

Europe

Just How Honest Does One Have to be with the Commission? The Lessons from the Merck/Sigma-Aldrich Case

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Former President Bill Clinton famously denied having had sexual relations with Ms. Lewinsky. After the details of his affair became public, most reasonable people concluded that that statement had been untrue or, at the very least, misleading. But when accused of perjury, Clinton essentially explained that, in his understanding, oral sex was not sex.²

This type of trick – some will perhaps call it clever lawyering – may have worked in an impeachment trial for perjury, but the Commission's *Sigma-Aldrich* case³ suggests it does not work in merger control proceedings, where parties have an obligation to make "a full and honest disclosure" of all relevant facts.⁴

The *Sigma-Aldrich* case is important because it sheds light on an issue which competition lawyers face almost daily: how truthful do you have to be to the Commission? Can you avoid giving away unfavorable information by side-stepping the question? By replying to the question in a narrow way? By using words in a somewhat peculiar meaning? To put it in language that any child would understand: can you answer the question "did you eat any snacks?" by replying "I ate neither cookies nor

candy," if you know that you just ate a bucket of ice cream?

In this particular case, Sigma-Aldrich tried to keep an R&D project hidden from the Commission, in the hope of not having to transfer this project to a third party, as part of a divestiture remedy. The strategy initially appeared to be successful, as the project was not included in the divested business. But the non-disclosure came to light and ultimately resulted in the European Commission imposing a 7.5 million euro fine on Sigma-Aldrich, for having provided incorrect or misleading information.

The Commission's decision was issued in May 2021 and made available to the public in March 2022. It is the third time the Commission fines a company for providing incorrect or misleading information under the EU Merger Regulation of 2004.⁵ In prior cases, the Commission imposed a 110 million euro fine on Facebook⁶ and a 52 million euro fine on General Electric.⁷ Together with a string of recent decisions and judgments on gun-jumping,⁸ this decision forms part of a growing body of case law on procedural violations in EU merger control.

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² To be more precise, in his testimony before Independent Counsel Kenneth Star's grand jury, Clinton at times relied on what he claimed was the "definition that most ordinary Americans would give" to the term sexual relations (and which, in his view, did not cover oral sex), and, at other times, on a specific definition used in the *Paula Jones* trial (and which, in his view, entailed that only the person performing the oral sex, not the recipient, engaged in sexual relations). See Peter Tiersma, *Did Clinton Lie?: Defining "Sexual Relations,"* 79 CHICAGO-KENT LAW REVIEW 927, 928 (2004).

³ Case M.8181 – *Merck / Sigma-Aldrich* (Art. 14(1) proc.), Commission decision of 3 May 2021, available at https://ec.europa.eu/competition/mergers/cases1/202212/M_8181_8229077_2373_3.pdf.

⁴ Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, as amended, recital 5 (OJ L 133, 30 April 2004, p. 1-39).

⁵ Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, as amended (OJ L 24, 29 January 2004, p. 1) (hereinafter the "EU Merger Regulation").

⁶ Case M.8228 – *Facebook / WhatsApp*, Commission decision of 17 May 2017, available at https://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf.

⁷ Case M.8436 – *General Electric Company / LM Wind Power Holding* (Art. 14.1 proc.), Commission decision of 8 April 2019, available at https://ec.europa.eu/competition/mergers/cases/decisions/m8436_627_3.pdf.

⁸ *Ernst & Young v. Konkurrenserådet*, C-633/16, EU:C:2018:371; *Marine Harvest v. Commission*, C-10/18 P, ECLI:EU:C:2020:149; *Altice Europe v. Commission*, T-425/18, ECLI:EU:T:2021:607 (an appeal is pending before the Court of Justice, case C-746/21 P); *Canon v. Commission*, T-609/19, ECLI:EU:T:2022:299.

In what follows, we summarize the (1) background to the case, (2) the Commission's finding that Sigma-Aldrich provided misleading or incorrect information, (3) the Commission's calculation of the fine, and we end with a number of (4) comments and lessons.

I. Background

Merck's 2015 Acquisition of Sigma-Aldrich

Sigma-Aldrich is a U.S. company active in life sciences. In 2015, it was acquired by German drug and chemicals company Merck KGaA (not to be confused with U.S. based Merck & Co.), in a deal worth 17 billion dollars. The deal had to be reviewed by, among others, the European Commission. The infringements occurred during this review process.

The European Commission approved Merck's acquisition in Phase I, subject to remedies.⁹ As is often the case, the remedy was a divestiture. Merck and Sigma-Aldrich were the two leading players in the markets for solvents and inorganics in Europe. The Commission was therefore concerned about the deal's negative impact on competition in those markets. The parties removed those concerns by making a commitment to sell Sigma-Aldrich's solvents and inorganics business in the EEA to a third party.

The discussions between the Commission and the parties on the design of the remedies followed a familiar pattern. After Merck and Sigma-Aldrich submitted an initial divestiture proposal, the Commission sought feedback on the proposal from market players through a so-called market test. Spurred on by feedback from the market test, the Commission insisted that the divestment business should include all related R&D and pipeline products. The Commission also probed the divestiture proposal by sending several requests for information to the parties, asking whether any assets had been carved out, and whether

Sigma-Aldrich had any R&D agreements with third parties.

In response to these questions and also in the Form RM (the explanatory document which companies must submit together with the remedies), Sigma-Aldrich decided not to mention the so-called iCap project. iCap was an R&D project which Sigma-Aldrich was developing with Swiss company Metrohm, a maker of titration instruments. It is essentially an intelligent bottle cap which seals bottles filled with solvents and reagents, and connects them to a titration instrument, allowing for the exchange of data between the bottle and the instrument.¹⁰ The technology was developed for Sigma-Aldrich's titration solutions and solvents, products which would ultimately be divested as part of the divestment business.

The Commission Finds Out

After the Commission's approval of the *Merck/Sigma-Aldrich* deal, Merck rather quickly found a willing buyer for the divestment business: Honeywell. The U.S. conglomerate acquired the divested business in a deal worth 105 million euro.

Sigma-Aldrich did not include the iCap project in the assets it divested to Honeywell but, after the signing and closing of the divestiture deal, Honeywell became aware that the project had been excluded from the divestiture package and complained to the monitoring trustee and the Commission.

This triggered an investigation by the Commission and led to a statement of objections in 2017. Initially, the proceedings were directed against both the acquirer Merck and the target Sigma-Aldrich, but in a subsequent supplementary statement of objections, issued in 2020, only Sigma-Aldrich was targeted. The decision does not explain why the proceedings against Merck were dropped, but presumably this has to do with the fact that the divested assets in this case were those of the target Sigma-Aldrich. Possibly, the relevant information was therefore exclusively in

⁹ Case M.7435 – *Merck / Sigma-Aldrich*, Commission decision of 15 June 2015, available at https://ec.europa.eu/competition/mergers/cases/decisions/m7435_20150615_20212_4370544_EN.pdf.

¹⁰ The product now appears to be marketed by Merck (the acquirer) as an "intelligent packaging solution" under the name 3S (safe, smart, secure).

Sigma-Aldrich's hand and, hence, Merck may not have had the requisite intent or negligence.

II. The Infringements: Sigma-Aldrich Provided Misleading or Inaccurate Information

The Commission decision finds that Sigma-Aldrich engaged in three separate infringements, corresponding to three occasions where it should have disclosed the iCap project but did not.

First, Sigma-Aldrich should have mentioned iCap in the Form RM, the document which companies submit together with the remedies. In case of a divestiture of a business, the Form RM requires companies to disclose "any innovations or new products or services planned" related to the divestment business.¹¹ Sigma-Aldrich had not mentioned the iCap project in this section, instead writing that "there are no new products or innovations imminently planned with regard to" the divestment business. This, the Commission found, was incorrect and misleading and constituted an infringement under Article 14(1)(a) of the EU Merger Regulation.

Second, Sigma-Aldrich also failed to disclose the iCap project in response to two requests for information, issued on the basis of Article 11(2) of the EU Merger Regulation. A first request for information had asked Merck and Sigma-Aldrich to describe "all differences between the Divestment Business and Sigma-Aldrich's business for solvents and inorganics in the EEA."¹² Since the iCap project had been developed for titration solutions and solvents, it was part of Sigma-Aldrich's solvents and inorganics business, but Sigma-Aldrich did not mention it.

Third, a subsequent request for information asked a series of questions about Sigma-Aldrich's R&D activities in solvents and

inorganics. Among others, the Commission asked: "Does Sigma have any R&D agreements with third parties related to solvents and inorganics in the EEA?" Although Sigma-Aldrich was developing the iCap project pursuant to an R&D agreement with Swiss company Metrohm, it replied that it did "not have any formal R&D agreements with respect to its current solvents and inorganics products in the EEA," again failing to mention the iCap project.

The Commission considered the replies to its two requests for information to be incorrect or misleading, and found an infringement under Article 14(1)(b) of the EU Merger Regulation, which deals specifically with incorrect or misleading information in response to requests for information.

III. The Calculation of the Fine

Although the Commission identified three separate infringements, it imposed one single fine of 7.5 million euro for all three, without breaking down how much each infringement contributed to the amount of the fine. The decision justifies this by pointing out that all the incorrect and misleading information was supplied in the same context, namely the assessment of the proposed divestiture, and was ultimately all consolidated in the Form RM (the replies to the requests for information were also incorporated in the Form RM).¹³ The decision also refers to an analogous practice in abuse of dominance cases, where the General Court has accepted that the Commission can impose a single fine for a multiplicity of infringements without being required to state specifically how it took into account each of the aspects of the abuse.¹⁴

The Commission decision then examines the three elements which it must take into account in setting the fine: the nature, gravity and

¹¹ Form RM, section 5.3. The Form RM is annexed to Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, as amended (OJ L 133, 30 April 2004, p. 1-39).

¹² Case M.8181, para. 301.

¹³ Case M.8181, para. 471.

¹⁴ Case M.8181, para. 471, fn. 915. The General Court case which the Commission refers to is *Tetra Pak v. Commission*, T-83/91, ECLI:EU:T:1994:246, para. 236.

duration of the infringement.¹⁵ It finds the infringements to be "of a serious nature and particularly grave"¹⁶ and "instantaneous."¹⁷ The "serious nature" comes as no surprise. In previous decisions (*Facebook/WhatsApp* and *General Electric/LM Wind*) the Commission also highlighted that the provision of correct information is crucial for effective merger control. However, the qualification of the infringement as "particularly grave" is a first for this type of infringement. The Commission decision justifies this by pointing out that the infringements were committed intentionally,¹⁸ the fact that the information related to an R&D project while the Commission had virtually no other way to obtain information about such confidential projects,¹⁹ and the fact that the iCap project was relevant for the divestment business and would have been included in the divestment, if Sigma-Aldrich had provided the relevant information.²⁰

After discussing all these factors, the decision then moves to the amount of the fine. Anyone looking for clues as to why the fine in this case (7.5 million euro) is much lower than the fines imposed on Facebook (110 million euro) and General Electric (52 million euro) will search in vain. The decision simply recalls the standard formula according to which the Commission "takes into account the need to ensure that fines have a sufficiently punishing and deterrent effect,"²¹ and then sets the fine at 7.5 million euro, based on the nature, gravity and duration of the infringement.²²

IV. Comments and Lessons

How did this Happen? Sigma-Aldrich's Defense

The Commission decision gives a rather damning account of Sigma-Aldrich's approach to answering the Commission's questions on R&D and its disclosure obligations in the Form RM. It concludes that the incorrect or misleading statements were "part of a strategy" and a "deliberate attempt" by Sigma-Aldrich "to avoid disclosing iCap to the Commission."²³ This, the Commission finds, "suggests the existence of a strategy to deceive the Commission."²⁴

Reading the Commission decision, one cannot help but think: how could such blatant infringements have occurred and what were the people involved thinking? Sigma-Aldrich's defense, and the internal documents cited in the Commission decision, shed some light on what happened behind the scenes.

Sigma-Aldrich's defense came in two prongs. First, it argued that it made a good faith decision not to include the iCap project because it genuinely believed the project was not primarily related to the divestment business and that it was not important for the divestment business.²⁵ The Commission decision rejects this defense, based on what it calls "a large body of contemporaneous evidence."²⁶ The iCap project had, in fact, been developed specifically for the type of products which were part of the divestment business²⁷ and, at least at the time of the discussions over remedies, it was considered important.²⁸

¹⁵ EU Merger Regulation, Art. 14(3).

¹⁶ Case M.8181, para. 473.

¹⁷ Case M.8181, para. 488. The instantaneous nature stems from the fact that the incorrect or misleading information was provided on three specific occasions.

¹⁸ Case M.8181, para. 477.

¹⁹ Case M.8181, para. 481.

²⁰ Case M.8181, paras. 482-484.

²¹ Case M.8181, para. 521.

²² Case M.8181, para. 522.

²³ Case M.8181, paras. 363, 476.

²⁴ Case M.8181, paras. 332, 364, 368, 386, 388.

²⁵ Case M.8181, para. 356.

²⁶ Case M.8181, paras. 285, 359.

²⁷ Case M.8181, paras. 226-235.

²⁸ Case M.8181, paras. 431-464.

But Sigma-Aldrich also put forward another defense: iCap was "packaging R&D," as distinct from "product R&D."²⁹ This defense gives some clues as to what actually happened.

In fact, it seems that Sigma-Aldrich, faced with the Commission's sweeping request to include in the remedies all R&D and pipeline projects relating to the divestment business, quickly identified iCap as a relevant project.³⁰ However, after an evening conference call, which included specialized antitrust counsel, it seems Sigma-Aldrich decided to make a distinction between product R&D and packaging R&D, with iCap being put in the packaging category.³¹ By subsequently referring to "R&D concerning products" or "product R&D" in its submissions to the Commission, Sigma-Aldrich believed it could shield iCap – being packaging R&D – from becoming known and ultimately having to include it in the divestiture business.³² Crucially, however, Sigma-Aldrich did not raise or discuss this distinction with the Commission and, instead, gave the impression that it was addressing the Commission's questions on R&D, which made no distinction between product R&D and packaging R&D.

Clever Lawyering Versus Good Faith and Transparency?

This brings us back to the question raised at the beginning of this piece: how truthful must one be to the Commission? Can one reply evasively, or answer to a question that is different from the one that was asked? In the U.S., the Supreme Court has construed the law on perjury strictly, and an answer that is literally true, even if it is misleading, does not constitute perjury.³³

By contrast, the *Sigma-Aldrich* case suggests that there is very little room for such tactics, and that the Commission requires a rather high level

of transparency and truthfulness from companies in their response to the questions asked.

The decision indeed contains several examples of Sigma-Aldrich using distinctions and limitations that would not be obvious to a normal reader and answering broad questions in a very narrow way. Above, we already discussed the distinction which Sigma-Aldrich drew between packaging R&D and product R&D, without alerting the Commission to this distinction. Another example is Sigma-Aldrich's statement that there were no R&D agreements relating to its *current* solvents and inorganics products. In fact, the iCap technology did relate to Sigma-Aldrich's solvents and inorganics products. However, since the iCap technology had not been launched yet, in some literal sense, it was not related to *current* solvents and inorganics.

The Commission decision rejects that sort of "literal truth" defenses and instead labels such responses as inaccurate or misleading.³⁴ It essentially faults Sigma-Aldrich for not alerting the Commission to the limitations it introduced, and for not answering the question that was asked.

By sanctioning an overly restrictive and misleading approach to responding to questions and filling out the Form RM, the decision in this case is good news for companies and counsel that take a generous approach to sharing information with the Commission and act in full transparency. It shows that, in the end, they are not put at a disadvantage.

The Commission's emphasis on a full and honest disclosure also squares well with the recent General Court judgment in *American Airlines v. Commission*.³⁵ That judgment – which is referenced abundantly in the Sigma-

²⁹ Case M.8181, para. 359.

³⁰ Case M.8181, paras. 102, 345.

³¹ Case M.8181, paras. 103-105, 108, 109 (*in fine*), 256.

³² See Case M. 8181, para. 365(a) and following.

³³ *Bronston v. United States*, 409 U.S. 352, 357-362 (1973) (holding that there is no liability for perjury if a person gives an answer that is literally true, but unresponsive, even assuming the witness intends to mislead his questioner by the answer, and even assuming the answer is arguably "false by negative implication"). That case was also invoked by Clinton's lawyers in his impeachment trial. In re Impeachment of William Jefferson Clinton President of the United States, Trial Memorandum of President William Jefferson Clinton (13 January 1999), p. 119-120, available at <https://clintonwhitehouse4.archives.gov/media/pdf/senatebrief.pdf>.

³⁴ E.g. Case M.8181, para. 278.

³⁵ *American Airlines v. Commission*, T-430/18, ECLI:EU:T:2020:603 (an appeal is pending before the Court of Justice, Case C-127/21 P).

Aldrich decision – stresses the duty of undertakings to provide "complete and accurate" information in the Form RM.³⁶ In that case, American Airlines had inserted some wording in the text of the remedies which deviated from the model remedies text used in airline mergers. Yet it had not alerted the Commission to this deviation in the Form RM. When American Airlines subsequently sought to rely on that wording before the court to argue for an interpretation that deviated from the model remedies text, it was unsuccessful, with the

court reminding American Airlines of what it had written in the Form RM.³⁷

In the end, what lesson can we draw from the *Sigma-Aldrich* case? In any process before a regulatory authority, companies face a dilemma between two proverbial wisdoms: "honesty is the best policy" and "honesty does not pay." The *Sigma-Aldrich* case will not resolve that tension, but it does constitute a thumb pushing the scale somewhat towards the honesty option.

³⁶ *American Airlines v. Commission*, para. 192.

³⁷ *American Airlines v. Commission*, paras. 193-200.