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EU Merger Control Alert

EU Merger Control 2017: Competition in Innovation; EC Prohibiting Deals; Fines for Procedural Infringements; and EU Courts Overturning EC Decisions

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Introduction¹

2017 saw some highly significant investigations and court judgments in European Union merger control. Notably:

- After detailed investigations and subject to extensive divestments, the European Commission (“EC”) cleared two transactions in the agricultural chemicals area. The EC’s analysis of competition in innovation in the *Dow/Dupont* merger broke new ground.
- Three notified transactions failed because of substantive concerns: the *Deutsche Börse/London Stock Exchange Group* and *HeidelbergCement/Schwenk/Cemex Croatia* deals were prohibited and *Knorr-Bremse/Haldex* was abandoned during a Phase II review.
- Procedural infringements attracted significant attention: the EC imposed a €110 million fine on Facebook for providing misleading information during a merger investigation. It also launched four other investigations into alleged procedural infringements.
- The EU courts issued four important judgments: one annulling a 2013 EC prohibition decision; one annulling a 2014 clearance; one upholding a fine for gun-jumping; and one on the interpretation of the EU Merger Regulation.

¹ A more detailed review of EU Merger Control in 2017 by the same authors will be published in the next journal of *Competition Law & Policy Debate*.

None of these developments raises new themes in EU merger control. However, the *Dow/DuPont* decision probably is the best and most controversial example of the EC analysing threats to innovation in the context of merger control, although this has been a prominent concern in EC investigations in the last years.

The EC also continues to impose up-front buyer requirements frequently. That is, the EC withholds clearance until it has approved an acceptable buyer for the divested assets.

Otherwise, the *UPS v Commission* and *KPN v Commission* judgments are a salutary reminder that no decision is ever final until the EU courts have ruled on any appeals.

Numerically, more deals (380 compared to 362 in 2016) were notified to the EC in 2017 than in any year since 2007. Further details are [available here](#).

Phase II Decisions

Following in-depth merger investigations, the EC adopted four Phase II decisions in 2017. Two of these were conditional clearances in the agricultural chemicals sector, while the other two were prohibition decisions in other sectors.

- Agricultural chemicals sector investigations
 - * *Dow/DuPont*
 - Conditional clearance subject to divestment, including sale of R&D capability, to an up-front buyer
 - Focus on threat to innovation generally in the industry, not only in specific product markets
 - * *ChemChina/Syngenta*
 - Conditional clearance subject to divestments
 - Multiple overlaps
 - * *Bayer/Monsanto* review ongoing

The EC approved the *Dow/DuPont* merger subject to divestment of overlapping businesses and almost all of DuPont's global R&D capability to an up-front buyer. The decision contains a detailed analysis of potential threats to innovation. It has been criticised for focussing on reduced innovation *at the overall industry level*, rather than on particular relevant antitrust markets. Nonetheless, the EC has insisted that the decision is consistent with precedent and in line with EU law. Only time will tell if this decision will usher in a focus on threats to innovation that go beyond identified product markets.

The EC's concern about innovation competition in the agricultural chemicals sector generally – rather than on specific markets – is novel. It examined how new active ingredients and formulated products are developed, without examining an effect on any specific downstream product market. The EC decision highlights the importance of rivalry in the overall industry, the existence of strong intellectual property rights and other barriers to entry, previous industry consolidation and the fact that few competitors were active globally throughout all the various stages of R&D. These criteria are sufficiently broad to apply to many transactions in concentrated industries. Moreover, while the EC assessed whether the merger would lead to efficiencies that might offset the reduction in innovation competition, it rejected this possibility on the facts. This was not surprising since it is always extremely difficult to meet the EC's standard for demonstrating a likelihood of sufficient transaction-specific efficiencies to overcome competition concerns.

In the second Phase II decision in the agricultural chemicals sector, *ChemChina/Syngenta*, the EC analysed over 450 markets where the parties' combined market share exceeded 20%. The EC narrowed these down to 115 markets where the merger would have raised significant competition concerns. It cleared the transaction subject to divestments in those markets. In its substantive assessment, the EC analysed potential Syngenta overlaps/relationships with other Chinese State-Owned Enterprises and not just ChemChina.

- 2 Phase II prohibition decisions
 - * *Deutsche Börse/London Stock Exchange Group*
 - EC found that proposed remedy did not address all its concerns
 - * *HeidelbergCement/Schwenk/Cemex Croatia*
 - EC found remedy was not sufficient
- Abandonment of 2 deals during Phase II investigations
 - * *Knorr-Bremse/Haldex* and *Socar/Desfa*, which was notified in 2014
- 6 ongoing Phase II investigations
 - * *ArcelorMittal/Ilva*; *Bayer/Monsanto*; *Celanese/Blackstone/JV*; *Luxottica/Essilor*; *Qualcomm/NXP*; and *Tronox/Cristal*
 - * 3 of these raise potential concerns arising from the combination of non-overlapping or vertically related product portfolios (“conglomerate effects”)

The EC prohibited the merger between *Deutsche Börse* and the *London Stock Exchange Group*. The EC analysed some of the key characteristics of financial infrastructure markets, namely strong network effects (people trade on already liquid trading venues where many other traders are present) and economies of scale and scope. In the EC's opinion, these characteristics resulted in entrenched market structures, incumbency advantage and high barriers to entry. The EC stated that it would have cleared the merger if the parties had agreed

to two divestments (a French clearing house and a fixed income trading platform), but the London Stock Exchange Group could not commit to divesting the relevant trading platform.

The EC also prohibited the acquisition of *Cemex Croatia* by a joint venture controlled by HeidelbergCement and Schwenk. The EC found that the acquisition would have increased concentration and prices on the Croatian market for grey cement and that the parties' proposed remedy would not adequately address this concern. The decision is under appeal.

Prominent Phase I Decisions

Smiths Group/Morpho Detection combined two producers of detection systems for explosives. The EC's clearance, which was conditional on a divestment, raised an unusual procedural issue when one of the limited number of competitors entered bankruptcy proceedings in the US. The parties delayed their EC notification to align with the US court's review of these proceedings and with the Department of Justice's review of the transaction.

Broadcom/Brocade combined suppliers of networking products for communications and datacentre infrastructure. The remedy addressed the EC's fears that the merged entity would degrade interoperability between the merged entity and rivals' products. This investigation focused exclusively on vertical and conglomerate theories of harm.

At the end of 2017, the EC cleared Lufthansa's acquisition of certain Air Berlin assets subject to Lufthansa divesting slots at Düsseldorf airport. The clearance decision did not include Air Berlin's NIKI carrier. Following the EC's preliminary conclusion that Lufthansa's proposed acquisition of NIKI would significantly impede effective competition, Lufthansa decided not to acquire NIKI. NIKI subsequently declared bankruptcy. While Lufthansa had offered remedies to try to resolve the EC's concerns related to the NIKI acquisition, the EC indicated that these were not sufficient.

Procedural Decisions

- Procedural investigations
 - * *Facebook* fined €110 million for providing incomplete/misleading information in *Facebook/WhatsApp*
 - * 4 other investigations into alleged provision of incomplete/misleading information and alleged gun-jumping

2017 saw renewed focus on potential procedural infringements.

The EC fined Facebook €110 million for providing misleading or incomplete information during the EC's 2014 review of the *Facebook/WhatsApp* transaction. During the EC's review of the transaction, Facebook had informed the EC that it would be unable to establish reliable automated matching between Facebook users' accounts and WhatsApp users' accounts. However, following a terms update in which WhatsApp announced the possibility of linking WhatsApp users' phone numbers with Facebook user identities, the EC found that the technical possibility of matching Facebook and WhatsApp user identities already existed in 2014. However, this change in the factual background did not affect the substance of the EC's 2014 clearance decision. The €110 million fine takes account of Facebook's extensive cooperation during the proceedings.

The EC issued four Statements of Objections; two concern alleged provision of misleading or incomplete information and the two others allege gun-jumping/failure to comply with EU merger law's standstill obligation.

European Courts

- Important EU Court judgments
 - * General Court annulled *UPS/TNT* prohibition
 - EC failed to respect rights of defence
 - * *KPN v Commission*: General Court annulled *Liberty Global/Ziggo* clearance
 - EC failed to state reasons regarding absence of vertical concerns on market for premium pay TV sport channels
 - First annulment of a clearance since *Impala* in 2006
 - * General Court upheld EC's fine on *Marine Harvest* for gun-jumping
 - * First ever preliminary reference concerning Merger Regulation in *Austria Asphalt*

There were four significant EU court judgments in 2017.

In *UPS v Commission*, the General Court ("GC") found that the Commission had infringed UPS's procedural rights by not providing it with an updated econometric model. The GC concluded that this affected UPS's ability to defend itself and annulled the EC's 2013 *UPS/TNT* prohibition decision.

In *KPN v Commission*, the GC ruled that the EC's 2014 clearance decision in *Liberty Global/Ziggo* lacked proper reasoning. The EC had noted that the Dutch market for premium pay TV channels could potentially be segmented into film and sport channels. However, it had left the precise market definition open, noting that no competition concerns would arise in any event. The GC determined that, having left the market definition open, the EC was required to

explain briefly why no concerns would arise on a potential market for premium pay TV sports channels.

In *Marine Harvest v Commission*, the GC rejected an appeal against a €20 million fine imposed on Marine Harvest for gun-jumping. The GC ruled that an exception to the standstill obligation was not applicable and that Marine Harvest had been negligent when it had not notified to the EC its initial purchase of 48.5% of the shares of Morpol.

Austria Asphalt was the first preliminary reference (in reply to a question from a German national court) to the Court of Justice concerning the Merger Regulation. The case concerned a technical issue related to change of control of assets used exclusively by the controlling parent companies.

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