Main developments in EU merger control 2013 - 2014

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The opinions in this article are personal and do not reflect the views of WilmerHale

The object of this paper is to give an overview of the main developments in EU Merger Control from 1 November 2013 until 31 October 2014 . We set out first a summary and then a more detailed account.

Summary

In terms of legislation and policy developments: The European Commission ("EC") revised its Notice on the Simplified Procedure and the Merger Implementing Regulation with a view to increasing the scope for using the simplified procedure.[1]

The EC also suggested that joint ventures operating outside the EEA and without any effect in the EEA might no longer need to be pre-notified to the EC.[2] With a similar aim of reducing the burden on parties to concentrations, the EC suggested that, in the future, parties to deals that do not involve any overlaps or vertically-related markets may not have to use Form CO to pre-notify the EC, but instead may be able to notify using some form of less detailed "Information Notice". Such reforms would be most welcome.

The EC's other main policy initiative is a proposal to extend the scope of the European Union Merger

1 See Section A below.

2 See discussion of the EC's Consultation document below in Section A.

Box 1 - *Main developments in EC Merger Control*

- Expanded scope for the Simplified Procedure/Short Form CO
- EC Consultation on minority shareholdings, referrals and other potential amendments to EUMR
- Publication of EC Decision in *Nynas/Shell*: "failing division defence"
- Phase II Decisions with remedies regarding German and Irish telecommunications markets
- *Microsoft/Nokia*: Seller's post-transaction conduct not reviewable under the EUMR
- Referrals
    - 3 cases where EC refused downwards referral
    - Parallel review by EC and Czech Authority in *Cemex/Holcim Assets*
- GC rejection of Cisco's appeal against *Microsoft/Skype*
- Fines for not respecting the EUMR's standstill obligation
    - ECJ rejects appeal against *Electrabel* €20 million fine
    - EC fines *Marine Harvest* €20 million
- Backdrop of protectionist rhetoric in Member States

Regulation ("EUMR")[3] to acquisitions of certain non-controlling minority shareholdings.[4] Above acquisitions of a 5% shareholding, parties may be required to submit an "Information Notice" to the EC. The EC's current proposal is that the parties then would have to respect a waiting period before acquiring shares and wait for expiry of a prescription period after acquiring them, before having any guarantee that the EC will not further investigate the acquisition.

The EC also proposes to reform the system for referring concentrations between the EC and Member State competition authorities.[5] Notably, parties would no longer have to file a Reasoned Submission ("Form RS") to the EC requesting it to take jurisdiction over concentrations that do not have a Community dimension, but which are notifiable in at least three Member States. Instead, parties could file a Form CO directly with the EC in such circumstances. Given that there is no guarantee that Member States will agree to the transfer of jurisdiction to the EC, it remains to be seen if the proposal will achieve its aim of encouraging greater use of the Article 5(4) EUMR procedure.[6]

The EC also suggests amending the EUMR to eliminate the possibility of both the EC and a Member State simultaneously reviewing a concentration that has been referred by a Member State to the EC under Article 22.[7] This year, Cemex's acquisition of Holcim assets was reviewed both by the EC and in the Czech Republic.[8] The EC's proposed "all or nothing approach" is quite radical and not without its own difficulties.

In terms of European Commission cases: In the 12 months to November 2014 the EC refused downwards referral requests under Article 9 EUMR on three occasions.[9] This number of refusals is unprecedented but, in fact, may be more a question of the markets involved than the EC trying to retain jurisdiction at all costs (as some have commented).

The EC published a non-confidential version of its decision in *Nynas/Shell/Harburg Refinery*, an interesting case which appears to expand the scope for relying on the failing firm defence in appropriate circumstances.[10]

The EC examined concentrations affecting the German and Irish telecommunications markets.[11] Both were conditionally cleared after Phase II investigations. The remedies seek to ensure that new entrants can acquire capacity and offer services as mobile virtual network operators to retail customers and to encourage new entrants to purchase spectrum and enter the markets as mobile network operators.

In its decision in *Microsoft/Nokia* the EC held that analysis of a seller's incentives post-concentration does not fall under the EUMR.[12]

As regards European Court cases involving merger control: The General Court ("GC") upheld the EC's clearance of *Microsoft*'s acquisition of *Skype* and upheld a second EC decision approving Wendel as a suitable purchaser of assets divested as a condition to the *Lagardère/Natexis/Vivendi Universal Publishing* transaction.[13]

The European Court of Justice ("ECJ") meanwhile upheld the GC's dismissal of *Electrabel's* appeal of a €20 million fine for having acquired control over *Compagnie nationale du Rhône* without having received prior authorisation from the EC.[14] More recently, the EC fined *Marine Harvest* €20 million for having acquired control of Morpol without EC approval.[15] This appears to be part of an international trend of merger authorities to sanction failures to notify.

Other themes: Two other general themes may be of interest. First, there appears to be an increased number of allegations that companies are breaching commitments.[16] It is too early to say if specific allegations are warranted, but it is worth noting, not least given the EC's (antitrust) decision to fine

3 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, pp. 1-22, 29 January 2004.
4 See Section A below.
5 *Id.*.
6 Article 5(4) allows parties to request that the EC review concentrations that do not have a Community dimension provided that the concentration is notifiable in at least three Member States.
7 *Id.*
8 See Section C below. See Section C below.
9 *Id.*

10 See Section B below.
11 *Id.*.
12 *Id.*.
13 See Section D below.
14 *Id.*.
15 See Section E below.
16 See, e.g. MLex reports dated 29 September 2014 regarding allegations that Standard & Poor's and ThyssenKrupp are alleged to have infringed commitments.

Microsoft for not having respected its "browser commitment".[17]

Secondly, there has been an increased amount of political debate concerning whether Member States should be allowed to protect "national interests". Prominent examples are French Government Ministers' statements regarding General Electric's attempted acquisition of Alstom and British Ministers' statements regarding Pfizer's abandoned attempt to acquire AstraZeneca.[18]

These are likely just signs of the times, as governments worry to keep jobs and key competitive businesses in their countries and as globalisation continues. Nevertheless, it has been somewhat surprising to see, given the existing provisions in the EUMR, defining the invocation of national interests.[19]

A. Legislative developments

Revised Notice on Simplified Procedure and Merger Implementing Regulation

In December 2013, the EC revised its Notice on the Simplified Procedure[20] and the Merger Implementing Regulation.[21] The main aim was to increase the number of cases qualifying for the simplified procedure and thereby reduce the amount of information that parties need to provide to the EC in unproblematic mergers.

The scope of application of the EC's short form notification procedure has been broadened in three ways. First, in markets in which the merging companies compete (horizontally), the threshold for review under the simplified procedure has been increased from 15% to 20% combined post-transaction market share.[22] This is very welcome, but the companies may still need to collect a lot of information including "information on all plausible alternative market definitions",[23] which can be very time-consuming even when submitting a short form notification.

Secondly, where the companies are active on markets that are upstream or downstream of each other, the threshold for using the short form notification has been raised from 25% to 30% for either company's individual, or both companies' combined, market share.[24]

Thirdly, it is also possible, although the EC has discretion over this on a case-by-case basis, to use the short form to notify deals that result only in a small increase in market share, provided that the companies' post-transaction combined market shares are below 50%. According to the revised Notice on Simplified Procedure, a small increase is where the change to the level of market concentration, as measured by the Herfindahl-Hirschman Index ("HHI") delta, would be less than 150.[25] All of this is

17 Case COMP 39.530 *Microsoft (Tying)*, 6 March 2013. For a similar power to fine under the EUMR, see Article 14(2)(d).

18 For further discussion, 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).

19 Article 21(4).

20 Commission Notice on a simplified procedure for treatment of certain concentrations under Council Regulation (EC) No 139/2004, OJ C 366/5, 14 December 2013.

21 Commission Implementing Regulation (EU) No 1269/2013 of 5 December 2013 amending Regulation (EC) No 802/2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 336/1, 14 December 2013.

22 Notice on Simplified Procedure, para. 5(c)(i).

23 *Id.*, para. 8.

24 *Id.*, para. 5(c)(ii).

25 *Id.*, para. 6. For example, if a company with a 26% market share acquires a competitor with a 2% market share, the delta is 104 and the short form in principle could be used, but if the same company acquires a competitor with a 3% market share, the delta is 156 and

Box 2 *- Legislative/policy developments (1)*

Amended Notice on Simplified Procedure and Merger Implementing Regulation

- Increased scope to use Simplified Procedure:
  - Horizontal competitors 20% combined post-transaction market share
  - Vertical relationship 30% market share individually or combined
  - Only a "small" increase in market share
- Revised Form CO and other standard texts

very welcome, but will still need careful handling, because there can often be difficulties in defining markets and calculating market shares.

The other principal changes introduced in this package are:

- A revised Form CO and Short Form CO, which now expressly allow companies to request a waiver from providing certain information to the EC (such as market share data on both a value and a volume basis).[26]
- The revised Section 5(4) of the Form CO, which requires that notifying parties must provide the following to the EC "analyses, reports, studies, surveys and any comparable documents from the last two years for the purpose of assessing any of the affected markets with respect to market shares, competitive conditions, competitors (actual and potential) and/or potential for sales growth or expansion into other product or geographic markets". While in practice the EC often required parties to submit the same documents to it as they had submitted to other authorities reviewing a proposed transaction (such as the "4(c)" documents submitted with the US Hart-Scott-Rodino filing), the revised Form CO formally broadens parties' document disclosure requirements.
- Furthermore, Section 5.3 of the Short Form CO now requires that parties may have to submit internal documents even with a Short Form CO. This was not formally required in the past, but again the EC often requested such documents during the pre-notification phase.
- The introduction of a statement in the Notice on Simplified Procedure that certain merger cases can be notified without first having pre-notification discussions with the EC (notably those mergers that do not involve horizontal overlaps or vertical links).[27]
- A Revised Form RS and revised standard commitments texts (which take into account the EC's experience since the previous texts were published in 2003 and are aligned to the 2008 Notice on Remedies).[28]

the short form is not available.

26 Form CO, Section 1.4(g) and Short Form CO, Section 1.6(g).

27 Notice on Simplified Procedures, paras 22-24.

28 Commission Notice on Remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, OJ C 267, pp. 1–27, 22 October 2008.

Box 3 - *Legislative/policy developments (2)*

- Proposal that some non-controlling minority shareholdings be subject to EUMR
  - Obligation to file "Information Notice" if competitively significant link between parties:
    - * Parties on same market or sector or on vertically-related markets
    - * Shareholding of around 20% acquired or 5% shareholding plus additional factors
  - 15 working day waiting period at end of which EC must decide if full notification required
  - Prescription period during which EC can still investigate
- Proposed changes to referral procedure
  - Article 4(5): Removal of Form RS requirement; parties directly file Form CO instead, but Member States allowed to object to transfer
  - Article 22: If one Member State objects to transfer to EC, transfer does not happen; no simultaneous EC/Member State review
- Other potential amendments
  - Full-function JVs wholly outside EEA would not need to be notified
  - Submission of Information Notice to EC if no overlaps and no vertically-related markets, rather than notification using Form CO

EC Consultation: Towards more effective EU merger control

In July 2014, the EC published a White Paper,[29] accompanied by a more detailed Staff Working Document,[30] entitled "*Towards more effective EU merger control*". The two documents propose some far-reaching changes to the EUMR. Third parties could comment on the proposed changes up to 3 October 2014. It is not yet clear when any of the proposed changes will come into force.

Extension of EUMR scope to include acquisition of non-controlling minority shareholdings[31].

The most publicised and potentially controversial change is that parties acquiring a minority shareholding, which does not give rise to "control" over the target would still have to file an "information notice" with the EC, if the share acquisition gives rise to a "competitively significant link" between the acquiring and target companies.[32]

Acquisitions of non-controlling minority shareholdings have been much debated in the EU for a number of years. Notably, Ryanair bought a stake in Aer Lingus and then, when the EC refused to authorise it to take over Aer Lingus, bought additional shares which gave Ryanair nearly a 30% shareholding in Aer Lingus. Ultimately, while the UK's Competition Commission initiated proceedings against Ryanair and ordered Ryanair to reduce its shareholding in Aer Lingus to 5%,[33] the EC was unable to require a similar remedy.[34] There are also review procedures for the acquisition of minority shareholdings in Germany, the United States and Japan.

The EC's current proposal is that, before acquiring shares, parties would have to file an information notice if (i) they are active in the same "sector", or active in vertically-related markets;[35] and (ii) a shareholding of "around" 20% is acquired, or a shareholding of between 5% and 20% is acquired, accompanied by the acquisition of additional rights, such as rights giving the acquirer a *de facto* blocking minority, a seat on the board of directors, or access to the target company's commercially sensitive information.[36]

Parties to an acquisition of a shareholding of between 5% and 20% would have to self-assess whether to file the information notice. Parties to transactions involving the acquisition of a shareholding below 5% would not have to file the information notice.[37]

The information notice would contain information relating to the parties, their turnover, a description of the transaction, the level of shareholding before and after the transaction, any rights attached to the minority shareholding and some limited market information.[38] While the EC appears to envisage a relatively short document, the EC is still considering the details and whether, for example, to require internal documents from the parties.

It is proposed that, after submitting the information notice, the parties would have to respect a waiting period of 15 working days before consummating their proposed transaction.[39] During this period, the EC would consider whether it should further investigate the proposed transaction. If the EC decides that further investigation is appropriate, the parties would have to submit a full

> It is controversial whether both the waiting period and a prescription period are necessary and proportionate

29 White Paper, "*Towards more effective EU merger control*", available on DG Competition's website. This consultation followed an initial public consultation on minority shareholdings and the referral system in June 2013.
30 Commission Staff Working Document Accompanying the White Paper, "*Towards more effective EU merger control*", available on DG Competition's website.
31 The EC has also published a Competition Policy Brief on Minority Shareholdings, see http://ec.europa.eu/competition/publications/cpb/2014/015_en.pdf.
32 White Paper, para. 46.
33 See, https://assets.digital.cabinet-office.gov.uk/media/5329d-dc8ed915d0e60000189/130828_ryanair_final_report.pdf. The UK Competition Appeal Tribunal rejected Ryanair's appeal of the Competition Commission's decision. Ryanair has now appealed to the Court of Appeal.
34 See Case T-411/07 *Aer Lingus*, [2010] ECR II-3691.
35 White Paper, para. 47.
36 *Id.*
37 Staff Working Document, para. 79.
38 White Paper, para. 49.
39 White Paper, para. 50.

"merger" notification using Form CO (or Short Form CO) to the EC. The EC proposes that parties could also voluntarily submit a full notification at the start of the procedure instead of first submitting an information notice.[40]

The EC also proposes a "prescription period" of between four and six months during which the EC could still investigate a minority acquisition, even though it had decided not to require the parties to file a full notification at the end of the 15 working day waiting period.[41] The rationale for this is that it would allow market participants to raise concerns after the waiting period.

This prescription period is controversial and novel in EU Merger Control (where waiting periods are generally required, without the risk of intervention after a transaction is completed). It is controversial whether both the waiting period and a prescription period are necessary and proportionate.

Simplifying the referral system

The other main set of proposed changes concerns the referral system. Two are worth particular note.

First, the EC proposes to abolish the requirement under Article 4(5) EUMR that parties to a concentration, which does not have a "Community dimension", but which is notifiable in at least three Member States submit a reasoned submission (Form RS) to the EC requesting that the EC review the concentration instead of the competent Member States. This procedure is considered "cumbersome and time-consuming". Instead, the EC suggests that parties should notify the transaction directly to the EC, which will then forward the notification to the Member States, who have the right to oppose the referral to the EC within 15 working days.[42]

The current requirement to submit a Form RS and wait 15 working days to see if a Member State objects to the transfer of jurisdiction and only then notify the concentration, discourages many companies from using the Article 4(5) EUMR procedure. However, given the much greater amount of work involved, it is an open question whether the proposed alternative of filing a full Form CO and then waiting to see if a Member State objects to transferring jurisdiction, will encourage greater uptake of the Article 4(5) procedure. Notably, a substantial amount of time and resources could be "wasted" preparing a Form CO if a Member State objects to transfer to the EC. The EC's argument is that few Member States have objected to such transfers (2% of cases since 2004).[43] However, for those concerned this would be a material wasted cost.

Secondly, the EC proposes to amend Article 22 EUMR to avoid the risk of some Member States choosing to conduct their own investigations at the same time as the EC is reviewing a concentration's effect in the other Member States.[44] The EC proposes that this possibility of parallel review at EC and Member State level would no longer exist if any Member State objects to transfer of jurisdiction to the EC. If a Member State objects, the EC would not be able to examine any aspect of a case, with the result that all the Member States having jurisdiction would have to conduct their own investigations.

While, as discussed below, parallel investigations at Member State and EC level can complicate procedures, the "all or nothing" nature of the EC's proposed solution appears quite drastic, particularly since a Member State which wants to resist transfer of jurisdiction to the EC does not have to provide reasons for its objection. To promote efficiency here, it may be argued that Member States at least should have to articulate the reasons for their opposition.

Amendment of Scope of Article 22 Review

The EC also proposes that it should be able to review concentrations transferred to it under Article 22 for their compatibility with the common market throughout the entire EEA and not just in the countries which would have competence to examine the concentrations otherwise.[45]

This appears hard to justify since it would oblige parties to gather and submit market information for countries which would not have had any power to examine the concentration under their own laws.

40 White Paper, para. 49.
41 White Paper, para. 51.
42 White Paper, para. 66.
43 White Paper, footnote 44.
44 White Paper, para. 69.
45 White Paper, para. 69 and Staff Working Document, para. 79, paras 145 and 148.

Other changes

Finally, the EC's consultation proposes a number of "miscellaneous" amendments. Two of these are particularly significant.

First, it is proposed that the EUMR would be amended so that a full-function joint venture, located and operating outside the EEA, which produces no effects on EEA markets, would fall outside the EUMR's scope.[46] This would mean that the creation of, or change of control over, such joint ventures would not be notifiable to the EC merely because the parent companies' turnovers exceed the EUMR's thresholds. This is most welcome.

Secondly, the rules could be amended to remove the requirement to use Form CO (or more likely Short Form CO) to notify transactions that do not involve any horizontal overlap or vertical relationship even though these transactions have a Community dimension.[47]

Instead, the parties would inform the EC of their proposed transaction via a less detailed submission (probably similar to the information notice envisaged for minority shareholdings). If this change was implemented, it would mean, in particular, that many acquisitions by venture capital funds would become much more straightforward. Parties to transactions would have to self-assess whether their concentration is exempt from notification using Form CO.

46 Staff Working Document, para. 180.
47 Staff Working Document, para. 182.

B. Selected EC decisions

In an overview paper of this type, it is not feasible to cover all of the EC's merger decisions, or even all of its Phase II decisions. What follows is therefore what we think are the most interesting cases.[48]

Nynas/Shell/Harburg Refinery

Although the EC's decision was adopted in September 2013[49] and therefore just before our reference period, perhaps the most interesting development in the last 12 months has been the recent publication of the EC's Phase II clearance decision in *Nynas/Shell/Harburg Refinery* on its website.[50]

This decision breaks new ground as it implicitly recognises a "failing division defence" or, at the

48 In addition to the Phase II decisions discussed here and in the section on referrals below, the EC approved the creation, subject to divestments, of a joint venture combining the European chlorvinyls businesses of INEOS and Solvay; see Case COMP/M.6905 *INEOS/Solvay/JV*. It also approved, subject to a divestment, Huntsman Corporation's acquisition of Rockwood Specialties Group's, Inc's chemical businesses; see Case COMP/M.7061 *Huntsman Corporation/Equity Interests Held by Rockwood Holdings*. The EC's decisions in these cases have not yet been published. Notable Phase I decisions that are not discussed here include Case COMP/M.7217 *Facebook/Whatsapp* (unconditional clearance), Case COMP/M.6944 *Thermo Fisher Scientific/Life Technologies* (clearance subject to divestments), Case COMP/M.7155 *SSAB/Rautaruukki* (clearance subject to divestments designed to facilitate market access) and Case M.7220 *Chiquita Brands International/Fyffes* (clearance subject to behavioural commitments).
49 Case COMP/M.6360 *Nynas/Shell/Harburg Refinery*.
50 During the year the EC also published a summary of its 1 February 2012 decision in Case COMP/M.6166 *Deutsche Börse/NYSE Euronext* in the Official Journal, OJ C 254/8, 5 August 2014. The full text of the decision is on DG COMP's website. The EC also published a summary of its decision of 30 January 2013 in Case COMP/M.6570 *UPS/TNT Express*, OJ C 137/8, 7 May 2014, corrigendum published in OJ C 187/14, 19 June 2014. The EC also published the full text of its 30 July 2013 decision in Case COMP/M.6663 *Ryanair/Aer Lingus III* on DG COMP's website.

Box 4 *- Main EC decisions*

- *Nynas/Shell/Harburg Refinery*
  - Failing Division Defence
  - Shell's intention to cease production proven by internal documents and its actions
  - Absent merger, prices would increase, whereas merger generated efficiencies
- *Hutchison/Telefónica Ireland and Telefónica Deutschland/E-Plus*
  - Conditional Phase II clearances
  - Obligation to sell capacity to MVNOs
  - Obligation to sell spectrum to encourage new MNO
- *Microsoft/Nokia*
  - Seller's post-transaction conduct not reviewable under the EUMR

least, is a new twist on the "failing firm defence" and this, despite the words "failing firm" or "failing division" not being used in the decision.[51]

Nynas, a global leader in specialty oils, wanted to acquire Shell's Harburg base oil manufacturing plant and some associated refining facilities. In March 2013, the EC opened a Phase II investigation due to the merged entity's high market shares and potential competition concerns on the markets for naphthenic base oils, naphthenic process oils and transformer oils ("TFO").

The EC found that the transaction would leave the merged entity as the EEA's only producer of naphthenic base and process oils (with a 70-90% market share and with all other supply coming from outside the EEA[52]) and its largest producer of TFO (with a market share of 50-70%[53]).[54]

The EC then considered the counterfactual which it considered would result if the intended transaction did not occur. Referring to the *Kali & Salz* failing firm case,[55] the EC states in its decision: "There is no basis for a prohibition, however, if the competitive structure of the market would deteriorate to the same or a greater extent without the concentration".[56]

Referring more directly to the failing firm concept, the Decision continues:

> *"Of particular relevance may be whether, without the concentration, the relevant assets would exit the market. Where the assets would in the near future be forced out of the market if not taken over by another undertaking and where there is no prospect of a less anti-competitive alternative purchase than the notified concentration, the Commission may conclude that a deterioration of the competitive structure that follows the concentration is not caused by the concentration, since the competitive structure of the market would in any event deteriorate to at least the same extent without the concentration."* [57]

The Decision sets out what the EC considered Shell would have been likely to do absent the concentration, how third parties would have reacted and how this would have affected the relevant markets. The EC concludes that Shell would have closed the refinery, that no other entity was interested in purchasing it and that the refinery's closure would have resulted in prices rising due to insufficient capacity on the relevant markets.

The EC places particular reliance on evidence from Shell. While it had not taken a binding decision to close the Harburg refinery (as this would have lessened its sale value),[58] it had publicly stated its intention to leave the naphthenic oil sector.[59] Shell produced evidence which showed it would be more costly to continue operating the refinery than to close it. Moreover, Shell already had started to convert and demolish some assets located at the refinery, which were not part of the intended concentration.[60]

Unlike Shell, Nynas had incentives that made it economically rational for it to maintain the refinery. In particular, pre-transaction, it was capacity constrained, but afterwards it would be able to generate production efficiencies.[61]

The EC assessed the likelihood of a less anti-competitive purchaser than Nynas. The only potential candidate considered was Ergon, the US-based worldwide market leader on the relevant markets. However, the EC concluded that Ergon was not a credible purchaser. The EC first pointed to 2011 approaches from Shell to Ergon, which had not resulted in credible binding offers for the Harburg assets.[62] In addition, after the EC adopted its Statement of Objections ("SO"), Shell had invited Ergon to recommence negotiations. While Ergon did not decline outright Shell's offer to negotiate, Ergon stated that it considered it would not be possible to consummate the transaction within Shell's "unrealistic" timeframe.[63] The EC concluded that, given Ergon's apparent over-capacity worldwide, its incentive to acquire the refinery "would most likely

51 See generally Bretz, Gore and Schallenberg, "*A new approach to the failing firm defence? The Nynas/Shell Harburg merger*", E.C.L.R. 2014, 35(10), 480-486.

52 Paras 266-273.

53 Paras 286-291.

54 The parties did not offer any remedies.

55 Joined Cases C-68/94 and C-30/95 *France and Société commerciale des potasses et de l'azote et Enterprise minière et chimique v Commission,* [1998] ECR I-1375.

56 Para. 307.

57 Para. 310, which cites to the EC's Decision in *Kali & Salz*, Case COMP/M.2314 *BASF/Eurodiol/Pantochim*, Paras 89 and 90 of the Horizontal Merger Guidelines and other decisions that have considered the failing firm defence.

58 Para. 326.

59 Para. 312.

60 Paras 322 and 323.

61 Para. 317.

62 Para. 334 et seq.

63 Para. 343.

diminish in the event of a prohibition Decision".[64] The EC also noted that, despite requests from the EC, Ergon had not submitted any documents to substantiate statements made to the EC that it was potentially interested in restarting negotiations with Shell.[65]

The EC found that there would be reduced EEA capacity if it prohibited the concentration and that this would likely lead to price increases.[66] In contrast, Nynas would be able to increase its capacity at Harburg and lower prices if the concentration was permitted.[67] In particular, the EC found that Nynas would achieve significant reductions of variable costs for its additional supplies, which would be merger specific, verifiable and likely to benefit consumers.[68]

In conclusion, the EC's decision does not find that Shell was a failing firm! (Unlike in *Aegean/Olympic II*,[69] which was based on the fact that "due to the on-going Greek crisis and given Olympic's own very difficult financial situation, Olympic would be forced to leave the market soon in any event".[70]) Nor does it conclude that the continuance of the Harburg division would have undermined Shell's overall viability. Rather, the decision emphasises that it would have been Shell's choice to close the refinery and that this would have resulted in greater damage to competition compared to an acquisition by Nynas.

It will be interesting to see if more concentrations are approved on the basis of this sort of mixed "*failing division and acquirer efficiency*" theory. One imagines such cases will remain very fact-specific and dependent on "good" internal documents supporting the case. Nevertheless, it is a interesting and welcome development.

Hutchison/Telefónica Ireland

The EC's conditional clearance in May 2014 of Hutchison 3G's ("H3G") acquisition of Telefónica Ireland's O2 Ireland business ("O2")[71] is one of two noteworthy Phase II decisions concerning telecommunications markets this year.

The EC's concerns related to the Irish retail market for mobile telecommunications and the wholesale market for network access and call origination.[72] H3G, through its brand "3", had been present on the Irish retail market since 2005. With a market share of some 10% (both by subscribers and revenues), it was the smallest of four mobile network operators ("MNOs") in Ireland, the others being Vodafone, with a market share of some 40%, O2 with around 30% and Eircom with around 20%.[73] Thus, the concentration would have reduced the number of players from four to three and resulted in two players with around 40% market share and one with the remaining 20%. The EC's summary decision states that the EC did not conclude that the concentration would give rise to single-firm dominance, but that a significant impediment to effective competition was still likely.[74]

> ... the chosen model would incentivise the new entrants to fill their agreed capacity ...

The EC found that high entry barriers existed and that it was unlikely that new entry, by either a new MNO or a Mobile Virtual Network Operator[75] ("MVNO") would occur within a relevant timeframe.[76]

The EC was particularly concerned that 3 would be eliminated, insofar as it had been an import-

64 Para. 350.
65 Paras 351 and 352.
66 See, in particular, para. 422.
67 Para. 443 *et seq.*
68 Para. 474.
69 Case COMP/M.6796 *Aegean/Olympic II*.
70 IP/13/927, 9 October 2013.
71 Summary of Commission Decision of 28 May 2014 (Case COMP/M.6992 *Hutchison 3G UK / Telefónica Ireland*), OJ C 264/6, 13 August 2014, IP/14/607, 28 May 2014 and MEMO/14/387, 28 May 2014. The commitments are available on the EC's website.
72 Para. 13.
73 Para. 18.
74 Para. 13.
75 A form of wholesale lease arrangement from a network owner. See further below.
76 Paras 20 and 21.

ant competitive force in the market.[77] Being the most recent entrant in Ireland, it had the highest incentives to grow its subscriber base by offering attractive prices and innovative services. The EC considered that it was likely that 3 would have continued to exert competitive constraints absent the merger.[78] In contrast, post-merger a combination of O2/3 would have lower incentives to compete aggressively. The EC also considered that Vodafone would not have had incentives to compete aggressively post-merger. Rather, it would have been likely to increase its prices.[79]

In its decision, the EC considered whether the concentration would have led to anti-competitive coordinated effects on retail markets. While some factors pointed in this direction (3 was a "maverick"; post-merger O2/3 and Vodafone would have been of a similar size and would have had similar incentives; and pricing was transparent), others suggested that such effects were unlikely, particularly the presence of Eircom, which would have different incentives and cost structures.[80]

The EC was also concerned that the planned transaction would damage Eircom's existing network sharing agreement with O2. This agreement was deemed crucial for Eircom's network roll-out plans. According to the summary decision, the merger would give the merged entity the ability and incentive to terminate or frustrate the network sharing agreement and thereby undermine Eircom.[81]

Finally, the EC considered that the transaction would not bring any material benefits to consumers in terms of network coverage, speed or quality. O2 on its own was likely to achieve the same coverage as the merged entity and 3 was likely to offer the same speeds and quality as the merged entity. While the merger would bring limited efficiencies in relation to broadband access in rural parts of Ireland, these where not sufficient to counter the harm that consumers would suffer from the elimination of competition.[82]

To address the EC's concerns that the proposed acquisition would have significantly reduced competition, the parties proposed a remedies package with two elements, (i) an MVNO entry element and (ii) an element relating to Eircom.[83]

First, H3G committed to sell up to 30% of the merged entity's network capacity to two MVNOs in return for fixed payments.[84] The MVNOs will obtain a dedicated "pipe" from the merged entity's network for voice and data traffic. This "fixed payments model" is different from the "pay-as you-go model" currently used in Europe and the EC considered that the chosen model would incentivise the new entrants to fill their agreed capacity by offering attractive prices and innovative services.[85] The two MVNOs will commit to purchase the capacity for a minimum of five years, with the possibility of extending that period by another five years.

One of the agreements with the MVNOs requires that the EC pre-approve the MVNO ("Upfront MVNO" requirement) before the concentration's implementation. The EC must also approve the second MVNO, but not before consummation of the concentration; if H3G does not conclude an agreement with a second MVNO within a specified time period, a divestiture trustee will sell the capacity on H3G's behalf.

One of the new MVNOs (not both) will also have the right to purchase spectrum from H3G and thereby become an MNO. This option will be available for ten years, starting from January 2016.

In sum therefore, the EC's decision authorising a reduction in the number of MNOs in Ireland from four to three will replace an MNO with two MVNOs and potentially allow one of these MVNOs to become an MNO.

Secondly, to address concerns over the merged entity's potential to undermine the current O2/Eircom agreement, H3G committed to offer Eircom improved terms in a revised network sharing agreement. Following the EC's decision, Eircom and HG3 signed a revised agreement, which will run to 2030.[86]

77 Para. 26.
78 Para. 29.
79 Para. 32.
80 Paras 42 and 43.
81 Para. 36.
82 Paras 46-49.

83 A notable feature of this review was the EC's willingness to stop the clock in Phase II effectively to allow the parties to refine their commitments. A similar approach was seen in *Liberty Global/Ziggo*, discussed below.
84 Para. 52.
85 See MEMO/14/387 at page 4.
86 See http://www.siliconrepublic.com/comms/item/38135-three-and-eircom-reach-4g/

Telefónica Deutschland/E-Plus

In July 2014, the EC conditionally approved Telefónica Deutschland's acquisition of Dutch Telecom operator KPN's German mobile telecommunications business, E-Plus.[87] Again, this followed a Phase II investigation and, as in the Irish case, the EC examined the concentration's effects on the retail market for mobile telecommunications services and the wholesale market for network access and call origination.

The planned concentration would produce a market structure with three MNOs of similar size, Deutsche Telekom, Vodafone and the merger entity, (between 25-30% market share each) on the German retail mobile telecommunications market. The merger would result in a reduction from four to three suppliers of wholesale access. Even though the merged entity would not have become dominant, the EC concluded there was a risk of a significant impediment to effective competition.

First, the transaction would have removed two close competitors and important competitive forces. E-Plus, which was the smallest of the four MNOs had been a "challenger", had invested in improving the quality of its 3G network and had recently launched a 4G network. To a lesser extent Telefónica had also launched innovative and aggressive offers.

Secondly, the EC found that the competitive pressure exerted by MVNOs, service providers and branded resellers would decrease.

Thirdly, the EC stated that the reduction in the number of suppliers of wholesale access would increase the already high level of market concentration. The transaction would eliminate two important competitors and negatively impact the incentives of the merged entity and other operators to grant access to their mobile networks to MVNOs and service providers on commercially attractive conditions. Additionally, if the merged entity raised its prices, it would be very difficult for MVNOs and service providers to switch their customers to another host MNO.

Fourthly, as in the Irish case, the EC considered that the merger would not generate any material benefits to consumers in terms of coverage, speed or quality.

To remedy these concerns, the parties offered remedies comprising three principal elements: capacity-based wholesale access commitments; extension of existing wholesale agreements with partners; and an offer to divest spectrum to a new MNO.

The capacity based wholesale access agreements are somewhat similar to the Irish case.[88] Telefónica must enter into such an agreement with up to three Upfront Mobile Bitstream Access MVNOs in Germany before closing its acquisition. The MVNO(s) can together purchase up to 30% of the merged entity's total capacity. Again this is in exchange for a fixed fee, rather than on a "pay-as-you-go" basis. The capacity agreements are for a minimum of five years extendable by another five years.

Telefónica committed to extend its existing wholesale agreements with its partners and those of E-Plus, such as MVNOs and service providers and to offer wholesale 4G services to interested players in the future. Telefónica is also to increase its wholesale partners' ability to switch their customers from one MNO to another.

The offer to divest spectrum is part of a number of factors which the EC believes may encourage a new MNO to enter the German market. Alongside the spectrum offer, Telefónica committed to make "a national roaming offer" and a "passive radio network sharing offer", divest sites and sell shops. The EC also noted that an upcoming frequency auction would increase the likelihood of MNO entry.

Microsoft/Nokia

In December 2013, the EC unconditionally authorised Microsoft's acquisition of Nokia's devices and services business, which includes Nokia's mobile phone and smart mobile devices unit.[89]

Like Google's acquisition of Motorola Mobility Inc,[90] the decision raised interesting issues regarding

87 Case COMP/M.7018 *Telefónica Deutschland/E-Plus*, IP/14/771, 2 July 2014 and, in particular, MEMO/14/460, 2 July 2014.

88 For differences between the two remedies, due to the different market conditions in Germany and Ireland, see MEMO/14/460. *Cf.* also Case COMP/M.6497 *Hutchinson 3G Austria/Orange Austria*.

89 Case COMP/M.7047 *Microsoft/Nokia*.

90 Case COMP/M.6381 *Google/Motorola Mobility Inc*.

post-merger incentives to license standard essential patents ("SEPs"). However, unlike *Google/Motorola Mobility*, Nokia retained its patent portfolio and granted Microsoft a ten-year (extendable) non-exclusive licence to its approximately 30,000 SEPs, non-SEPs and pending patent applications.[91]

Thus, the EC examined the effect of the transaction on the seller's potential conduct and incentives post-transaction and the extent to which the EUMR applies to this.[92]

A number of third parties argued that the sale would strengthen Nokia's dominant position on the patent licensing market by eliminating existing restraints on Nokia resulting from it being a mobile phone vendor.[93]

It was claimed that Nokia no longer would be prevented from exercising its market power as it had been to date. Notably, it would no longer need as many cross-licences from other SEP owners; it would no longer fear retaliation ("mutually assured destruction") from other SEP owners; and it would no longer have an incentive to keep royalties lower in order to encourage demand on the downstream markets for mobile devices.[94] It was also alleged that Nokia would increase royalties to other mobile device manufacturers apart from Microsoft and increase its patent enforcement efforts against these manufacturers.[95]

...an assessment of Nokia's potential conduct post-transaction was not within the scope of the EUMR

The EC noted that none of these concerns were either horizontal or vertical in nature and that they also did not arise from parties to the transaction being active on neighbouring markets.[96] Rather the concerns arose purely because Nokia, the seller, no longer would be active on certain markets.[97]

The EC found that an assessment of Nokia's potential conduct post-transaction was not within the scope of the EUMR.[98] It relied on the wording of Article 2(1) EUMR, which refers to the "market positions of the undertakings concerned" and Article 2(3) EUMR, which requires a causal link between the merger and any alleged significant impediment to effective competition.[99]

The EC also referred to the concept of undertakings concerned in the Jurisdictional Notice[100] and the Implementing Regulation[101], both of which limit this concept to the parties and do not extend it to others, such as the seller.[102] The EC also noted by analogy that under Article 2(4) EUMR, coordination between parents in the case of a joint venture is assessed under Article 101 TFEU[103] and not under the EUMR.[104] Finally, the EC reasoned that only an acquirer or the target can offer commitments.[105]

Notwithstanding this conclusion, the EC analysed Nokia's likely post-transaction behaviour. It concluded that, even if an assessment of Nokia's post-transaction behaviour would have fallen within the scope of the EUMR, it would still not have led the EC to declare Microsoft's acquisition incompatible with the internal market.[106] Notably,

91 Nokia's retention of its patent portfolio was similar to IBM's retention of its patents when it sold its PC business to Lenovo and Siemens and Ericsson's sales of their mobile device businesses respectively to BenQ and Sony. See para. 215.
92 The bulk of the EC's decision assesses vertical issues arising from Microsoft's ownership of a mobile OS, apps and patents covering communications protocols. The EC found that there was no risk of input or competitor foreclosure in any market segment, as Microsoft lacked both the ability and incentive to foreclose.
93 Para. 194 et seq.
94 Paras 195-198.
95 Paras 200-208.
96 Para. 222.
97 Para. 223.
98 Para. 224.
99 Para. 225.
100 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ C 95, pp. 1–48, 16 April 2008.
101 Commission Regulation (EC) No 802/2004 of 21 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, OJ L 133, pp.1–8, 30 April 2004.
102 Para. 226.
103 Treaty on the Functioning of the European Union.
104 Para. 227.
105 Para. 228.
106 Paras 238-263.

the EC found that Nokia's ability to enforce its SEPs was not merger-specific and that any potential change in its incentives would be capable only of having limited effects.

> Notwithstanding this conclusion, the EC analysed Nokia's likely post-transaction behaviour

The EC also emphasised that Nokia's incentives would be influenced by the EC's ability under Articles 101 and 102 TFEU to enforce respect for commitments to license SEPs on fair reasonable and non-discriminatory (“FRAND”) terms.

Finally, the extent to which merger control has become globalised is highlighted by the fact that, while Microsoft's acquisition was also unconditionally cleared in several jurisdictions outside of Europe, China's MOFCOM imposed extensive behavioural remedies on both Microsoft and Nokia in respect of their licensing of SEPs and on Microsoft in respect of its licensing of non-SEPs.[107]

107 See Microsoft Commitments to MOFCOM Related to the Acquisition of Nokias's Devices and Services Business, available at http://www.microsoft.com/en-us/news/download/docs/0414chinaannouncement.pdf.

Box 5 *- Referrals*

- 3 cases where EC refused downwards referral
  - *Holcim/Cemex West*
  - *Telefónica Deutschland/E-Plus*
  - *Liberty Global/Ziggo*
- All 3 were Phase II investigations
- Parallel review by EC and Czech Authority in *Cemex/Holcim Assets*

C. Referral issues

The first 10 months of 2014 have seen no fewer than three examples of the EC deciding not to cede jurisdiction to Member State authorities under Article 9 EUMR. This is the first time that there has been more than one such EC decision in a calendar year.

The last year has also seen another example of parallel review of transactions at Member State and EU level.

Holcim/Cemex West and Cemex/Holcim Assets

In August 2013, Holcim and Cemex announced a series of transactions or asset-swaps.[108] These included Holcim acquiring assets from Cemex in Western Germany (Case M.7009 *Holcim/Cemex West*)[109]; Holcim and Cemex combining their Spanish activities with Holcim taking a minority shareholding in Cemex Spain (Case M.7054 *Cemex/Holcim Assets*)[110] and Cemex acquiring Holcim Cesko in the Czech Republic. The different transactions were interlinked in so far as the approval of the relevant competition authority for each transaction was a pre-condition to the entire agreement between Holcim and Cemex.

Holcim's acquisition of assets from Cemex in Western Germany met the EUMR's turnover thresholds. However, in September 2013, Germany requested, under Article 9 EUMR, that the EC refer review of the entire case to the Bundeskartellamt (“BKA”). In January 2014, the EC refused on the grounds that the geographic scope of the affected markets was wider than national since, in addition to Germany, it included part of Belgium and Northeast France.[111]

In June 2014, after an in-depth investigation, the EC unconditionally approved the concentration.[112] The EC concluded that the parties did not impose significant competitive constraints on each other on the markets for grey cement and that the concentration was unlikely to make coordination more likely or more stable.

108 The EC had a further opportunity to examine the cement industry when it reviewed the planned merger between *Holcim and Lafarge* (not yet published) Case M.7252.
109 Case COMP/M.7009 *Holcim/Cemex West.*
110 Case COMP/M.7054 *Cemex/Holcim Assets.*
111 Case COMP/M.7009 *Holcim/Cemex West*. See IP/14/2, 6 January 2014.
112 See IP/14/639, 5 June 2014.

The concentration comprising Cemex's acquisition of Holcim's assets in Spain and the Czech Republic did not meet the EUMR's turnover thresholds. Thus, the transactions were notified respectively to the Spanish and Czech Competition Authorities.

However, following notification in Spain, the Spanish Competition Authority requested, under Article 22 EUMR, that the EC examine the concentration. In October 2013, the EC agreed to take jurisdiction, since it was the better placed authority to address the transaction's potential cross-border effects.[113]

The Czech Republic could have agreed to join Spain's referral request,[114] but it did not so. Instead, the Czech Authority examined the Czech aspects of the transaction at the same time as the EC examined the other parts. As noted above, if the EC's proposed reform of Article 22 comes into force, parallel review of this kind will no longer be possible.

In September 2014, following an in-depth investigation, the EC unconditionally approved the acquisition of the Spanish assets.[115] The EC found that the parties would continue to face effective competition in Eastern Spain in the markets for grey cement and that the transaction would not increase the scope for coordinated effects on the market for grey cement in central Spain. Meanwhile, the Czech Competition Authority, following its own second phase investigation, unconditionally approved Cemex's acquisition of Holcim Cesko in March 2014.[116]

Telefónica Deutschland / E-Plus

Telefónica Deutschland's acquisition of E-Plus has been described above.[117] In November 2013, before the EC opened its Phase II investigation, the BKA requested that the EC transfer review of the case to Germany under Article 9 EUMR. According to the BKA, the proposed transaction significantly threatened competition in German markets and the BKA was the most appropriate authority to examine it.

In January 2014, the EC decided not to refer the case to Germany.[118] The relevant press release noted the need to ensure consistency in the EC in the application of merger control rules in the telecommunication sector and the EC's experience in this area. Thus, the EC considered that it was the better placed authority.

Liberty Global / Ziggo

In March 2014, Liberty Global notified its plans to acquire Ziggo, a Dutch cable TV company, to the EC.[119] The parties' turnover met the thresholds under the EUMR. However, 11 days later, the ACM, the Dutch Competition Authority, submitted a request for referral under Article 9 EUMR.

The EC decided not to refer the transaction for review in the Netherlands.[120] The EC considered that it was the better placed authority and noted that it had "extensive experience in the application of its merger control rules across the converging media and telecommunication sectors, including in national markets". It noted that Liberty Global, with cable networks in 12 countries, was an international operator and not confined to the Netherlands. It also considered that the concentration could have effects outside the Netherlands, in the Flemish-speaking part of Belgium.

In October 2014, following an in-depth review, the EC approved Liberty Global's acquisition subject to commitments. The commitments require Liberty Global to divest a premium Pay TV film channel (with Liberty Global also committing to carry the relevant channel on its network for three years) and a commitment to terminate clauses in agreements with TV broadcasters that restrict the broadcasters from offering their channels and content via the Internet (over-the-top or "OTT" services).

113 Case COMP/M.7054 Cemex/Holcim Assets. See IP/13/977, 18 October 2013
114 Article 22(2).
115 See IP/14/985, 9 September 2014.
116 See MLex report of 12 March 2014.
117 Case COMP/M.7018 *Telefónica Deutschland/E-Plus.*
118 See IP/14/95, 30 January 2014.
119 Case COMP/M.7000 *Liberty Global/Ziggo.*
120 See IP/14/726, 25 June 2014.

Box 6 - *European Court cases*

- GC rejection of Cisco challenge to *Microsoft/Skype*
- ECJ rejection of appeal against Electrabel's €20 million fine
- GC rejection of Odile Jacob's appeal against second EC decision approving Wendel as suitable purchaser of divested business in the *Lagardère/Natexis/Vivendi Universal Publishing* transaction.

D. European court cases

Cisco v Commission

In October 2011, the EC unconditionally cleared Microsoft's acquisition of Skype.[121] Cisco had participated as a third-party in the EC's administrative procedure.

Arguing that the EC should not have cleared the acquisition unconditionally in Phase I, Cisco appealed the EC's decision to the GC. Cisco claimed that, in reviewing whether the EC should have opened a Phase II investigation, the GC should not limit itself to a "manifest error" assessment, since the EC had no discretion on the issue. It also maintained that the EC should open a Phase II investigation unless it could conclude, beyond reasonable doubt, that there was no competition concern.[122]

The GC disagreed in part and agreed in part and rejected Cisco's claim.[123]

First, the Court noted that the standard of proof was a question of probabilities, not beyond reasonable doubt.

Secondly, the Court noted that it was true that where the EC has serious doubts as to the compatibility with the internal market of a concentration it is obliged to open Phase II proceedings.

Thirdly, the Court recalled that the EC has to carry out a complex economic assessment here and in doing so, the EC enjoys a margin of discretion in a case like this, in other words, involving a prospective assessment.[124] However, the Court reiterated that the EC's decision is closely reviewable by the Court applying the *Tetra Laval*[125] test.[126] The Court then proceeded to carry out that detailed review and upheld the EC's decision.

Cisco argued that the EC should have further explored the anti-competitive effects of the merger on the consumer communications market for video calls made on PCs running Windows Operating System. Cisco claimed that the EC should have taken into account network effects, lack of competitive pressure and the combination of high combined market shares (between 80-90%)[127] and the high degree of concentration (7340 according to the HHI).[128]

The GC considered that market shares and HHIs are only indicia of competition concerns and that both assume that the market already has been defined;[129] that market shares in this sector fluctuate greatly[130] since it is characterised by short innovation cycles in which large market shares may prove "ephemeral";[131] that the merged entity had a weak presence in non-PC platforms such as tablets and smartphones;[132] and that the potential for the merged entity to set prices was limited, as customers expect video call services to be free and can easily switch to providers of free services.[133]

As for network effects, the GC noted that the existence of such effects would not necessarily mean that there would be a competitive advantage for the merged entity.[134] According to the GC, Cisco had failed to substantiate its claim that network effects were a barrier to entry or to switching.[135]

121 Case COMP/M.6281 *Microsoft/ Skype*.
122 Case T-79/12 *Cisco v Commission*, judgment of 11 December 2013, para. 43.
123 Para. 47.
124 Para. 49.
125 Case C-12/03P *Tetra Laval* [2005] ECRI-987, para. 39.
126 Paras 49-50 and 63.
127 Para. 51.
128 Para. 56.
129 Para. 65.
130 Para. 68.
131 Para. 69.
132 Para. 71.
133 Para. 73.
134 Para. 76.
135 Para. 81.

Lastly, the GC rejected Cisco's claims that the transaction would cause future harm to competition, finding that Cisco had not demonstrated how this would occur.[136]

The GC also examined whether the EC had correctly assessed the concentration's alleged conglomerate effects on the enterprise communications market. Cisco argued that the EC had breached its duty to state reasons by not addressing concerns raised by Cisco and others during the administrative procedure and that the EC had wrongly disregarded those concerns. In particular, Cisco had alleged that Microsoft had the ability and incentive to create preferential links between Microsoft's Lync products and Skype's large customer base and/or degrade third parties' interoperability with these products.

The GC held that the EC is not required to address all arguments put forward during the administrative procedure.[137] A succinct statement of reasons responding to Cisco's arguments "in summary fashion" was sufficient in the circumstances.[138]

Furthermore, the EC had not committed a manifest error of assessment in finding that the conglomerate effects would not give rise to a significant impediment of effective competition.[139] In particular, the GC ruled that any foreclosure effects were too uncertain to be a direct and immediate result of the concentration[140] and that there were no tangible incentives for Microsoft to implement a foreclosure strategy.[141]

Electrabel v Commission

In July 2014, the ECJ upheld a GC judgment in which that court had rejected an appeal against an EC decision imposing a €20 million fine on Electrabel.[142] In December 2003, Electrabel had increased its existing shareholding in French electricity producer Compagnie nationale du Rhône ("CNR") to 49.95% of CNR's shares and 47.92% of its voting rights, without first having notified its acquisition of shares to the EC.[143]

Electrabel argued that the GC was wrong to uphold the EC taking into account the duration of its infringement (namely the period between when it first acquired control and the date on which it received clearance from the EC).[144] According to Electrabel, duration was not one of the factors to be taken into account when setting the amount of a fine under Article 14(3) of the former EU Merger Regulation[145] and duration could only influence an infringement's gravity where the infringement had affected competition on the relevant market, which was not the case here.[146]

The ECJ declared this plea inadmissible since, before the GC, Electrabel had only contested the duration of the infringement in the context of a plea regarding the fine's proportionality and deterrent effect.[147]

Odile Jacob v Commission

This case arose from the EC's 2008 *Lagardère/Natexis/Vivendi Universal Publishing* decision in which the EC required divestment of a business to a suitable buyer.[148] Odile Jacob, which had been interested in purchasing the divested business, sought to annul both the EC's decision approving the concentration and its decision approving Wendel as a suitable purchaser.

In 2010, the GC rejected the action to annul the EC's decision authorising the concentration, but it annulled the decision approving Wendel as a suitable buyer on the basis that the appointed trustee lacked sufficient independence from Wendel.[149] The ECJ rejected appeals against both GC judgments.[150] The EC re-approved Wendel as a suitable purchaser and Odile Jacob sought to annul this decision.

136 Paras 85-94.
137 Para. 110.
138 Paras 111 and 113.
139 Paras 119-133.
140 Para. 122.
141 Paras 125 and 133.
142 Case C-84/13 P *Electrabel v Commission*, judgment of 3 July 2014.
143 Electrabel subsequently notified the concentration and it was unconditionally approved. See Case COMP/M.4994 *Electrabel/ Compagnie nationale du Rhône.*
144 Para. 27.
145 Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, pp. 1–12, 30 December 1989.
146 Para. 29.
147 Para. 47. Similarly, the ECJ declared that a plea alleging that the GC had wrongly applied Article 14(3) of the former EU Merger Regulation retroactively was inadmissible, see paras 30-31 and 55.
148 Case COMP/M.2978 *Lagardère/Natexis/Vivendi Universal Publishing.*
149 Case T-279/04 *Éditions Odile Jacob v Commission*, [2010] ECR II-185 and Case T-452/04, *Éditions Odile Jacob v Commission*, [2010] ECR II-4713.
150 Case C-551/10 *Éditions Odile Jacob v Commission*, judgment of 6 November 2012 and Case C-553/10, *Éditions Odile Jacob v Commission*, judgment of 6 November 2012.

Odile Jacob raised a number of arguments alleging that the EC's second approval of Wendel was unlawful, but the GC rejected all of these and upheld the EC's decision.[151] Notably, Odile Jacob argued that the EC had violated Article 266 of the TFEU by not restarting the approval process from the beginning instead of merely restarting it from when the trustee was appointed. The GC held that only that element of the previously annulled decision had to be rectified to give full effect to the GC's earlier judgment.[152] Similarly, the GC rejected the contention that the EC should have revoked its decision authorising the concentration: The GC's annulment of the first decision approving Wendel as a buyer did not affect the legality of the decision authorising the concentration.[153]

The GC also rejected arguments based on a wrongful violation of the principle of non-retroactivity, incorrect legal basis, manifest error of assessment and alleged abuse of powers.

E. Other developments

Marine Harvest/Morpol

In December 2012, Norwegian salmon farmer and processor Marine Harvest acquired a 48.5% stake in its rival Morpol. The acquisition was implemented eight months before formal notification to the EC and nine months before the EC authorised it.[154] In July 2014, the EC imposed a fine of €20 million on Marine Harvest for having implemented a concentration without respecting the EUMR's standstill obligation and therefore in breach of EUMR Articles 4(1) and 7(1).[155]

151 Case T-471/11 *Éditions Odile Jacob SAS v Commission*, judgment of 5 September 2014.
152 Paras 65-66.
153 Para. 69.
154 Case COMP/M.6850 *Marine Harvest/Morpol*.
155 Case COMP/M.7184 *Marine Harvest/Morpol*, IP/14/862, 23 July 2014.

The EC found that the acquisition of a 48.5% shareholding gave Marine Harvest a stable majority at Morpol's shareholders' meetings.[156] This conclusion was based on the fact that the remaining shares were widely dispersed and on the previous attendance record at the meetings. The EC thus concluded that the transaction gave Marine Harvest de facto sole control over Morpol.

The EC held that Marine Harvest should have been aware of its obligation to notify the acquisition and to obtain clearance before closing the transaction.[157] The EC considered the infringement to be "particularly serious", because the transaction as it was originally implemented could not have been authorised under the EUMR and the EC's subsequent clearance was therefore conditional upon the companies offering remedies. [158]

The EC took account of mitigating circumstances.[159] In particular, Marine Harvest had not exercised its voting rights in Morpol. The EC also attached "particular importance" to Marine Harvest having promptly informed the EC of its acquisition of control via pre-notification contacts.

Marine Harvest has appealed the EC's decision.

Groupe Lagardère/SNCF Participations

In July 2014, the EC adopted a rare decision under Article 6(1)(a) of the EUMR (the first such decision under Council Regulation 139/2004) ruling that a planned joint venture between SNCF and Lagardère was not full-function and therefore not within the EUMR's scope.[160]

156 Paras 57-64.
157 Paras 149.
158 Paras 150-158.
159 Paras 196-200.
160 Case COMP/M.7253 *Groupe Lagardère/SNCF Participations*.

Box 7 - *Other notable developments*

- *€20 million fine for Marine Harvest for failing to obtain EC approval before acquiring control*
- *Article 6(1)(a) decision in Groupe Lagardère/SNCF Participations*
- *Investigation into whether Ahlstrom/Munksjö provided incorrect information to EC (but EC closed investigation)*
- *Zimmer/Biomet first notification declared incomplete*
- *Two Article 7(3) decisions permitting conditional derogation from suspension obligation*

The planned joint venture would operate shops selling products, such as tobacco, magazines, games, stamps, snacks, drinks, souvenirs etc. in French train stations. The EC held that it would not be sufficiently independent from its parents to constitute a full-function joint venture. The EC's press release noted that the joint venture would be dependent on its parents for financing, staff and purchase and sale of its products.

Ahlstrom/Munksjö

In February 2014, the EC announced that it had sent a SO to Ahlstrom Corporation and Munksjö Oyj indicating that the companies may have provided misleading information to the EC during the procedure leading to the EC's decision[161] in May 2013 authorising the merger of the parties' label and processing paper business.[162] However, in October 2014, the EC announced that it had closed its investigation.[163]

Zimmer/Biomet

The EC has recently opened a Phase II investigation into Zimmer's planned acquisition of Biomet.[164] In June 2014, the EC adopted a decision under EUMR Article 5(2) declaring that the parties' first notification was incomplete. This was the first such decision under the EUMR since early 2012.

Article 7(3) EUMR Decisions

In the last 12 months, the EC has issued two decisions under Article 7(3) EUMR authorising conditional derogations from Article 7(1)'s suspension obligation. In both cases, the companies that were being acquired were experiencing financial difficulties. In ECOM Agroindustrial Corporation/ Armajaro Trading, the conditional derogation enabled the acquirer to inject capital into the target, appoint representatives to its board and introduce cost-cutting measures.[165] In Gerdau Europe/Ascometal, the conditional derogation allowed Gerdau to make an unconditional offer for the target company, which was subject to a French *redressement judiciaire* procedure.[166] Without the derogation, Gerdau would have been disadvantaged in the *redressement judiciaire* procedure and there was a possibility that the target would become subject to a judicial liquidation (*liquidation judiciaire*).

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161 Case COMP/M.6576 *Ahlstrom/Munksjö*.

162 Case COMP/M.7191 *Ahlstrom/Munksjö*. See IP/14/189, 25 February 2014.

163 IP/14/1222, 29 October 2014.

164 Case COMP/M.7265 *Zimmer/Biomet*.

165 Case COMP/M.7120 ECOM *Agroindustrial Corporation/Armajaro Trading*, Decision under Article 7(3) EUMR, 13 May 2014.

166 Case COMP/M.7273 *Gerdau Europe/Ascometal*, Decision under Article 7(3) EUMR, 19 December 2013.