Recent Developments in EU Merger Remedies
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I. Overview

Over a decade has passed since the Commission published the Merger Remedies Study, which found around one-third of the remedies evaluated to have been wholly or partially ineffective. Subsequent empirical studies covering the Commission’s early merger control practice supported the notion that EU merger remedies sometimes failed to preserve effective competition in the affected markets, for reasons including inadequate scope of the divestment business, unsuitable purchasers, and insufficient cooperation from third parties.

In recent years, the Commission has tried to improve this record by applying an increasingly stringent approach to the assessment of merger remedies, which has become even more pronounced under Commissioner Vestager. In a recent speech, she reaffirmed her services’ ‘read [iness] to intervene when competition is at risk’ in the face of rapid consolidation and growing levels of concentration across industries. In 2016, this translated into the Commission’s highest intervention rate since 2008, the first prohibition decision since 2013 (Hutchison 3G UK/Telefónica UK (under appeal)), and an arguably tougher stance on remedy design and implementation in general. Five trends were particularly noteworthy.

A. Innovation, innovation, innovation

Last year, we reported on the Commission’s increasing focus on innovation concerns in remedy design and implementation. This trend intensified in 2016.

Key Points

- 2016 saw the highest Commission merger intervention rate since 2008, and the highest number of conditional clearance decisions since 2000.
- The Commission’s 2016 remedy practice reflected an unprecedented increase in fix-it-first structures.
- Innovation-related concerns featured prominently in the Commission’s approach to remedy design and implementation.
- The Commission’s evolving approach in a series of four-to-three mobile telecommunications mergers suggests heightened scrutiny of non-structural remedies under Commissioner Vestager.

First, the Commission’s 2016 remedy practice confirmed its strong commitment to securing clear-cut structural or quasi-structural remedies that address innovation-related competition concerns. In Abbott Laboratories/St Jude Medical, for example, the Commission insisted that Abbott divest its highly innovative product along with a shareholding in its inventor and developer to ensure that the product would continue to be developed and would be launched successfully. In Airbus Safran Launchers/Arianespace, the parties agreed to erect firewalls to prevent the exchange of competitively sensitive information that would have contributed to reducing both their own and their competitors’ incentives to innovate. In Dentsply/Sirona, the Commission

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1 European Commission, Merger Remedies Study, Public Version (October 2005), p. 130 (DG COMP staff were unable to analyse the effectiveness of the remaining 12 per cent of remedies evaluated, ‘either because [their] impact […] could not be disentangled from the impact of concurrent liberalisation measures; or because the Study had not obtained sufficient information in the interviews to arrive at a clear result’).


similarly required the parties to extend an existing licensing agreement to prevent the merged entity from engaging in a foreclosure strategy that would have reduced competitors’ incentives to continue investing in research and new technologies. And at least two high-stakes mergers fell through in part due to concerns that the proposed remedies were insufficient or too complex to ensure that incentives to innovate would be preserved (Hutchison 3G UK/Telefónica UK; Halliburton/Baker Hughes).

Second, whether or not innovation-related concerns had featured in the Commission’s competitive assessment, the Commission repeatedly required that the divestment business include sufficient innovation capabilities to ensure that the buyer would continue to innovate like the divestment business pre-transaction (Plastic Omnium/Faurecia; Konkrecrane/Terex MHPS; Danone/The WhiteWave Foods Company; Coherent/Rofin-Sinar Technologies; Ball/Rexam). In Coherent/Rofin-Sinar, for example, the Commission required the parties to divest assets and activities specifically to facilitate the buyer’s ability to innovate in markets where no competitive concerns arose but where demand was expected to grow.

B. Reluctance to accept non-divestiture remedies in four-to-three mobile telecommunications mergers

The Commission also appears to have become more reluctant to clear four-to-three mobile-to-mobile mergers on the basis of non-divestiture remedies. Amid concerns that prior access-based remedy packages in the industry had failed to preserve effective competition or had proven difficult to implement, the Commission rejected access remedies aimed at facilitating the entry or expansion of mobile virtual network operators (MVNOs) in Hutchison 3G UK/Telefónica UK, even though they resembled those approved in similar-looking cases in 2012 (Hutchison 3G Austria/Orange Austria) and 2014 (Telefónica Deutschland/E-Plus; Hutchison 3G UK/Telefónica Ireland). The Hutchison 3G UK/Telefónica UK prohibition decision came on the heels of the Phase II withdrawal of the substantially similar Telefónica/TeliaSonera merger after the Commission found that a mixed remedies package would not enable the emergence of a new mobile network operator (MNO). And it came only a few months before the Commission’s conditional approval of a four-to-three MNO merger in Italy (Hutchison 3G Italy/Wind/JV). In that case, the parties reportedly did not even formally submit an MVNO-based remedies package. Instead, they obtained clearance, subject to the fix-it-first divestiture of substantial radio spectrum and fixed assets to a new MNO entrant.

Taking stock of the Commission’s recent experience in mobile-to-mobile mergers, Commissioner Vestager insisted that ‘the Commission has not laid down a general rule saying that three or four network operators are necessary’ and that ‘each case needs to be assessed on its own merits’, but also highlighted that divestitures aimed at creating a new MNO are ‘the best answer to competition concerns’. ‘There are good reasons,’ she emphasised in the wake of the Hutchison 3G Italy/Wind/JV clearance, ‘to prefer structural remedies. They have the potential to resolve competition concerns in mergers once and for all.’ Unlike behavioural remedies, the Commission explained in an official statement, divestitures do ‘not require future monitoring, which can be a complex and lengthy process.’

C. Openness to non-divestiture remedies in non-horizontal cases

Still, remedy design is a highly fact-intensive and case-specific exercise, and the Commission has remained...
open to non-divestiture remedies in appropriate cases, especially those that raised non-horizontal competition concerns. In particular, conglomerate effects theories of harm are coming back into fashion more than a decade after the Airtours, Schneider Electric, and Tetra Laval trilogy (Dentsply/Sirona; Microsoft/LinkedIn; Worldline/Equens/PaySquare; Teva/Allergan Generics), but the Commission now accepts that they can often be addressed with non-structural commitments. In Dentsply/Sirona, for example, the Commission accepted that commitments ‘other than divestiture remedies appear[ed] best suited to directly address’ conglomerate effects concerns, and cleared the concentration subject to a set of access commitments. More generally, access and interoperability remedies continued to feature prominently in non-horizontal cases (Dentsply/Sirona; Microsoft/LinkedIn; Worldline/Equens/PaySquare), as did commitments to maintain, or withdraw from, certain agreements (Teva/Allergan Generics; CMA CGM/NOL; Hapag-Lloyd/UASC), to engage or not to engage in certain conduct in the market (Microsoft/LinkedIn), or to prevent anticompetitive information exchanges (Airbus Safran Launchers/Arianespace).

Yet, the Commission’s pragmatism in assessing non-divestiture remedies should not be mistaken for lenience. Remedies that fall short of outright divestitures have been subject to stringent conditions designed to ensure their effective implementation. These include fast-track arbitration mechanisms to swiftly settle any disputes in connection with remedy compliance (Dentsply/Sirona; Airbus Safran Launchers/Arianespace), penalties for non-compliance (Worldline/Equens/PaySquare), and, in specific cases, the delegation of extraordinary powers to monitoring trustees, such as temporary veto rights (CMA CGM/NOL; Hapag-Lloyd/UASC).

D. Up-front buyer vs. fix-it-first

Last year, we reported on the Commission’s increased use of up-front buyer structures, which featured in seven out of twenty conditional clearance decisions adopted in 2015. The Commission’s 2016 remedy practice mirrored this approach, with seven commitment decisions requiring the early identification of a suitable purchaser. Interestingly though, in four of these cases (AB InBev/SABMiller; Boehringer Ingelheim/Sanofi Animal Health Business; Liberty Global/BASE; Hutchison 3G Italy/Wind/JV), the commitments went a step further by taking the form of a ‘fix-it-first’ remedy (i.e., the merging parties agreed to a binding sale agreement for the divestment business to an approved buyer during the Commission’s review). Previously, the Commission had rarely applied fix-it-first conditions, probably because of the difficulty of completing the purchaser approval within the already tight statutory deadlines.

E. Intensifying inter-agency cooperation

The increase in cross-border M&A and the proliferation of merger control regimes around the world have made inter-agency cooperation key to effective merger remedy design and implementation. One frequently overlooked component of that cooperation is the role played by regulators and national competition authorities in complex EU merger investigations. In Hutchison 3G UK/Telefónica UK, both the UK Competition and Markets Authority and the UK Office of Communications provided the Commission with substantial input on the parties’ proposed remedies. In Hutchison 3G Italy/Wind/JV, the parties agreed to empower the monitoring trustee to seek expert advisory opinions from Italy’s telecommunications regulator on a range of questions related to Italy’s mobile telecommunications market.

Cooperation with non-EU agencies has also intensified over the past few years. In a recent interview, Commissioner Vestager stressed that her services cooperate with agencies based outside the EU in ‘about 60 per cent of [their] complex merger investigations’. In Halliburton/Baker Hughes, for instance, the Commission cooperated closely with several agencies and had ‘especially good discussions with the US Department of Justice,’ reaching very similar conclusions about the excessive complexity of the proposed remedies. The transatlantic divergence in the assessment of the Staples/Office Depot merger is not a counter-example: as Commissioner


17 In last year’s NXP Semiconductors/Freescale Semiconductor case (NXP Semiconductors/Freescale Semiconductor (COMP/M.7585) Commission Decision C(2015) 6502 final, [2015] OJ C375/1), the Commission required NXP to convert a proposed ‘fix-it-first’ into an ‘up-front buyer’ remedy over concerns that the former would be unworkable.


Vestager emphasised, the fact that the US Federal Trade Commission went to court while the Commission conditionally cleared the deal ‘does not show a lack of coordination. It only reminds us that however closely we coordinate, there will always be times when we come to different answers simply because the markets – or the remedies the companies offer to address our concerns – are different.’

There may still be room to further minimise the risk of diverging remedy assessments. The efforts spearheaded by the International Competition Network’s Merger Working Group to promote substantive and procedural convergence in remedies design and implementation are a welcome step in that direction. In particular, the Merger Working Group’s 2016 Merger Remedies Guide recommends that coordinating agencies worldwide should strive to align the timing of respective remedy procedures to minimise the risk of divergence and incompatibility between remedies packages offered in different jurisdictions.

II. M&A activity: trends and statistics

With around €3.25 trillion in total announced deal value, 2016 was the third-best year on record for mergers and acquisitions, trailing only 2007 and 2015. Cross-border take-overs grew to a record-breaking 40 per cent of total M&A activity, as companies faced with poor organic growth prospects continued to look beyond their core markets for external growth opportunities. This spurred a third consecutive increase in the number of merger notifications filed with the Commission, from 303 in 2014 to 337 in 2015 and 362 in 2016, although still below the pre-crisis high of 402 in 2007.

At the same time, 2016 witnessed a surge in abandoned M&A transactions, which rose to an 8-year value peak of around €760 billion. According to analysts, many deals collapsed in the face of heightened scrutiny from competition authorities. This may have contributed to the uptick in the Commission’s overall intervention rate, which rose to 7.5 per cent in 2016, from 6.5 per cent in 2015 and an average of around 5.9 per cent over the decade from 2005 to 2014. In fact, 2016 saw the highest number of conditional clearance decisions and Commission merger intervention rate since 2008. As can be seen from the figures below, this most importantly reflects a sharp increase in both the

III. Commission decisions

This section summarises each of the Commission’s 2016 merger remedy decisions.

A. Structural remedies

1. Statoil Fuel and Retail/Dansk Fuels

On 23 March 2016, the Commission conditionally approved the acquisition of Shell’s Danish wholesale and retail fuels business (‘Dansk Fuels’) by Statoil Fuel and Retail (‘SFR’). The investigation focused on the parties’ activities in the wholesale of refined oil products (diesel, gasoline, light heating oil, and heavy fuel oil) and the retail sale of motor fuels (diesel and gasoline) at petrol stations in Denmark.

In the wholesale markets and plausible sub-segments related to wholesale supply to resellers/retailers and end-users, the parties would have had shares up to 50–60 per cent, making the merged entity two to three times larger than its nearest competitor. The Commission concluded that the parties were close competitors, as confirmed by a win/loss data assessment; that entry barriers were high; and that most customers were price takers without any buyer power.

In the retail sale of motor fuels, and plausible sub-segments related to private and business customers, the parties’ combined share was 40–50 per cent. The Commission’s review focused on the closeness of competition between the parties, as evidenced by similar features of their petrol station networks: the parties ranked as number one and two in (i) network coverage (national coverage with convenient locations); (ii) number of full-service manned stations; (iii) number of on-motorway stations; and (iv) number of truck-accessible stations. With no similar alternative networks, customer switching would not be a viable threat.

To secure Commission approval at the end of Phase I, the parties assembled an asset divestiture package designed to eliminate or reduce the overlaps of concern and create a strong new independent competitor. The parties agreed to divest Shell’s entire commercial and aviation fuels business as well as a nationwide network of 205 Shell and SFR fuel stations, together with transitional supply arrangements and access to oil terminal

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20 Ibid.
21 These figures include Phase II withdrawals.
infrastructure. In addition, to enable the purchaser to attract non-retail customers, the parties agreed to allow the purchaser to issue euroShell fuel cards to Danish customers and accept international euroShell cards at all of its retail sites. Following criticism from market test respondents, the parties also specified that the purchaser should have proven expertise in the fuels industry.

2. Staples/Office Depot

On 2 February 2016, the Commission approved the proposed acquisition of Office Depot by Staples following a Phase II review. Both undertakings’ EEA activities focused on the distribution of office supplies to businesses.

The Commission’s detailed market definition analysis concluded that business customers prefer a one-stop-shop for all traditional office supply categories (stationery, paper, and ink & toner). The Commission also identified three separate distribution channels, each forming a separate relevant market: direct sales at retail level; wholesale sales to office supply retailers; and contract sales to large business customers. The Commission further split contract sales between international and non-international (national) customers.

The Commission identified horizontal concerns in three markets. First, the merger would have reduced the number of viable competitors for international contracts in the EEA from three to two. Following the transaction, the merged firm would face effective competition only from its rival Lyreco, as no other supplier had sufficient scale and geographic footprint to supply customers across several EEA countries. Bidding data and survey evidence

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confirmed close competition between the parties and a combined share up to 50–60 per cent. Rivals active in only one country were not viable alternatives for international customers, and would face significant costs and risks in setting up contract distribution operations in new EEA countries, meaning that entry barriers were high. Second, the transaction would have left Lyreco as the only credible competitor in non-international contracts in Sweden and the Netherlands. Past bidding data showed that Office Depot won 30–40 per cent and Lyreco won 20–30 per cent of all business customer tenders lost by Staples in Sweden. The remaining competitors exercised only a limited competitive constraint. Third, the transaction would essentially create a monopoly in the wholesale office supply market in Sweden.

To obtain clearance, the parties agreed to divest, to an up-front buyer, Office Depot’s EEA and Swiss contract distribution business and its entire Swedish business, removing the entire overlap in each of the markets of concern. In practical terms, this meant the divestiture of most of Office Depot’s EEA activity. Following market testing of the remedy, the Commission identified some shortcomings regarding the viability of the divestment business. In particular, the divestment business would be vulnerable during the crucial period shortly after the divestment to cost increases for office supplies, prices of which were to be negotiated with the combined business. To address this, the parties agreed to offer the purchaser a transitional supply agreement covering all products from Office Depot’s vendors at cost, ensuring that the divestment business would have access to supplies on terms as favourable as Office Depot had prior to the transaction.

While the parties were able to obtain Commission clearance with these broad remedies, the transaction was ultimately abandoned as a result of challenges from the US Federal Trade Commission and the Canadian Competition Bureau, which found that the transaction would have essentially led to a monopoly for the supply of consumable office supplies to large business customers in the USA and Canada.

3. Plastic Omnium/Faurecia exterior automotive business

On 11 July 2016, the Commission conditionally cleared the acquisition by Plastic Omnium of Faurecia’s automotive plastic exterior component business. The business supplies front/rear bumpers, front end carriers, hatchbacks/tailgates, and front end modules.

The Commission identified competitive concerns in four product markets. First, in plastic front and rear bumpers, the parties’ combined shares ranged from 60 to 80 per cent in various overlapping catchment areas in France, Belgium, and Spain; in each case tendering data also showed that the parties competed closely against each other and faced few rivals. Second, in the EEA-wide front end carriers market, the transaction would have combined two close competitors in terms of capacity, geographic coverage, and know-how, creating a market leader with EEA share of up to 50 per cent—more than twice the share of its nearest rival. Third, in hatchbacks/tailgates, Plastic Omnium’s pre-merger EEA share was 70–80 per cent, rising to 80–90 per cent post-transaction and eliminating competition from Faurecia, the only significant competitor of Plastic Omnium. Fourth, in front end modules, the parties were the two most important EEA suppliers, with a combined share of 70–80 per cent. In all four markets, the Commission found significant entry barriers, limited scope for customer switching, and insufficient countervailing buyer power, concluding that the transaction would therefore lead to a reduction in consumer choice and price increases.

To address the Commission’s concerns, the parties agreed to divest seven of the plants at which Faurecia produced the relevant products, and an R&D centre to ensure continued viability of the divested business going forward. The Commission agreed that the plants could be sold to multiple purchasers, provided that the purchaser(s) have experience in the supply of automotive components or are approved by the customers.

4. Sanofi/Boehringer Ingelheim consumer healthcare business

The acquisition by Sanofi of Boehringer Ingelheim’s (‘BI’) consumer healthcare business was part of a two-part business swap that also included the separately notified acquisition by BI of Sanofi’s animal health business. The Commission reviewed the concentration’s effects on all ‘Group 1’ markets (combined share >35 per cent and increment >1 per cent) as well as certain plausible ‘Group 2’ (combined share >35 per cent and increment <1 per cent) and ‘Group 3’ (combined share between 20 per cent and 35 per cent) markets spanning gastrointestinal treatments, cough and cold, pain and

26 Each catchment area comprised a 250 km radius around each production plant (i.e., automotive OEMs) of the parties’ customers.
mobility, cardiac stimulants, and vitamins and well-being products, all sold over-the-counter (‘OTC’).

The Commission identified horizontal concerns in four areas, namely (i) chesty/wet cough treatments in Greece and Ireland; (ii) non-narcotics and anti-pyretics (pain management) in France; (iii) antispasmodics (treatment of various gastrointestinal disorders, abdominal pain, cramping, and discomfort) in several EEA countries; and (iv) constipation drugs in the Czech Republic. In each market the parties had high combined shares, competed closely against each other with well-recognised brands, and would have been in position to implement price increases given the applicable OTC regulatory framework.

To address the Commission’s concerns after a Phase I review, the parties agreed to divest Sanofi’s or BI’s local business in each of the markets at issue to one or more purchasers. The divestitures were structured as asset carve-outs and included marketing and regulatory authorisations, a transitional manufacturing or supply arrangement on a reasonable cost-plus basis or reasonable technical assistance to the purchaser to assume the manufacturing and supply responsibility, transitional distribution arrangements on a reasonable cost-plus basis until the completion of the transfer of relevant marketing authorisations, customer information, local brands, and an option for key personnel. In line with previous decisional practice in the pharmaceutical sector, the Commission required that the purchaser be an established OTC branded products supplier with an existing distribution and sales footprint in the relevant countries, because OTC suppliers compete using their entire portfolio to appeal to pharmacies and wholesale customers.

5. Boehringer Ingelheim/Merial

The Boehringer Ingelheim/Merial transaction—the second element of the two-part business swap between the parties—brought together two key competitors in the development, manufacturing, marketing, and sale of animal health products across the EEA. The Commission’s review focused on biologicals (swine and ruminant vaccines) and pharmaceuticals (anti-inflammatory and antimicrobial drugs, and other specialty products).

The investigation showed that in several markets either BI or Merial was a strong player while the other was already competing or had a pipeline product in development. The Commission identified concerns in markets for different types of porcine and bovine vaccines and in non-steroidal anti-inflammatory drugs in injectable forms and in tablets for horses. The limited number of remaining players would not exercise a sufficient constraint to prevent price increases and a loss of quality of service and supply.

To address the Commission’s concerns after a Phase I review, BI offered to divest several of Merial’s marketed and pipeline vaccine and pharmaceutical products. Reflecting the specific nature of vaccines (the production of which is difficult to stop and restart or move), the remedy required a full transfer of production technology, along with technical support and transitional supply arrangements. For the same reasons, the identity of the purchaser was also critical: BI thus agreed to carry out the technology transfer to up-front buyer Ceva Santé Animale, an established company in the animal health sector with expertise and experience in the relevant production technologies and an established distribution and marketing network throughout the EEA.

6. AB InBev/SABMiller

The proposed merger of AB InBev and SABMiller would bring together the two largest beer brewers worldwide, and the number three and four players in Europe. AB InBev’s brands include Corona, Stella Artois, and Budweiser. SABMiller’s brands include Miller, Peroni, Pilsner Urquell, and Grolsch.

The Commission found that the transaction would remove an important competitive constraint in the national beer markets (and their various sub-segments) in Italy, the Netherlands, the United Kingdom, Romania, and Hungary, while also increasing the likelihood of tacit price coordination. The Commission’s investigation revealed evidence that European brewers seek to engage in coordinated ‘follow-the-leader’ pricing at the national level. This means that the market leader raises prices with the expectation that other rivals will follow or be retaliated against. The Commission was also concerned that the transaction would create a link between the parties and Molson Coors, AB InBev’s long-term licensed bottler and distributor in the Czech Republic, Hungary, Romania, and Slovakia, reducing Molson Coors’s incentive to compete while reinforcing the likelihood of tacit coordination.

The Commission also found that the transaction would facilitate tacit price coordination among brewers across the entire EEA, in particular through the increase in the number of ‘multimarket contacts’ i.e., national markets where the merged entity and the two remaining major brewers encounter each other as competitors. This would have facilitated retaliation to any price reduction by a rival, including in countries other than...
one where the price deviation took place. This theory of harm was supported by specific evidence that brewers had previously considered such multimarket retaliation options. As Commissioner Margrethe Vestager stated, in a €125 billion European market, even a relatively small price increase would be capable of causing serious harm to consumers.\(^{30}\)

In anticipation of concerns resulting from straightforward horizontal overlaps, AB InBev offered to divest the whole of SABMiller’s business in France, Italy, the Netherlands, and the United Kingdom already at the time of the notification. In response to the Commission’s further objections, AB InBev later added SABMiller’s business in the Czech Republic, Hungary, Poland, Romania, and Slovakia to the divestiture package. This meant that AB InBev agreed to divest essentially all of the SABMiller European businesses it initially intended to acquire, which effectively addressed the Commission’s unilateral and coordinated horizontal concerns.

7. Abbott Laboratories/Alere\(^{31}\)

The Abbott Laboratories/Alere transaction brought together two companies active in in-vitro diagnostics (‘IVD’) systems, which perform clinical tests outside the body using blood, urine, or other samples. The Commission focused on the parties’ overlap in point of care IVD systems used in emergency rooms, hospital wards, ambulances, and other near-patient settings with samples assessed at the same location, and in particular those used in testing of blood gases and cardiac markers. Blood gases are vital parameters monitored for patients who are on oxygen or have been admitted into critical care and are undergoing prolonged anaesthesia. Cardiac markers are biomarkers measured to evaluate heart functions.

In handheld point of care systems for blood gases, the Commission found that the proposed transaction was a merger-to-monopoly as the parties produced the only two systems available: iSTAT and Epoc. In cardiac markers, the contemplated merger would not have created a monopoly, but the iSTAT and Triage systems still competed closely in functionality and use in hospitals. The Commission also identified vertical input foreclosure concerns stemming from Alere’s activity in the upstream manufacturing and sale of B-type natriuretic peptide (‘BNP’) tests used to check heart failures, which Alere supplied to Danaher, Abbott’s competitor in the downstream laboratory IVD systems. According to the Commission, the merged entity would have had the ability and incentive to cease supplying BNP tests to Danaher, rendering Danaher’s systems less attractive.

To secure clearance in Phase I, Abbott committed to divest Alere’s worldwide Epoc and Triage businesses, along with Alere’s BNP reagents business and manufacturing sites that produce essential inputs for the production of BNP reagents for Danaher laboratory devices. The Commission was satisfied that the remedy package addressed its horizontal and vertical concerns. However, Abbott abandoned the proposed acquisition for financial reasons, citing a substantial loss of Alere’s value since the deal was initially agreed.\(^{32}\)

8. Abbott Laboratories/St Jude Medical\(^{33}\)

On 23 November 2016, the Commission conditionally approved the acquisition of St Jude Medical by Abbott Laboratories. The review focused on cardiovascular devices, in particular for vessel closure and electrophysiology procedures. Vessel closure devices (‘VCDs’) are used to close holes made in arteries in order to access the heart or the vascular system for vascular disease treatment. Electrophysiology procedures are used to diagnose and treat abnormalities in the timing and pattern of a heartbeat; when the abnormalities are treated by way of a minimally invasive surgery, known as catheter ablation, transseptal sheaths are used to introduce and remove catheters.

With regard to VCDs, the Commission found that although several alternative methods can be used to close arterial holes, including manual compression, surgical suturing, and closure assist devices, certain interventions require VCDs specifically. The merged entity would have had VCD market shares of at least 50–60 per cent in most EEA countries, and the parties were perceived as by far the two leading players. In transseptal sheaths, the Commission found that St Jude was the market leader in Europe, with national shares of at least 40–50 per cent in most countries. Abbott was in the process of introducing a new product called Vado that, absent the transaction, would have been a close competitor and exerted significant pressure on St Jude. The Commission was concerned that the merged entity would have the incentive to abandon the launch of the new Abbott product.

To secure Commission approval after a Phase I review, Abbott agreed to divest (i) St Jude’s global VCD business,


including a production facility; and (ii) Abbot’s Vado business, including Abbott’s shareholding in Kalila Medical, the company that had developed the Vado device and which Abbott had recently acquired but had not yet integrated into its operations. These divestments removed the overlaps of concern on a global basis.

9. Mylan/Meda

On 20 July 2016, the Commission conditionally approved the acquisition of Meda by Mylan. Both companies were active in the manufacturing and distribution of OTC and prescription generic and specialty finished dose pharmaceuticals (‘FDPs’), as well as active pharmaceutical ingredients, and contract manufacturing and out-licensing of FDPs.

The Commission identified horizontal concerns related to FDPs in several therapeutic areas, in particular cardio-metabolic; alimentary tract and metabolism; dermatologicals; genito-urinary system and sex hormones; anti-infective agents; antineoplastic and immunomodulating agents; musculoskeletal system; nervous system; and respiratory system, in several EEA countries. The merged firm would have had shares of 50 per cent to almost 100 per cent, with significant increments, in each of these markets. The Commission found that the parties were often each other’s closest competitors, with only one remaining rival in several markets.

To alleviate the Commission’s concerns after a Phase I review, Mylan offered to carve out and divest to one or more purchasers its own or Meda’s local business in each of the 15 markets of concern, including the relevant marketing authorisations, customer information, and brands. The market test had confirmed that generic suppliers compete using their entire portfolio in order to appeal to pharmacies and wholesale customers, so the Commission required that the purchaser(s) be established in the marketing of generic pharmaceutical products, with a significant product portfolio and an existing distribution and sales footprint in the relevant countries.

10. HeidelbergCement/Italcementi

HeidelbergCement’s acquisition of Italcementi marked the latest milestone in the recent wave of consolidation in the construction materials industry, after the 2014 tie-up between Cemex and Holcim and the 2015 asset swap between Cemex and Holcim. Both HeidelbergCement and Italcementi ranked among the largest European manufacturers of grey cement, a fine powder made from limestone to bind other materials for stability and strength. Both are also active in ready-mix concrete and aggregates.

Although the parties’ activities in the EEA were largely complementary from a geographical standpoint, their grey cement and ready-mix concrete operations in Belgium and adjacent regions in France and the Netherlands presented significant horizontal overlaps. In several catchment areas drawn with a radius of 150 km or 250 km around the parties’ cement production plants in Belgium and in adjacent regions in France and the Netherlands, their combined shares would have exceeded 50 per cent. The Commission found that even pre-merger, HeidelbergCement’s conduct in those markets had been restrained by competitors only to a limited extent. The acquisition of Italcementi’s state-of-the-art Belgian cement plant, along with the removal of one of only three major competitors in the markets at issue would likely further reinforce HeidelbergCement’s market power.

To address the Commission’s concerns after a Phase I review, the parties offered to eliminate the overlaps of concern by divesting to an up-front buyer Italcementi’s entire Belgian business, including grey cement, ready-mix concrete, and aggregates production facilities. The divestment business also included some of Italcementi’s French sales staff, to enable the divestment business to continue to serve those French customers that Italcementi had supplied from its Belgian plant. Moreover, to ensure that the divestment business would have adequate long-term access to limestone reserves, which is necessary to manufacture grey cement, the parties also agreed to divest a portion of HeidelbergCement’s limestone quarry in southern Belgium and Italcementi’s stake in a limestone joint venture with LafargeHolcim. Since the transfer of Italcementi’s stake in the joint venture was contingent on LafargeHolcim’s approval, the parties agreed to submit any amendments to the joint venture agreement to the Commission for approval prior to closing the divestment.

11. Konecranes/Terex MHPS

On 8 August 2016, the Commission conditionally approved the acquisition by Konecranes of Terex’s Material Handling and Port Solutions (‘MHPS’) business after a Phase I review.

The transaction involved overlaps in the manufacture and sale of industrial cranes, hoists for industrial cranes, industrial crane services, and port equipment supply.

The Commission identified horizontal competition concerns in the markets for electric chain hoists and wire rope hoists. In both markets the merged entity’s combined market share would have been 30–40 per cent at EEA level and from 40 to 70 per cent in several Member States. The Commission found that the parties were the closest competitors for hoists, with highly recognised and high-end brands and a combined position far larger than their nearest competitors. The market test revealed widespread concern that the merged entity would be able to increase prices.

To gain clearance in Phase I, the parties committed to divest to an up-front buyer Konecranes’ entire Stahl business. Stahl is a Germany-based company that markets and sells wire rope and electric chain hoists, and is one of Konecranes’ strongest brands. The divestment business included Stahl’s manufacturing facility, brands, customer contracts and information, intellectual property rights, product lines, R&D and pipeline projects, and, at the option of the purchaser, a supply agreement negotiated on standard market terms. Notably, the commitments included a provision empowering the Monitoring Trustee to appoint a third-party expert to supervise and provide an expert opinion on the allocation and transfer or license of the shared technology between the combined entity and the purchaser.

The Commission found that the proposed divestiture would eliminate the whole market share increment for wire rope hoists (the product where most concerns had been raised) at the EEA level and in Germany and halve the increment in France, and halve the increment for electric chain hoists in the EEA, Germany, and France. The Commission was satisfied that the remedy was sufficient, including because Stahl was a stand-alone business (having been acquired by Korecranes in 2005) and the Stahl brand was Terex’s closest competitor, with a strong reputation in the market, notably because of its ‘made-in-Germany’ appeal.

12. Coherent/Rofin-Sinar Technologies

The proposed concentration between laser manufacturers Coherent and Rofin raised horizontal competition concerns in the worldwide market for low-power (0–999 W) CO2 lasers, which are used in a variety of material cutting and marking applications. The Commission found that the deal involved the combination of the global first and third players in a concentrated industry, and that the combined firm would have had shares of 40–60 per cent in 0–999 W CO2 lasers and 50–80 per cent in a plausible narrower market for 100–999 W CO2 lasers. The Commission found that the parties were close competitors, that barriers to entry and expansion were significant, and that the parties’ far-smaller rivals would not seriously constrain the merged firm.

To address the Commission’s concerns, the parties offered to divest Rofin’s entire global 0–999 W CO2 laser manufacturing operations, along with specific testing, repair, and quality control equipment, Rofin’s CO2 laser R&D capacity, and most of the patents used by Rofin to manufacture CO2 lasers. The Commission was satisfied that these commitments removed the entire horizontal overlap in low-power CO2 lasers.

But the Commission had reservations about the divestment business’s viability and competitiveness, as initially structured. The concerns centred on the proposed transfer of intellectual property rights, which would have (i) required the divestment business to grant an exclusive back-license of two patents to the merged entity for CO2 laser sources in the power range above 999 W; and (ii) involved a reverse carve-out of a carbon monoxide (CO) laser R&D project for retention by the merged firm. Neither of these measures would have had any direct impact on the low-power 0–999 W CO2 lasers market in which the transaction raised competition concerns, but the Commission found that both measures would have blocked or delayed the divestment business’s ability to extend and diversify its product offering into the power range above 999 W and the CO laser segment, thus impairing its overall competitiveness and growth prospects. To address these concerns, the parties settled for a non-exclusive back-license and abandoned the reverse carve-out of the CO laser project.

13. Danone/The WhiteWave Foods Company

On 16 December 2016, the Commission conditionally approved the acquisition of WhiteWave Foods by Danone. WhiteWave manufactures plant-based products, including growing-up milk (‘GUM’) for children between the ages of one and three. Danone, one of the largest dairy producers in Europe, also manufactures plant-based GUM.
The transaction would have resulted in a merger to monopoly in the Belgian market for plant-based GUM. Even in the broader, overall (dairy and plant-based) GUM market in Belgium, the transaction would still have represented a reduction in the number of suppliers from three to two. This would have left Belgian consumers with little, if any, alternative, to the combined entity’s plant-based products. The Commission found that the difficulties associated with building a well-known brand to secure access to retail shelf space meant that new entry was unlikely to offset these effects.

To secure clearance in Phase I, the parties offered to divest to a purchaser with an industrial background a significant portion of Danone’s GUM business in Belgium, including both plant-based and dairy products. The divestment package included an exclusive, time-limited license for Danone’s Olvarit brand under which it sold both dairy and plant-based GUM, along with relevant customer contracts, know-how, promotional materials, and the assignment of the third-party supply agreement under which Danone acquired the GUM products sold under the Olvarit brand. The package also included the assignment of Danone’s Bambix brand, as the platform for the purchaser to rebrand the acquired Olvarit business. Following input from market test respondents concerning the importance of R&D and innovation in the GUM market, the parties clarified that the Olvarit license would, at the purchaser’s option, include access to new recipes and formulae developed by Danone during the license period.

The Commission was satisfied that the proposed divestitures would eliminate the entire overlap between the parties’ activities in the plant-based GUM market in Belgium; the inclusion of regular GUM sold under the Olvarit brand would give the buyer significantly greater scale and improve the attractiveness of the license for a potential purchaser.

14. Imerys/Alteo certain assets

On 28 October 2016, the Commission conditionally approved Imerys’s proposed take-over of Alteo ARC and Alufin from alumina supplier Alteo. Alteo ARC and Alufin operated two alumina plants in France and one in Germany, respectively. Both Imerys and Alteo ARC were active in the market for white fused alumina, a material typically available in the form of powder or grains that can be used for refractory applications (e.g., mortars) or abrasive products (e.g., grinding wheels). Both were also active in bubble alumina, a higher-value sub-segment of white alumina.

The Commission found significant overlaps between the parties’ activities in the market for white fused alumina for refractory and abrasive applications and its bubble alumina sub-segment. The merger would have eliminated one of Imerys’s closest competitors and left the combined entity with only one major EEA-based competitor. This was liable to lead to price increases for white fused and bubble alumina.

To secure the Commission’s approval in Phase I, the parties proposed to divest Alteo ARC’s white fused alumina activities and related businesses located in one of Alteo ARC’s two French plants. The Commission was satisfied that this would remove the entire overlap between the parties’ activities in the markets at issue.

15. Wabtec/Faiveley Transport

The Wabtec/Faiveley Transport merger would have brought together two leading train equipment suppliers. The parties were both active in several types of train equipment, including sintered friction materials for train brakes. These are materials transformed from powder into a strong substance capable of withstanding high pressure and temperatures to generate controlled friction for braking.

The Commission’s concerns focused on horizontal overlaps between the parties’ activities in the aftermarket, where train operators purchase sintered train friction brake materials for their existing train fleets. In that market, the transaction would have reduced the number of strong suppliers from three to two, leaving the only remaining competitor unable to exert sufficient competitive pressure on the merged entity to prevent price increases.

To address the Commission’s concerns in Phase II, the parties offered to sell Faiveley’s sintered friction materials business. The Commission was satisfied that the proposed remedy would remove the entire overlap between the parties’ activities in the market at issue.

16. Ball/Rexam

The Ball/Rexam transaction brought together the number one and two beverage can manufacturers in the EEA and worldwide.

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43 Alufin’s activities focused on a different kind of alumina.
44 Refractories are construction materials designed to withstand aggressive service conditions at high temperatures. They are used as heat-resistant walls, coatings, or linings to protect units from oxidation, corrosion, erosion, and heat damage.
The Commission was initially concerned that the combined firm would supply about two-thirds of the beverage cans sold in Europe, leaving just two additional, much smaller, competitors. During its Phase II review, however, the Commission shifted its focus to separate regional markets, defined as clusters of catchment areas of 700 km around individual beverage can customer filling locations. The parties’ combined volume and capacity shares in each of the nine regional markets identified by the Commission ranged from 40–50 per cent to 90–100 per cent, with significant increments. In a sector characterised by high entry and expansion barriers, high capacity utilisation rates, a lack of switching opportunities, and corresponding limited countervailing buyer power, the Commission concluded that the transaction would have significantly impeded competition in each of the nine markets.

To address these concerns, the parties agreed to sell to a single up-front buyer Ball’s entire metal beverage packaging activities in Europe, including: eight Ball can body plants and two can end plants; Ball’s shared services centre (which housed corporate support functions and a dedicated R&D and innovation centre); Ball’s European headquarters, at the purchaser’s option; and two of Rexam’s can body plants, with the exclusion of two Ball plants that could be retained. The package thus consisted essentially Ball’s existing European business, which would be sold as a going concern, and with limited reverse carve-outs. With the divestiture, the transaction would result in neutral or reduced concentration in each of the nine relevant markets and the buyer would have geographic reach and capacity nearly matching the overlap created by the transaction.

17. Vodafone/Liberty Global

The Vodafone/Liberty Global transaction involved the formation of a 50/50 joint venture combining Liberty Global’s and Vodafone’s Dutch operations. In the Netherlands, Vodafone owns and operates its own mobile telecommunications network, and provides other services such as fixed telephony, broadband internet, and TV via wholesale access to Dutch telecommunications incumbent KPN’s copper and fibre infrastructure. Liberty Global provides retail fixed telephony, broadband internet, and TV services over a cable network that it owns and operates, and provides mobile telecommunications services as an MVNO by way of wholesale access to another operator’s network.

The Commission’s investigation focused on the overlaps between the parties’ activities in fixed multiple play and fixed-mobile multiple play services in the Netherlands. The Commission found that Vodafone was a recent entrant with the potential to develop into a strong competitor in these markets, and concluded that removing this potential competitive constraint would lead to higher prices.

To address the Commission’s concerns in Phase I, the parties offered to divest Vodafone’s entire Dutch retail consumer fixed line business, including the customer base. The Commission was satisfied that this would remove the overlap between the parties’ activities in the markets at issue and allow a suitable purchaser to replicate the competitive role played by Vodafone prior to the transaction.

B. Quasi-structural remedies

1. CMA CGM/NOL

On 29 April 2016, the Commission conditionally cleared in Phase I the acquisition by CMA CGM of Neptune Orient Lines (NOL). Both companies are active in deep sea container line shipping services involving the provision of regular, scheduled services for the carriage of cargo by container, as well as container terminal services involving the (un-) loading, storage, and land-side handling for inland transportation of containerised cargo. Shipping companies provide their services either individually using their own vessels or jointly through slot charter agreements, consortia, or alliances involving several shipping companies.

The Commission’s analysis followed its recent decision in CSAV/HGV/Kühne Maritime/Hapag-Lloyd AG, where it found that participation in a consortium restricts members’ flexibility on some key parameters of competition. Consortium members, the Commission concluded, typically agree on various aspects of the service including capacity, which in turn materially influences price competition (both between competing consortia and among consortium members), frequency, transit times, and ports of call. The Commission therefore considered not only the combined shares on overlapping shipping routes (trades) represented by the parties themselves, but also the combined shares held by each of the parties’ consortia, on the basis...
that the latter measure provides a quantitative indication of the overall volumes over which the parties exercise influence. On this basis, the Commission identified competitive concerns on two routes, Northern Europe–North America and Northern Europe–Middle East, where the combined shares of the parties’ consortia ranged from 40 to 70 per cent.

To address these concerns, CMA CGM committed that NOL would withdraw from the G6 consortium of which it was a party and would not re-join it, or any substantially similar consortium, within 5 years. The parties also committed to a set of ring-fencing measures designed to ensure that no commercially sensitive information from G6 would be passed to CMA CGM pending the withdrawal of NOL, agreed that NOL would not participate in G6 board discussions related to contingency planning for the period following NOL’s exit, and delegated to a monitoring trustee the power to exercise NOL’s veto rights in G6 committees during the period leading up to NOL’s exit.

2. Hapag-Lloyd/UASC

Following its approval of the CMA CGM/NOL transaction in the first half of 2016, the Commission cleared another transaction in the container liner shipping sector, namely the acquisition of United Arab Shipping Company (‘UASC’) by Hapag-Lloyd.

In line with its analysis in CMA CGM/NOL, the Commission focused on the parties’ membership in consortia and alliances, and concluded that the transaction would create links between the consortia to which they were party on the Northern Europe–North America route. On that route, via their alliances the parties would have been able to influence capacity and prices on a large part of the market and would face insufficient competitive constraint from rival companies.

In keeping with the standard remedy practice in the container liner shipping sector, Hapag-Lloyd agreed to terminate UASC’s membership in the NEU1 consortium, effectively removing the links that had raised concern. A monitoring trustee would oversee the orderly exit of UASC from NEU1, ensuring that no competitively sensitive information would flow between the consortia during the interim period.

3. Airbus Safran Launchers/Arianespace

On 20 July 2016, the Commission conditionally cleared the acquisition of Arianespace by Airbus Safran Launchers (‘ASL’). Arianespace offers satellite launch services to private and institutional satellite operators and is entrusted by the European Space Agency with the commercial exploitation of two launchers funded by the ESA: Ariane (manufactured by ASL) and Vega (manufactured by ELV). ASL is a 50/50 joint venture between Airbus and Safran that manufactures the Ariane launcher. Airbus is active in aeronautics, space, and defence, and in particular is one of the world’s leading satellite manufacturers as well as a supplier of sub-systems for launchers. Safran is active in aerospace propulsion, aircraft equipment, and defence/security.

The Commission found that the transaction would facilitate flows of sensitive information among the parties, namely (i) from Arianespace to Airbus concerning other satellite manufacturers; and (ii) from Airbus to Arianespace concerning other launch service providers. These information exchanges could have reduced competition in tenders and incentives to innovate in the markets for satellites and launch services.

To secure Commission approval following a Phase II review, the parties agreed to (i) erect firewalls to prevent the sharing of information about third parties, other than as typically required for day-to-day operations; (ii) put in place measures restricting employees’ mobility between the companies; and (iii) provide for an arbitration mechanism to be included in the parties’ future third-party non-disclosure agreements aimed at ensuring effective implementation of the firewalls. Recognising that ‘[a] well-functioning satellite and launcher industry is important to guarantee that European companies and institutions can gain access to space at competitive terms,’ Commissioner Margrethe Vestager commented that ‘[t]he commitments offered by ASL ensure that after its take-over of Arianespace, all players in the industry will continue to have incentives to innovate.’

4. Microsoft/LinkedIn

On 6 December 2016, the Commission approved, subject to commitments, the acquisition of LinkedIn by Microsoft. LinkedIn operates a professional social network (‘PSN’) that includes various product lines such as recruiting tools and online education courses, sales intelligence, premium member subscriptions, and an advertisement platform. Microsoft is a technology company offering operating systems for personal computers, servers, and mobile devices, other software and cloud-based solutions, hardware devices, and online advertising.

52 Ibid.
53 Microsoft/LinkedIn (COMP/M.8124) Commission Decision of 6 December 2016 (not yet published).
Reminiscent of competition issues that arose more than a decade ago in connection with Microsoft’s Internet Explorer and Windows Media Player, the Commission identified conglomerate effects concerns arising from the combination of Microsoft’s strong positions with Windows for PCs and Microsoft Office and LinkedIn’s leading professional social network. Specifically, the Commission was concerned that Microsoft would have the ability and incentive to leverage its strong positions in Windows and Office by pre-installing LinkedIn on all Windows PCs and integrating LinkedIn into Office, thereby enhancing LinkedIn’s visibility to the detriment of other PSNs. According to the Commission, Microsoft would also have had the ability and incentive to foreclose LinkedIn’s competitors from accessing Microsoft’s application programming interfaces (‘APIs’) needed to interoperate with Microsoft’s products and to access data in the Microsoft cloud, reinforcing the foreclosure effect. The increase in LinkedIn’s user base would raise entry barriers (including as a result of network effects), foreclosing new and existing players from providing PSN services in the EEA.

To gain clearance in Phase I, Microsoft offered a set of 5-year commitments relating to both the integration of LinkedIn with Microsoft software and the pre-installation of LinkedIn on Windows PCs. Regarding integration, Microsoft agreed to make available to competing PSN providers the relevant APIs and related tools, and to maintain existing levels of interoperability with Office, so that rivals can continue to develop PSNs offering similar Office-integrated functionality to what Microsoft envisaged to introduce in relation to LinkedIn. Regarding pre-installation, Microsoft agreed that PC manufacturers and distributors would be free not to install LinkedIn, and that users would be free to remove LinkedIn should the OEMs/distributors decide to install it. The Commission specifically did not require that Microsoft be prevented from integrating LinkedIn with its existing products (even in ways that competing PSNs might not entirely be able to replicate via the integration commitments) or from pre-installing LinkedIn on Windows PCs, concluding that such requirements would impinge unduly on Microsoft’s ability to market its products going forward.

5. Dentsply/Sirona

On 25 February 2016, the Commission conditionally approved the acquisition by professional consumable dental products supplier Dentsply of professional dental equipment supplier Sirona. The Commission’s investigation focused on a dental restoration technology known as CAD/CAM (computer-aided design and computer-aided manufacturing). The CAD/CAM technology can be used by dental laboratories (labside CAD/CAM systems) or directly by dentists in their practices (chairside CAD/CAM systems) to manufacture dental prosthetics such as bridges, crowns, and inlays out of specially manufactured zirconia, glass ceramics, or acrylics blocks (CAD/CAM blocks). Sirona was the leading chairside CAD/CAM systems supplier (EEA market share 80–90 per cent) and also sold CAD/CAM blocks under a private label. Dentsply supplied CAD/CAM blocks licensed to be used with Sirona’s chairside CAD/CAM system.

The overlap between the parties’ CAD/CAM blocks activities did not raise horizontal concerns, as the combined firm would account for only 0–5 per cent of EEA sales. However, the Commission found that the combination of Sirona’s chairside CAD/CAM system with Dentsply’s CAD/CAM blocks activity was likely to result in the anticompetitive foreclosure of competing CAD/CAM block suppliers via conglomerate effects. The combined entity would have the ability and incentive to leverage Sirona’s dominant or quasi-monopolistic position in chairside CAD/CAM systems to favour its own CAD/CAM blocks. To that effect, the merged entity could have foreclosed rival block suppliers’ access to its chairside CAD/CAM system by (i) terminating licensing agreements according to which third-party blocks were approved for use with the Sirona system; (ii) degrading interoperability with third-party blocks; or (iii) pursuing bundling strategies. The Commission was concerned about competitor foreclosure despite the merged firm’s current low share of CAD/CAM blocks, since Dentsply was a leading supplier of various dental materials and had plans to significantly expand its CAD/CAM block range and capacity.

According to the Commission, this was liable to harm competition in two ways. First, the prospective foreclosure strategy would have resulted in increased prices for CAD/CAM blocks. Customers (i.e., dentists) would be able to pass on these price increases to end consumers (i.e., patients) and would therefore be unlikely to oppose them. Second, the successful implementation of the merged entity’s prospective foreclosure strategy risked having a detrimental impact on innovation. With their access to the dominant chairside CAD/CAM system cut off, rival CAD/CAM blocks suppliers might become unwilling to continue to invest in research and new technologies. At the same time, in a

market where innovation is the main driver of competition, the eventual elimination of competition in the supply of CAD/CAM blocks would have lowered the merged entity’s incentives to innovate.

To address the Commission’s concerns at the end of Phase I, the parties offered a set of access remedies designed to prevent the merged entity from foreclosing access by rival CAD/CAM block suppliers to Sirona’s chairside CAD/CAM system. In particular, the parties committed to extend Sirona’s existing licensing agreements with competing CAD/CAM block suppliers to 2026. This was complemented with a set of technical and legal safeguards including (i) providing the licensees with the necessary know-how to ensure continued usage of their blocks with the Sirona system; (ii) taking all reasonable measures (e.g., firewalls and clean teams) to protect against misuse of confidential commercially or technically sensitive information from rival block suppliers; and (iii) refraining from making future technical changes to the Sirona system that could limit the usability of rival CAD/CAM blocks or might discriminate against them. The parties also committed to introducing a fast-track ICC arbitration procedure to settle any disputes that might arise in connection with the merged entity’s compliance with the remedies.

In assessing the proposed remedies package, the Commission recalled that structural remedies such as divestitures are the preferred method for addressing competition concerns. But in the case at hand, the Commission conceded that ‘remedies other than divestiture remedies appear[ed] best suited to directly address the concerns raised.’56 By ensuring that the combined entity’s CAD/CAM system would, for 10 years, remain open to competing CAD/CAM block suppliers on terms at least as favourable as prior to the transaction, the Commission found the remedies would preserve effective competition and foster consumer choice for CAD/CAM blocks customers.

C. Mixed remedies

1. Teva/Allergan Generics

The Teva/Allergan Generics transaction brought together two of the top four generic pharmaceuticals producers worldwide in ‘an unprecedented generics merger both in its size and number of overlaps.’58 A generic is a pharmaceutical drug equivalent to an originator drug in dosage, efficacy, route of administration, quality, performance, and intended use.

The transaction would have combined two key competitors in the manufacturing, marketing, and sale of generics across the EEA, and led to horizontal and/or vertical input foreclosure concerns (related to upstream out-licensing of dossiers and licensing rights related to generic drugs to downstream suppliers) in several marketed and pipeline generics in 24 EEA countries. Moreover, in addition to the traditional product-by-product individual molecule overlaps, the Commission identified country-wide competition concerns in Iceland, Ireland, and the United Kingdom, where the parties were the overall number one and two generics suppliers, entailing risks of higher prices and lesser quality of supply for the sale of generics overall. In Iceland, Allergan was historically the dominant generic supplier, which had been challenged recently by Teva. In Ireland, the parties were each recent entrants that had quickly become the generics market leaders, in particular through aggressive pricing strategies. In the United Kingdom, the parties were the only two generics suppliers with broad enough portfolios to be able to by-pass wholesalers and sell directly to pharmacies, making them unique and close competitors.

To address the Commission’s concerns, the parties assembled a divestiture package that included (i) either Teva’s or Allergan’s version of each of the marketed and pipeline molecules giving rise to horizontal or vertical concern in the 24 EEA countries; (ii) Teva’s portfolio of marketed and pipeline molecules in Iceland; and (iii) the vast majority of Allergan’s marketed and pipeline generics activities in United Kingdom and Ireland.59 The second and third elements of the package addressed the Commission’s country-wide concerns by effectively replicating the portfolio each party could offer its customers pre-merger. The divestments of pipeline products would ensure that the divested business remains competitive while it establishes its own R&D activity. Unlike in previous generics deals that involved fewer molecule divestitures, here the Commission required the divestment of Allergan’s manufacturing plant in the United Kingdom, together with supply and distribution assets and a transitional supply and technology transfer agreement related to divested molecules that were produced elsewhere. The divestment involved many non-overlapping products, which was necessary to give the purchaser the scale and scope to effectively compete with the merged entity post-transaction.

The Commission’s vertical concerns regarding out-licensing were addressed through a combination of

structural and behavioural remedies. The structural remedy, which Commission policy favours, consisted of the divestiture of either the upstream dossiers/licensing rights or the downstream manufacturing assets and supply rights for a country in question. In some countries, however, the vertical relationship related to Allergan out-licensing molecules to Aurobindo under a transitional arrangement stemming from Aurobindo’s 2014 acquisition of the relevant molecules from Allergan. The Commission recognised that this arrangement would be temporary, and therefore accepted a behavioural remedy according to which Teva agreed to continue the out-licensing arrangement under the same terms until Aurobindo would be able to take over the manufacturing itself.

Notably, the remedy also included a complex post-clearance monitoring arrangement until the divestiture is implemented due to the large number of individual molecule/country divestitures as well as associated complexities in transferring numerous marketing authorisations. The monitoring scheme included hold separate managers for each of the Teva and Allergan product portfolios to be sold, and a separate team to manage the UK and Irish divestment business, which would be sold to one buyer.

2. Worldline/Equens/PaySquare

On 20 April 2016, the Commission conditionally cleared two inter-related acquisitions of Equens and its subsidiary PaySquare by Worldline, all of which are active in the payment systems area. The Commission’s review focused on merchant acquiring, which consists of collecting card-based payments accepted from merchants that the acquirers aggregate and separate and then send to card issuers, typically via the respective card scheme networks (e.g., Visa/MasterCard). These payments are then debited to the card issuing bank and ultimately the cardholder. Worldline is also active as a manufacturer and provider of payment terminals.

The Commission identified horizontal, vertical, and conglomerate concerns. First, it found that Worldline held a dominant position with shares close to or above 90 per cent in merchant acquiring (and many of the market’s possible sub-segments) in Belgium. Although PaySquare was not a close competitor, it was one of the most credible and well-equipped companies to challenge Worldline’s position. Second, the transaction raised conglomerate concerns because Worldline had a 60–70 per cent share in the neighbouring market for payment terminals in Belgium, while there was a large common pool of customers that bought merchant acquiring services and payment terminals as a bundle. By strengthening Worldline’s position in the neighbouring acquiring services market, Worldline’s ability and incentive to foreclose competing terminal suppliers would be reinforced. Third, the transaction would lead to vertical input foreclosure concerns in Germany, because Worldline owned a software used by the vast majority of network service providers (‘NSPs’) in Germany, including PaySquare, who Worldline would be incentivised to favour post-transaction by offering superior pricing and quality than would be available to competing NSPs.

To address the Commission’s concerns after a Phase I review, the parties agreed to divest PaySquare’s merchant acquiring business in Belgium, including customer contracts, partnership agreements, and merchant data and records, and agreed not to target customers of the divestment business for 5 years. This addressed the Commission’s horizontal and conglomerate concerns. To resolve the vertical issues, the parties agreed to grant the NSPs in Germany a license to Worldline’s software on FRAND terms, which, for 10 years, cannot be less favourable than the terms provided to PaySquare. Compliance with the FRAND commitment will be monitored by a ‘licensing trustee’ with access to all of Worldline’s licensing agreements to carry out annual contract benchmarking, with any non-compliance subject to penalties such as a mandatory provision of the software’s source code for free. The license undertaking also entailed a commitment to cap software maintenance fees and to grant access to the software’s source code to enable NSPs to develop an alternative software.

3. Liberty Global/BASE

The Liberty Global/BASE transaction involved the acquisition of MNO BASE by Telenet, a cable operator and MVNO controlled by Liberty Global. This marked the first time the Commission undertook an in-depth

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62 MNOs own and operate their own mobile telecommunications networks. MNOs do not and therefore have to rely on wholesale access to a host MNO’s network to provide mobile telecommunications services. There are different types of MVNOs, ranging from full (or ‘thick’) to partial (or ‘light’). Full MVNOs typically own at least some of their core infrastructure but own no radio network access or spectrum. Light MVNOs own no network infrastructure at all.
investigation of the impact on the retail mobile telecommunications market of a merger between an MNO and an MVNO. The Commission identified horizontal concerns in the Belgian market for retail mobile telecommunications. Although the merged entity would only be a close second to market leader Proximus in terms of subscriber numbers and a close third to Mobistar in terms of revenue, the merger nonetheless raised concerns because it would have removed competitive pressure between two of the more dynamic players in that market. As the most recent MNO to enter the market, BASE competed aggressively with attractively priced offers. Telenet was the country’s largest MVNO and had contributed to lowering retail mobile telecommunications prices.

To alleviate the Commission’s concerns, the parties devised a remedy package based on three key components. First, the parties offered to divest to a new entrant BASE’s 50 per cent stake in ‘light’ MVNO Mobile Vikings. Second, the parties offered to transfer to that new entrant all BASE customers who purchase their services under the Jim Mobile brand, owned by branded reseller Mediálaan.

Third, the parties undertook to craft a wholesale agreement granting the new entrant access to BASE’s mobile network. The terms of the agreement are noteworthy because they require the purchaser to transition from a ‘light’ MVNO to a full MVNO within 2 years of closing the transfer of the customer base. This was designed to remove uncertainty about the actual implementation by the purchaser of a competitive business model (approximating Telenet’s position) within a reasonable period. Moreover, the wholesale agreement allows the purchaser to choose between a volumetric or capacity option. The volumetric option is a pay-as-you-go model, whereas the capacity option allows the purchaser to acquire a sizeable chunk of BASE’s network capacity up-front at a fixed annual rate. The Commission’s recent decisional practice suggests a strong preference for the latter, because it incentivises MVNO entrants to compete aggressively to fully utilise any capacity they have committed to purchase.

Finally, the remedy was structured as a fix-it-first divestiture, meaning that the parties had to enter into a legally binding agreement with a suitable purchaser during the Commission’s merger review process, such that the Commission’s decision clearing the merger also includes approval of the purchaser. The parties entered into an agreement with Mediálaan as the purchaser of the divestment business, which allowed them to close the merger shortly after the Commission’s approval decision.

4. Hutchison 3G Italy/Wind/JV

The proposed 50/50 joint venture between CK Hutchison’s subsidiary H3G and Vimpelcom’s subsidiary Wind would have created the largest retail mobile telecommunications operator in Italy. Prior to the transaction, Italy’s retail mobile telecommunications market was competitive, with four MNOs (TIM, Vodafone, recent entrant H3G, and Wind) and sixteen MVNOs. The Commission was concerned that the deal would derail this competitive dynamic in three ways. First, the transaction would lead to horizontal non-coordinated effects in the market for retail mobile telecommunications in Italy, reducing the number of MNOs from four to three while removing the competitive constraint the parties exerted on each other and on the two other MNOs.

Second, the transaction would also lead to horizontal coordinated effects concerns in the retail mobile telecommunications market. The shift from four to three MNOs, combined with the disappearance of H3G as an independent maverick player with misaligned commercial interests, would have created a highly concentrated and relatively symmetrical market structure, in which each MNO would have controlled around 30–32 per cent of the market. This would have aligned their incentives to coordinate, while removing obstacles to their ability to reach sustainable terms of coordination (e.g., using market shares as a focal point to slow down promotional efforts to win back lost customers, increase prices for new customers, or reduce dealers’ commissions for new customers).

Third, the transaction raised horizontal non-coordinated effects concerns on the wholesale market for access and call origination services on public mobile networks in Italy. The removal of one network access supplier was likely to reduce the bargaining power of MVNOs, while lowering the remaining network access suppliers’ incentives to host them on commercially attractive terms.

To address the Commission’s concerns, the parties agreed to a wide-ranging divestment package designed

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to create a fourth MNO capable of exerting a significant competitive constraint on the merged entity and the other two competitors in both the retail and wholesale markets. The parties offered to divest to a new entrant several radio spectrum blocks from different frequency bands along with several thousand mobile base station sites by way of either transfer or colocation (i.e., sharing). In addition, a five-year renewable transitional agreement for 2G, 3G, and 4G roaming on the merged entity’s network was meant to enable the purchaser to offer nationwide service while building its own mobile network.

The remedy package included three notable features. First, as in the Liberty Global/BASE case, the parties agreed to a fix-it-first remedy. The Commission approved French telecommunications maverick Iliad as the purchaser of the divestment business. Second, the parties agreed to set up a fast-track dispute resolution mechanism to ensure proper implementation of the remedies. Third, the parties offered to empower the monitoring trustee to seek expert advisory opinions from Italy’s telecommunications regulator on a range of questions related to Italy’s mobile telecommunications market.

D. Withdrawn cases/prohibition decisions

1. Halliburton/Baker Hughes66

On 2 May 2016, four months into a protracted Phase II review, Halliburton and Baker Hughes withdrew their notification of a merger that would have combined the second- and third-largest oilfield service suppliers worldwide. Both parties supply a wide range of tools and services for drilling and exploration as well as completion and production of oil and gas wells.

The Commission found that the parties were two of only four global providers, along with market leader Schlumberger and the smaller supplier Weatherford. The Commission identified serious horizontal concerns in relation to more than 30 product and service lines in the EEA where the parties competed closely, in particular in relation to tenders and innovation.

In tenders, the investigation revealed that small companies exercised only a limited constraint due to the importance of quality and reputation, in particular for offshore operations. The transaction would also have reduced the number of integrated service providers— who had a competitive advantage due to cost savings—from three to two. In innovation, the parties competed head-to-head in developing new products. This innovation competition would be removed post-merger and the merged entity and Schlumberger would have reduced incentives to innovate.

Other agencies worldwide were also concerned about the deal, including the US Department of Justice,67 which sued to block the transaction and thus substantially contributed to the parties’ decision to abandon it. Indeed, referring to difficulties the deal was facing ‘abroad,’ Halliburton did not submit a formal EU remedy, despite initial public comments that it was ready to do so.

2. Hutchison 3G UK/Telefónica UK68

On 11 May 2016, the Commission blocked the proposed acquisition of Telefónica UK by Hutchison 3G UK (‘H3G’). When the parties notified the transaction to the Commission in September 2015, the UK retail mobile telecommunications market was highly competitive, with prices among the lowest in the EU and 4G technology roll-out more advanced than in most other Member States. At the time, there were four MNOs (Vodafone, Telefónica’s O2, H3G, and British Telecom’s EE) along with a host of MVNOs.69 To share the costs of rolling out their networks while continuing to compete for retail customers, EE and H3G had combined their networks, as had Vodafone and O2.

The Commission’s in-depth investigation showed that the transaction was likely to adversely affect competition in the UK mobile telecommunications sector in three ways, none of which were addressed adequately by the parties’ proposed commitments. First, the four-to-three merger would have created a market leader with a share of more than 40 per cent in the market for retail mobile telecommunications, while removing H3G, a recent entrant that had been the main driver of competition as the most aggressive and innovative MNO. In a market with high barriers to entry and no countervailing buyer power, this was liable to lead to higher prices, reduced quality, and fewer choices for consumers.

69 A range of other non-MNO players are also active in the UK, including mobile virtual network enablers (MVNEs) and mobile virtual network aggregators (MVNA). MVNEs provide network infrastructure and related services, such as network sub-systems, business support systems, provisioning, and administration and operation support systems to MVNOs. MVNA are resellers of wholesale services. They purchase mobile airtime in bulk from the MNO and wholesale this airtime to multiple MVNOs.
To try to address those concerns, the parties offered a set of commitments designed to strengthen existing MVNOs or facilitate the entry of new ones. In particular, the parties proposed (i) to offer a wholesale agreement for a share of the merged entity’s network capacity to one or two MVNOs; and (ii) to divest O2’s stake in an MVNO joint venture and offer to the divested joint venture a wholesale agreement for a share of its network capacity. Several previous four-to-three MNO mergers had been cleared subject to similar MVNO remedies. However, in this case the Commission found that these measures would not enable the purchasers to replicate pre-merger levels of competition because the relevant MVNOs would have remained commercially and technically dependent on the merged entity, with limited ability or incentive to differentiate their offerings.

The Commission has emphasised that the prior transactions were distinguishable, in particular as regards the Commission’s second competition concern, namely that the merged entity would have had network sharing agreements with both of the remaining MNOs (EE and Vodafone). This would have given the merged entity a full view of its competitors’ network plans and the ability to weaken them. In particular, the merged entity would have had little incentive to invest in and maintain both networks, since if one network fell behind, the merged firm could simply have shifted to the other one. This would have substantially reduced the two other MNOs’ ability to compete and would have led to reduced industry-wide investment, in turn hampering the future development of mobile infrastructure in the UK. In an effort to address this concern, the parties offered a set of behavioural commitments designed to strengthen Vodafone’s and EE’s positions under the network sharing agreements. However, the Commission found that these commitments did not address the underlying structural issue, namely that the merged entity would keep the parties’ stakes in the two network sharing agreements. Moreover, they would have been difficult to implement and monitor effectively.

Third, the Commission concluded that the transaction would likely also give rise to non-coordinated horizontal effects in the wholesale market for access and call origination services on public mobile networks in the UK. As in the Hutchison 3G Italy/Wind/JV case, the reduction in the number of host MNOs from four to three would have left prospective and existing MVNOs in a weaker bargaining position to obtain favourable wholesale access terms. In response to this concern, the parties proposed behavioural remedies that would have extended existing wholesale access agreements with MVNOs to cover 4G at no extra cost, and offered wholesale access to MVNOs with which the parties had no existing agreement. But the Commission found that these offers were commercially unattractive for MVNOs, and there was significant uncertainty as to whether they could be effectively implemented.

The Commission therefore concluded that the proposed remedies were not sufficient, and prohibited the transaction. Hutchison has appealed the Commission’s decision to the General Court.

E. Legislative/soft law developments

1. ICN Merger Working Group’s Merger Remedies Guide

On 2 September 2016, the ICN’s Merger Working Group adopted a Merger Remedies Guide, which offers a set of best practices with respect to merger remedies. The Guide is divided into three chapters (i) Guiding Principles and Procedural Considerations; (ii) Choice and Design of Remedy; and (iii) Implementation and Monitoring of Remedies.

The first chapter describes overarching principles and procedural considerations for the review of merger remedies. First, the Guide emphasises that the remedy should be effective and tailored to the harm identified, and that the agencies should be transparent and consistent in designing and implementing remedies. Second, the Guide recognises that remedies may have a detrimental impact on a transaction’s efficiencies or other pro-competitive benefits, which needs to be adequately taken into account. Third, the Guide notes that coordinating agencies worldwide should strive to align the timing of their respective remedy procedures to minimise the risk of divergence and incompatibility.

The second chapter sets out categories of remedies (Fig. 3), and discusses in detail how each one ought to be designed.

The third chapter concludes with best practices for the implementation and monitoring of remedies, including the approval of the divestiture agreement and any ancillary agreements, the approval of a suitable purchaser, monitoring


71 See European Commission, Mergers: Commission Prohibits Hutchison’s Proposed Acquisition of Telefonica UK – Factsheet, MEMO/16/1705, 11


oversight, post-implementation modifications, and periodic reviews.

In addition, the Guide includes a set of annexes containing practical agency cooperation tips, examples of non-structural remedies, risks associated with price control remedies, a list of selected country-specific merger remedy guidelines, a list of selected ex post reviews and studies of merger remedies, and 23 remedy case studies involving several agencies worldwide.

**F. Perspectives**

In 2016, the Commission’s intervention rate was at a 13-year high, resulting in a total of 25 conditional clearances, two withdrawn notifications, and one prohibition decision. It remains to be seen whether this was a function of the peculiarities of the cases reviewed in 2016, a necessary consequence of increasing concentration levels across industries, or the reflection of a shift toward more aggressive enforcement.

One trend that seems likely to continue is the Commission’s increasing focus on preserving innovation in competition. This is manifest not only in the substantive concerns identified by the Commission, but also in the design of remedies, which often need to include R&D-related assets and activities going beyond specific markets of concern to ensure that the divestment business continues to innovate.

At the same time, the appeals pending before the General Court against a series of merger control decisions in the mobile telecommunications industry will put the Commission’s increasingly strict approach to remedies in four-to-three mergers to the test.

Finally, the recent US presidential election brought about a change of administration. Although there is still considerable uncertainty about the Trump administration’s approach to merger control, commentators predict a likely reduction in the US agencies’ appetite for intervention. This may present an opportunity for the Commission to take the lead in policing global mergers, including in the area of cross-border remedy design.

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