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EU Competition Law – Merger Enforcement

2014 Year in Review

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EU Merger Enforcement - 2014 Year in Review

Introduction

Mergers, acquisitions and joint ventures ("JVs") (all referred to as "concentrations" in EU law) that fall within the European Commission's ("Commission") definition of concentration and that have a minimum nexus with the EU (measured on the basis of a set of revenue thresholds) must be notified to the Commission before they can be implemented.[1] The Commission both investigates and decides on these transactions. Parties can appeal this decision to the General Court of the European Union but the appeal is not normally suspensory. The Commission's investigation takes place in two phases - a shorter Phase 1 investigation and, for those transactions that cause serious concern which the parties have not been able to address through commitments at the end of Phase 1, an additional, longer Phase 2 investigation. Under newly introduced rules, an increasing number of transactions can be notified under a lighter - and in practice often shorter - notification process, referred to as the "simplified procedure".

2014 Summary

The Commission adopted 294 merger decisions:

- The vast majority of these were Phase 1 clearances. Only thirteen Phase 1 cases required commitments (a slight increase compared to previous years) and 206 (more than two-thirds) were able to benefit from the simplified procedure.
- There were seven Phase 2 decisions, two without and five with commitments.
- There were no prohibition decisions in 2014 (in 2011-2013 there were typically one or two prohibitions).
- There was one decision in which fines were imposed for implementing a transaction prior to EC clearance.
- There was also one case in which the Commission formally declined jurisdiction - the first time it did so since 2002 - because the transaction was outside the scope of the EU Merger Regulation ("EUMR").[2]

There are a few exceptions to the EU jurisdictional rules described above. Under specific circumstances, the notifying parties or Member States can ask that a transaction that does not have an EU dimension nevertheless be reviewed by the Commission, or they can ask that a transaction with an EU dimension nevertheless - in whole or in part - be referred to it. In 2014, we saw a slightly higher number of requests from parties for cases to be referred down to Member States, which were generally granted. Interestingly, there were also three requests from Member States for a case to be referred down, all of which the Commission refused - a first since the EU merger control regime entered into force.

Meanwhile, the Commission has launched a review process of the EUMR on which it published a White Paper in the summer of 2014.[3] A key aspect of this review is the extent to which the EU should expand its jurisdiction over non-controlling minority shareholdings - a topic that has been hotly debated in reactions to the White Paper.

Noteworthy European Commission Decisions

Seven Phase 2 Decisions - What Triggered Them and What is Particularly Noteworthy about Them?

Liberty Global/Ziggo[4]

In January 2014, after seven months of negotiations, international cable TV operator Liberty Global agreed to buy all of the shares in Dutch cable TV operator Ziggo (of which it already owned 28.5%). The transaction was notified to the Commission on March 14. On May 8, the Commission initiated Phase 2 proceedings. It was concerned that the proposed transaction would harm competition by removing two close competitors in the Dutch market for the wholesale of premium pay TV film channels. It also feared that Liberty Global's buying power towards broadcasters would be strengthened, allowing it to reduce innovation in the delivery of audio-visual content over the Internet (so-called over-the-top, or OTT, services). To address the Commission's concerns, Liberty Global agreed to sell Film1, its premium pay TV film channel to a third-party purchaser, and to remove clauses from current and future (for eight years) carriage agreements with TV broadcasters that restrict their ability to offer their channels and content via OTT services. The transaction was cleared on October 10, subject to these conditions.

Of particular interest also in this case was the refusal by the Commission to refer the transaction to the Dutch Competition Authority under Article 9(3) of the EUMR (see below).

Cemex/Holcim assets[5]

In July 2013, Cemex, a Mexican-based global producer of grey cement, ready-mix concrete, aggregates and other building materials, and Swiss-based global cement supplier Holcim signed a MoU concerning a series of transactions by which Holcim would acquire certain Cemex assets located primarily in western Germany ("Cemex West") whilst Cemex would acquire control of the whole of Holcim's activities in cement, RMX and aggregates in the Czech Republic and Spain. The *Holcim/Cemex West* transaction

was notified to the Commission in September 2013 (see below). *The Cemex/Holcim assets* transaction did not have an EU dimension, but following an Article 22 EUMR referral request from Spain, the Commission agreed to assess the transaction related to Spain. As the Czech Republic did not join the request submitted by Spain, it continued to examine Cemex' acquisition of Holcim's assets in the Czech Republic.[6] The *Cemex/Holcim assets (Spain)* transaction was notified to the Commission on February 28, 2014. On April 23, the Commission decided to open an in-depth investigation over concerns that the transaction may remove an actual competitor in Eastern Spain, and may facilitate existing coordination between grey cement producers in Central Spain or make future coordination more likely. On September 9, 2014, however, the Commission decided to clear the transaction unconditionally.

Huntsman Corporation/Equity interests held by Rockwood Holdings[7]

In September 2013, Huntsman Corporation agreed to buy a number of chemical businesses from Rockwood Holdings. The transaction was notified to the Commission on January 29, 2014. On March 5, the Commission opened an in-depth investigation over concerns that the transaction would reduce competition in the EEA market for sulphate-based titanium dioxide used for printing inks, cosmetics, pharmaceuticals, food and fibres. The Commission's in-depth investigation showed that the transaction would have combined the two leading suppliers of titanium dioxide for printing ink applications, leading to the creation of a dominant position in the EEA. To address the Commission's concerns, Huntsman agreed to divest its global TR52 business (TR52 being Huntsman's main titanium dioxide grade used for printing ink applications), including the TR52 brand, technology and know-how, customer arrangements and some key personnel. In a so-called up-front buyer arrangement, the parties committed not to close the transaction before concluding a binding agreement for the sale of the divestment business to a suitable purchaser approved by the Commission. The transaction was cleared on September 10, subject to these conditions.

Telefónica Deutschland/E-Plus[8]

In August 2013, Spanish telecoms company Telefónica announced its intention to acquire E-Plus, the German subsidiary of Dutch telecoms company KPN, bringing together the third and the fourth largest mobile network operators in Germany. The transaction was notified to the Commission on October 31, 2013. On December 20, the Commission opened an in-depth investigation over concerns that the deal would reduce competition on the retail market for mobile telecommunications services and on the wholesale market for access and call origination in Germany, resulting in higher prices for consumers. To address the Commission's concerns, the parties agreed to the divestment of (i) radio wave spectrum to a company wanting to enter the wireless market; and (ii) up to 30% of the merger company's network capacity for up to ten years to companies that do not own telecom infrastructure. This capacity corresponds to a market share of approximately 10% in terms of subscribers. The transaction was cleared on July 2, subject to these conditions.

Of particular interest in this case was also the Commission's refusal to refer the transaction to the German Federal Cartel Office under Article 9(3) of the EUMR (see below).

Holcim/Cemex West [9]

In July 2013, Holcim agreed to acquire the West German cement plants of Cemex Group (see above). The transaction was notified to the Commission on September 3. After extension of the initial review period due to an Article 9(2)(a) downward referral request from Germany (see below), the Commission decided on October 22 to open an in-depth investigation over concerns that the transaction may remove an actual

or potential competitor in parts of Germany and in Belgium, facilitate coordination in the cement market, and remove parties' incentives to expand in regions where Holcim was strong. However, in the end the transaction was unconditionally cleared on June 6, after multiple deadline suspensions and an extension.

Hutchison/Telefónica Ireland [10]

In June 2013, UK telecoms company Hutchison 3G announced its plan to buy Telefónica Ireland (O2 Ireland). The transaction bringing together two out of the four mobile network operators in Ireland was notified to the Commission on October 1, 2013. On November 6, the Commission announced that it had decided to open an in-depth investigation over concerns that the transaction may reduce competition in the markets for retail mobile telephony and for wholesale access and call origination in Ireland. Hutchison 3G, as the smallest player among the mobile network operators with an important potential for growth, was considered an important competitive force in the Irish retail market.

The commitments package included the following. Hutchison 3G would sell up to 30% of the merged company's network capacity to two mobile virtual network operators (MVNO) in Ireland at fixed payments. According to the Commission, this was to allow for the two MVNOs to enter the market in Ireland and thus replace in the short term the competitive force that Hutchison 3G previously exercised. The commitment to divest five blocks of spectrum for 10 years was to further give those MVNOs a possibility to become full mobile network operators at a later stage. In addition, Hutchison 3G agreed to maintain the network sharing agreement with Eircom, the third existing operator, to allow Eircom to achieve its network roll-out plans, including for 4G/LTE services. The transaction was cleared on May 28, subject to these conditions.

INEOS/Solvay/JV [11]

In May 2013, Solvay and INEOS agreed to combine their European chlorvinyls activities into a newly-created 50-50 JV. The parties notified the proposed transaction to the Commission on September 16, 2013. On November 5, the Commission opened an in-depth investigation over concerns that the transaction may hinder competition in the market for suspension polyvinyl chloride ("S-PVC") in North-West Europe and in the market for sodium hypochlorite ("bleach") in the Benelux by combining the two largest players in these markets. In order to address the Commission's concerns, INEOS agreed to divest some of its S-PVC plants and related assets in Belgium, Germany, France, the UK and the Netherlands to an up-front buyer approved by the Commission. The merged entity was also required to form a JV with the purchaser to produce chlorine at the Runcorn plant in the UK. The Commission approved the transaction on May 8, 2014, subject to these conditions.

Noteworthy Phase 1 Decisions

IMS/Cegedim business[12]

In June 2014, IMS Health announced its intention to buy part of Cegedim's customer relationship management and strategic data business ("the Target"). IMS Health and the Target both provide solutions to measure and improve performance to companies in the pharmaceutical, biotech, and healthcare sectors. IMS Health is a market leader in the EEA for tracking sales of prescription drugs on the basis of which pharmaceutical companies measure their performance (sales tracking data). The target offers one of the largest databases of doctors' contact details in Europe on which pharmaceutical companies rely to target their sales efforts.

The transaction was notified to the Commission on November 4. The Commission had concerns that the proposed transaction could lead to less choice and higher prices for customers of standardised primary market research services (studies and reports compiled on a regular basis by market research providers based on information and data gathered from panels of physicians). It was also concerned that IMS Health could refuse to give access to its competitors to the "brick structure," which underlies its sales tracking data and is an important input for these players to be able to operate in the market. Given IMS Health's leading position in sales tracking data in the EEA, pharmaceutical companies typically expect that providers of other data and services (such as doctors' contact details and software products) are also able to deliver their data based on the same structure or to use it in their software solutions. To address the Commission's concerns, IMS Health agreed to divest its standardised primary market research business and to grant third party access to the brick structure for ten years. The Commission cleared the transaction on December 10, subject to these conditions.[13]

Holcim/Lafarge[14]

In April 2014, Holcim and Lafarge agreed to merge to create the world's largest cement producer. The merger was notified to the Commission on October 27. It was cleared on December 15, subject to a substantial remedy package. The Commission had concerns that the transaction would have had a detrimental effect on competition in a significant number of markets in the EEA. To address the Commission's concerns, the parties agreed to divest most of the operations where their activities overlap (*i.e.,* divestment of Lafarge businesses in Germany, Romania and the UK, and of Holcim operations in France, Hungary, Slovakia, Spain and the Czech Republic). They agreed not to close the deal until the Commission has approved the buyer(s) of the assets put up for sale. During its investigation, the Commission maintained close cooperation with Member States' competition authorities and also had contacts with a number of third country competition authorities, including the US and Canada, which were also examining the merger. The transaction is still under review in the US.

Earlier in the year, the Commission looked at two transactions in the same sector involving Holcim: Holcim's acquisition of West German cement plants owned by Cemex, and the acquisition by Cemex of Holcim's assets in Spain, both cleared in Phase 2 without commitments (see above). Since December 2010, the Commission has also been investigating Lafarge and Holcim, and six other companies for operating a suspected cartel in cement and cement-based products.[15]

Medtronic/Covidien [16]

In June 2014, Medtronic, a US-based company active in medical technologies and therapies, agreed to acquire Covidien, an Ireland-based manufacturer of medical devices with worldwide activities. The transaction was notified to the Commission on October 14. It was cleared on November 28, subject to conditions. The Commission examined the competitive effects of the proposed acquisition, in particular on the markets for peripheral vascular and electrosurgical devices, where the companies' activities overlap. It found that the transaction would raise no competition concerns, except in the market for drug-coated balloons. There are few competitors active in this market and the Commission found that they exert limited competitive pressure on the market leader, Medtronic. However, the Commission also considered that it was likely that Covidien would have constrained Medtronic in the near future, in view of the promising first clinical trials' results of *Stellarex,* its drug-coated balloon in development. The proposed transaction, as initially notified, would have therefore removed a credible future competitor of Medtronic and reduced innovation in this area. To address the Commission's concerns, Medtronic committed to divest Covidien's worldwide *Stellarex* business. They further agreed, for a transitional period, to supply the purchaser with the balloons on which the drug is applied as well as to transfer staff, including some key personnel. The divestiture of the drug-coated balloon product was also a condition of the clearances from the US FTC and the Canadian Competition Bureau, given on November 26.

Airbus/Safran/JV [17]

In June 2014, Airbus Group N.V. and Safran S.A. announced their plan to create a 50-50 JV to which they would contribute their respective activities in space launchers, satellite subsystems and missile propulsion. Safran makes propulsion systems for the Airbus launchers, which provide the power to take spaceships into space. A separate company, Arianespace, retails and operates these launchers. In addition, the parties intended to take control of Arianespace at an unspecified time in the future. Interestingly, the Commission considered that this would be a "*separate transaction"* and that its decision in the current case *"neither takes it into account nor prejudices the possible assessment of such a transaction in the future"*.

The Airbus/Safran/JV transaction was notified to the Commission on October 8. The Commission considered that the JV would have the incentive to shut out Airbus' competitors or limit their access to a number of important components, and also would have led to exchanges of competitors' confidential information between the JV and Airbus. To address the Commission's concerns, the parties committed to exclude Safran's activities in electric satellite propulsion from the JV. In addition, they agreed to conclude a framework supply agreement with Safran's current main customer for a number of components, as well as to guarantee the supply of these components to any third-party prime contractor on transparent and non-discriminatory terms. The Commission cleared the transaction on November 26, subject to these conditions.

Doremi/Dolby/Highlands [18]

In February 2014, Dolby agreed to acquire rival US producer of digital cinema servers ("DCS") Doremi and Highlands Technologies Solutions, a French company active in the marketing and resale of DCS. The transaction was notified to the Commission on September 25, following an Article 22 EUMR referral request from Spain, subsequently joined by the UK. The transaction was cleared on October 27. The Commission's investigation confirmed that, despite the overlap between the two companies' activities in the production of DCS worldwide and in the EEA, the proposed transaction would not lead to any anticompetitive effects because of the presence of alternative suppliers, the fast-moving nature of the market and the ease of switching for customers due to the existence of industry specifications to which producers adhere in order to be able to sell their products. The Commission's investigation also confirmed the absence of any anticompetitive conglomerate effects resulting from the combination of the parties' activities in the production of DCS and digital cinema audio processors. The transaction had been granted early termination by the US DOJ in August.

Chiquita Brands International /Fyffes [19]

In March 2014, US banana producer Chiquita Brands International agreed to merge with Irish banana supplier Fyffes. The transaction was notified to the Commission on August 14 and cleared on October 3, subject to conditions.[20] On the market for the import and supply of bananas, the Commission found that, despite the parties' high combined market shares in many Member States, there was no basis for competition concerns. The Commission noted in particular that wholesale and retail customers would still have a number of alternative suppliers to choose from, that these competitors face no significant obstacles to expanding their activities, that barriers to new market entry at the various levels of the banana supply chain are low, and that supermarkets have strong countervailing buyer power. However, the Commission did find a risk of foreclosing competitors at the shipping level. The remedies agreed upon to address this concern did not include any divestments and were limited to the elimination for the next ten years of any exclusivity in shipping arrangements to Northern Europe with third-party shipping providers. The Commission did not identify competition concerns on the markets for banana ripening services and for the sourcing and sale of pineapples.

The merger would have brought together the number one and two suppliers of fresh bananas in Europe. But it fell through shortly after receiving EU clearance, when Chiquita shareholders rejected the merger and instead approved a rival buyout proposal from Brazilian juice producer Cutrale Group and banker Joseph Safra's investment firm, Safra Group.[21]

Facebook/WhatsApp [22]

In February 2014, Facebook agreed to buy US mobile phone communications application ("app") WhatsApp. The transaction was notified to the Commission on August 29, and unconditionally cleared on October 3. The transaction received US clearance in April. Facebook (via Facebook Messenger) and WhatsApp both offer apps for smartphones which allow consumers to communicate by sending text, photo, voice and video messages. The Commission investigation addressed the effects of the transaction in the areas of consumer communication services, social networking services and online advertising services. With respect to communication services, it concluded that Facebook Messenger and WhatsApp are not close competitors. Further, although the Commission found that consumer communications apps are characterised by network effects, it noted that network effects are mitigated in this case by the fact that the consumer communications apps market is characterised by rapid innovation cycles, and that customers can and do use multiple apps at the same time and can easily switch from one to another. In the areas of social networking and online advertising, the Commission likewise found no concerns. According to Carles Esteva Mosso, the acting Deputy Director General for mergers at DG COMP, the EU review in this case was an example of a merger regulator paying increased attention to innovation issues as part of a move towards a more dynamic antitrust analysis of fast-moving markets.

CSAV/HGV/Kühne Maritime/Hapag Lloyd AG [23]

In April 2014, German container shipper Hapag-Lloyd AG and its Chilean peer CSAV agreed to merge to create the world's fourth-largest container-shipping company. The transaction was notified to the Commission on July 23 and cleared on September 11, subject to conditions. The Commission examined the effects of the merger on competition in the market for container liner shipping services on twelve trade routes connecting Europe with the Americas, Asia and the Middle East. Like many other carriers, the two companies offer container liner shipping services mainly through "consortia". The Commission found that the merger, as initially notified, would have created new links between previously unconnected consortia, and had concerns that these new links would have resulted in anticompetitive effects on two trade routes: the route between Northern Europe and the Caribbean, and the route between Northern Europe and South America's West Coast. In order to address these concerns, the companies offered to terminate the two consortia in which CSAV currently participates on these two trade routes.

BSkyB/Sky Deutschland/Sky Italia [24]

In July 2014, BSkyB agreed to buy most of Sky Deutschland and all of Sky Italia from 21st Century Fox. The transaction was notified to the Commission on August 6 and received unconditional clearance on September 11. The transaction brings together the leading pay TV operators in the UK, Ireland, Germany, Austria and Italy. However, the Commission considered that the geographic scope of the markets is national or to be defined along linguistically homogeneous areas, and hence that the transaction would not lead to any material overlaps in the parties' activities as they are mainly active in different national markets. The Commission also assessed whether the transaction would give the merged entity increased bargaining power vis-à-vis content rights holders by allowing it to purchase "premium" content jointly for several territories, to the detriment of its pay TV competitors. The Commission found that this was unlikely, due to practical obstacles (*e.g.,* different timelines for the negotiations), the fact that rights holders would not deviate from their current preferred licensing model unless it is in their own interest, and the fact that the merged entity would in any event face

competition for multi-territory rights from a number of multinational groups which already operate in the EEA. Accordingly, the transaction was cleared unconditionally.

SSAB/Rautaruukki [25]

In January 2014, Swedish steelmaker SSAB offered to buy Finnish peer Rautaruukki Oyj, thereby combining the two market leaders in the Nordic countries in the production and distribution of flat carbon steel, stainless steel and steel sheets. The transaction was notified to the EC on May 22. It received conditional clearance on July 14. The Commission had concerns that the transaction would have significantly reduced competition in the markets for certain carbon steel products in the Nordic countries, as well as for stainless steel and profiled steel construction sheets in Finland. As regards flat carbon steel, the Commission noted in particular that Continental European steel producers, in spite of large overcapacity, have limited market presence in the Nordic countries and face barriers to expansion in terms of routes to market, access to efficient local supply chains and transport costs. To address the Commission's concerns, SSAB committed to divest production and distribution businesses in Sweden, Finland and Norway, and to ensure that another flat carbon steel producer would own a stake in these assets. The commitments seek to ensure that these businesses will be in a position, not only to compete with the combined entity at distribution level, but also to serve as a route to market for another producer to establish and develop a direct presence in the Nordic countries.

Federal-Mogul Corporation/Honeywell's friction materials [26]

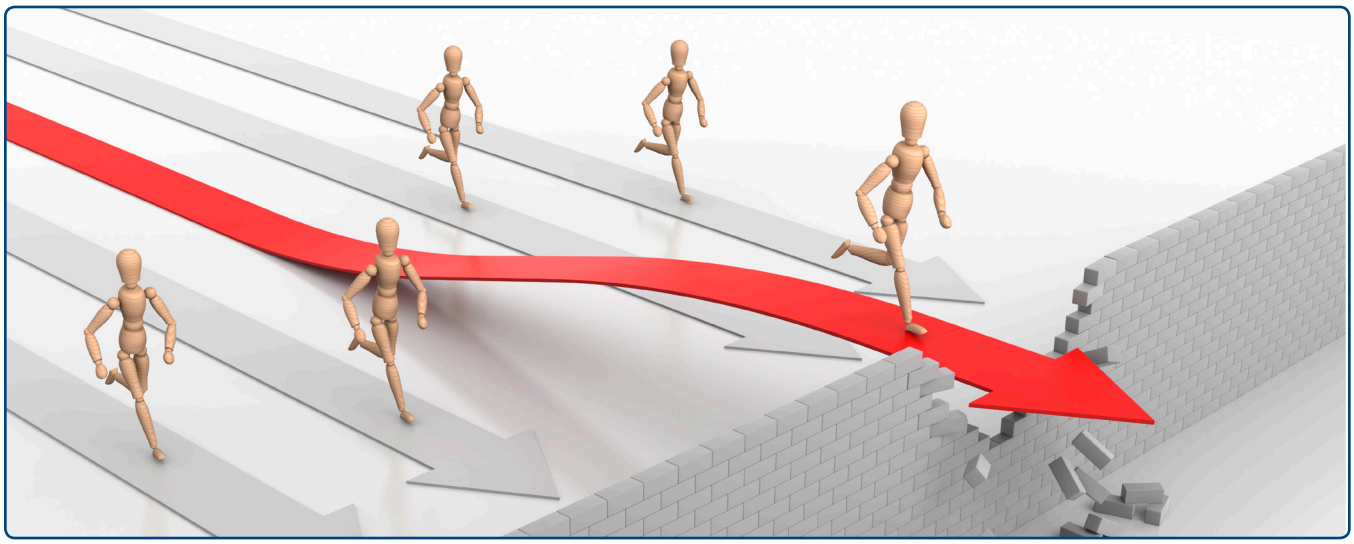
In January 2014, Honeywell International agreed to sell the European part of its friction material business to another large US friction material manufacturer, Federal-Mogul Corporation. The transaction was notified to the Commission on April 16, and cleared on June 16 subject to significant divestitures. The proposed transaction, as originally notified, would have combined two of the largest original equipment ("OEM") and original equipment spare parts ("OES") producers for commercial and light vehicle pads in the EEA. The Commission had concerns that the remaining players, a single competitor of similar size for commercial vehicle pads and two for light vehicle pads, would have been unable to sufficiently constrain the merged entity to avoid price increases. The Commission's investigation concluded that barriers to entry and expansion are high and that a small number of producers dominate this industry. Further, it found that customers are reluctant to switch contracts and do not have sufficient buyer power to counteract concentrations in the supply market. To address the Commission's concerns, Federal-Mogul agreed to divest the OEM/OES business at a German and a French factory producing brake pads for commercial and light vehicles.

Discrepancies in Provision of Information to the Commission - Infringement Proceedings Closed

On October 29, 2014, the European Commission announced that it had decided to close proceedings brought against Munksjö and Ahlstrom in relation to the alleged provision of misleading information in the notification of their merger.[27]

During the merger investigation, the Commission had identified significant discrepancies between the companies' market share estimates for abrasive paper backings and its heavy-weight segment submitted in the merger notification and information in the companies' pre-existing internal documents. Although the Commission had pointed out these discrepancies in the course of the merger review process, the companies did not provide sufficient clarifications at the time. In February 2014, the Commission sent a statement of objections to Munksjö and Ahlstrom alleging a breach of their obligation under Article 14(1)(a) of the EUMR to include in the notification their true best estimates of the markets. In response to the statement of objections, the parties provided contemporaneous evidence explaining these discrepancies and showing reasons for their

reassessment of market shares. The Commission considered these reasons to be valid and therefore closed the infringement proceedings on the basis that it had now received the necessary information. However, it warned that any discrepancies between the information provided in the merger notification and that contained in the merging parties' internal documents should always be justified by the parties in a timely manner.



Fines Imposed for Implementing Transaction Prior to EC Clearance

The decision of the Commission in the *Marine Harvest/Morpol*[28] case and the judgment of the European Court of Justice ("ECJ") in *Electrabel v. Commission*[29] highlight the risks of early implementation of a transaction.

Marine Harvest/Morpol

On July 23, 2014, the Commission imposed a fine of EUR 20 million on salmon farmer and processor Marine Harvest for acquiring its rival Morpol, both of Norway, without having received prior authorisation under the EUMR.

The facts were as follows. On December 14, 2012, Marine Harvest entered into a SPA with Friendmall and Bazmonta Holding by which it acquired a 48.5% shareholding in its rival Morpol. The closing of this transaction took place on December 18. On January 15, 2013, Marine Harvest submitted a mandatory public offer for the remaining 51.5% shares in Morpol pursuant to the Norwegian Securities Trading Act. Following the settlement and completion of the mandatory offer on March 12, Marine Harvest acquired 87.1% of the shares in Morpol. The acquisition of the remaining shares in Morpol was completed on November 12. Marine Harvest notified its acquisition of Morpol to the Commission on August 9, 2013.[30] It was cleared subject to conditions on September 30.

However, the Commission found that by already acquiring a 48.5% stake in Morpol on December 18, Marine Harvest had acquired (*de facto)* sole control over Morpol. In particular, the Commission found that with 48.5% of the shares Marine Harvest enjoyed a stable majority at the shareholders' meetings because of the wide dispersion of the remaining shares and previous attendance rates. The Commission held that by implementing the acquisition eight months before the formal notification to the Commission, and over nine months before the Commission authorised it, Marine Harvest had therefore infringed Articles 4(1) (prior notification requirement) and 7(1) (stand-still obligation) of the EUMR.

In setting the amount of the fine, the Commission took into account the gravity and duration (over nine months) of the infringement. As regards the gravity, it noted in particular that: Marine Harvest is a large European company with wide previous experience and familiarity with EU merger control rules and that its failure to comply with the notification requirement and stand-still obligation amounted to negligent conduct. The Commission found the infringement particularly serious because the transaction, as originally implemented, had raised serious competition concerns and was only cleared by the Commission after the submission of significant remedies. Moreover, Marine Harvest (at the time Pan Fish) had already been fined in 2007 by the French Competition Authority for infringement of the stand-still obligation with respect to its acquisition of Fjord Seafood. At the same time, the Commission also took into account mitigating circumstances - in particular the fact that Marine Harvest had not exercised its voting rights in Morpol, that it had kept it as a ring-fenced entity, separate from Marine Harvest, in the interim of the merger review process, and that it informed the Commission through pre-notification contacts shortly after the closing of the December 2012 acquisition.

Electrabel v. Commission

On July 3, 2014, the ECJ judgment dismissed Electrabel's appeal against the General Court ruling upholding a Commission decision to fine Electrabel for acquiring control of Compagnie Nationale du Rhône ("CNR") without having received prior approval under the EUMR.

The facts were as follows. On December 23, 2003, Electrabel increased its shareholding in CNR from 17.68% to 49.95% in terms of shares, and from 16.88% to 47.95% in terms of voting rights. Electrabel notified the Commission of the transaction in March 2008, some four years after closing. The Commission cleared the acquisition on April 29, 2008.[31] In reaching this decision, however, the Commission left open the issue of the precise date on which Electrabel acquired control of CNR for the purposes of the EUMR.[32] The Commission opened a separate investigation into whether Electrabel had breached the stand-still obligation. On June 10, 2009, the Commission found that Electrabel had already acquired *de facto* sole control of CNR in December 2003, and was therefore in breach of the stand-still obligation.[33] Electrabel was fined EUR 20 million.

Electrabel appealed the Commission decision to the General Court on August 20, 2009, arguing that the Commission erred in its classification of the infringement and in its conclusion that Electrabel had acquired *de facto* sole control of CNR prior to notification of the merger. Electrabel also claimed that the proposed fine was time-barred and disproportionate. The General Court dismissed the appeal on December 12, 2012.[34] The General Court held that the Commission's finding that Electrabel had acquired *de facto* sole control as of December 2003 was correct. It also found that breach of the stand-still obligation was not a mere procedural infringement, and that the fact that Electrabel's acquisition was ultimately found not to raise any competition concerns was not a decisive factor for determining the gravity of the infringement, nor was the fact that the breach occurred through negligence sufficient to reduce the fine.

Electrabel appealed the General Court's ruling to the ECJ on February 21, 2013. On July 3, 2014, the ECJ dismissed the appeal in its entirety. Electrabel's appeal had several grounds which included the allegation that the duration of its breach should not have been relevant to the setting of the amount under Article 14(3) of Regulation 4064/89. Electrabel also alleged that the General Court and the Commission had applied the law retroactively in that they had erroneously applied the provisions of the EUMR to a concentration that predated its entry into force, and which was, therefore, covered by the provisions of Regulation 4064/89. The ECJ found that these two grounds of appeal were in fact new arguments and were therefore inadmissible. It also rejected the third plea, alleging that the General Court erred in law and gave contradictory reasons when categorising Electrabel's breach as continuous, whereas it was a one-off infringement. According to the ECJ, it was irrelevant whether the infringement was continuous or one-off.

A No Jurisdiction Decision

On July 25, 2014, the Commission concluded that a joint venture between French media group Lagardère and French railway operator SNCF to jointly operate a network of shops in train stations across France was not full-function and did not therefore qualify as a concentration for the purposes of the EUMR.[35] It found that the dependence of the joint venture company on its parent companies as regards its financial resources and personnel, and the purchase and sale of its products, would not allow it to perform on a lasting basis all the functions of an autonomous economic entity.

Three Downward Referral Requests from Member States Refused by the Commission[36]

Telefónica Deutschland/E-Plus downward referral to Germany [37]

In August 2013, Spanish telecoms company Telefónica announced its intention to acquire E-Plus, a German subsidiary of Dutch telecoms company KPN (see also above). The transaction was notified to the Commission on October 31, 2013, followed by an Article 9(2)(a) EUMR downward referral request by Germany. This provision allows the Commission to refer all or part of the assessment of a case to a Member State provided that the competitive effects are restricted to purely national or smaller-than-national markets.

The telecoms companies in Europe were in the process of increased consolidation in the wake of the EU legislative proposal for the creation of the single telecoms market. From the Commission's perspective, there was thus a need to ensure consistency in the application of the merger control rules in this sector. In the meantime, Germany, too, was planning reforms in the telecoms sector with a view to better regulate market access and, thus, also had vested interests in reviewing the deal. It was for the Commission to decide which authority would be better placed to assess the case and the Commission decided to keep jurisdiction in light of its extensive experience in assessing cases in the telecoms sector, the *Telefónica Deutschland/E-Plus* deal being the fourth telecoms merger case in the past two years scrutinized by the Commission. The Commission cleared the transaction in Phase 2 subject to conditions.

Liberty Global/Ziggo downward referral to the Netherlands [38]

In January 2014, international cable TV operator Liberty Global agreed to buy Dutch cable TV operator Ziggo. The transaction was notified to the Commission on March 14 (see above). On March 25, the Dutch Competition Authority submitted a full downward Article 9(2)(a) EUMR referral request. On June 25, 2014,

the Commission concluded that it was better placed than the national authority to examine the transaction due to its extensive experience scrutinizing media and telecommunications deals, including in national markets, the fact that Liberty Global is an international operator present in a majority of EEA countries, and the need for a consistent application of the merger control rules across the EEA. Further, the Commission found it could not be excluded that the transaction might have effects outside the territory of the Netherlands, such as the linguistically homogeneous Flemish part of Belgium. The Commission cleared the transaction in Phase 2 subject to conditions.

Holcim/Cemex West downward referral to Germany [39]

In July 2013, Swiss-based global supplier of cement and building materials Holcim agreed to buy Cemex West, a subsidiary of its rival Cemex Group (see above). The assets to be acquired were based in western Germany together with a small number of plants and sites located in France and the Netherlands.

The transaction was notified to the Commission on September 3, 2013, followed by an Article 9(2)(a) EUMR downward referral request from Germany. The German Federal Cartel Office submitted that the transaction threatened to significantly affect competition in the cement markets in northern and western Germany that it contended present all the characteristics of distinct markets within Germany. The Commission on the other hand considered the markets to be much broader, including the border regions of Belgium, France and the Netherlands, and eventually refused the request. The Commission cleared the transaction in Phase 2 subject to conditions.

The *Holcim/Cemex West* transaction was linked to another transaction notified originally in Spain and the Czech Republic whereby Cemex was acquiring the whole of Holcim's activities in cement, RMX and aggregates in Spain and the Czech Republic. In this latter *Cemex/Holcim assets* transaction, following an Article 22 EUMR referral request from Spain, the Commission agreed to assess the transaction related to Spain.[40] Reviewing the two deals simultaneously allowed the Commission to assess the overall effect of the asset swap between the two global suppliers.

White Paper: 'Towards More Effective EU Merger Control'

On July 9, 2014, the Commission published its White Paper suggesting possible improvements to the EU merger control rules, ten years after the entry into force of the revised EUMR in 2004. It invited comments on its proposals by October 3, 2014. The Commission will now decide whether to adopt legislative measures to effect any or all of the proposed changes.

The key proposals of the White Paper are the following:

Non-controlling minority shareholdings - a "targeted transparency system"

The review of non-minority shareholdings has been on the Commission's agenda since 2007 when the Commission was found to lack jurisdiction to review Ryanair's acquisition of a minority shareholding in Aer Lingus.[41] It remains the most contentious area of the proposed reform.

Under the White Paper's proposals, the Commission would have jurisdiction over transactions which have an EU dimension and create a *"competitively significant link."* This will be the case where (i) the transaction involves the acquisition of a minority shareholding in a competitor or a vertically related company,[42] and (ii) the acquired shareholding is (a) above around 20% or (b) between 5% and around 20%, but accompanied by certain plus factors such as *de facto* blocking minority rights, a seat on the board of directors or access to commercially sensitive information of the target. It will be up to the purchaser to self-assess whether such a link exists. There will be a safe harbour for shareholdings of 5% and below.

Such transactions would be subject to the submission of an "information notice" to the Commission (as opposed to a full-fledged Form CO). This would detail information on the parties, the transaction, the level of shareholding before and after the transaction, any rights attached to the minority shareholding and some limited market share information. Notice of filing would be published to alert third parties, and the EU Member States would be informed so that they can request a referral.

The White Paper proposes a 15 working-day waiting period following the submission of the information notice during which the parties would not be able to close the transaction. This would also be the period within which Member States could request a referral back to their national competition authority if they believe they are best placed to look at the transaction. The Commission, however, would have a much longer period - four to six months - to decide whether to investigate the transaction, meaning that parties may well have chosen to close the transaction by the time the Commission decides to investigate. If an investigation is ultimately initiated, the parties will be required to make a full notification. Where a transaction has already closed, the Commission suggests that it should have the power to issue interim hold separate measures to prevent any further integration until a decision is issued. Where parties have not already closed, a new standstill obligation would presumably apply (although the White Paper does not mention this specifically).

Case referrals between national competition authorities and the Commission

The White Paper also proposes some changes to the EU referral system that would ease and speed up referrals between Member States and the Commission, in particular:

- Article 4(5) of the EUMR - pre-notification referrals to the Commission by notifying parties: the White Paper proposes to abolish the requirement on parties to submit a Form RS on top of the Form CO. Under the proposals, the parties would submit a Form CO directly to the Commission which would, in turn, immediately forward it to the relevant national competition authorities and provide them with fifteen working days to reject the referral;

- Article 22 of the EUMR - post-notification referrals to the Commission by national competition authorities: the White Paper suggests granting the Commission jurisdiction for the whole of the EEA should it decide to accept a Member State's referral request, thereby avoiding parallel reviews by the Commission and national competition authorities. If one (or more) competent Member State(s) oppose the referral, the Commission would renounce jurisdiction for the whole of the EEA, and the Member States would retain their jurisdiction;

- Article 4(4) of the EUMR - pre-notification referrals from the Commission to the Member State(s) by the notifying parties: the White Paper proposes to modify the substantive test so that the parties would no longer be required to show that the transaction may *"significantly affect competition in a market"* (which was perceived as self-incrimination) for a case to qualify for a referral, but only that the transaction is likely to have its *"main impact"* in a distinct market in the Member State.

Miscellaneous

The Commission is proposing a number of other changes, including excluding extra-EEA joint ventures with no competitive effect in the EEA from the scope of the EU Merger Regulation, and eliminating the notification requirement for cases that do not give rise to any "reportable markets" (due to the absence of any horizontal or vertical relationship between the parties) and otherwise qualify for simplified review.

Endnotes

1 All EU Member States except Luxembourg have their own national merger control regime that can apply, depending on the local thresholds, to transactions that fall outside the scope of the EU merger control regime. This Overview only discusses EU developments.

2 *Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings* (*available at* http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32004R0139).

3 *Towards more effective EU merger control*, COM(2014) 449 final, July 9, 2014, *available at* http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf.

4 Case No COMP/M.7000 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7000).

5 Case No COMP/M.7054 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7054).

6 This operation was cleared by the Czech competition authority in March 2014 after an in-depth review.

7 Case No COMP/M.7061 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7061).

8 Case No COMP/M.7018 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7018).

9 Case No COMP/M.7009 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7009).

10 Case No COMP/M.6992 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6992).

11 Case No COMP/M.6905 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6905).

12 Case No COMP/M.7337 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7337).

13 Interestingly, in 2002, following a complaint by NDC for alleged abuse of dominance by IMS, the Commission imposed interim measures ordering IMS to license the use of its brick structure. However, on appeal the Commission's interim measures were suspended and the Commission subsequently closed its investigation.

14 Case No COMP/M.7252 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7252).

15 Case AT.39520 - *Cement and related products*.

16 Case No COMP/M.7326 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7326).

17 Case No COMP/M.7353 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7353).

18 Case No COMP/M.7297 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7297).

19 Case No COMP/M.7220 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7220).

20 The transaction cleared in the US without any conditions.

21 The transaction was cleared by the Commission on December 16 under the simplified merger review procedure.

22 Case No COMP/M.7217 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7217).

23 Case No COMP/M.7268 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7268).

24 Case No COMP/M.7332 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7332).

25 Case No COMP/M.7155 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7155).

26 Case No COMP/M.7174 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7174).

27 See Commission press release IP/14/1222, *available at* http://europa.eu/rapid/press-release_IP-14-1222_en.htm.

28 Case No COMP/M.7184 (Art.14.2 proc.) (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7184).

29 Case C-84/13 P, *Electrabel v. Commission* (see http://curia.europa.eu/juris/document/document.jsf?text=&docid=154537&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=297532 - judgment available in French only).

30 Case No COMP/M.6850 - *Marine Harvest/Morpol* (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6850).

31 Case No COMP/M.4994 - *Electrabel/Compagnie Nationale du Rhône (Art. 6(1)(b))* (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_4994).

32 The decision was largely based on the wide dispersal of shares and the past attendance rates at CNR shareholder meetings, which meant that Electrabel was very likely to obtain a majority in votes despite not holding an overall majority of voting rights.

33 Case No COMP/M.4994 - *Electrabel/Compagnie Nationale du Rhône (Art. 14)* (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_4994).

34 Case T-332/09 (see http://curia.europa.eu/juris/document/document.jsf?text=&docid=131705&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=297746).

35 Case No COMP/M.7253 - *Groupe Lagardère/ SNCF Participations/ JV* (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7253).

36 In Case No COMP/M.7421 - *Orange/Jazztel* (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7421), the Commission refused Spain's downward referral request, concluding that given its experience in assessing cases in the telecoms sector (see the section on phase two decision, above), it is better placed to assess the case at hand. The Commission has opened an in-depth investigation of the proposed transaction; the Commission's final decision is expected by the end of April 2015.

37 Case No COMP/M.7018 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7018).

38 Case No COMP/M.7000 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7000).

39 Case No COMP/M.7009 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7009).

40 As the Czech Republic did not join the request submitted by Spain, it continued to examine Cemex' acquisition of Holcim's assets in the Czech Republic. This operation was cleared by the Czech competition authority in March 2014 after an in-depth review.

41 The case was subsequently reviewed by the UK competition authorities, although they only had jurisdiction to investigate flights from Ireland to the UK.

42 Conglomerate transactions would thus not be caught.

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