', the Court held that the product market must be determined taking into account also the generic versions if their manufacturers are in a position to enter the market with sufficient strength to constitute a serious counterbalance to the manufacturer of originator medicines already on that market. The Court observed that the possible

cumulative effects of the various agreements may have a significant foreclosure effect on the market. Such conduct may be justified if the party proves that its anti-competitive effects may be counterbalanced or outweighed by advantages in terms of efficiency that also benefit consumers.

Commission fines NBC-Universal €14.3m for restricting merchandise sales

On 30 January 2020 the Commission fined NBC-Universal €14.3m for restricting traders from selling licensed merchandise within Europe to territories and customers beyond those allocated to them.

NBC-Universal operates cable and broadcast networks, as well as film and television production companies worldwide. In June 2017 the Commission opened an antitrust investigation into certain licensing and distribution practices of NBC-Universal between 2013 and 2019. It concerned the sales of merchandise products such as mugs, bags, clothes, and toys with logos or images protected by intellectual property rights. The Commission investigation found that the non-exclusive licensing agreements breached EU competition rules by enforcing direct measures restricting out-of-territory sales by licensees, sales beyond allocated customers or customer groups, or online sales to certain websites of specific retailers. NBC-Universal obliged licensees to pass on these sales restrictions to their next level customers. It also implemented a series of measures as an indirect way to encourage compliance with the sales restrictions, such as carrying out audits and termination or non-renewal of contracts.

The Commission concluded that NBC-Universal's practices partitioned the Single Market and prevented licensees in Europe from selling products cross-border and across customer groups to the detriment of consumers. The Commission granted NBC-Universal a 30% fine reduction for its cooperation. In 2019 the Commission similarly fined Nike €12.5m and Sanrio €6.2m for restricting cross-border sales of merchandise products.

Commission approves ZF's acquisition of WABCO

On 23 January 2020 the Commission approved the proposed acquisition of truck and bus parts manufacturer WABCO by the ZF automotive conglomerate.

ZF Friedrichshafen is based in Germany and WABCO Holdings in the US. Both are manufacturers of various commercial vehicle components, in particular for medium and heavy commercial vehicles. Their product portfolios are largely complementary in this market. ZF's focus is on steering, chassis and driveline products such as transmission systems for cars and commercial vehicles. WABCO's focus is on braking and active safety technologies for commercial vehicles only.

The Commission assessed the impact of the transaction on the very specific markets for transmission systems, clutches for air compressors, cabin air suspension systems and automated driver assistance solutions. It concluded that the transaction would raise no competition concerns because of actual or potential alternative sources of supply. Therefore, ZF will continue to face effective competition after the transaction on these relevant markets. The Commission cleared the case unconditionally.

AbbVie's acquisition of Allergan conditionally approved

On 10 January 2020 the Commission approved the proposed acquisition of Allergan by AbbVie. The approval is conditional on the divestment of a product under development by Allergan to treat inflammatory bowel diseases.

AbbVie is headquartered in the US and Allergan in Ireland. They are global pharmaceutical companies active in several therapeutic areas. The Commission's investigation primarily focused on biologic treatments for ulcerative e colitis and Crohn's disease, collectively termed inflammatory bowel diseases ("IBD"). IBD are lifelong autoimmune diseases that involve inflammation of the digestive tract and for which there is no cure. Biologic drugs are typically prescribed after the failure of conventional therapies. AbbVie's product portfolio includes several biologic drugs for IBD. Allergan is also currently developing a drug called brazikumab. The Commission found that brazikumab is likely to compete closely with AbbVie's risankizumab as it belongs to the same class of drugs.

The transaction, as initially notified, would have led to a loss of innovation for IBD treatments, as AbbVie would not continue developing Allergan's drug. There are only two other competing pipeline products currently being developed, in addition to AbbVie's and Allergan's drugs. The transaction would have thus prevented a promising drug from reaching the market, leading to potentially less choice and higher prices for patients and health systems. To address these concerns, AbbVie offered to divest brazikumab, including the development, manufacturing and marketing rights at worldwide level, to a purchaser that will continue the drug's development. The Commission concluded that the proposed transaction, as modified by the commitments, would no longer raise competition concerns.

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