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9

Editorial

- *Annette Schild* [3]

Synopsis: EU Merger Control

Major developments in EU Merger Control (2016) [4]
- *Cormac O'Daly*

Symposium: Arbitration

Competition Law & Arbitration - Introduction [24]

Arbitration and Competition : Between conflict and cooperation [26]
- *Céline Gauer and Johannes Lübking*

Arbitration and Competition Law - Have we entered a fourth phase in their relations? [38]
- *Laurence Idot*

EU Commitment Arbitrations: Some reflections on theory and practice [48]
- *Dr. Gordon Blanke*

The Effictiveness Principle and cartel damages arbitrations - beyond 'institutional ambivalence' [61]
- *James Menz*

State aid and arbitration [70]
- *Tim Maxian Rusche*

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Major developments in EU Merger Control (2016)

Cormac O'Daly
WilmerHale, London

Summary

This is an overview of the main developments in EU Merger Control in 2016. The main developments are outlined and then discussed in more detail. All the 2016 cases and developments turn on their own facts. However, a number of more general themes have been common to several investigations and developments.

First, numerous investigations have focused on potential reduction of incentives to innovate post-merger. Notable examples are *Halliburton/Baker Hughes*, *Hutchison 3G UK/Telefónica UK* and *Wabtec/Faiveley* and this issue is apparently also central to ongoing investigations in the agrichemicals sector. The European Commission ("EC") should take account of threats to innovation and emphasise the need for dynamic competition. However, it appears to be setting a high bar for parties to clear. Notably, the concern has been expressed that in some investigations the EC has tended to regard a reduction in R&D expenditure as almost tantamount to a reduction in innovation and that the EC's approach to efficiencies also makes it extremely difficult for parties to prove dynamic efficiencies.[1]

Secondly, a number of remedies have required up-front buyer commitments. Moreover, within the last 12 months, two EC decisions have involved "fix-it-first" remedies.

Thirdly, DG COMP (and indeed the EC more widely) is increasingly concerned with "big data". In the mergers context, this concern manifests itself in two ways. First, should potential substantive concerns caused by one or more companies having access to "big data" be taken into account when the EC is investigating a transaction? Second, at a procedural level, some companies that have big data might not have generated sufficient turnover for a transaction involving them to fall under the EC's jurisdiction. The EC is therefore considering whether the European Union Merger Regulation's ("EUMR's") thresholds for notification should be amended to cover such deals.

Fourthly, the EC has frequently noted that cooperation between international merger authorities is essential.[2] As well as highlighting case-by-case cooperation in many of its press releases, the EC has also drawn attention to the *ICN Merger Working Group Practical Guide to International Enforcement Cooperation in Mergers*.[3] In the last 12 months, the EC reportedly cooperated with a number of competition authorities in other jurisdictions; prominent examples include the *Staples/Office Depot*, *Ball/Rexam* and *Halliburton/Baker Hughes* investigations.

Finally, the concern has been expressed that EU merger control has become "much stricter

1 See Baxter, Depoortere and Gavala, *Developments in the treatment of innovation in EU merger control*, Competition Law & Policy Debate, Vol. 2, Issue 3, p. 64.

2 See the EC's Competition Policy Brief *International enforcement cooperation in mergers: main principles and recent experiences*, May 2016 and Commissioner Vestager's speech *Working together to support fair competition worldwide*, 3 June 2016, both available on DG COMP's website.

3 See http://www.internationalcompetitionnetwork.org/uploads/library/doc1031.pdf.

and cumbersome".[4] Certainly, the last 12 to 24 months have seen increased emphasis on threats to innovation, increased insistence on up-front buyer requirements, provision of a great number of the parties' internal documents, a general trend for the elimination of an "important" or "close" (rather than "closest") competitive constraint being deemed problematic and numerous lengthy requests for information in certain investigations. Yet each decision turns on its own facts, so while the EC may have been strict in a number of recent investigations, it is perhaps still a little early to identify a wider general trend in this direction.

Phase II Decisions[5]

The EC adopted eight Phase II decisions in the last 12 months. Most notably, it prohibited *Hutchison's attempted purchase of Telefónica's UK network*. This investigation and the concerns raised are similar to those raised in a number of other recent telecom cases. However, the greater degree of network sharing in the UK and the prospect of the merged entity being involved in both shared networks was an added concern for the EC.

In contrast, the EC authorised *Hutchison to enter into a joint venture in Italy* subject to implementation of a fix-it-first divestment. Among other things, the EC's decision focuses on anti-competitive coordinated effects. Likewise the *Liberty Global/ BASE Belgium* transaction was authorised subject to a fix-it-first divestment.

The EC also authorised the *Ball/Rexam*, *Staples/ Office Depot* and *Wabtec/Faiveley* transactions subject to divestments. *Ball/Rexam* involved a reverse carve-out divestment under which Ball essentially sold its own European business as a going-concern. The EC accepted the parties' proposed remedies in *Staples/Office Depot* although this transaction was ultimately abandoned when the US Federal Trade Commission obtained an injunction preventing its consummation; different competitive conditions in the US (and Canada) rather than a fundamentally different approach explain the EC's clearance of the transaction and it being blocked in the US.

The EC unconditionally cleared FedEx's TNT acquisition (the EC having prohibited UPS from acquiring TNT in 2013). In *ASL/Arianespace*, it authorised the transaction subject to behavioural remedies designed to avoid competitively sensitive information being shared between the joint ventures' parent companies.

Phase I Decisions[6]

While the decision is not yet published, the EC's authorisation of the *Teva/Allergan Generics* transaction is the most interesting Phase I decision of the last 12 months. The remedies are very extensive and require significant monitoring from the EC. As such, it is an unusual Phase I clearance. Microsoft's recent acquisition of LinkedIn was conditioned on compliance with a remedy designed to ensure continued competitiveness of rival professional social network services and their continued interoperability with Microsoft products.

The *Dentsply/Sirona* decision involves a behavioural remedy to address a purely conglomerate effects concern.

The decision authorising *Statoil Fuel and Retail to acquire Shell Dansk Fuels* is subject to divestment of over 200 petrol stations and Shell's Danish commercial fuels business and aviation fuel activities. These divestments addressed the EC's concerns that the transaction would lead to anti-competitive non-coordinated horizontal effects.

The *Worldline/Equens/PaySquare* transaction involves both structural and behavioural commitments, while *CMA CGM/Neptune Oriental Lines* is subject to a structural remedy in the form of withdrawal from a shipping consortium.

Legislative/policy developments[7]

In October, the EC launched a consultation on potential changes to the EUMR:

- First, the EC is proposing changes to the referral system along the lines of its 2014 proposals in this area (most importantly, it would abolish Form RS but any one Member State could prevent the EC obtaining jurisdiction under

4 See Dethmers, *EU merger control; out of control?*, E.C.L.R. 2016, 37(11), 435.
5 See Section A below.
6 See Section B below.
7 See Section C below.

Article 22 EUMR – neither of these suggestions is uncontroversial).

- Second, it is consulting on the potential need to introduce deal-size based thresholds in particular to capture deals involving tech and pharmaceutical undertakings that may not yet have generated significant revenues. If the EC introduces any new thresholds, it will have to set them at a significantly high level to avoid capturing too many unproblematic transactions.
- Third, the EC is seeking feedback on how to simplify merger notification for the most unproblematic concentrations – this could even lead to some transactions being exempted from notification.

While potential extension of the EUMR's scope to cover non-controlling acquisitions of minority shareholdings is absent from the October consultation, the EC recently published a study that it commissioned on this issue. The EC also published a study on geographic market definition on its website.

European Court

The Court of Justice of the European Union ("ECJ") brought an end to Odile Jacob's long-running attempts to overturn the EC's 2008 conditional approval of the *Lagardère/Natexis/Vivendi Universal Publishing* transaction[8] and the selection of Wendel as a suitable purchaser of divested assets.[9]

In 2010, the General Court ("GC") rejected Odile Jacob's action to annul the EC's decision authorising the concentration, but it annulled its decision to approve Wendel as a suitable buyer (on the grounds that the trustee was not sufficiently independent).[10] The ECJ rejected appeals against both judgments.[11] The EC re-approved Wendel as a suitable purchaser and Odile Jacob sought to annul this decision. In 2014, the GC rejected this application.[12] In January 2016, the ECJ upheld the GC's judgment.

Brexit

It is too early to assess Brexit's consequences on merger control.

However, if the UK does not join the EEA (which now seems very unlikely), then, unless something specific is agreed between the UK and the EU regarding merger control, companies may need to make merger notifications to both the EC and the UK's Competition and Markets Authority ("CMA") since the EC's "one-stop shop" will no longer cover the UK. Since merger notification (currently at least) is voluntary in the UK, notification to the CMA will not occur in every case. However, parallel notifications to both the EC and the CMA are likely, particularly in more complex cases and in cases with a significant link to the UK.

If even a relatively small number of (non-simplified procedure) concentrations notified to the EC were also notified to the CMA, this could require significant additional CMA resources. It will be interesting to see if, in response to this, the UK might adapt its law to avoid too many transactions being subject to UK merger control and/or to avoid onerous investigations (this could, for example, be achieved by raising the revenue and/or share of supply thresholds or even by expanding the concept of a *de minimis* market in the UK).

Conversely, if parties' UK revenues no longer count as EEA revenues, this could lead to certain transactions falling outside the EUMR's scope.

Lastly, the UK Prime Minister Theresa May has suggested that the UK should review acquisitions of UK companies by foreign investors on the basis of broader strategic national interests and not just competition law. Notably she highlighted concerns related to Pfizer's attempt to acquire Astra Zeneca (noting the concern about the effect on R&D in the UK) and Kraft Foods' purchase of Cadbury.[13] Other governments have raised similar concerns in recent years (e.g. the French government's scrutiny of GE's acquisition of

8 Case M.2978, *Lagardère/Natexis/Vivendi Universal Publishing*.

9 Case C-514/14 P, *Éditions Odile Jacob v Commission*, ECLI:EU:C:2016:55. The judgment is not discussed in more detail below.

10 Case T-279/04, *Éditions Odile Jacob v Commission*, ECLI:EU:T:2010:384 and Case T-452/04, *Éditions Odile Jacob v Commission*, ECLI:EU:T:2010:385.

11 Case C-551/10, *Éditions Odile Jacob v Commission*, ECLI:EU:C:2012:681 and Case C-553/10, *Éditions Odile Jacob v Commission*, ECLI:EU:C:2012:682.

12 Case T-471/11, *Éditions Odile Jacob SAS v Commission*, ECLI:EU:T:2014:739.

13 See http://www.wlrk.com/docs/TheresaMayJuly11Speech.pdf.

Phase II Decisions

- Prohibition of Hutchison's plan to acquire Telefónica in the UK
- Approval subject to "fix-it-first" remedy
  - *Hutchison 3G Italy/WIND/JV*
  - *Liberty Global/BASE Belgium*
- Reverse carve-out divestment and up-front buyer requirement in *Ball/Rexam*
- *Staples/Office Depot* cleared in EU subject to divestment and up-front buyer requirement, but blocked in US
- Unconditional clearance in *FedEx/TNT*
- Behavioural remedy in *ASL/Arianespace*
- *Wabtec/Faiveley* clearance subject to divestment

Alstom).[14] Since the UK referendum, François Hollande has also suggested that EU competition law should take increased account of industrial policy considerations.[15] It remains to be seen whether that will happen.

A. EC Phase II Decisions

The EC adopted eight decisions bringing Phase II investigations to a conclusion.[16] As of 1 January 2017, there are five Phase II investigations ongoing.[17]

Two transactions were abandoned during Phase II investigations: *Mondi/Walki Assets* (in late December 2015); and *Halliburton/Baker Hughes*. Mondi withdrew its notification when it could not agree a remedy with the EC.[18] Halliburton and Baker Hughes abandoned their deal after the US Department of Justice filed suit to block the transaction.[19] The planned transaction gave rise to alleged issues on oilfield service markets and allegations that incentives to innovate would be diminished.

A.1 Hutchison 3G UK/Telefónica UK

In May, in a 959 page decision, the EC prohibited Hutchison from acquiring Telefónica UK's "O2".[20] This was the first EC decision prohibiting a

14 See Brandenburger and Jones, *Protectionism or Legitimate National Interest? A European Perspective on the Review of Corporate Acquisitions by Foreign Purchasers*, CPI Antitrust Chronicle, October 2014(1).

15 See http://www.ambafrance-us.org/spip.php?article7630.

16 In addition to the decisions that the EC took during the last 12 months, it also published a number of older decisions on its website. These included Case M.7265, *Zimmer/Biomet*, which is noteworthy because it identifies loss of an innovative force as a competitive concern and because the EC required a remedy that extended wider than the nationally defined markets in which concerns were identified (the EC considered that the purchaser of the divested assets would need to manufacture on a scale that went beyond individual countries so it also required an EEA-wide, non-exclusive licence to intellectual property and know-how). The EC also published its unconditional Phase II clearance decision in Case M.7429, *Siemens/Dresser-Rand*, which concluded, among other things, that the parties were not close competitors in what initially appeared to be a three-to-two transaction; the most interesting points are the complexity of defining a systems market composed of components that each have to meet detailed bespoke specifications, the EC's modified counterfactual analysis (it had to take into account that Siemens had recently purchased Rolls-Royce's competing business and how this would affect competition absent the merger) and its bidding analysis. Other decisions published in the year include Case M.7421, *Orange/Jazztel* and Case M.7292, *DEMB/Mondelēz*. The decision in Case M.7278, *General Electric/Alstom* has not yet been published; it is discussed in the EC's Competition Merger Brief, Issue 1/2016, p. 1; elimination of an innovative competitor and the analysis of the parties' bidding data were central to this investigation.

17 Case M.7095, *Socar/Defsa* (on which the clock appears to have been stopped since January 2015); Case M.7932, *Dow/Dupont*; Case M.7995, *Deutsche Börse/London Stock Exchange Group*; Case M.7878, *Heidelberg Cement/Schwenk/Cemex Hungary/Cemex Croatia*; and Case M.7962, *ChemChina/Sygenta*.

18 Case M.7566, *Mondi/Walki Assets*. See http://www.londonstockexchange.com/exchange/news/market-news/market-news-detail/MNDI/12563313.html and OJ C430/3, 22 December 2015.

19 Case M.7477, *Halliburton/Baker Hughes*. See https://www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal and http://europa.eu/rapid/press-release_STATEMENT-16-1642_en.htm.

20 Case M.7612, Hutchison *3G UK/Telefónica UK*, available on DG COMP's website. See also the summary decision, also available on DG COMP's website and at OJ C357/15, 29 Sept 2016 and Press releases IP/15/5956, IP/16/1704 and MEMO/16/1705.

proposed concentration since 2013. Hutchison has appealed.[21]

Hutchison is no stranger to EU merger control. In the last four years, it has been party to four notifiable concentrations: on Austrian markets; Irish markets; and in 2015/2016 two notifications on the UK and Italian markets.[22]

> "Hutchison 3G UK/ Telefónica UK is the first EC decision prohibiting a transaction since 2013"

The proposed transaction would have combined Telefónica's O2 network, which is the largest UK retail mobile network by number of subscribers and the second largest by revenue,[23] with Hutchison's "Three" network, which is the fourth largest in terms of both subscribers and revenues.[24] There are two other mobile network operators ("MNOs") in the UK: EE (which is now owned by British Telecom) and Vodafone, so the transaction would have reduced the number of MNOs from four to three.

The transaction would also have led to an overlap on the wholesale market for network access and call origination on which MNOs provide hosting services to non-MNOs which in turn provide retail services to customers.

As part of its investigation, the EC sent over 500 requests for information to the parties and third parties and reviewed over 300,000 of the parties' internal documents.[25] It also commissioned a survey of 1,200 private retail customers.[26]

On the retail market, the EC's main concern was non-coordinated horizontal effects through the elimination of a significant competitive constraint. The transaction would have created a new market leader – by both number of subscribers and revenues – and increased the level of concentration in the market.[27]

The Decision notes that while Three was the most recent MNO to enter the market, it had influenced competition significantly, notably by offering less restrictive and less costly data plans.[28] The EC concluded that it was the most innovative and aggressive player on the market. Absent the transaction, Three was likely to continue to exert an important competitive constraint.[29]

Likewise, the EC considered O2 to be a strong competitor.[30] It regularly achieved high customer satisfaction and had the strongest brand image. It too was likely to remain an important competitive constraint absent the transaction.

In contrast to the other MNOs, O2 and Three's market shares had grown consistently over recent years. The EC also considered that they competed closely both with each other and with other MNOs. The EC concluded that the transaction would eliminate the competitive constraint that Three and O2 exerted on each other and on the other MNOs.[31] In particular, it appeared likely, from both quantitative[32] and qualitative evidence, that together Three and O2, as the largest MNO, would compete less aggressively and raise prices.[33] The EC also concluded that EE and Vodafone were likely to follow Three/O2's price increases and that non-MNOs would not be able to counterbalance the loss of Three and O2 as independent competitive constraints.[34]

According to the EC, the anti-competitive effects on the retail market were exacerbated by each of the four UK MNOs having teamed with another MNO to roll out and share networks.[35] Vodafone

21 Case T-399/16, *CK Telecoms UK Investments v Commission*.
22 See below at Section A.2 for Case M.7758, *Hutchison 3G Italy/WIND/JV*.
23 See IP/16/1704 and Decision, para. 114.
24 Decision, para. 125.
25 Decision, paras 42-43.
26 Decision, para. 45.

27 Decision, paras 336, 345, 372 *et seq* and 398 *et seq*.
28 See the EC's assessment of the competitive constraint exercised by Three at paras 474-680.
29 Decision, paras 684-777.
30 Decision, paras 782-872.
31 See generally decision, Section 8.2.1.4.
32 See decision, paras 1198-1225; Annex A to decision is heavily redacted.
33 See the assessment in para. 878 *et seq.*
34 Decision, Section 8.2.1.3 (especially paras 941-960).
35 See decision, paras 135-179 and Section 8.2.2. The extent of network sharing in the UK contrasts with the lower level of sharing in Italy – see Case M.7758, *Hutchison 3G Italy/WIND/JV* below, para. 100 *et seq* where the EC notes that no Italian MNO was engaged

and O2 together created the CTIL/Beacon network while Three and EE shared the MBNL network. Thus the four MNOs each had incentives to develop and improve their respective shared networks. This dynamic would have disappeared post-transaction since the merged entity would be part of both network sharing arrangements and EE and Vodafone could no longer count on having a fully committed network sharing partner. In the EC's view this would jeopardise future development of mobile infrastructure.

The parties presented two alternative network consolidation plans to the EC.[36] The EC concluded that under either plan, the competitive position of one or both of Vodafone or EE as network partners would be damaged and that this would lead to less industry-wide investment in infrastructure on an oligopolistic market with high entry barriers. This phenomenon of shared networks and the spectre of a combined Three/O2 being part of both shared networks distinguishes this transaction from other recent telecom mergers and, in part at least, may explain why the EC prohibited it.

On the wholesale market, the EC noted that both Three and O2 exercised important competitive constraints on each other and the other MNOs.[37] Post-transaction non-MNOs would have less MNOs willing to host them. Both O2 and Three's market shares were growing and post-transaction the merged entity would have less incentive to offer commercially attractive terms.[38] This reduction in competition would not be offset by EE and Vodafone's reactions.[39]

On both the retail and wholesale markets, the EC analysed whether countervailing buyer power or potential new entry would mitigate the anti-competitive effects, but concluded it would not.[40] The EC also considered whether the transaction would result in network and scale efficiencies.[41] In particular, the parties argued that it would produce technical benefits that would increase network capacity, quality and speed and lower network costs. However, the EC concluded that it was uncertain when and whether some of these efficiencies were achievable and others were not merger-specific or verifiable. Moreover, even assuming that some of the efficiencies would materialise, the expected level of pass-through to consumers would not be sufficient to counterbalance the parties' incentives to raise prices.

The parties offered three sets of wide-ranging commitments, but the EC concluded that these did not alleviate the identified competitive concerns on either the retail or the wholesale market.

The initial commitments essentially had four components:[42]

- *Tesco Mobile commitment.* Three would divest O2's 50% stake in Tesco Mobile, the UK's largest non-MNO[43] and offer Tesco Mobile a capacity-based wholesale agreement on specified terms.
- *NEO commitment.* Three would facilitate entry of a new-entrant operator ("NEO") by, among other things, divesting a network ownership interest to the new operator, offering it access to all elements of the network on specified terms, offering it exclusive use of a defined amount of spectrum and granting it the option to acquire O2 UK or a stake in Three. Three would also update the NEO on its technology and business plans.
- *Network sharing commitment.* As regards the shared networks, Three committed, among other things, (a) to amend its agreement with EE to enable both parties to make unilateral network investments and (b) to complete the (Vodafone/O2) Beacon network within a defined time period.
- *Wholesale market commitment.* Three would commit to offer 4G services to non-MNOs that already had contracts with Three or O2 at the same rates that these non-MNOs currently paid for 3G services. Non-MNOs which did not already have contracts with Three or O2 would be offered wholesale access (including for 4G services) at benchmarked rates.

in "active" network sharing; any sharing was restricted to "passive" sharing of basic infrastructure.

36 The paragraphs discussing these plans are heavily redacted in the decision.

37 Decision, Section 8.3.12(b), (c), (d), (e) and (f) and 8.3.1.4.

38 Decision, paras 2173-2210.

39 Decision, paras 2218-2291.

40 Decision, Section 8.2.3 and Section 8.3.2.

41 Decision, Section 8.4.

42 The Commitments are described and analysed in Section 9 of the decision and Section VIII of the summary decision.

43 Decision, para. 184.

The EC concluded that the proposed commitments were insufficient.[44]

- It was uncertain whether the Tesco Mobile commitment would ever be implemented and some of its elements remained unclear (despite Tesco and Three signing a term sheet). Even if the commitment was implemented in full and alongside the other commitments, the EC considered that it would not adequately address its concerns.
- Despite changes to the NEO commitment (and despite Sky having signed a term sheet with Three), including making it an up-front commitment, the EC considered that the new entrant would be commercially and technically dependent on the merged entity and have little ability to differentiate its offer.
- The EC considered that the network sharing commitment did not resolve inconsistencies and uncertainties regarding network sharing (and indeed exacerbated some of these).
- The offers to non-MNOs were "mere" offers and their terms and attractiveness (particularly the proposed pricing) were too uncertain.

The parties' final set of commitments also included two additional elements:

- *Virgin Media commitment.* Three would offer a capacity-based wholesale agreement to Virgin Media on defined terms. The EC again considered that this commitment was unclear and its implementation uncertain.
- *Certainty of network plans commitment.* Three undertook to use certain parts of the MBNL and Beacon network in the future and to achieve defined levels of 4G coverage within specified deadlines. The EC considered this commitment too uncertain.

Given how unusual they are, prohibition decisions are always noteworthy and often controversial. Previous four-to-three telecom mergers had been permitted mainly because of commitments to facilitate the entry and expansion of non-MNOs. Here the parties made numerous commitments regarding non-MNOs but these did not address all the EC's concerns.

The parties had submitted a study claiming that the Hutchison 3G Austria/Orange Austria merger had led to a decrease in prices and increased investment and consumer welfare. While the EC considered that the particular study had some shortcomings, the decision also states that while *ex post* studies are useful and aid understanding, they cannot replace specific assessment of a given transaction.[45] Moreover, the EC draws attention to "more reliable" studies showing that four-to-three mergers tend to increase prices and the evidence that they lead to increased investment is inconclusive.[46] This statement could be read as indicating that the EC might not approve four-to-three mergers in telecoms markets in the future although, as discussed below, it cleared *Hutchison 3G Italy/WIND/JV* subject to remedies.

> "There is no 'Magic Number' yet this is effectively the second prohibition of a four-to-three telecoms merger"

The EC's Factsheet issued when the UK transaction was prohibited notes that "there is no 'magic number' for the number of mobile network operators required to ensure a competitive telecoms market. It depends on the specific characteristics of the national market in question".[47] However, this is the second time that

44 Decision, Sections 9.4.2.5 and 9.6.

45 See Annex B to the decision and the EC's summary in the summary decision.

46 A number of *ex-post* studies have analysed the effects of the Hutchison 3G Austria/Orange Austria merger. The EC commissioned its own study, which is discussed in its EC's Competition Merger Brief, Issue 1/2016, p. 18 (see also http://ec.europa.eu/competition/publications/reports/kd0215836enn.pdf). The Austrian Competition Authority and the Austrian Broadcasting and Communications Authority also analysed the merger and concluded that that while prices increased in 2013 and 2014, they subsequently declined – see MLex report 14 March 2016.

47 MEMO/16/1705. Commissioner Vestager has also emphasised that each case is assessed "on its merits". See http://europa.eu/rapid/press-release_STATEMENT-16-1713_en.htm.

DG COMP has effectively prevented a four-to-three telecoms merger.[48]

A.2 Hutchison 3G Italy/WIND/JV

In September, the EC authorised Hutchison's entry into a joint venture with VimpelCom in Italy subject to commitments.[49]
The joint venture combines H3G Italy and WIND, which are the third and fourth largest operators on the Italian retail mobile market behind TIM and Vodafone. The EC found that the transaction would create the largest MNO in Italy[50] and eliminate competition between two strong players. In particular, H3G had offered the most competitive mobile tariffs in Italy and was perceived as an aggressive player and a disruptive force.[51] The EC concluded that the joint venture would have less incentive to compete than the parties previously had[52] and that TIM and Vodafone would also have lower incentives to compete.[53]

In addition, the investigation concluded that since the transaction would result in three market players with similar market shares, they would be more likely to coordinate their behavior on a sustainable basis.[54] The EC considered that the elimination of H3G as an independent maverick firm would lead to the three post-transaction MNOs having aligned incentives.[55]

The EC's assessment on coordinated effects was influenced by the parties' internal documents referring to "market repair" and other MNOs having indicated that they were in favour of consolidation. The EC describes the concept of "market repair" as "an overall reduction of the level of competition and stabilisation of the mobile market through an increase in mobile prices and a reduction in churn among mobile operators, leading to higher industry-wide profits".[56]

Moreover, the EC found that the market was sufficiently transparent to enable the MNOs to reach agreement on terms of coordination (most likely an agreement to "cement" current market shares[57]), monitor adherence to this agreed coordination and punish deviation from agreed coordination. The decision refers to past practices and statements by the MNOs to support these conclusions.[58]

Like in the UK investigation discussed above, the EC also concluded that the transaction would reduce the number of potential hosts for non-MNOs.[59]

The EC considered a number of efficiencies that the parties presented but concluded that these were either not merger specific, were unlikely to materialise or were not sufficient to counter the anti-competitive effects.[60]
Unlike in the UK investigation, however, the parties offered remedies that the EC considered were adequate to address all of its concerns.[61] They proposed that they would divest mobile radio spectrum to a new entrant and share several thousand mobile base stations and enter a transitional agreement with this entrant. In a "fix-it-first" remedy, the EC approved the French company Iliad, which the parties had presented as a potential remedy taker, as a suitable new entrant.[62] Iliad had successfully entered the French mobile telecommunications market and the EC considered that it had the know-how and expertise to operate, invest and innovate in the Italian market.

A.3 Liberty Global/BASE Belgium

In February, the EC conditionally approved Liberty Global's acquisition of BASE, the Belgian MNO.[63]

Along with Proximus and Mobistar, BASE was one of three MNOs in Belgium. In 2014, it was number three in terms of revenues on the Belgian retail mobile telecommunications market and number

48 In September 2015, Telenor and TeliaSonera abandoned plans to create a wireless joint venture in Denmark. See OJ C316/1, 24 Sep 2015, Case M.7419, *TeliaSonera/Telenor/JV*.
49 Case M.7758, *Hutchison 3G Italy/WIND/JV*. The decision is available on DG COMP's website. See also IP/16/2932 and IP/16/1123.
50 Decision, para. 370. The detailed market share information is redacted.
51 See, *inter alia*, decision, paras 456 and 463 *et seq* (although these paragraphs are again heavily redacted).
52 Decision, paras 820-838.
53 Decision, paras 843-855.
54 Decision, Section 7.3.3.
55 Decision, paras 972-981.
56 Decision, para. 243; see also Section 7.2 although it is heavily redacted.
57 Decision, para. 1092 *et seq*.
58 E.g. see paras 1048 *et seq* and 1191 *et seq*.
59 Decision, paras 1343-1349.
60 Decision, Section 7.5
61 Decision, Section 8.
62 Decision, paras 1800-1804 and Annex E.
63 Case M.7637, *Liberty Global/BASE Belgium*. The decision is available on DG COMP's website. See also IP/15/5774 and IP/16/241 and the EC's Competition Merger Brief, Issue 2/2016, p. 10.

two by number of subscribers.[64] BASE had a reputation for competing aggressively and offering competitive tariffs.[65]

Through its subsidiary, Telenet, Liberty Global offers fixed internet, fixed phone and cable television to retail customers in Flanders and some parts of Brussels. In addition, under a hosting agreement with Mobistar, Telenet operated as a mobile virtual network operator ("MVNO") in Belgium. Telenet had tripled its market share in three years and become number four on the market with a share of 5-10% by both number of subscribers and revenues.[66]

Telenet/BASE would have become the second largest MNO by subscribers (30-40% market share) and the third largest by revenues (20-30%).[67] Together with Proximus and Mobistar, the three MNOs' combined market share would have been 90-100% by revenues.[68] Based on a non-coordinated effects theory, the EC found that post-transaction BASE/Telenet would no longer compete as aggressively as before and that effective competition would be significantly impeded.[69] The EC calculated diversion ratios for both parties to assess if they were close competitors and concluded that they were.[70]

Liberty Global submitted a commitment comprising three elements.[71] First, it committed to sell BASE's 50% share in Mobile Vikings, an MVNO that was hosted on BASE's network. Liberty Global proposed the Belgian media company Medialaan as a suitable buyer (around the same time Medialaan purchased the other 50% of Mobile Vikings from the other shareholder). Second, it committed to transfer ownership of the customers of the "JIM Mobile" brand to Medialaan; Medialaan already owned the JIM Mobile brand but the customers had belonged to BASE. Third, Liberty Global committed to enter into an MVNO agreement with Medialaan on specified terms. The remedy effectively means that Medialaan enters the market as an MVNO with sufficient scale and recreates the competitive pressure that was previously exercised by Telenet.[72]

Liberty Global proposed Medialaan as a "fix-it-first" remedy taker (the EC had previously been considering an up-front purchaser obligation).[73] The EC's decision approving Liberty Global's acquisition of BASE therefore also approves Medialaan as a suitable purchaser[74] and approves Liberty Global's MVNO agreement with Medialaan as being consistent with the commitments.[75]

> "Fix-it-first remedies are unusual in the EU but this was one of two in 2016"

"Fix-it-first" remedies are unusual in EC procedures but, along with *Hutchison 3G Italy/WIND/JV*, this is the second in the last 12 months.[76] More often, the EC requires that it must approve the purchaser of the divested assets as a suitable purchaser before a deal can close, but this is via a separate subsequent procedure (an up-front buyer obligation in EC terminology[77]). Fix-it first remedies correspond to what the US authorities understand as an up-front buyer requirement namely the competition authority clears the acquisition taking into account that assets will be divested to a specific pre-identified buyer.

The EC's Phase II investigation also examined whether the transaction would raise vertical input foreclosure concerns as a result of reduced wholesale access to BASE's mobile network or Telenet's cable network[78] and whether any conglomerate effects would occur due to Telenet

64 Decision, para. 202.
65 Decision, paras 235-242.
66 Decision, paras 243-253.
67 Decision, para. 204.
68 Decision, para. 203.
69 Decision, paras 261-269.
70 Decision, paras 223-230.
71 Decision, Section 6.
72 The EC considered it essential that the same purchaser acquired the Mobile Vikings shares and the JIM Mobile customer base. See Decision, para. 484 and paras 499 and 500.
73 See decision, paras 494-495 and para. 485. See also paras 517-523.
74 Decision, paras 546-553.
75 Decision, paras 575-576.
76 On Fix-it-first remedies, see Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004 ("Remedies Notice"), OJ C267, 22 October 2008, pp. 1–27, paras 56-57.
77 On up-front buyer remedies, see Remedies Notice paras 53-55.
78 Decision, Section 5.2.

being able to bundle fixed and mobile services.[79] The EC concluded that neither of these concerns was justified.

A.4 Ball/Rexam

In January 2016, the EC conditionally approved Ball's proposed acquisition of Rexam.[80]

Ball is the largest beverage can manufacturer in the world and the second largest in the EEA. Rexam meanwhile was the second largest manufacturer in the world and the largest in the EEA.[81]

The European beverage can manufacturing market was very concentrated with four main suppliers: Ball, Rexam, Crown and Can-Pack.[82] The merged entity would have produced approximately two-thirds of total supply and its geographic coverage in terms of number of plants would have been three times larger than its next competitor.[83]

The EC noted that even pre-transaction competition was weak. In particular, it noted the existence of high variable margins; localised market power; limited capacity; readily available information about competitors; and an apparent lack of interest to try to gain new customers.[84] Furthermore, the EC found high barriers to entry and expansion. Setting up a plant is costly and since profitability requires high utilisation, a prospective supplier would be unlikely to invest without a significant advance commitment from a customer.[85]

The EC also found that even large customers cannot exert sufficient countervailing buyer power and that this would not change post-transaction.[86] Furthermore, tight capacity in the market made switching between suppliers difficult. In addition, manufacturing costs were relatively opaque, capacity relatively transparent and EEA customers do not self-supply.[87]

The parties were also the two leading innovators in the market and their incentives to innovate would have reduced post-transaction.

The EC's use of customer-centric catchments areas as the basis for defining the geographic market is interesting.

The EC's investigation noted four key features of the market:[88]

- Supply and demand conditions are geographically differentiated, but not along national lines.
- 80% of purchases are made within a maximum distance of approximately 700 kms from the customer's filling facility and these catchment areas "adequately capture the prevailing competitive dynamics around each customer".[89]
- Suppliers deliver to customers.
- Pricing is ordinarily determined on a customer site-by-site basis.

In light of these features, the EC determined it appropriate to define the geographic market "on the basis of clusters of catchment areas around individual customers filling locations where the competitive conditions were sufficiently homogenous".[90]

The EC then "clustered" the catchment areas around individual customers together into nine regions with sufficiently homogenous competitive conditions: Central Europe; Benelux; France; Italy; Iberia; North East Europe; South East Europe; the Nordics; and the UK and Ireland.[91]

The EC found that the merged entity would have the largest volume of sales in the EEA and the largest EEA capacity.[92] It found that the transaction would result in high post-transaction HHIs and HHI deltas.[93] It would reduce the number of

79 Decision, Section 5.3.
80 Case M.7567, *Ball/Rexam*. The decision is available on DG COMP's website. See also the summary decision, also available on DG COMP's website and at OJ C 107/7, 22 March 2016, IP/15/5417 and IP/16/80 and the EC's Competition Merger Brief, Issue 2/2016, p. 1. With thanks to Matthew Kennedy for his assistance with this summary.
81 Decision, paras 2-3.
82 Decision, para. 48 *et seq*.
83 Decision, para. 366.
84 Decision, Section 9.1.2.
85 Decision, Section 9.1.15.2.
86 Decision, para. 607.
87 Decision, Section 9.1.16.2.
88 Decision, para. 240.
89 Decision, para. 248.
90 Decision, para. 242.
91 Decision, para. 257.
92 Decision, paras 307 and 310.
93 Decision, para. 316.

players in the EEA from four to three, and, in some areas, from two to one.[94] Neither Crown nor Can-Pack would be able to compete adequately with the parties.[95]

Ball offered the following initial commitments:[96]

- To divest various Ball production facilities in the UK, Central Europe, Benelux, and France.[97]
- To divest a Business and Technical Centre in Bonn and, at the purchaser's option, Ball's European headquarters in Zurich.
- To divest two Rexam production facilities, one in Austria and one in Spain.

The initial commitments stipulated that a single purchaser should purchase all the divested assets and that there would have been an up-front buyer requirement.[98]

Following some negative feedback in the EC's market test, Ball modified its commitments:[99]

- It would also divest a production facility in Poland.
- The divestment business would include certain key personnel, including management, R&D and sales staff.

The EC found that the inclusion of the production facility in Poland addressed concerns relating to competition in North-East Europe. The inclusion of key personnel, combined with the single purchaser and the up-front buyer clause, addressed concerns regarding the viability of the divestment business. The EC therefore found that the final commitments were sufficient.[100]

Ball/Rexam illustrates how the EC can assess effects on competition when the relevant markets do not coincide with national boundaries.[101] The decision is also noteworthy for its use of "reverse carve-outs" as well as its insistence on a single purchaser and an up-front buyer requirement. Like other decisions in the last 12 months, it also highlights extensive cooperation between multiple competition authorities.

A.5 Staples/Office Depot

In February, the EC conditionally cleared Staples' proposed acquisition of Office Depot.[102] The EC's decision was subject to significant divestments. The parties ultimately abandoned their deal after a US District Court granted a preliminary injunction blocking the deal.[103]

Both Staples and Office Depot distribute office supplies. Along with Lyreco, they are among the three largest suppliers of office products in the EEA.

Defining the relevant market was a threshold issue since the parties distributed a variety of different products, through a variety of channels, to a variety of customers.

As regards the relevant products, the EC distinguished between traditional office supplies and items such as furniture, larger machines, cleaning services and IT equipment.[104] Within the category of traditional office supplies, the EC examined whether stationery, cut sheet paper and printer toner/ink might constitute separate narrower product markets.[105] The EC concluded that a sufficient number of customers purchased these three products together, which would indicate that they belong to a wider market for traditional office supplies. In any event, the EC did not have to reach a definitive conclusion since the planned transaction would have led to competition

94 Decision, Section 9.1.3.
95 Decision, Section 9.1.5.2.
96 Decision, Section 12.2.1.
97 Certain entities, assets and personnel were, however, to be excluded from the divestment business.
98 Decision, paras 961 and 962.
99 The final commitments are described and analysed in Section 12.3 of the decision and Section VIII of the summary decision.
100 Ardagh announced that it would be purchasing the divestment business as well as assets in the US and Brazil, making it the third largest manufacturer in the world. The EC approved the sale on 17 June 2016.
101 See Section C.3 below.
102 Case M.7555, *Staples/Office Depot*. The decision is on the EC's website. See also IP/15/5716 and IP/16/278 and the EC's Competition Merger Brief, Issue 2/2016, p. 5.
103 See https://www.ftc.gov/system/files/documents/cases/160510staplesmotion.pdf. The Canadian Competition Bureau had also applied for an injunction to enjoin the transaction. Following, the US District Court's granting of an injunction to the Federal Trade Commission and the parties' announcement that they no longer intended to proceed with the transaction, the Canadian Competition Bureau withdrew its application, see http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04080.html.
104 Decision, para. 71.
105 Decision, Section 6.1.2.1.2.

being reduced either on the market for traditional office supplies or on a narrower market for supply of stationery.[106]

Turning to the different distribution channels, the EC noted that office supplies can be distributed directly (online, catalogue sales or through retailers), via wholesalers and under supply contracts. The EC's main focus was on the market for supply under framework contracts awarded on the basis of tenders.[107] Business customers tended to use these when their expenditure on office supplies was significant.

As regards categories of customers, the EC distinguished between international business customers and business customers based wholly in one Member State. Customers with offices in more than one Member State tended to organise tenders covering their activities across the EEA. Moreover, the parties advertised their capability to fulfil such tenders.

The EC ultimately therefore examined competitive conditions on (1) the market for distribution of traditional office supplies via international contracts in the EEA[108] and (2) the markets for distribution of traditional office supplies via national contracts to businesses located in a single Member State (with 250 or more employees).[109]

The EC's market investigation was hampered by the absence of reliable third party data on market shares.[110] The EC instead relied heavily on data collected from a customer survey and bidding data.

The EC found that only the parties and Lyreco were significant constraints on each other.[111] Online sellers – such as Amazon – were not a significant constraint.[112] There were high entry barriers due to the range of products that a new entrant would have to carry and the potential need to distribute in a number of different Member States.[113] The EC concluded that competition would be significantly reduced on the market for supplies via international supply contracts and on the market for national supply via contract sales in each of the Netherlands and Sweden. Moreover, the EC concluded that the transaction would have led to concerns on the market for wholesale distribution in Sweden.

The parties offered to divest the entirety of One Depot's contract distribution business in the EEA and Switzerland.[114] This addressed the EC's concerns regarding the international contract sales channel and the national contract sales markets in the Netherlands and Sweden. Additionally, to address the wholesale channel issue, the parties agreed to divest all of One Depot's Swedish business to the same purchaser. These divestments would have removed all overlaps between the parties on the markets on which the EC had identified concerns. Given the scale of the divestments and the need to ensure their viability, the EC required an up-front buyer provision.[115]

As noted above, the parties abandoned the proposed transaction following objections from the Canadian and US agencies. Both the EC's press release[116] and the article in its Merger Brief emphasise the EC's cooperation with other authorities investigating the transaction. It appears that the different conclusions reached were due to different competitive conditions (in North America, this would have been a two to one transaction) and the parties having offered adequate remedies to the EC.

A.6 TNT/FedEx

In January 2016, the EC cleared FedEx's acquisition of TNT Express unconditionally.[117]

Along with DHL and UPS, the parties were two of four integrators operating in the European small package delivery sector. The EC's Phase II investigation focused (1) on the international intra-EEA express delivery services market for packages under 31.5 kg and (2) on numerous extra-EEA delivery services markets again for packages up to 31.5 kg.

106 Decision, para. 91.
107 Decision, Section 6.1.1.
108 See discussion on the EEA-wide geographic market definition in Section 6.2.1.
109 Decision, para. 169.
110 Decision, para. 220.
111 Decision, Section 7.2.2.2.2.
112 See e.g., Decision, para. 337.
113 Decision, Section 7.2.2.4.2.

114 The commitments are available on DG COMP's website.
115 Commitments, para. 3.
116 IP/16/278.
117 Case M.7630, *FedEx/TNT Express*. See IP/16/28 and IP/15/5463. The decision was published in December 2016.

As regards the markets for international intra-EEA express delivery, the EC concluded, among other reasons, that the transaction would not reduce competition because the merged entity's market shares were moderate;[118] FedEx and TNT were not close competitors (they focused on customers with different profiles and neither the parties' internal documents nor their bidding data suggested that they were close competitors);[119] TNT was not an important competitive force within the meaning of the EUMR;[120] and because (competitors) DHL and UPS would be able to constrain the merged entity post-closing.[121]

The EC also carried out a price concentration analysis. However, the results were inconclusive.[122] In any event, the EC also found that the merger would generate verifiable, merger-specific efficiencies in the form of network cost savings and that these would benefit customers.[123] More specifically, the transaction would reduce the parties' aggregate pick-up and delivery ("PUD") costs and their air transport costs.[124]

On the markets for extra-EEA delivery services, the EC again concluded that the parties were not particularly close competitors and noted that TNT Express focused more on intra-EEA markets. Largely for the same reasons as on the markets for international intra-EEA express delivery, it found that the transaction would not reduce competition.[125] Again, the EC noted that the transaction would lead to network cost savings in the form of reduced PUD and air transport costs.[126] The EC's analysis is very detailed and concerns multiple markets some of which are analysed in additional depth.[127]

In June 2013, the EC had prohibited another competitor, UPS, from acquiring TNT Express.[128] The EC's press release in the FedEx decision states that the EC replicated the same assessment as in *UPS/TNT Express* and claims that this ensures "full consistency" with the *UPS/TNT Express* decision.

A.7 ASL/Arianespace

In July, the EC cleared Airbus Safran Launchers' ("ASL") proposal to acquire Arianespace.[129] The clearance is subject to implementation of behavioural commitments.

The transaction concerned the satellite and launcher industries. The EC's main concern (the only one that was substantiated after the Phase II investigation) was that the parties would have access to sensitive information that could harm competition. The relevant information would be (1) information from Arianespace regarding other satellite manufacturers, which could potentially be disclosed to Airbus (one of ASL's parents and a leading satellite manufacturer) and (2) information from Airbus about other launch service providers that competed with Arianespace. The EC feared that these potential information flows could lead to less competitive tenders and reduced innovation.

The parties committed to implement firewalls between Airbus and Arianespace to prevent flow of sensitive information. They also agreed to restrict employees' mobility between the companies and, to ensure implementation of the firewalls, they agreed to include an arbitration procedure in all future non-disclosure agreements with third parties. These commitments addressed the EC's concerns.

A.8 Wabtec/Faiveley

In October, the EC conditionally approved Wabtec's acquisition of Faiveley Transport.[130]

Both parties supplied train equipment. In particular, in the aftermarket for sintered train friction brake materials, the number of strong competitors would have been reduced from three to two. These materials are key components in braking systems and train operators purchase them for their existing fleets.

The EC authorised the transaction on condition that Faiveley's entire sintered friction material business be divested.

118 Decision, Section 9.3.
119 Decision, Section 9.4.
120 Decision, Section 9.5.
121 Decision, Section 9.6.
122 Decision, paras 483 to 497.
123 Decision, Section 9.9.
124 Decision, paras 516 to 588.
125 Decision, Section 10.
126 Decision, Section 10.9.
127 Decision, Section 11.
128 Case M.6590, *UPS/TNT Express*. UPS appealed this decision to the GC, see Case T-194/13, *United Parcel Service v Commission*, which is pending.

129 Case M.7724, *ASL/Arianespace*. The decision is not yet published but see IP/16/2591 and IP/16/430.
130 Case M.7801, *Wabtec/Faiveley*. The decision is not yet published but see IP/16/3305 and IP/16/1722.

Selected Phase I Decisions

- *Teva/Allergan Generics* – extensive divestments requiring close monitoring
- *Microsoft/LinkedIn* – behavioural commitment to preserve interoperability
- *Dentsply/Sirona* – behavioural remedy to address conglomerate effects
- *Statoil Fuel and Retail/Shell Dansk Fuels* – extensive divestment package, including access to facilities
- *Worldline/Equens/PaySquare* – divestment and behavioural remedy
- *CMA CGM/Neptune Oriental Lines* – subject to withdrawal from a shipping consortium

Other noteworthy Phase I decisions that are not discussed here include Case M.7881, *Ab InBev's acquisition of SAB Miller*, which was conditional on the divestment of practically the entire SAB Miller beer business in Europe (decision not yet published but see IP/16/1900); Case M.7978, the creation of a *joint venture in the Netherlands between Vodafone and Liberty Global*, which was conditional on Vodafone divesting its Dutch consumer fixed line business (decision not yet published but see IP/16/2711); Case M.7777, *Solvay's acquisition of Cytec*, which was subject to Solvay's divestment of its activities in phosphor-based solvent extraction, including divestment of IP rights, transfer of customer contracts and purchase history and the conclusion of a transitional toll manufacturing agreement (decision on DG COMP's website and see IP/15/6236); and Case M.7792, *Konecranes/Terex MHPS*, which was subject to divestment to an up-front buyer (decision not yet published but see IP/16/2763).

B. Selected EC Phase I Decisions

B.1 Teva/Allergan Generics

In March, the EC authorised Teva, the world's largest generic medicines manufacturer, to purchase Allergan Generics, the world's fourth largest generics manufacturer, subject to implementation of extensive remedies.[131]

In addition to a traditional product-by-product analysis (at molecule or group of molecules level using the Anatomical Therapeutic Classification), the EC also examined whether the combination of the parties' activities would lead to more general concerns at Member State level. The EC concluded that the transaction would likely lead to increased prices and loss of quality of service and supply in each of Iceland, Ireland and the UK.

To alleviate the EC's country-level concerns, the parties offered to divest Teva's entire portfolio of marketed molecules and molecules in the development pipeline in Iceland and the vast majority of Allergan Generics' activities in Ireland and the UK. The UK/Ireland divestment covers the manufacture, supply and distribution of generics and includes sale of a factory in the UK and transfer of Allergan Generics' British and Irish staff. The remedy is designed as a single package covering both countries. In all three countries, the divestment covers both molecules in which the parties' activities overlapped and non-overlapping molecules (both marketed and pipeline).

At a product level, the EC had concerns regarding 159 marketed and 20 pipeline molecules in 26 EEA countries either because of horizontal overlaps between the parties' activities or because of vertical relationships resulting from their out-licensing activities.[132] These concerns were addressed by the parties agreeing to divest the relevant marketed molecules and those in the development pipeline, or by Teva committing to continue to out-license an existing licensee on the same terms as before the transaction.[133]

Implementing these remedies will require significant ongoing monitoring. The commitment requires appointment of a monitoring trustee and two hold-separate managers. One particular challenge is the need to oversee transfer of a large number of market authorisations in various different complex regulatory frameworks.

131 Case M.7746, *Teva/Allergan Generics*. The decision is not yet published but see IP/16/727 and EC's Competition Merger Brief, Issue 2/2016, p. 13.

132 Out-licensing is when the inventor/manufacturer of a product licenses another company to take further steps in relation to commercialising the product.

133 The EC also investigated whether the parties' upstream offering of active pharmaceutical ingredients would reduce competition but concluded that this was not a concern.

"The complex remedy will require extensive monitoring. As such it is unusual, especially in a Phase I clearance."

B.2 Microsoft/LinkedIn

In December, the EC authorised Microsoft's acquisition of LinkedIn subject to implementation of a behavioral remedy.[134]

The parties' activities in online display advertising overlapped but mainly because of their low combined market share, the EC excluded any concerns on this market. The EC also examined whether concerns could arise from the concentration of the parties' user data or data concentration.

However, the EC's principal concern was the potential impact on professional social network services[135] and whether Microsoft could leverage its strong positions on the market for operating systems for personal computers (Windows) and productivity software (Microsoft Office) to strengthen LinkedIn's position among professional social networks. The EC was particularly concerned that Microsoft might pre-install LinkedIn on all Windows-based PCs and/or integrate LinkedIn into Microsoft Office. The EC also examined whether Microsoft could deny LinkedIn's competitors from accessing programming interfaces required to interoperate with Microsoft products. The EC concluded that Microsoft would be able to deploy these strategies and that they would benefit LinkedIn.

To address the EC's concerns, Microsoft committed to ensure that PC manufacturers and distributors would be free not to install LinkedIn and to allow users to uninstall LinkedIn. Microsoft also committed to maintain LinkedIn's competitors' current level of interoperability with Microsoft Office and to grant these competitors access to Microsoft Graph, which is a software development platform. The commitments apply only in the EEA and for five years.

B.3 Dentsply/Sirona

In February, the EC approved Dentsply's planned acquisition of Sirona subject to compliance with behavioral remedies designed to address the transaction's conglomerate effects.[136]
Sirona was the leading supplier of chairside CAD/CAM (computer-aided design and computer-aided manufacturing) systems, which dentists use to manufacture prosthetics from CAD/CAM "blocks". Dentsply manufactures CAD/CAM blocks. The EC was concerned that, although Dentsply's block supply was currently limited, it could expand and Dentsply would have the ability and incentive to foreclose other block suppliers from Sirona's CAD/CAM system.[137]

The parties committed to extend Sirona's existing licensing agreements with competing CAD/CAM block suppliers by ten years. In addition, Sirona agreed to provide these CAD/CAM block suppliers with necessary know-how and to refrain from taking measures that could damage the compatibility of these blocks with the Sirona chairside CAD/CAM system. The commitment also contains a fast-track arbitration procedure.

In addition to the conglomerate effects, the EC analysed a number of overlaps in the parties' activities but concluded that these did not give rise to any concerns. Therefore the remedy is designed purely to address conglomerate effects.

B.4 Statoil Fuel and Retail/Shell Dansk Fuels

In March, the EC approved Statoil Fuel and Retail's ("SFR", which is no longer linked to the Norwegian Statoil group) acquisition of Shell Dansk Fuels, subject to divestment of over 200 petrol stations and Shell's Danish commercial fuels business.[138]

134 Case M.8124, *Microsoft/LinkedIn*. The decision is not yet published but see IP/16/4284.

135 The EC also examined the impact on competition in customer relationship management software solutions but did not find any likely competitive concerns.

136 Case M.7822, *Dentsply/Sirona*. The decision is available on DG COMP's website. See also IP/16/425.

137 Decision, Section V.2.

138 Case M. 7603, *Statoil Fuel and Retail/Dansk Fuels*. The decision is available on DG COMP's website; see also IP/16/1061.

The EC was concerned that competition would be undermined on the horizontally affected Danish wholesale markets for non-retail supply of refined oil products, including diesel, gasoline, light heating oil and heavy fuel oil (used for inland industrial processes such as power plants, horticulture etc.) and on the horizontally affected market for retail supply of motor fuel in Denmark. Regardless of how the market for retail supply of motor fuel was defined the transaction would have reduced competition. Therefore the EC did not have to reach a definitive conclusion on market definition.[139]

However, the EC considered that in Denmark, there was no need to subdivide the market between any of the following: on-motorway and off-motorway stations; dedicated truck and regular stations; or manned or unmanned stations. In contrast, the EC was inclined to subdivide the market between sales to B2B and B2C customers since competition occurred differently for each customer segment.[140] As regards the market's geographic scope, again the EC did not have to conclude on this point but indicated that the market was national with some local elements of competition.[141]

The transaction would have combined the number one and two players on the wholesale markets and the number one and three players on the market for retail supply of motor fuel. It would have removed an important competitive constraint on the parties and their competitors would not be able to exercise a sufficient competitive constraint. The EC considered, but ultimately rejected, submissions that buyers could switch suppliers or exercise countervailing buyer power to counteract these non-coordinated horizontal effects. It also found significant barriers to entry.

In addition, the EC considered that, because of the parties' upstream activities, the merged entity could foreclose downstream competitors on the markets for non-retail supply of diesel, gasoline and light heating oil to end users.

SFR offered significant commitments to assuage the EC's concerns.[142]

First, it would divest Dansk Shell's commercial fuels business and aviation fuel activities. This eliminated the concerns at wholesale level.

Second, SFR committed to sell a network of over 200 petrol stations (around 175 Shell and 25 SFR stations) to a suitable buyer, who would be approved by the EC; the EC considered that this network would replace the competitive constraint that Shell had previously exercised.

The EC noted that the commitment allows the purchaser to continue to use the Shell brand, provides access to a supply of refined fuels under a transitional agreement, provides access to terminal storage, involves the transfer of Shell's existing fuel card customer base and employees and that Shell (the seller group) had agreed to grant the purchaser an exclusive right to issue euroShell fuel cards and accept international euroShell cards.

Five companies had apparently expressed their interest in acquiring the divestment package.

B.5 Worldline/Equens/PaySquare

Although the decision has not yet been published, the EC's February 2016 conditional clearance of Wordline's acquisition of Equens and its PaySquare subsidiary appears interesting.[143] The parties provide payment and related services.

The parties agreed to divest PaySquare's Belgian activities. They also agreed to license Worldline's Poseidon software (relating to merchant acquiring in Germany) on fair, reasonable and non-discriminatory terms for ten years. Linked to this, they agreed to provide access to the Poseidon source code under certain conditions (which are not clear in the EC's press release) and transfer the governance of a related protocol to an independent not-for-profit industry association.[144]

139 Decision, para. 42. The EC has considered petrol station markets in multiple decisions – see e.g. Case M.4919, *StatoilHydro/ConocoPhillips*.
140 Decision, paras 33-42.
141 Decision, paras 54-62.
142 Decision, Section VI and VII.
143 Case M.7873, *Worldline/Equens/PaySquare*.
144 These remedies appear to echo aspects of the remedies in Case M.5669, *Cisco/Tandberg*.

Legislative/Policy Developments

- EC Consultation on potential changes to EUMR
  - Potential changes to rules on when EC can refer an investigation to NCAs and *vice-versa*
  - Proposals mirror 2014 proposals namely abolition of Form RS; straight to Form CO with ability of one Member State to prevent EC acquiring any jurisdiction under Article 22 EUMR; amendment of Article 4(4) EUMR
  - Potentially new notification thresholds based on deal size to capture deals where target has not yet generated sufficient turnover to trigger an obligation to notify
  - Potential removal of obligation to notify and/or simplify notification in unproblematic cases
- Publication of EC-commissioned study on acquisitions of non-controlling minority shareholdings
  - Provides details on current systems that allow review of non-controlling interests
  - Highlights areas that EC should address if it introduces review of such acquisitions
- Publication of EC-commissioned study on geographic market definition
  - Review of 10 decisions in which relevant geographic market was contested
  - Analysis of EC's approach to defining geographic markets – no evidence of approach leading to poor decisions
  - Recommendations on how EC should improve its approach

B.6 CMA CGM/Neptune Oriental Lines[145]

In April, the EC conditionally authorised CMA CGM's acquisition of Neptune Oriental Lines ("NOL").[146]

Both companies operate container lining shipping businesses and offer services on many routes through participation in shipping consortia. Among other alliances, CMA CGM participates in the Ocean Three Alliance and NOL participates in the G6 Alliance.

The EC was concerned that the transaction would lead to non-coordinated horizontal effects since it would create links between the Ocean Three and G6 alliances and that the parties would have access to sensitive information about both consortia.[147] In particular, through the consortia, the parties could influence capacity and prices post-transaction on routes between Northern Europe and North America and between Northern Europe and the Middle East.[148]

CMA CGM had stated publicly that it intended to end NOL's membership of the G6 Alliance. The EC required that this intention be incorporated into a formal commitment. NOL's withdrawal from G6 will be effective from 31 March 2017. During the interim period, a trustee will ensure that no G6 competitively sensitive information is shared with CMA CGM.

C. Legislative/policy developments

C.1 October EUMR Consultation

In October, the EC launched a consultation concerning a number of aspects of the EUMR.[149] Notably, the EC sought feedback on referral of concentrations between the EU and Member State competition authorities, on whether additional thresholds for notification should be incorporated into the EUMR and on potential ways to reduce the administrative burden associated with merger filings, particularly in less problematic cases.

On referrals, the EC essentially is maintaining the proposals contained in its 2014 white paper

145 See also Case M.8120 Hapag-Lloyd/United Arab Shipping Company, which was cleared on condition that United Arab Shipping Company exit the NEU1 alliance on routes between North America and Nothern Europe – IP/16/3942.

146 Case M.7908, *CMA CGM/NOL*. The decision is available on DG COMP's website. See also IP/16/1631.

147 Decision, paras 48-52.

148 Decision, paras 60-67 and 79-88.

149 See http://ec.europa.eu/competition/consultations/2016_merger_control/index_en.html. See also Commissioner Vestager's speech *Refining the EU merger control system*, 10 March 2016, available on DG COMP's website.

"Towards More Effective EU Merger Control"[150] and consulting on whether the proposals would be beneficial.[151]

First, it proposes that parties should no longer have to file a Form RS if they want the EC to assume jurisdiction under Article 5(4) EUMR. Parties can instead file a Form CO and the EC will obtain jurisdiction in the absence of an objection from a Member State to which the transaction would otherwise have been notified. The potential drawback with this suggestion is that a lot of time and work could be wasted if a Member State objects to the transfer of jurisdiction.

Secondly, the EC proposes to amend Article 22 EUMR to avoid Member States investigating transactions in parallel to the EC reviewing the transaction's effect in other Member States. Under the proposal if a Member State wants to examine a transaction and opposes the transfer of jurisdiction to the EC, the EC would not acquire any jurisdiction over the case. This proposal unfortunately means that one Member State on its own could prevent the EC examining a transaction.

Third, the EC proposes to amend Article 4(4) EUMR. Parties would no longer have to state that their transaction may "significantly affect competition in a market" when requesting that the EC take jurisdiction. This removal of the "perceived 'element of self-incrimination'"[152] is welcome.

On thresholds for notification, the EC questions whether turnover-based jurisdictional thresholds adequately capture all transactions that might reduce competition in the EU.[153]

The EC's concern arises when acquired companies have not generated significant turnover in the past. For example, in the digital sector, some companies' value is not the turnover that they have created, but the data that they hold. For example, when Facebook acquired WhatsApp in 2014, the EC did not have automatic jurisdiction to review the transaction, but only acquired jurisdiction because the transaction was reviewable in three or more Member States (and any of these Member States could have objected to the EC acquiring jurisdiction).[154]

Similarly, in the pharmaceutical sector, a company could acquire a business that has not generated significant turnover, but which has valuable pipeline products. In *Novartis/GSK (Ofatumumab Autoimmune Indications)*,[155] Novartis acquired a pipeline product from GSK and the EC considered that this constituted an "undertaking" under Article 3 EUMR. However, since the product had not generated any turnover, the EC normally would not have had jurisdiction except that Novartis and GSK had notified another transaction to the EC within the previous two years. So the acquisition of the pipeline product became reviewable by application of Article 5(2) EUMR, which requires that undertakings' turnover be aggregated in this situation.[156]

The EC's consultation questions whether this "enforcement gap" needs to be filled by amending the EUMR to add additional thresholds, such as thresholds related to deal value and whether a nexus to the EU should additionally be required. The EC also asks if any amendment is necessary given that the EC can acquire jurisdiction via referrals from Member State authorities and via requests for referrals to the EC from parties.

These questions are linked to the EC's concerns regarding companies' holding of data as potentially conferring a competitive advantage and potentially undermining competition.[157] However, any amendment to the jurisdictional thresholds must be set high enough to avoid transactions that do *not* raise the sort of issues that the EC is concerned about routinely becoming reviewable under the EUMR.

Furthermore, as the EC itself recognises, any enforcement gap appears only to be of any concern in a limited number of sectors, most notably

150 See http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html.
151 Section IV.3.
152 Section IV.3, p. 27.
153 Section IV.2
154 Case M.7217, *Facebook/ WhatsApp*, para. 10 *et seq*.
155 Case M.7872, *Novartis/GSK (Ofatumumab Autoimmune Indications)*.
156 *Ibid.*, para. 13.
157 See Commissioner Vestager's speeches *Competition in a big data world*, 17 January 2016, *Making data work for us*, 9 September 2016, *Big Data and Competition*, 29 September 2016, all available on DG COMP's website. The European Data Protection Supervisor, Giovanni Buttarelli, has also recommended that merger control should "better reflect the interests of the individual in big data mergers" https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/EDPS/Events/16-09-23_BigData_opinion_EN.pdf.

the tech and pharmaceutical sectors. While it would be novel for the EC to introduce sector-specific merger control rules, some consideration of specific regimes or particular procedures for certain sectors might be appropriate.

Other questions in the consultation notably concern the effectiveness of the 2013 changes to the simplified procedure, other potential ways to simplify procedures such as excluding "non-problematic" transactions like the establishment of JVs that operate solely outside the EEA from the EUMR's scope, lighter information requirements and potentially allowing parties to self-assess whether to notify certain types of transactions.[158]

C.2 Minority Shareholdings

One notable omission from the October consultation documents is reference to the EC's 2014 proposal to extend the EUMR's scope to certain acquisitions of non-controlling minority shareholdings.[159] Perhaps this is not surprising in light of Commissioner Vestager's remarks in March 2016 that she was not convinced that "this is a change we absolutely have to make to our system".[160]

In October, the EC published a study that it had commissioned on the subject.[161] The Study details the features of the merger control systems of countries[162] that currently review acquisitions of non-controlling minority interests and also provides information on the types of rights attached to various levels of minority shareholdings in a slightly different set of countries.[163]

The Study notes that "very few" acquisitions of non-controlling minority shareholdings raise competition concerns.[164] However, it also notes that "there may be some merit in introducing the competence for the European Commission to assess some of these cases under the EU Merger Regulation".[165]

The Study emphasises that if the EC were to extend the scope of the EUMR to minority shareholdings, it would be essential to limit the resulting administrative burden.[166] The stakeholders interviewed for the Study considered that the EC's 2014 proposal of a "targeted transparency system" was overly burdensome.[167]

The Study concludes that "should the European Commission decide to put forward a legislative proposal" to introduce review of acquisitions of minority shareholdings, this should, in particular, address:[168]

1. A threshold "triggering the review of the acquisition of the minority shareholding (in the form of a legal threshold or presumption) … for the purposes of legal certainty". The Study's authors suggest a threshold of 25% of shares as appropriate.
2. A safe harbour "below which a minority shareholding would generally not be subject to review". The Study's authors suggest a threshold of either 15% or 10% of shares.
3. Guidance on the concepts mentioned in the EC's 2014 proposal to enable determination of whether an acquisition of a minority shareholding should be reported.[169]

Thus far the EC has not commented on the Study.

C.3 Geographic market definition

In February, the EC published a study by Amelia Fletcher and Bruce Lyons of the Centre for Competition Policy at the University of East Anglia in the UK entitled *Geographic Market Definition in European Commission Merger Control* ("the GMD Study").[170] It reviews how the EC defined geographic markets in ten recent EC decisions (all

158 Section IV.1.
159 See http://ec.europa.eu/competition/consultations/2014_merger_control/index_en.html.
160 *Refining the EU merger control system*, 10 March 2016, available on DG COMP's website. See also *Thoughts on merger reform and market definition*, 12 March 2015, also available on DG COMP's website.
161 *Support study for impact assessment concerning the review of Merger Regulation regarding minority shareholdings* ("Study"), see http://ec.europa.eu/competition/publications/reports/KD0416839ENN.pdf
162 The study analyses the UK, Germany, Austria, the US, Japan and Brazil.
163 This part of the study analyses the UK, Germany, France, The Netherlands and the US.
164 Study, pp. 4 and 58-59.
165 Study, p. 4.
166 *Ibid.*
167 Study, pp. 5 and 59-61.
168 Study, pp. 5 and 62-64.
169 These concepts include issues such as an acquisition that gives rise to a "competitively significant link" between companies.
170 See http://ec.europa.eu/competition/publications/reports/study_gmd.pdf.

chosen because they raised issues on geographic market definition), makes some general observations on the EC's approach and some recommendations on how the EC's approach could be improved.

The GMD Study's main points are:

- There should be greater clarity that market definition "provides a useful framework for competitive analysis, but is not an end in itself".[171] Thus, even if markets are narrowly defined, this is not of concern provided the competitive assessment fully assesses constraints from firms outside the market.
- There is no evidence that the EC's approach is leading to poor merger decisions.[172]
- The EC's practice is "generally well-evidenced" and "broadly in line" with its 1997 Notice on market definition.[173] Notably, when the EC defines markets narrowly, it also analyses competitive constraints from outside the market.
- The EC generally relies on a range of evidence rather than relying on a single piece of evidence or analysis.[174] Notably, statistical and quantitative evidence was not the sole and decisive evidence in any of the analysed decisions.
- The EC should clarify that supply substitution by imports will normally not be accepted as a reason for widening the geographic market definition.[175] The GMD Study's authors believe this recommendation is in line with the Notice on geographic market definition and that imports should be analysed as part of the competitive assessment. Parties in the analysed decisions had argued that markets should be widened because of imports; the EC had not accepted this argument in any of the cases but appeared to indicate that it could accept the argument if the relevant evidence was strong.
- The EC should give greater consideration to including "swing capacity" and "rapid entrants" when calculating market shares based on capacity.[176]
- While the EC generally defines markets as being no narrower than a single Member State, it rarely defines smaller markets or cross-border but sub-Member State region markets.[177] The GMD Study's authors recommend that in appropriate cases, the EC should use isochrones or isodistance frontiers to define geographic markets. (This happened in *Ball/Rexam*, which was decided in January.)
- The EC should have a more formal methodology for treating transport costs.[178] In the analysed decisions, transport costs are variously compared to average selling prices, gross margin, total cost and differences between domestic suppliers and importers' costs.
- Greater care should be given to defining separate upstream manufacturing and downstream distribution markets.[179] Relatedly, the EC should be clearer on the extent to which vertical integration influences geographic market definition.[180]

The GMD Study also provides a useful overview of how the EC defines markets[181] and how the EC analyses the six main types of relevant evidence as set out in the Notice on market definition.[182]

171 GMD Study, pp. 3, 12 and 55-56.
172 GMD Study, pp. 2 and 19.
173 GMD Study, p. 2. See EC Notice on the definition of the relevant market for the purposes of Community competition law, OJ C372, 9 Dec 1997, pp. 5–13.
174 GMD Study, p. 3.
175 GMD Study, pp. 4, 13-15 and 56-57.
176 GMD Study, pp. 5, 16 and 57-58.
177 GMD Study, pp. 5, 17 and 58-59.
178 GMD Study, pp. 5 and 59.
179 GMD Study, pp. 6, 18 and 59-60.
180 *Ibid.*
181 GMD Study, Section 2.
182 GMD Study, Section 5.