Competition News Bulletin

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Inside...

I. CARTELS AND ANTI-COMPETITIVE AGREEMENTS

INDIA

Competition Appellate Tribunal (COMPAT) quashes CCI order and directs fresh investigation into alleged anti-competitive practices of International Air Transport Association (IATA)

COMPAT, by its order dated November 15, 2016, has set-aside the order of Competition Commission of India (CCI) which dismissed allegations of cartelization and abuse of dominance against International Air Transport Association (IATA) and its Indian subsidiary.

In the Information filed by Air Cargo Agents Association of India (ACAAI), it was alleged that air lines who are members of IATA have entered into anti-competitive agreements through IATA whereby IATA has issued directives through its resolutions to determine a uniform rate of commission payable by all IATA airlines to all cargo agents for the freight forwarding services rendered by them for the airlines. ACAAI had also alleged that IATA was abusing its dominant position by regulating the air cargo industry in India through its resolutions. It was alleged that, through the IATA resolutions, all member airlines had entered into agreements to restrict competition in the cargo transport industry by imposing unfair conditions for registration and accreditation of air cargo agents as IATA agents as well fixing the rate of commission payable to air cargo agents by the member airlines. Further, it was alleged that the Cargo Accounts Settlement System (CASS)-which provides for electronic settlement of accounts of airlines and freight forwarders- had various unfair conditions biased against the cargo agents and the joining CASS was mandatory for car agents but voluntary for airlines.

The CCI ordered investigation into the allegations for finding any violation of the "provisions" of the Competition Act, 2002(the Act). In the investigation report, the Director General (DG) found that the IATA resolutions as well as the CASS system were not in violation of Section 3 of the Act. However, the DG did not investigate the violation of Section 4 of the Act and did not return any findings thereto. ACAAI, in its objections raised before CCI,pleaded, among others, that the investigation should also have been conducted for violation of Section 4 of the Act for alleged abuse of dominance. However, the CCI ignored the plea and agreed with the DG and closed the case forthwith under Section 26(6) of the Act.

ACAAI challenged the same in COMPAT on this ground, among others. The COMPAT, agreeing with the contention of ACAAI, held that "*. . . if the Commission does not specifically reject an allegation constituting violation of a particular provision of the Act and issues omnibus direction for investigation into the allegation of violation of the provisions of the Act, as has been done in the present case, then the DG is duty bound to record findings on each of the allegations made in the information or reference. In other words, in the absence of express negation by the Commission of any particular allegation made in the information / reference, the DG is under a* *statutory obligation to conduct investigation into all the allegations contained in the information or reference and record findings on each allegation."*

The COMPAT held that the DG had failed to discharge his statutory duty under Regulation 20(4) of the CCI (General) Regulations read with Section 26(3) of the Act and failed to record finding on the allegation of abuse of dominant position by IATA and consequential violation of Section 4. At the hearing held by the CCI, this point was specifically argued by ACAAI but the CCI completely ignored the same and simply approved the negative finding record by the DG on the issue of violation of Section 3(3) of the Act.

The COMPAT noted that *"The Commission too committed serious error by omitting to consider the specific plea taken by the appellant in the objections, which was also pressed during the course of oral hearing, that the DG had failed to make investigation into the allegation of abuse of dominant position and violation of Section 4 of the Act by Respondent Nos. 2 and 3."*

Consequently, the CCI order has been set-aside and the DG has been directed to conduct fresh investigation into the allegations levelled by the ACAAI against the respondents and submit a report to the CCI within 60 days.

(Source: COMPAT Order dated November 15, 2016. For full text see COMPAT website)

COMMENT: *The order is important for development in jurisprudence in competition law. The COMPAT has laid down that CCI is required under law to finally decide on every allegations raised in a complaint even though it may have referred only some of these allegation(s) for investigation at prima facie stage.*

COMPAT sets aside penalty against GSK Pharmaceuticals Ltd. (GSK) and Sanofi Ltd. (Sanofi) for alleged bid-rigging in procurement of meningitis vaccine for Haj and Umrah pilgrims by Ministry of Health and Family Welfare

COMPAT by its order dated November 8, 2016, has set aside the penalty imposed by CCI on GSK and Sanofi for being guilty of acting in contravention of Section 3 (3) (d) read with Section 3(1) of the Act and imposed penalty at the rate of 3% of their turnover of last three financial years.

In the Information filed by Bio-med Pvt Ltd., an indigenous manufacturer of the QMMV vaccine, it was alleged that the Union of India had abused its dominant position by incorporating restrictive and exclusionary conditions like minimum annual turnover of INR 10 Crores initially, then INR 20 Crores and later INR 50 Crores in subsequent tenders, and a certificate in support of manufacturing and marketing for the last three years. Being an indigenous manufacturers, the Informant was supplying the vaccines to the Union of India at a price much lower than GSK/Sanofi. However, the introduction of these new conditions restricted the participation of the Informant even though it was fully licensed under the provisions of the Drugs and Cosmetics Act, 1940.

Further, the Informant alleged that GSK and Sanofi have adopted deliberate plan where only one of the companies plans to participate in a tender process. While from 2003 to 2008, only GSK participated in the tender or the tender offer by Sanofi was higher than GSK; the roles were reversed from 2008 onwards. Informant alleged the same as amounting to violation of Section 3(3) (d) of the Act.

The CCI ordered investigation against GSK and Sanofi for alleged bid rigging, while rejecting allegations of abuse of dominance. The DG Report noted that both Sanofi and GSK had failed to explain why they quoted half quantities in the tender of 2011 and why the prices quoted were higher than the approved prices of the last tender. The DG found that the documents produced by GSK and Sanofi did not show any constraint relating to supply of vaccines. Considering their regular global supplies, it was not explained with evidences as to how they were unable to supply full quantity in the tender of 2011. According to the DG, non-participation of GSK in tenders of 2012 and 2013 further established the collusion. Thus, the DG Report recommended that the conduct of GSK and Sanofi, sharing the tender quantity and having quoted very high price in the bids given for the year 2011, was in contravention of Section 3(3)(d) read with Section 3(1) of the Act.

The CCI approved the finding recorded by the DG that the GSK and Sanofi have acted in contravention of Section 3(3)(d) read with Section 3(1) of the Act and imposed penalty of INR 604,890,469.998 on GSK and INR 30,434,200.89 on Sanofi respectively.

Both GSK and Sanofi challenged the order of the CCI imposing penalty before COMPAT. It was contended that GSK did not participate in the tender of August 2011 because the time gap between the opening of tender and supply of the vaccine was very short and it was impossible to import the vaccine from Belgium and then undertake the exercise of putting stickers, testing and packaging. Sanofi argued that GSK did not participate in the first and the second re-tender, the question of collusive bidding or bid rigging is altogether ruled out, more so because no evidence was produced to show that non-participation of GSK in the first and second re-tender was a part of the arrangement made between the Sanofi and GSK

The COMPAT noted that in response to tender notice dated June 25, 2011, GSK had given bid for 1,00,000 doses @ INR 3000.90 per 10 doses vial and Sanofi had given bid for supply of 90,000 doses @ INR 2899/- per 10 doses vial. Both the GSK and Sanofi had given cogent explanation and produced voluminous records to show as to why they had given bids for limited quantity. Sanofi had explained that it did not give bid for the entire quantity because in the previous years, it remained unsuccessful and had to destroy the vaccine by incurring huge losses. GSK had explained that it was not plausible to import vaccine from Belgium, get the same tested at Kasauli, put stickers and do packaging in a short period of 11-12 days in response to the first re-tender and 2-3 days in response to the second re-tender. Notwithstanding this, the

DG observed that the appellants had quoted identical quantity at the same price. Further, the bid price of Sanofi was not higher by 39.44% as compared to the last purchase as stated by the DG, but was only higher by 16.14% higher than the previous purchase price and that too was as a result of general increase in the price.

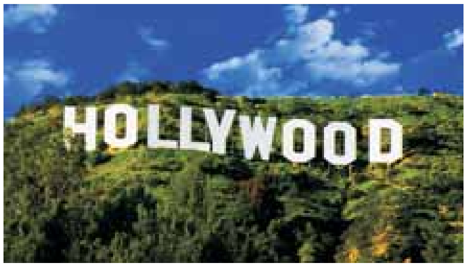
Consequently, the COMPAT held that the finding recorded by the CCI that the GSK and Sanofi are guilty of collusive conduct and violated Section 3(3) (d) read with Section 3(1) of the Act was legally unsustainable and the impugned order is liable to be set-aside in toto.

(Source: COMPAT Order dated November 08, 2016. For full text see COMPAT website)

II. ABUSE OF DOMINANT POSITION/MARKET POWER

INDIA

COMPAT orders investigation against producers of Hollywood movies



COMPAT by its order dated November 9, 2016 has ordered investigation against 6 producers of Hollywood films for the allegedly forcing a technology, called D-Cinema technology, for providing cinema screening under the auspices of Digital Cinema Initiatives, LLC, a joint venture between the 6 movie producers.

In an information filed by K Sera Sera Digital Cinema Pvt. Ltd. (Informant), it was alleged that the exhibitors who want to use non D-Cinema technology for screening of Hollywood films are not given the Hollywood films for release thereby getting them excluded from the line of business. The Informant itself propagates the technology of E-cinema for cinema screening. Informant alleged that by this conduct the respondents are excluding any other method of exhibition of Hollywood films and, therefore, have resorted to anti-competitive conduct.

Respondents have defended their act by stating that their technology is superior in nature, it provides piracy proof exhibition and the adoption of technology is entirely voluntary. They further state that in order to protect their intellectual property they release their films only to those who adopt this particular technology.

The CCI had initially dismissed the allegations. However, the COMPAT by its earlier order dated 08 December 2015 had remanded the matter back to the CCI for reconsideration stressing on the need to analyse as to at what point forcing standards can lead to pushing out competition. The COMPAT was of the opinion that as long as there is pluralism in the standards, all coexist and market demands determine their survival. By the COMPAT's earlier order, it was opined that such forcing of particular standards was by itself a good enough reason for the CCI to have directed an investigation into the matter.

However, upon reconsideration, the CCI again dismissed the matter holding that the technology propagated by Respondents was superior to the Informant's D-Cinema technology.

During the second appeal, the COMPAT noted that the CCI had done nothing by "way of value addition" in the CCI's second order. The CCI itself recognised that there would be foreclosure of competition if technology choices are severely constrained. The COMPAT also noted that in CCI's order the issue of cartel has been addressed to some extent, there is no prima facie examination of the question of dominance as alleged in the information. COMPAT disagreed with the respondents' claim that their technology is voluntary, when they themselves create potential entry barriers by releasing their films only to those who opt for digital technology.

COMPAT concluded that it would have saved time and efforts of all those involved in this matter if the CCI had ordered an investigation into the matter. Accordingly, the impugned order was set aside and the DG was directedby COMPAT to conduct investigation into the allegations contained in the Information filed by the Appellant.

(Source: COMPAT Order dated November 9, 2016. For full text see COMPAT website)

COMPAT orders investigation against Gas Authority of India Limited (GAIL) for abuse of dominance

COMPAT by order dated November 28, 2016 has set aside the order of CCI refusing investigation against GAIL for allegedly incorporating unfair terms and conditions in its gas supply agreements with power producers.

The Information was filed by Gujarat Industries Power Company Limited (GIPCL) which is engaged in the business of power generation and is operating on 310 MW power plant in Vadodara. GAIL is engaged in the distribution and marketing of gas in India and also other activities relating to gas including exploration, production, transmission, extraction, processing of natural gas and its related process, products and services. For running its plants, the GIPCL requires a continuous supply of gas of 1065 MMSCMD. It executed Gas Sales Agreement (GSA) with GAIL on February 12, 2004. Duration of that agreement was five years with a provision for extension at the instance of either party. After the termination of the GSA, the parties executed a fresh GSA on December 26, 2008 whereby GAIL agreed to supply RLNG to the GIPCL for 20 years subject to the terms and conditions contained in various Articles of the GSA. Article 14 of GSA dated December 26, 2008 contained "Take or Pay" Clause which provided for certain quantity of gas which shall be taken and paid for or paid for if not taken by GIPCL.

After seven years of the execution of GSA dated December 26, 2008, GAIL sent letter dated February 27, 2015 to GIPCL requiring it to pay INR 49.81 Crores towards 'Annual Take or Pay Deficiency'. The GIPCL replied requesting GAIL to waive the take or pay penalty imposed on GIPCL. When GIPCL did not comply with the demand of GAIL, the GAIL sent communication dated 22.06.2015 to the Branch Manager, ICICI Bank Ltd., Baroda seeking to invoke the Letter of Credit submitted by the GIPCL.

While adjudicating the matter, the CCI considered that the relevant product market would be the market of 'supply and distribution of natural gas (RLNG) to industrial consumers in Vadodara'. It further held that GAIL prima facie was in a dominant position in the relevant market. However, the CCI was of the opinion that the conduct of GAIL did not amount to abuse of dominance as safeguarding commercial interest or invoking contractual clauses which were not unfair per se cannot be termed as unfair just because they are invoked by one of the parties to the contract.

The COMPAT noted that instead of examining the allegations contained in the information and the documents filed by GIPCL from the point of view of forming an opinion about existence or otherwise of a prima facie case, the CCI assumed the role of an investigator and an adjudicator and unequivocally pronounced that the decision taken by GAIL to invoke 'Take or Pay' clause contained in GSA dated December 26, 2008 cannot be termed as arbitrary or abuse of dominant position as envisaged in Section 4(2) of the Act. The COMPAT held that within the scheme of the Act, the exercise required to be undertaken by the CCI for forming an opinion whether or not there exists a prima facie case which requires investigation, the CCI is required to take cognizance of the averments contained in the reference or an information and the documents supplied with the reference or information.

The COMPAT concluded that the exercise undertaken by the CCI to determine the issues like relevant market, dominant position enjoyed by GAIL in the relevant market and its conclusion that GAIL cannot be held to have abused its dominant position was clearly beyond the scope of the power required to be exercised under Section 26(1) of the Act. Consequently, the CCI order has been set aside and the Director General has been directed to conduct an investigation into the allegations contained in the information filed by the GIPCL.

(Source: COMPAT Order dated November 28, 2016. For full text see COMPAT website)

Comment: *This is the second order by COMPAT laying down the limits of scrutiny by CCI while forming an opinion of existence of a prima facie case or otherwise under Section 26(1) of the Act . The first Order was dated 26.11.2015 in the appeal no. 51 of 2014.*

CCI dismisses allegation of abuse of dominance against HP

CCI, by its order dated November 10, 2016, has dismissed allegation of abuse of dominance against HP for defective products and spurious spare parts.

In the Information filed by an individual, Dr. S.K. Mittal, who was essentially aggrieved by the alleged conduct of HP in selling a defective, spurious and sub-standard laptop to him and not providing the desired after-sale repair services for the said defective laptop.

The CCI observed that the dispute in question appears to be a purely consumer issue for which the Informant may approach the appropriate forum. It was observed that the allegations of the Informant relate to sale of a defective laptop and deficiency in the provision of after-sale repair services for the said laptop and there is no competition issue involved in the matter.

Nonetheless, the CCI considered that in the relevant market for "laptops including its spares and after-sale services in India.", even though OP is a major player besides many other leading players such DP, Lenovo, Apple, Sony, Acer, etc. are operating and exert competitive pressure on HP. HP does not enjoy a position of strength required to operate independently of market forces. Therefore, the CCI is of the view that HP does not hold a dominant position in the relevant market. In the absence of dominance of HP, the question of abuse of dominant position by it under Section 4 of the Act does not arise at all. The matter has accordingly been closed under Section 26(2) of the Act.

(Source: Order dated November 10, 2016. For full text see CCI website-www.cci.gov.in)

INTERNATIONAL

China: SAIC fines Tetra Pak record $97 Million for abuse of dominance

China's antitrust regulator, the State Administration for Industry and Commerce (SAIC) has fined Swedish packaging giant Tetra Pak International S.A. $97 million for abuse of dominance.

The same represents the largest ever fine imposed by the SAIC for violation of antitrust law. The present fine ends a three-and-a-half year probe into Tetra Pak's China operations, including bundle sales and loyalty discounts.

SAIC held that between 2009 and 2013, Tetra Pak abused its market dominance in the aseptic carton packaging machinery for liquid food products packing equipment and technology markets by bundling paper materials with equipment and technology, and by restraining suppliers from selling to competitors with a loyalty discounts program. The geographic market was defined as Mainland China.

The SAIC found that in Mainland China Tetrapak had without justifiable reasons conducted tie-in sales, exclusive dealing and loyalty discounts. The SAIC found that Tetrapak required its customers to use its cartons or cartons which were "approved by Tetrapak. Tetrapak'sprerequisite for the provision of technical services for its carton machinery during this period was that customers must adhere to the exclusive use of cartons provided Tetrapak. The SAIC concluded that Tetrapak was using its dominant position in machinery and technical service markets to impose restrictions on and affect customer's usage of cartons, which damaged the competition in the carton market. Therefore, Tetrapak's tie-in sales behavior constitutes "implementing tie-in sales or imposing other unreasonable trading conditions at the time of trading without justifiable reasons" as prohibited by Article 17(1) (v) of the Chinese Anti-Monopoly Law (AML).

The SAIC also found that loyalty discounts have a loyalty inducing effect. The discount scheme implemented by Tetrapak held that the discount applies to all units purchased by a customer during a defined reference period. When a customer's purchase volume reaches the threshold, the price that the customer needs to pay drops significantly. Therefore, to obtain more products at a lower price when a customer's purchase volume approaches the threshold, customers tend to continue purchasing until the threshold is met, which leads to a loyalty inducing effect. The SAIC held it as abuse of dominant position.

(Source: SAIC Press Release dated 16 November 2016, available at: <http://www.saic.gov.cn/zwgk/zyfb/qt/xxzx/201611/t20161116_172376.html>)

EU: Commission investigates practices of Czech railway incumbent Českédráhy in passenger transport

The European Commission has opened an investigation to assess whether the Czech railway incumbent Českédráhy, a.s. (ČD) charged prices below costs with the aim of shutting out competition in rail passenger transport services, in breach of EU antitrust rules. ČD is the main railway operator in the Czech Republic and until 2011, it was the only rail company active on the Prague – Ostrava route. After the market entries of competing rail passenger companies RegioJet in 2011 and LEO Express in 2012 on the Prague –Ostrava route, ČD significantly decreased the prices, it charged to passengers on the route. The Commission has concerns that ČD may have charged prices that are so low that it could not cover the costs of the service. Such practices can hinder competitors from remaining in the market to the detriment of passengers. Following a complaint, the Commission carried out inspections at the premises of ČD in April 2016. There is no legal deadline to complete inquiries into anti-competitive conduct. The duration of an antitrust investigation depends on a number of factors, including the complexity of the case, the extent to which the undertaking concerned cooperates with the Commission and the exercise of the rights of defense.

(Source: EU Press Release dated November 10, 2016)

Sweden: Swedish Competition Authority's investigation reveals no abuse of dominance on the pharmaceuticals market

The Swedish Competition Authority ("SCA") found no abuse of dominance on the pharmaceuticals market. In December 2015, the SCA received a complaint alleging abuse of dominance by distributors or producers by refusing to supply pharmaceuticals to the complainant company, a wholesaler. According to the complainant, as a result of the refusal to supply, it was compelled to suspend all parallel exports

from Sweden. The SCA's investigation concluded that there was no established contractual relationship between the complainant and the pharmaceutical companies concerning the supply of pharmaceuticals to the complainant for its wholesale distribution business. Moreover, the SCA concluded that there was no obligation to supply to the complainant as a new customer as such an obligation only exists if: i) access to the pharmaceutical company's drug is necessary in order to compete on the downstream market, ii) the refusal to supply eliminates all effective competition on the market and iii) the refusal is not objectively justified. Therefore, the SCA found that there had been no cutting off of supplies or refusal to supply in breach of the competition rules. In light of this, the SCA decided to discontinue its investigation.

(Source: November 18, 2016 Press Release (in Swedish))

III. COMBINATION

CCI approves international organization within the Fortis Group

CCI vide its order dated October 14, 2016, has given the approval to the internal re-organization of the hospitals and diagnostics business of Fortis Group into separate verticals.

Prior the proposed combination, the healthcare business of Fortis Group was housed under Fortis Healthcare Limited and Fortis Malar Hospital Limited (FMHL), whereas the diagnostics services were provided by Fortis Healthcare Limited (FHL) as well as SRL Limited.

FHL is primarily engaged in providing integrated healthcare services such as medicare, healthcare and diagnostics through a network of multi-specialty hospitals. FHL also undertakes its diagnostics services business through SRL. FMHL belongs to the Fortis group. FMHL is engaged in the business of operating hospitals and providing diagnostics services through SRL in Fortis Malar Hospital, Chennai. SRL is , inter alia, engaged in establishing, maintaining and managing clinical reference laboratories and other laboratories for providing testing and diagnostic services.

The proposed combination contemplated a series of interconnected steps: (i) FMHL to sell its healthcare business to FHL under slump sale route as a going concern; (ii) FHL to de-merge its diagnostics business undertaking and its investment/shareholding in SRL to FMHL; and (iii) SRL to be amalgamated into FMHL, consequent to which the name of FMHL would be changed to “SRL Limited”.

After the proposed combination, the hospitals business of Fortis Group would be undertaken through FHL; while the diagnostic services of Fortis Group would be undertaken through SRL Limited.

The proposed combination is an internal restructuring within the Fortis group (controlled by Mr. Malvinder Mohan Singh & Dr. Shivinder Mohan Singh) to consolidate the hospitals and diagnostics business of Fortis group under separate verticals.

After detailed examination of the proposed reorganization, CCI was of the opinion that the proposed combination did not cause appreciable adverse effect on competition (AAEC) in India. The proposed combination has been approved under Section 31 of the Act.

(Source: Order dated October 14, 2016. For full text see CCI website-www.cci.gov.in)

INTERNATIONAL

EU: Commission conditionally approves acquisition of Sanofi's animal health business Merial by BoehringerIngelheim

The European Commission has approved under the EU Merger Regulation the acquisition of the animal health business of Sanofi (Merial) of France by BoehringerIngelheim (BI) of Germany. The decision is conditional on the divestment of a number of animal health vaccines and pharmaceuticals by both companies. The proposed transaction leads to combination of two key competitors in the development, manufacturing, marketing and sale of animal health products across the European Economic Area (EEA). The Commission's investigation focused on overlaps between BI and Merial's activities in the following areas:

- Biologicals: swine and ruminant vaccines,
- Pharmaceuticals: anti-inflammatory drugs in injectable and oral forms, anti-microbial and other specialty products,
- Feed supplements: Osteoarthritis feed nutrients for pets.

Following a thorough market investigation, the Commission found that competition concerns arose in the area of biologicals and pharmaceuticals. The Commission identified several markets where BI and Merial's products are in competition with each other, namely different types of porcine and bovine vaccines, as well as non-steroidal anti-inflammatory drugs (NSAID) in injectable forms and NSAID in tablets for horses.

In these markets, the Commission found that either BI or Merial was a strong player in the market, while the other was either already competing or developing a product in order to do so. Thereby, the Commission concluded that the elimination of one of the merging companies would harm competition for the supply of these products in Europe, with a risk of price increases and loss of quality of service and supply.

However, the Commission found no competition concerns for pharmaceuticals other than NSAIDs and for feed supplements since the companies' market positions are limited and important competitors will remain active on these markets. Further, in order to address the Commission's competition concerns, the two companies offered to divest a number of Merial's marketed and pipeline products, including its existing vaccines Circovac, Progressis, Parvovax, Parvovurax and Mucossifa and pharmaceuticals Ketofen, Wellicox, Allevinix, Genixine, Equioxx Injectable and Equioxx Paste.Given the specific nature of these products, and in particular the stability and the consistency of all production processes involved, the divestment includes the full transfer of production technology (antigens and finished products) to the purchaser. During the transfer, BI and Merial committed to provide the purchaser with full technical support and a transitional supply agreement. To ensure the success of the production transfer and the effectiveness of the commitments it was necessary to identify a purchaser able to take over the divested products. BI committed to carry out the technology transfer to Ceva Santé Animale (Ceva). Ceva is an established company in the animal health sector with expertise and experience in the relevant production technologies and an established distribution and marketing network throughout Europe. This transaction will require separate merger approval from the relevant competition authorities. After the investigation and following a market test, the Commission concluded that the commitments addressed the identified competition concerns. In particular, the companies proposed a suitable purchaser with strong capabilities and incentives to run the divested businesses successfully in the long term. The decision is conditional upon full compliance with the commitments.

(Source: EU Press Release dated November 9, 2016)

EU: Commission conditionally approves acquisition of St Jude Medical by Abbott Laboratories

The European Commission has approved under the EU Merger Regulation the proposed acquisition of St Jude Medical by Abbott Laboratories, both US based companies that develop and market medical devices. The approval is conditional on Abbott divesting two devices used in cardiovascular treatments. The Commission's investigation focused on the two areas of cardiovascular devices where Abbott and St Jude compete: vessel closure devices and devices used in electrophysiology procedures, in particular trans septal introducer sheaths. In order to address the competition concerns identified by the Commission, Abbott offered to:

- fully divest St Jude's global vessel closure devices business, including its manufacturing site in Puerto Rico;

- divest the whole of Abbott's Vado business, including its shareholding in Kalila Medical, the company which developed Vado. Kalila Medical was purchased by Abbott in early 2016 but was not subsequently integrated into Abbott operations.

These commitments fully remove the overlap between Abbott and St Jude in the two markets where the Commission had identified competition concerns. The Commission was, therefore, able to conclude that the proposed transaction, as modified by the commitments, would no longer raise competition concerns. The decision is conditional upon full compliance with the commitments. Given the global reach of the companies' activities, the Commission cooperated closely with competition agencies in other jurisdictions, including in particular the US Federal Trade Commission.

(Source: EU Press Release dated November 23, 2016)

EU: Commission conditionally approves container liner shipping merger between Hapag-Lloyd and UASC

The European Commission has approved under the EU Merger Regulation the proposed acquisition of United Arab Shipping Company ("UASC") by Hapag-Lloyd of Germany, subject to conditions. Both companies operate in the container liner shipping sector. The clearance is conditional on the withdrawal of UASC from a consortium on the trade routes between Northern Europe and North America, where the merged entity would have faced insufficient competitive constraint. The transaction leads to the combination of two competitors in the container liner shipping business and will create the fifth largest container liner shipping company worldwide. Like several other carriers, UASC and Hapag-Lloyd offer their services on trade routes mainly through cooperation agreements with other shipping companies, known as "consortia" or "alliances". Consortia and alliance members decide jointly on capacity setting, scheduling and ports of call, which are all important parameters of competition. The Commission examined the effects of the merger on competition in the market for container liner shipping on thirteen trade routes connecting Europe with the Americas, the Middle East, the Indian Subcontinent, the Far East, Australia, New Zealand and West Africa, as well as Northern Europe with the Mediterranean.

The Commission found that the merger, as initially notified, would have created links on the Northern Europe – North America trade routes between the consortia and alliances in which Hapag-Lloyd is a member and the NEU1 (ex-Pendulum) consortium, in which UASC is a member. As a result, through the consortia and alliances it would belong to, the merged entity could have influenced capacity and prices on a very large part of those markets, to the detriment of customers and, ultimately, consumers. The Commission had concerns that on those routes, the merged entity would have faced insufficient competitive constraint from rival companies. The transaction also creates limited vertical links between the companies' activities in container liner shipping services and the following services, where Hapag-Lloyd or its controlling shareholders are active: (i) container terminals, (ii) inland transportation, (iii) freight forwarding, and (iv) harbor towage. However, the Commission found no competition concerns in these areas, in particular because several other service providers are active in these markets. In order to address the Commission's competition concerns, Hapag-Lloyd offered to terminate the participation of UASC in the NEU1 consortium. This will entirely remove the additional link between Hapag-Lloyd's and UASC's consortia that the transaction would have created on the Northern Europe – North America trade routes. As a result, the merged entity's position on these trade routes will be comparable to that of Hapag-Lloyd. Although UASC will continue to operate as part of the NEU1 consortium during the notice period to guarantee an orderly exit, a monitoring trustee will ensure that no anti-competitive information is shared between the NEU1 consortium and the merged entity during that notice period. The Commission therefore concluded that the proposed transaction, as modified by the remedies proposed, would no longer raise competition concerns. The decision is conditional upon full compliance with the commitments.

(Source: EU Press Release dated November 23, 2016).

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