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Misleading information provided by merging parties

The European Commission's recent EUR 7.5 million fine issued to Sigma-Aldrich for providing misleading information during the Merck/Sigma-Aldrich merger control proceedings is a reminder for all parties in merger cases of the importance of providing competition authorities with complete and accurate information

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Until a few years ago, proceedings regarding infringements of procedural rules of EU merger control were very rare. This has changed. In 2017 the European Commission ("Commission") started a series of investigations for violations of procedural rules during merger control proceedings. The latest example of this series of proceedings is a fine of EUR 7.5 million against chemical maker Sigma-Aldrich. The Commission found that Sigma-Aldrich provided misleading information during merger control proceedings for Sigma-Aldrich's takeover by rival Merck. The fine sends a clear message that the Commission expects companies to strictly comply with procedural rules during merger proceedings. In particular, information provided upon requests for information (RFI) must be accurate and complete.

The merger control case Merck/Sigma-Aldrich case (Commission case number M.7435)

Merck notified the Commission of its acquisition of Sigma-Aldrich in April 2015. In its investigation, the Commission found that the parties' activities were largely complementary regarding bioscience products and raw materials for pharmaceutical production, meaning that the transaction did not create competitive problems in these markets. However, the Commission had concerns about certain chemicals used in laboratories by companies and research centres for which Merck and Sigma-Aldrich were the two leading suppliers in Europe. In order to address the Commission's concerns, the merging parties offered a comprehensive remedy package, covering all the main steps in the manufacture, supply and distribution of the solvents and inorganics the Commission expressed concerns about. In particular, the package included Sigma's manufacturing assets in Seelze, Germany and brands and trademarks, and was – following an extensive market test and certain improvements by the parties – accepted as a suitable solution by the Commission during the initial 25 day investigation (i.e. phase I), which meant that it was possible to clear the transaction in June 2015.

However, one year later following the implementation of the remedy, a third party reported to the Commission that a Sigma-Aldrich innovation project called "iCap" with relevance for the laboratory chemicals at the core of the Commission's concerns was not part of the remedies and had not been provided to the purchaser of the remedy package. Until that time, the Commission was not aware of the existence of iCap and explained that if the project had been correctly disclosed, the Commission would have demanded that the iCap innovation be included in the remedy package since it was closely linked to the divestment business and had the potential to substantially increase its sales. According to the Commission, not including iCap impaired the viability and competitiveness of the divested business. Merck subsequently provided a

license for iCap to Honeywell, the purchaser of the remedy package.

Subsequent proceedings for violation of procedural rules (Commission case number M.8181)

But that was not the end of the story. Under the EU Merger Regulation, companies in a merger investigation are obliged to provide correct and non-misleading information. Suspecting that Merck and Sigma-Aldrich failed to provide the Commission with correct information about iCap, the Commission opened proceedings under Article 14.1 of the EU Merger Control Regulation and on 6 July 2017 sent a statement of objections detailing its preliminary view that Sigma intentionally and Merck negligently provided incorrect and misleading information to the Commission. Having heard the parties and following further investigations, in June 2020, the Commission issued a Supplementary Statement of Objections dropping the case against Merck, which as the purchaser prior to the closing of the transaction, had no access to Sigma-Aldrich's R&D projects. It upheld the allegations against Sigma-Aldrich.

On 3 May 2021, the Commission fined Sigma-Aldrich EUR 7.5 million for three distinct infringements by providing intentionally or at least negligently incorrect or misleading information on the iCap project. According to the Commission, Sigma-Aldrich provided, deliberately or at least negligently, incorrect or misleading information in the explanatory submission describing the remedy package and in the replies to two specific requests for information. The Commission stated that there were indications Sigma-Aldrich intended to hide the project from the Commission to avoid its transfer to the purchaser of the remedies.

Legal framework

Under the EU merger rules companies must follow different procedural rules. First, they are required to notify transactions falling under the EU Merger Regulation and not to implement them until cleared by the Commission. Furthermore, during merger control proceedings, companies must provide complete and correct information, both in the notification and when replying to requests for information. Accuracy in response to an RFI not only concerns the merging parties, but also third parties being asked for their view or data during the Commission's market investigation. Other procedural rules include obligations to provide required documents during inspections, respect Commission seals and to comply with remedies imposed as conditions and obligations in clearance decisions.

To ensure that the procedural rules are followed, Article 14 of the EU Merger Regulation gives the Commission the power to:

- fine intentional or negligent infringements of "lighter" procedural rules with up to 1% of the annual turnover of the company (Article 14 (1) EU Merger Regulation);
- impose fines of up to 10% the annual turnover of the company for intentional or negligent infringements of core procedural rules such as the duty to notify transactions and to respect the standstill obligation (Article 14 (2) EU Merger Regulation).

Concerning the obligation to provide correct information, the Commission may further revoke a clearance decision under Articles 6 and 8 of the EU Merger Regulation if the decision was based on incorrect information for which one of the merging parties was responsible.

Decisional practice by the European Commission

Until a few years ago, the Commission had not widely used its fining powers for procedural infringements. This changed since at least 2017 when the Commission fined Facebook EUR 110 million for providing misleading or incorrect information in merger control proceedings regarding the WhatsApp acquisition, and

opened investigations against several other companies, among them Merck and Sigma-Aldrich. In doing this, the Commission made it unequivocally clear that from now it would place greater emphasis on companies fully playing by the rules. Subsequently, the Commission fined Altice in April 2018 and Canon in June 2019 for breaches of the standstill obligation (i.e. gun jumping) as well as General Electric (GE) in April 2019 for providing incorrect or misleading information. The recent fine against Sigma-Aldrich is its latest action.

Looking more deeply at the cases concerning the provision of incorrect or misleading information (i.e. Facebook, GE and Sigma-Aldrich), all three companies were found to have acted negligently when they provided incorrect information (regarding Sigma-Aldrich, the Commission stated that there were "indications" the company acted intentionally). "Negligently" means that it knew or ought to have known that the information was incorrect. This shows the high standards companies must comply with when providing information in merger proceedings, even at times that the Commission's requests for information are becoming more and more extensive and – in particular, during the later phase of proceedings – the time limits for replying to request for information are becoming shorter and shorter. However, as the Commission points out, accurate information and full knowledge of the facts are essential for the Commission to make competition decisions. Large companies cannot argue that internal communication or organisational problems caused the provision of incorrect information. In the Facebook case, the Commission found that the company was at least negligent since some staff members were aware of the user matching possibility and its relevance for the Commission's assessment, as the later investigation showed.

As explained above, the Commission has the power to impose fines of up to 1% respectively 10% of the worldwide turnover of the undertakings concerned for the infringement of procedural rules, depending on their type. Concerning the determination of fines, Article 14 EU Merger Regulation states that this depends on "the nature, gravity and duration of the infringement". However, in contrast to fines under Regulation 1/2003 for the breach of Articles 101 and 102 TFEU, the Commission has not published guidelines on how it calculates fines for procedural infringements.

Although the fines can be painful, they are certainly the lesser evil compared to revoking the clearance decision, which is also an option for the Commission. So far, the Commission has not made use of this power. This is because none of the decisions were based on the incorrect information provided to the Commission during the proceedings and therefore had no impact on them:

- Facebook had informed the Commission in the Facebook/WhatsApp merger case that it would be unable to establish reliable automated matching between Facebook user accounts and WhatsApp user accounts, which was information the Commission later found to be incorrect. The Commission considered the information "relevant" for its decision. However, since it had also carried out an 'even if' assessment that assumed user matching as a possibility, the incorrect information provided by Facebook did not have an impact on the outcome of the clearance decision.
- GE had stated in its notification of the LM Wind takeover, that it did not have certain wind turbine for offshore applications in development. Following a hint from a third party, the Commission found that GE was simultaneously offering these exact turbines to potential customers. However, since GE subsequently withdrew its notification and re-notified with the correct information later, the Commission's eventual decision was not impacted by the infringement.
- In the Sigma-Aldrich case, the Commission pointed out that if Sigma-Aldrich had provided correct information and the innovation project had been correctly disclosed to the Commission, the project would have needed to be included in the remedy package. At first glance, this appears to have impacted the clearance decision, which included the remedies and made them binding. The remedy

considered suitable by the Commission, however, entailed the divestment of the solvents and inorganics business as it was in operation before the merger, expressly including IP, Know-How and R&D. The information concerning the innovation project seems to have concerned the description of the business to be transferred and the implementation of the divestment, not the clearance decision. This is also demonstrated by the fact that Merck was able to “repair” the misinformation by later licensing the innovation to the purchaser Honeywell. What remained was the lack of access to the innovation in the meantime, but that did not affect the competitive assessment made by the Commission in the clearance decision.