Survey

Recent Developments in EU Merger Control†

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I. Introduction: 2011–2012 at a glance

Notwithstanding the College's decision to prohibit the merger of Deutsche Börse and NYSE Euronext[1]—just the second prohibition decision to bear Commissioner Almunia's imprimatur—the sixteen months to 31 December 2012 are unlikely to be remembered as a period of radical change in the field of European merger control. It is clear that econometrics have been playing a more prominent role in the harder cases before DG COMP for a number of years but, as a practical matter, market definition remains the threshold issue in horizontal merger analysis, leading to structural remedies when certain market share levels are reached or where the number of direct competitors after the merger drops to three or fewer.

Global M&A markets remained stubbornly sluggish, against the backdrop of a eurozone crisis and a pending US presidential election, and while it was assumed that a difficult economic climate would drive consolidation in struggling sectors of the economy, there were, ultimately, fewer hard cases than many commentators expected in the period covered by this survey. *Horizontal mergers with unilateral effects* were by-and-large cleared subject to plain vanilla divestment commitments,[2] although it is clear from the Commission's decisional practice that officials take more care than before to satisfy themselves that the business to be divested is viable and, where appropriate, has guaranteed access to inputs.[3] As far as *non-horizontal mergers* were concerned, the Commission pursued the work begun in *Intel/McAfee* on assessing the vertical and conglomerate effects of mergers in innovative industries. The most important cases in this area, *Microsoft/Skype* and *Google/Motorola Mobility*, are discussed in this survey.

Key Points

- During the period examined, the Commission declined to apply the efficiency defence in a case where, as a result, a deal was prohibited (Deutsche Börse).
- Originating in the USA, 'Gross Upward Pricing Pressure Index' (GUPPI) analysis was conducted for the first time and commitments were requested from the parties to secure approval (H3G Austrian telecoms case).
- In several technology cases, deals were cleared without commitments after a detailed analysis of the merging parties' ability and incentives to pursue a profitable foreclosure strategy.
- The legislative battle ground in 2013 is likely to be the possible extension of the EUMR to the acquisition of certain minority stakes.

Signs of the Commission's determination to enforce the merger control rules strictly and to arm itself with accurate data and other information to assess a proposed concentration properly can be seen in the Commission's decision to *conduct dawn raids* during a Phase II investigation to collect bidding data for its merger analysis[4] and, in other cases, to adopt Article 11(3) decisions requiring the production of information that it deemed necessary for its investigation, and whether damaging to the interests of the merging parties or exculpatory.

Modest, but important, changes were made to *merger control procedures* affecting, first, relations between the Commission and the NCAs and, secondly,

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† 1 September 2011–31 December 2012

1 Case COMP/M.6166—*Deutsche Börse/NYSE Euronext*.

2 The notable exception is Case COMP/M.6497—*Hutchison 3G Austria/Orange Austria*, which displayed several novel features, both in relation to the competition analysis and the commitments accepted by the Commission.

3 See, for instance, Case COMP/M.6286—*Südzucker/ED&F MAN*.

4 See *Caterpillar/MWM*, discussed in Section VI.

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the European Commission's dealings with the US Department of Justice and Federal Trade Commission, and the Commission pursued its analysis on a number of *reform* projects (eg possible application of the EUMR to acquisitions of non-controlling minority stakes).

At the *court*, the ECJ delivered judgments on two cases on third-party access to documents in merger proceedings (ruling that there is a general presumption that disclosure of such documents undermines the investigation as well as the commercial interests of the undertakings concerned), and the GC refused a request for interim measures, that would allow EDF to delay the implementation of commitments given in the Segebel case.

II. Taking stock

There is no doubt that much good work is being done in the mergers units of DG COMP, in the hierarchy, in Legal Services, and in cabinet. This does not hide the fact, however, that there are rumblings from competition lawyers, economists, and from industry (who are, of course, DG COMP's clients) that the Commission's procedures have *too often* become unwieldy and *unduly* cumbersome. Best practices have been issued, for instance, on the submission of economic evidence, and in those cases where economic evidence is likely to play a significant role, those best practices are valuable. But in the vast majority of cases—which are by common accord unproblematic[5]—the criticism of DG COMP's processes persists. External counsel and economists bear their share of the blame for these inefficiencies; some customer disgruntlement can no doubt be ascribed to corporate impatience; and the Commission can legitimately shift some of the responsibility for inefficiencies on to the court, which has ruled that the standard of proof for clearing a proposed concentration is no higher and no lower than the standard of proof needed to block a transaction. But it is still true—and some officials acknowledge this at least in private—that the Commission 'could do better'.

One recurring gripe is the *time that cases take in pre-notification*. This may be an urban myth—and only the Commission has the figures—but it is widely believed that the period that cases spend in pre-notification has increased appreciably in the eight years since the recast EUMR was introduced. Rightly or wrongly, there is a perception that in many cases, officials will only confirm that a file is ready for notification when all of their questions have been answered and—*de facto*—they are equipped to start drafting the clearance decision. Is it really right that one of the world's best-staffed[6] and most influential competition agencies should take the time it takes in pre-notification?

Another source of dissatisfaction are *Commission questionnaires*. Once a candidate market or segmentation has been identified in a particular industry, in subsequent cases the Commission frequently requests the data, even if the original request appears—based on the results of the market investigation—to have been misguided or unnecessary. Why is it that experienced senior officials do not have the confidence to ditch questions that have shown themselves to be off-the-mark or concern 'good-to-know' information, rather than evidence essential for disposal of the case? What does the seemingly insatiable quest for *more* market data add to the *quality* of a Commission decision if the data are not relevant to an articulated theory of competitive harm?

Finally, there is what might be called 'noise' around the scope of internal document requests sent to the merging parties in an increasing number of cases. Gone are the days when it was sufficient for the notifying party to file a (thin and often inadequate) Lever Arch file of 5.4 board documents with Form CO. But if it is hard for businesses to resist the *trawl for internal documents*, it is important that industry should be confident, first, that the documents are used by the case team properly, that the claims of an over-enthusiastic employee seeking to impress his or her boss and reduced to writing are not ascribed to the company itself, and, finally, that document requests are not merely fishing expeditions by over-zealous case handlers or a procedural ruse designed to delay notification. Data dumps need to be properly circumscribed and due weight needs to be given to internal documentary evidence. That said, the enhanced ability of the Commission to handle document production and the use of internal documentary evidence in Commission decisions should be welcomed, because they should logically lead to better quality decisions and, hopefully, more 'right' decisions.

III. Trends and statistics

A. 2011

In the calendar year 2011, a total of 309 mergers were notified to the European Commission. Of these, ten

5 See Vice-President Joaquín Almunia 'Policy Objectives in Merger Control', Fordham Competition Conference, New York, 8 September 2011; available as SPEECH/11/561: 'Over these two decades, we have examined more than 4,500 mergers and we approved without conditions about 90% of them'.

6 There is a school of thought that the high level of mobility within the Commission (laudable though it is from a human resources perspective) means that many case handlers in the merger units of DG COMP have little on-the-job experience and that this makes it difficult to build up trusted and experienced teams.

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were withdrawn (one in Phase II); 299 cases were cleared during Phase I, of which 191 mergers (representing approximately 64 per cent of all Phase I compatibility decisions) were cleared under the simplified procedure.

Five Phase I cases were cleared subject to conditions (including *Teva/Cephalon* mentioned in this survey), which is low in absolute terms as compared to previous years. Between 2005 and 2010, for instance, the number of cases cleared in Phase I subject to conditions ranged between 13 and 19.

Phase II investigations were launched in eight cases. Four Phase II investigations led to unconditional clearances in the course of the year; one case was cleared subject to commitments (*Western Digital/Hitachi/Viviti*, reviewed below); there was one prohibition decision (*Olympic/Aegean Airlines*, reviewed last year) and in one other case, the parties aborted the deal during Phase II.

B. 2012

In 2012, the number of cases notified to the European Commission dipped to 283 (8.4 per cent down on 2011). In the course of the year, four filings were withdrawn during Phase I and one in Phase II (*CIN/Tirrenia Business Branch*).

A total of 254 cases were cleared in Phase I, of which 170 (representing more than two-thirds of all Phase I compatibility decisions) were cleared under the simplified procedure. The Commission approved nine Phase I cases subject to commitments (*IAG/bmi*, *Sony/Mubadala/EMI Music Publishing*, *DS Smith/SCA Packaging*, *La Poste/Swiss Post*, *SCA/Georgia Pacific Europe*, *Arla Foods/Milk Link*, *ARM/Giesecke & Devrient/Gemalto/JV*, *Glencore/Xstrata*, and *Kinnevik/Billerud*).

The number of Phase II proceedings initiated by the Commission in 2012—ten—is fairly high when compared to the overall number of notifications (3.5 per cent of total filings, as compared to 2.6 per cent in 2011 and just 1.4 per cent in 2010). At year-end, one transaction had been approved without the need for commitments (*Telefónica/Vodafone/Everything Everywhere*), six Phase II cases had closed subject to conditions (*J&J/Synthes*, *Südzucker/ED&F MAN*, *UTC/Goodrich*, *Universal/EMI Recorded Music*, *Outokumpu/Inoxum*, and *Hutchison 3G Austria/Orange Austria*), and the Commission prohibited one proposed merger (*Deutsche Börse/NYSE Euronext*).

As at 31 December 2012, there were four pending Phase II investigations (*UPS/TNT Express*, *Ryanair/Aer Lingus III*, *Munkjso/Ahlstrom*, and *Syniverse/Mach*).

IV. Commitments, prohibitions, and abandoned transactions

As noted earlier, conditional clearance was given in ten Phase I cases during the 16-month period under review. Nine of these ten transactions involved what might be termed textbook horizontal overlaps, and in all but one of these cases the merging parties committed to divest subsidiaries, businesses, or brands in order to secure approval; in the other case, *Glencore/Xstrata*, the unilateral effects of the merger were addressed with a commitment by Glencore to terminate an exclusive off-take agreement with a major supplier. These cases, which are reviewed in Section A below, reaffirm the point—need it be made—that, where it is possible to identify a suitable and viable divestment business, the sale of which addresses the Commission's concerns and eliminates the competitive overlap between the parties in the problematic market(s), the Commission is able to clear a transaction involving horizontal overlaps without the need for a time-consuming Phase II investigation. The principal concern in the tenth Phase I remedies case was that a key player in the market for the licensing of IP infrastructure might seek to foreclose the competitors of its downstream joint venture; see Section B below. Seven Phase II cases involving remedies are examined in Section C, and the prohibition decision in *Deutsche Börse/NYSE Euronext* in Section D. Finally in Section E, we turn briefly to consider abandoned transactions.

A. Phase I commitments decisions, involving 'textbook' horizontal overlaps

From the outsider's perspective, none of these decisions appears to be particularly controversial. Nonetheless, the one point that is still worth stressing is that, for the Commission to be comfortable that the divested business is viable and attractive to potential purchasers, the merging parties may—as illustrated in *Sony/Mubadala/EMI Music Publishing*—need to be prepared to sell 'more than the overlap'.

1. Teva/Cephalon

In *Teva/Cephalon*,[7] the Commission gave conditional approval to the acquisition of a US-based pharmaceutical company (Cephalon) by the Israeli generics company Teva. The Commission's inquiry homed in on the impact of the merger on competition for drugs used to treat narcolepsy-related excessive daytime sleepiness. Cephalon, an originator, had marketed a

7 Case COMP/M.6258—*Teva/Cephalon*.

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branded product, Provigil, and developed a generic product; for its part, Teva had a generic product. To address the overlap in the parties' activities in generics, the parties agreed to divest the generic version of Provigil developed by Cephalon itself.

2. IAG/bmi British Midland

The acquisition of *bmi British Midland* by the *holding company of British Airways and Iberia*[8] was cleared subject to traditional airline slot divestments of the type examined in previous merger surveys.[9] The merging parties agreed, *inter alia*, to release up to 12 pairs of take-off/landing slots at London Heathrow for domestic and European services and to lease two pairs of slots to a Russian carrier to operate between London and Moscow. IAG also committed to enter into agreements with competitors operating long-haul services out of Heathrow to provide those competitors with feeder traffic from other UK airports.

3. Sony/Mubadala/EMI Music Publishing

The primary focus of the Commission's review in *Sony/Mubadala/EMI Music Publishing*[10] was on the exploitation of music publishing rights (mechanical and performance, print, synchronisation, and online) and on the provision of publishing services to authors.[11] In relation to the licensing of online rights to Anglo-American repertoire, the Commission estimated the parties' combined market share to be in excess of 50 per cent in Ireland and in the UK. To obviate the need for a Phase II investigation, the merging parties offered to divest worldwide rights to four catalogues and to the future-delivery works of 12 contemporary Anglo-American authors.

4. DS Smith/SCA Packaging

In *DS Smith/SCA Packaging*,[12] the market investigation confirmed that the merged business would have very strong positions in heavy duty corrugated sheets and in off-set printed litho-laminated corrugated packaging in the UK. Although the Commission was satisfied that the merged entity would have a relatively moderate market share in corrugated cases in France, following a precedent set by the French NCA, it also examined the position in a number of regional markets, and in particular in the west of France. The parties argued that Smurfit Kappa would remain the leader in that region, but this was challenged by competitors and by customers.[13] Rather than have the matter tested in Phase II, the merging parties offered to divest one of their two plants in the UK producing heavy duty corrugated packaging, a UK plant producing litho-laminated corrugated packaging and one of their three plants in Brittany, France producing corrugated packaging.

5. La Poste/Swiss Post

In *La Poste/Swiss Post*, the creation of a joint venture by the French and Swiss postal incumbents to operate their international mail delivery services was approved subject to a commitment by Swiss Post to sell its French subsidiary which had historically bid against La Poste for French outbound international mail services to business customers.

6. SCA/Georgia Pacific Europe

In *SCA/Georgia Pacific Europe*,[14] the Commission cleared SCA's acquisition of Georgia Pacific's European consumer products business on the condition that the merged business sold off a toilet paper and household towels business serving the UK and Ireland (including well-known brands such as *Nouvelle* and *Dixcell*), and one of its integrated production facilities in Scandinavia (to address concerns in private label toilet paper and household towels). In addition, it offered to license its *Lotus* and *Lotus Moltonel* brands to a 'buyer' which would then re-brand the goods for the Benelux market.

7. Arla Foods/Milk Link

The acquisition by the *Arla dairy cooperative* of *Milk Link's business* in the UK[15] led not only to horizontal overlaps in a variety of markets for milk, butter, cheese, whey, and powders but also to a number of vertically affected markets (e.g. fresh milk and fresh cream, downstream of the market for the procurement of raw milk). The overlap was most pronounced in relation to the production and supply of long-life milk where both Nielsen and Kantar data suggested a combined market share of between 60 per cent and 70 per cent. To address these concerns, Arla undertook to divest the only Milk Link plant in the UK which manufactures long-life milk (as well as long-life cream, extended

8 Case COMP/M.6447—*IAG/bmi*.

9 See, for example, Götz Drauz *et al.* 'Recent Developments in EC Merger Control' (2010) 1 JECLAP 12 at 14.

10 Case COMP/M.6459—Sony/*Mubadala/EMI Music Publishing*.

11 The Commission's examination of *Sony/Mubadala/EMI Music Publishing* also included a study of possible coordinated effects in a number of markets.

12 Case COMP/M.6512—*DS Smith/SCA Packaging*.

13 It is notable that the Commission's decision is peppered with footnotes referring not only to written replies to Commission questionnaires from competitors and customers, but also to notes of conference calls with competitors.

14 Case COMP/M.6455—*SCA/Georgia Pacific Europe*.

15 Case COMP/M.6611—*Arla Foods/Milk Link*.

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shelf-life dairy drinks and bulk fresh cream), the associated trademarks, and other IPRs.

8. Glencore/Xstrata

This transaction concerned the public bid for the mining firm *Xstrata* by its principal shareholder, *Glencore*.[16] While Glencore's only proprietary interest in zinc metal in Europe was in a smelter in Italy, it also had an exclusive off-take agreement with the world's largest zinc metal producer (Nyrstar) and was a leading trader in zinc. Xstrata's European zinc businesses were located in northern Spain and in north-western Germany. The Commission expressed concern that the transaction would strengthen Glencore's already strong position as the largest supplier of zinc metal in the EEA. To avoid an in-depth inquiry in Phase II, Glencore committed to divest its 7.8 per cent stake in Nyrstar and to terminate its long term off-take agreement with Nyrstar as it relates to commodity zinc products produced by Nyrstar in Europe.[17] In order to reinforce the structural nature of its commitment, Glencore also undertook, for a period of ten years, not knowingly to purchase zinc metal produced by Nyrstar in the EEA or to engage in practices the effect of which would be to materially restrict Nyrstar's ability to compete with the merged business. Having secured Nyrstar as a likely strong competitor to the merged business in Europe, the Commission was able to leave open the question whether the zinc metal market was EEA-wide or worldwide and otherwise confirm the findings of earlier cases that mining and metal supply markets are in general global.

9. Kinnevik/Billerud

The acquisition[18] of the pulp- and paper-based packaging manufacturer *Billerud* by the Swedish conglomerate *Kinnevik*—already the owner of *Korsnäs*—would have brought together the two leading suppliers of white sack kraft paper (used *inter alia* for pet food, flour, and cement) and the number one and three players in white MF/UG kraft paper (used *inter alia* for consumer packaging of sugar and flour) in the EEA. In order to address the concerns identified by the Commission during Phase I, Kinnevik offered to sell the only Korsnäs asset that produced white sack kraft, namely its PM2 paper machine at Gävle. At the option of the purchaser, Kinnevik agreed that it would also enter into input supply agreements with the new business.

Overlaps in other products (notably corrugated case materials, liquid packaging board and in the procurement and supply of wood) did not give rise to concern, nor did two vertical relationships examined by the Commission (supply of wood pulp by Billerud to paper manufacturers, and the procurement and supply of wood by both parties).

B. Phase I decision with behavioural commitments

It is no secret that DG COMP has a strong preference for structural commitments to solve problems in horizontal mergers, and that it acts cautiously when offered behavioural remedies, even in vertical and conglomerate cases. The Commission is therefore to be congratulated for its decision to grant conditional clearance in Phase I in a case that concerned the creation of a mobile devices security joint venture between the UK-based IP solutions house, *ARM*, and *two Dutch and German digital security companies* and raised questions of foreclosure.[19]

1. ARM/Giesecke & Devrient/Gemalto/JV

ARM, G&D, and Gemalto announced in April 2012 that they had agreed to set up a joint venture to develop and market so-called trusted execution environments (or TEEs) for various consumer electronic devices.[20] These TEEs offer enhanced security options for applications on mobile payment devices on smartphones and tablets.

The Commission found that ARM held a strong pre-existing position *upstream* as a supplier of IP architecture for applications processors used in consumer electronic devices, including proprietary software that the joint venture and its competitors (*downstream*) would need, and had both the ability and the incentive to degrade the interoperability of its IP architecture with competing TEE solutions (by withholding information needed by the competitors to run on ARM's processor architecture or by modifying ARM's design of the TrustZone's IP).

While it might have been reasonable to assume that such complex matters would need an in-depth Phase II investigation, ARM offered:

16 Case COMP/M.6541—*Glencore/Xstrata*.

17 For other examples of cases where the termination of commercial/distribution agreements with a competitor was an acceptable remedy, see Case COMP/M.1806—*AstraZeneca/Novartis* (decided in Phase II) and Case COMP/M.3658—*Orkla/Chips* (Phase I).

18 Case COMP/M.6682—*Kinnevik/Billerud*.

19 It should be noted, however, that a Phase I clearance was only possible at the second attempt, the original notification being withdrawn on working day 12 and a fresh notification made more than two months later.

20 Case COMP/M.6564—*ARM/Giesecke & Devrient/Gemalto/JV*.

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- to provide the joint venture's competitors with information on current and future versions of ARM's TrustZone, on the same terms and conditions as those offered to the joint venture;
- not to design its own IP in a manner that would intentionally degrade the performance of another party's TEEs.

In approving the transaction, the Commission accepted these behavioural commitments for a period of eight years, that is, for long enough to cover the release of the next generation of ARM's IP architecture. Two monitoring trustees (one of whom is a professor of computer security, and the other a court/arbitration expert in technology watching) have been appointed to monitor compliance with the undertakings.

C. Phase II commitments decisions

There were seven Phase II commitments decisions in the 16 months from 1 September 2011 to the end of December 2012.

1. Western Digital/Hitachi/Viviti

The *Western Digital/Hitachi/Viviti* case[21] (already mentioned in last year's survey under 'Parallel mergers')[22] concerned the market for hard disk drives, used in desktop computers, laptops, consumer electronics devices such as DVD players, and in servers and data centres. Having determined that the *Seagate/Samsung* merger had priority over the WD transaction (notwithstanding the fact that the WD deal had been announced first and that pre-notification discussions with the case team had started some time before those on the *Seagate/Samsung* deal), the Commission was compelled to conclude that the WD deal would reduce competition from three to two and would—without remedies—drive up prices and harm consumers. Western Digital therefore undertook to divest production assets needed for the manufacture of 3.5″ hard disk drives. Those assets included a production plant, the transfer of personnel, and the assignment or licensing of the IP rights to be used by the divested business. To ensure the viability of the divested business, the parties also undertook to enter into a supply contract for the delivery of HDD components to the business. Because of concerns as to the identity of the purchaser, in what was already a concentrated market, Western Digital agreed not to complete the Hitachi/Viviti acquisition until a suitable purchaser approved by the Commission had been found. Toshiba's acquisition of the divestment business was notified at the end of February 2012 and cleared under the simplified procedure by the Commission.[23]

2. Johnson & Johnson/Synthes

In *Johnson & Johnson/Synthes*,[24] the Commission found that, following its acquisition of Synthes, J&J's high market share would significantly impede effective competition in the market for the supply of trauma devices. The concentration, however, did not raise any issues with regard to spine, shoulder, and craniomaxillofacial devices as well as surgical power tools. The Commission's concerns in the area of trauma devices also related to the mature character of the products and Synthes' exclusive relationship with the AO Foundation, a well-respected surgeon-led organisation based in Switzerland, which would make surgeons reluctant to switch to other suppliers of trauma devices. In order to remedy the Commission's concerns, Johnson & Johnson offered to divest its entire trauma business in the EEA which had the effect of removing the overlaps in the parties' trauma activities and allowed the Commission to clear the transaction in April 2012.

3. Südzucker/ED&F MAN

On 16 May 2012, the Commission gave conditional clearance to *Südzucker*'s acquisition of *ED&F MAN*, both active in sugar production.[25] Südzucker is Europe's largest producer of sugar and ED&F MAN, also a producer of sugar, is the second largest sugar trader and largest molasses trader worldwide. The Commission's decision to clear the transaction followed an in-depth investigation which focused on the supply of refined sugar to food and beverage industrial processors in Italy, where the merger would have created a dominant player and eliminated current and potential competition between the parties. In order to remedy these concerns, the parties offered to divest ED&F MAN's interest in a pristine state-of-the-art

21 Case COMP/M.6203—*Western Digital/Hitachi/Viviti*.

22 We do not propose to rehearse the fine detail of the priority rule again in this year's survey. Western Digital did initiate proceedings at the GC, attacking the priority rule (Case T-452/11 *Western Digital v Commission*), but the application was later removed from the registry on 20 September 2012. The impact of the choice of the date of notification as the marker for sequential or parallel mergers can be observed more recently in cases involving Arla Foods, when two cases were decided within 24 hours of each other: *Arla Foods/Milk Link*, a Phase I commitments case, discussed above, and *Arla Foods/Milch-Union Hocheifel* where it would appear from the Commission press release that the commitments offered in the Milk Link case were treated as relevant facts that allayed any concerns that the Commission might have had in relation to the supply of long-life milk in the United Kingdom in the M-UH case.

23 Case COMP/M.6531—*Toshiba/HDD Assets of Western Digital*.

24 Case COMP/M.6266—*Johnson & Johnson/Synthes*.

25 Case COMP/M.6286—*Südzucker/ED&F MAN*.

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refinery in Brindisi, the largest and most advanced production facility. In addition, to ensure that the Brindisi facility had access to raw materials at a time when there is a scarcity of preferential raw cane sugar (ie sugar not subject to import duties or quotas), the parties agreed to transfer to the purchaser of the Brindisi plant the benefit of the long-term contracts through which the refinery obtained raw cane sugar input from providers at competitive prices.

4. United Technologies Corporation/Goodrich

On 26 July 2012, following a Phase II investigation, the Commission approved the acquisition of *Goodrich Corporation* by *United Technologies Corporation* (UTC) subject to the following conditions:[26]

- the divestment of electrical power generation (AC) and engine controls for small engines businesses
- the granting of an option to acquire Goodrich's lean burn fuel nozzle R&D project to Rolls Royce.

The Commission's in-depth market investigation had confirmed its provisional view that insufficient competitive constraints would have remained on the market for power generation following the transaction. The Commission was also concerned that certain competing engine suppliers which depended on Goodrich for fuel nozzles and engine controls would be shut out from access to these components following the merger.

5. Universal/EMI Music

Having cleared the sale of EMI's song catalogue to Sony and the Abu Dhabi-based Mubadala investment fund in spring 2012 (see Section IV.A above), the Commission gave conditional approval in September 2012 to the sale of *EMI's record labels* to *Universal*.[27] As the balance of music sales has tipped from CDs (physical sales) over to digital, the Commission's Phase II investigation concentrated on the likely effects of a merger of two of the four remaining 'majors' on the wholesale of digital music by record labels to digital retailers (eg Apple/iTunes, Amazon, Spotify, and Deezer) and to mobile telecoms operators, and more specifically on the leverage that the enlarged Universal/EMI group would have in agreeing licensing terms with smaller or innovative digital platforms (offering downloads or music streaming).

To win the Commission's approval of the deal, Universal agreed to sell its interests in a variety of well-known labels: EMI Recording Limited (whose artists include Coldplay, David Guetta, and Lily Allen), Mute, Chrysalis, EMI classical music labels, Sanctuary, Coop (a label licensing business selling artists such as Mumford & Sons) and EMI's 50 per cent stake in Now! The rights divested were global (although the geographic scope of the competition problem was more modest), and were for digital and for CDs/physical music. It was agreed that the purchaser needed to be a company with a proven track record in the music industry (and not a private equity house). To protect the value of the divestment of EMI's interest in Now!, Universal committed to license its repertoire to Now! for ten years on substantially the same terms as those currently offered to the Now! joint venture. It also agreed not to include most favoured nation clauses in its own favour in any new or renegotiated contracts with customers in the EEA for ten years.

6. Outokumpu/Inoxum

The Commission's Phase I investigation of *Outokumpu*'s planned acquisition of Thyssen's stainless steel business (*Inoxum*)[28] revealed possible concerns in a variety of markets, and in particular on EEA sales of slabs, hot rolled stainless steel products and cold rolled stainless steel products. On closer examination, however, the Commission abandoned its objections, except in relation to cold rolled products, where it concluded that, without remedies, the merged business would be three times larger than its closest competitor and that, while imports 'account for an appreciable part of the EEA market', they would be insufficient to constrain price increases.[29]

To address the Commission's persisting concerns, Outokumpu agreed to divest Inoxum's stainless steel plant in Terni in Italy together with a number of distribution centres in Italy, Germany and (at the option of the purchaser) in France and/or the UK to a suitable purchaser. Prospective purchasers will also be given the option, should they wish, to acquire Terni's forge and a large bright annealing line. To ensure no disruption to Outokumpu's retained businesses, provision was also made in the commitments for the seller to have the right to buy black hot band from the divestment business for a transitional period.

7. Hutchison 3G Austria/Orange Austria

The most recent Phase II approval granted by the Commission concerned this four-to-three merger in

26 Case COMP/M.6410—*UTC/Goodrich*.

27 Case COMP/M.6458—*Universal/EMI Music*.

28 Case COMP/M.6471—*Outokumpu/Inxoum*.

29 The full text of the decision has not yet been posted on DG COMP's website, but it would appear from the Commission press release that the parties made efficiencies submissions to the Commission to defend their transaction.

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the *Austrian mobile telephony* business.[30] Prior to the proposed transaction, Orange Austria offered voice, SMS, MMS, and mobile broadband services in Austria in head-to-head competition with Telekom Austria, T-Mobile, and Hutchison 3G, and with some virtual service providers, known as MVNOs.

In preparation for the roll-out of the new 4G LTE protocol, Telekom Austria, H3G, and Orange entered into a number of transactions: H3G agreed to acquire Orange; and Telekom Austria agreed to acquire (post-closing, from H3G) 700,000 Orange subscribers served under the Yesss! brand. This second transaction fell outside the EU Merger Regulation and was therefore notified separately to the Austrian NCA (BWB). In addition, H3G agreed in a third transaction to sell certain spectrum and assets to Telekom Austria. Both the 'transfer' of spectrum from Orange Austria to H3G under the Orange Austria (first) acquisition and the transfer of spectrum from H3G to Telekom Austria under the third transaction were subject to a review by the Austrian telecoms regulator, the Telekom-Control-Kommission (TKK). The reorganisation of the Austrian telecoms landscape therefore involved two separate merger control filings (one to the Commission, the other to the BWB) plus two separate national regulatory approvals.

On the face of it, the transactions bear the hallmarks of cases ripe for referral to a single competition authority, and to start with, the BWB asked the Commission to refer back the Orange Austria acquisition under Article 9 of the EUMR, as the OFT had done in *T-Mobile/Orange JV*.[31] However, the Commission, consistent with its decisional practice in this sector, did not accept the request and instead launched a Phase II inquiry. The BWB for its part was equally unwilling to refer the Yesss! acquisition (the second transaction) to the Commission under Article 22 of the EUMR. As a result, the two competition reviews proceeded in parallel, relying on informal cooperation between the Commission, the BWB (and subsequently the Austrian Cartel Court), and the TKK.

In the H3G case, the Commission defined a single market for the provision of mobile telecommunication services to end customers in Austria. On this basis, although the Orange Austria acquisition reduced the number of MNOs from four to three, the merged entity would still have been the smallest operator in Austria with a market share in the low twenties, behind Telekom Austria and T-Mobile. Recital 32 of the EUMR states that concentrations giving rise to limited market shares may be presumed to be compatible with the single market and that a combined share below 25 per cent is indicative of such a situation. However, it is understood that the Commission was keen to challenge the proposition that the recital creates an irrebuttable presumption and therefore focused its analysis on possible unilateral effects in certain sub-segments of the relevant market and on the risk that the elimination of Orange Austria would lead to higher prices in the overall retail market for the provision of mobile telephony.

In assessing those risks, the Commission—apparently for the first time—made use of a gross upward pricing pressure index. GUPPI is a metric used to evaluate a merger's potential for adverse unilateral effects in light of the expected post-transaction incentives of the merged entity to raise the price of one or more of the merging parties' products. It is a technique endorsed in the US horizontal merger guidelines[32] and one that has been used in a number of OFT merger assessments.

The Commission ultimately dismissed the parties' arguments that the transaction would bolster the combined group's ability to roll out LTE. Interestingly, those investment-related efficiency claims were evaluated by the Commission against a hypothetical network-sharing counterfactual: '*we do not have evidence that operators will invest more if they reach a bigger size, as long as markets will remain fragmented along national borders. . . . I can also think of other ways than mergers to promote efficiency gains among operators, such as network-sharing agreements*'.[33]

Once again, therefore, the Commission appears to have been keen to show that a complex transaction can be approved without a revolutionary change in its analytical framework, which remains firmly rooted in a traditional paradigm of short-term consumer welfare and which sets a very high threshold for the integration of dynamic considerations of investment needs and incentives into its analysis. Against this background, a commitments package was offered, market tested, and ultimately accepted by the Commission (closely working with the TKK) whereby:

- H3G will divest radio spectrum in the 2600 MHz frequency range (which is suitable for 4G services) and associated rights to a new entrant, with a formal guarantee from the TKK that, in the upcoming

30 Case COMP/M.6497—*Hutchison 3G Austria/Orange Austria*.

31 Case COMP/M.5650—*T-Mobile/Orange*.

32 US Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, 19 August 2010.

33 Vice-President Joaquín Almunia 'Introductory remarks on Hutchison 3G Austria/Orange Austria merger decision', Strasbourg, 12 December 2012, available as SPEECH/12/946.

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frequency auction, it will reserve spectrum for that new entrant also in the 800 MHz range; and

- H3G will provide wholesale access to its network for up to 30 per cent of its capacity to up to 16 MVNOs in the coming ten years to allow MNVOs to offer mobile services to end-users.

To ensure the efficacy of the commitments, H3G committed not to complete the Orange Austria acquisition before it has entered a wholesale access agreement with at least one MNVO.[34]

D. Consolidation blocked in financial services

Competition cases—merger, antitrust, and State aid—involving the financial sector have continued to enjoy a high profile and to engage Commissioner Almunia and his staff. In the year 2011–2012, besides working on the bailouts of several European financial institutions, the Commission completed its extended review of plans by Deutsche Börse (which operates the Frankfurt stock exchange and jointly owns the Eurex derivatives exchange and Eurex Clearing) and NYSE Euronext (which owns Liffe, a London-based derivatives exchange, as well as the stock exchanges in Amsterdam, Brussels, Lisbon, and Paris) to merge their global businesses.

1. Deutsche Börse/NYSE Euronext

On 1 February 2012, Commissioner Almunia announced that the College had decided to prohibit the proposed US$10 billion merger of Deutsche Börse and NYSE Euronext.[35] The proposed concentration would, the Commission ruled, have resulted in a quasi-monopoly in exchange-traded financial derivatives based on European underlyings where the merging businesses accounted for more than 90 per cent of the global market. The commitments offered by the parties to address the Commission's concerns were, it was ruled, inadequate.

The Commission found that the proposed merger (which did not raise problems in relation to the listing or trading of shares on the stock market) would have impeded effective competition on the market for European financial derivatives traded on exchanges (European interest rates, European single equities, and European equity indices). According to the Commission, the market investigation revealed that the two companies compete head-to-head for certain types of products, that they are each other's closest rivals in developing new product offerings, and that, due to high barriers to entry, new entrants were unlikely to pose a credible threat to the merged entity. Key to the Commission's decision was the finding that relevant markets needed to be defined by reference to the underlying asset on which the derivative was based, and accordingly that eurozone interest rate-based derivatives are in a different market from US interest rate-based derivatives. An important distinction was also drawn between exchange-traded derivatives (standardised, highly liquid derivatives, traded in small sizes of around €100,000 per trade) and customer-bespoke high-risk over-the-counter (OTC) derivative products (which could, said the Commission, be worth €200 million per trade and which often need to be supported by sophisticated risk management procedures).

The Commission's investigation of the parties' internal papers turned out evidence that they regarded only each other as true or close competitors and did not view OTC products as a competitive threat to the exchange-traded derivatives that they handled. The impact of potential competition from the well-renowned Chicago Mercantile Exchange (CME) was considered, but ultimately found to be inadequate, principally because the CME had, at best, a modest track record in derivatives based on European equities and interest rates.

The Commission also found that the closed vertical silo operated by Deutsche Börse/Eurex, whereby trades were exclusively linked to a vertically-integrated clearing house, dissuaded customers from abandoning or switching from a structure where they might pool margins and save collateral and therefore would, if extended to NYSE Euronext-Liffe (as suggested by certain internal documents), operate as a major barrier to entry for third parties.

The parties' extensive submissions on efficiencies (including papers on the reduction of IT and user access costs, savings for users resulting from the pooling of the parties' clearing operations, and the liquidity impact of the integration of trading and clearing platforms) were ultimately found by the Commission to be insufficient to outweigh its outstanding concerns. In the case of user access costs, the Commission ruled that the savings were not verifiable or merger-specific. As regards reduced clearing house costs (collateral savings), at least part of the efficiencies *could* be achieved, said the Commission, through less anticompetitive means

34 Press reports suggested that, even before the Commission's decision was adopted, H3G had negotiated terms with Liberty Media's UPC subsidiary; see Dafydd Nelson and Sille Ruubel 'Hutchison's spectrum sale could be enough to win EC approval for Orange Austria buy', mlex, 1 November 2012.

35 Case COMP/M. 6166—*Deutsche Börse/NYSE Euronext.*

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(namely cross-margining agreements) and that while some benefits might be passed on to users, there was insufficient data to quantify this effect with any degree of confidence. As regards liquidity benefits, the Commission distinguished the merger from empirical evidence that the creation of Euronext had had a beneficial impact upon bid–ask spreads, volumes traded, and the volatility of stocks, saying that competition and market conditions had changed substantially since the early 2000s making natural experiments or inferences from past findings of 'little relevance' to the current case.[36]

In an attempt to assuage the Commission, the parties offered a number of commitments, and more specifically to divest Liffe's European single stock equity derivatives products and to provide access to the merged entity's clearing for some categories of *new* interest rate, bond, and equity derivative contracts. However, the Commission considered these commitments insufficient in scale and scope and unlikely to be verifiable in practice, expressing a lingering concern that the parties' proposal was unacceptable if it did not offer full or adequate access to their clearing facilities to both existing and potential competitors.[37]

E. Withdrawn notifications and abandoned transactions

Mention should, finally, be made of the decisions taken in a handful of cases by the notifying parties to withdraw their notifications and/or abandon their proposed transactions.

In the 16 months to 31 December 2012, the most notable of these was the decision of the three founding members of Compagnia Italiana di Navigazione/CIN to abandon their joint acquisition of the passenger and freight business of the troubled Italian ferry group, Tirrenia.[38] In mid-January 2012, the Commission announced that it had decided to conduct a Phase II investigation into the deal, noting that the parties had 'very high, if not monopolistic, market shares' on a number of maritime routes, notably to and from Sardinia. Requests for further information issued by the Commission at the start of its Phase II investigation went unanswered and the Commission was forced to suspend the timetable for review in mid-February. In light of the Commission's concerns, the notification was withdrawn, the original transaction abandoned and a revised proposal involving just one of the three members of the CIN consortium filed with the Italian NCA.

In other cases, notifications were seemingly withdrawn to allow the parties more time to reply to the Commission's questions or to address relationships not properly addressed in the original notification. This was the case in *Agrana/RWA/JV* and in *ECE/Metro/MEC JV* (both of which were subsequently cleared unconditionally). In *ARM/Giesecke & Devrient/Gemalto/JV* (where there were substantive foreclosure concerns), the parties withdrew the original notification but re-filed the transaction approximately two months later and were able to secure conditional approval in Phase I.

V. Crafting and re-shaping Commission practice in innovative industries

In the same way that there has been a focus on the operation of the financial sector since the failure of various banks and financial institutions post Lehman Brothers, the maelstrom around the Apple/Samsung IP litigation and the scrutiny of some of Google's business practices have meant that the spotlight has also been directed at the potentially harmful effects of some mergers in the technology sector. Without wishing to be seen to deter initiatives that bring new services to consumers, Commissioner Almunia has been forthright in stressing the need for vigilance in approving mergers that could lock up or foreclose markets or dampen the incentives to innovate.[39] Having explored a number of conglomerate theories as they apply to the computer industry in *Intel/McAfee* at the beginning of 2011,[40] the Commission had the opportunity to investigate non-horizontal effects in three more cases in the high-tech sector in 2011–2012.

1. Microsoft/Skype

In *Microsoft/Skype*, the Commission was faced with complex questions of market definition in a field (converged TMT markets) where technological divisions that used to help in defining markets have patently become less relevant.[41] The Commission reviewed the transaction's effects (horizontal and conglomerate) on

36 See Kai-Uwe Kühn 'The relationship between regulatory reform and competition policy in financial markets', Presentation to CRESSE, Seventh international conference on competition and regulation, 8 July 2012.

37 Deutsche Börse has applied to the GC for the annulment of the Commission's decision; see Case T-175/12 *Deutsche Börse v Commission*. On 20 December 2012, Intercontinental Exchange announced that it had agreed terms to acquire NYSE Euronext.

38 Case COMP/M.6362—*CIN/Tirrenia Business Branch*.

39 See Vice-President Joaquín Almunia 'Antitrust enforcement : Challenges old and new', 19th International Competition Law Forum, St Gallen, 8 June 2012; available as SPEECH/12/428.

40 See Götz Drauz *et al.* 'Recent Developments in EU Merger Control' (2012) 3 JECLAP 52 at 71.

41 Case COMP/M.6281—*Microsoft/Skype*.

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consumer and enterprise communications, integrating a wide range of functionalities (instant messaging, voice, and video calls) across various platforms (PCs, smartphones, tablets) and operating systems.

As to consumer communications, the Commission concluded that despite an overlap in the parties' activities with respect to video communication (where Microsoft's Live Messenger competes with Skype), the acquisition did not raise competition concerns, because the market was growing and was contested by numerous players. As regards any overlaps in enterprise communications, the market investigation confirmed that Skype (which has a modest presence) did not compete in any meaningful way with Microsoft's Lync, a product used mainly by large companies.

In the more controversial area of possible conglomerate effects, the Commission had to address complaints from third parties that, in the consumer communications segment, (a) Microsoft would be able to degrade Skype's interoperability with competing services and that (b) it would be able to tie its own products (and notably its operating system) with Skype, so hampering their ability to compete. In the first case, the Commission concluded that Microsoft would not have the incentive to damage Skype's interoperability, since it is essential for Skype's success that it be available on as many platforms as possible. Nor did the Commission find it likely that Microsoft would seek to tie its own operating system or other products with Skype. On the contrary, its investigation indicated that the vast majority of customers who acquire a PC with Skype already installed (typically because they are registered users), subsequently download a version that is different from the pre-installed version. As a result, the Commission was able to clear the transaction without conditions.[42]

2. Google/Motorola Mobility

The Commission's investigation of Google's proposed acquisition of Motorola Mobility[43] focused on two vertical relationships:

- in the downstream closer-to-the-consumer market, on mobile OSs such as Google's open source Android OS as a key input into smart mobile devices (notably smart phones and tablets, of the type manufactured by Motorola Mobility); and
- secondly (upstream), on standard essential patents (or SEPS) as key inputs into the smart mobile devices industry.

Its decision to clear the transaction without conditions was noteworthy in as much as it was taken against the backdrop of a letter, in terms stated to be 'legally binding' and 'irrevocable', sent by Google to various standard setting organisations (SSOs) three business days before adoption of the Commission's decision in which Google bound itself to honour Motorola Mobility's pre-existing commitments to license its SEPs on fair, reasonable, and non-discriminatory terms; to negotiate in good faith with potential licensees provided neither party to the negotiation initiates proceedings challenging the other's SEPs or seeks injunctive relief based on those SEPs; and to afford licensees the opportunity to prevent a Google injunction by making an offer to license and providing guarantees in respect of royalty payments.

During the course of its market investigation of the effects of the acquisition of Motorola Mobility's SEPs, a number of third parties articulated concerns that, once it had acquired the SEPs, Google would seek to enforce them or threaten injunctions against good faith competitors wishing to exploit the SEPs in order to impose more onerous licensing on them, and so stifle operating system competition. The strengthening of Google/Android's position in the market for OS would, they alleged, reinforce Google's position in the more lucrative market for mobile search and advertising. Guided by its non-horizontal guidelines, the Commission considered in turn whether Google would as a result of the acquisition have the ability and incentive to engage in exclusionary conduct. It found that Google would have some leeway to extract more onerous licensing terms from potential licensees than they would otherwise have agreed to, and therefore checked the *ability* box. In weighing up Google's *incentives*, the Commission noted that Motorola Mobility had a long-standing practice of charging 2.25 per cent of the net selling price of the end product for the use of its SEPs and that there could only be a merger-specific effect if Google were to start to seek royalties in excess of that long-established benchmark. Its scrutiny of Google's internal papers revealed that Google's commercial interest was not to increase royalties beyond their historical level (2.25 per cent) but rather to create what it called

42 The case is on appeal to the GC in Case T-79/12 *Cisco Systems and Messagenet v Commission*. Cisco alleges that the Commission made a manifest error in assessing the impact of the transaction, in particular (a) in relation to network effects and (b) in view of the high combined market shares of the parties in consumer unified communications. However, experience suggests that the court will be loathe to double-guess the Commission's judgment on complex questions of market definition and competitive effects in fast moving IT markets.

43 Case COMP/M.6381—*Google/Motorola Mobility*.

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a 'patent balance' or even a 'patent peace'. This left one final area left to be examined, namely Google's incentive to use Motorola Mobility SEPs to forcibly *extract cross-licences* which would not otherwise have been entered into.[44] It was here that Google's letter to the SSOs committing to engage in FRAND licensing enabled Google to secure a Phase I clearance. The Commission did not decide whether the SSO letter was or was not binding on Google—which argued that it had binding legal effects under various national laws of the member states governing contractual principles, estoppel, and good faith—but did conclude that any incentive that Google had to impede effective competition was limited by the letter from which Google would find it hard to backtrack in litigation.

As regards mobile OSs as a key input for smart mobile devices, the Commission examined a series of allegations suggesting that Google would systematically favour Motorola Mobility as lead manufacturer of smart phones for each new version of its open source Android OS, irrespective of performance; that Google would leak information to Motorola Mobility from other OEMs to distort the approval process for OEMs; and that it could degrade the versions of Android offered to OEMs other than Motorola Mobility. While the majority of respondents to the market investigation seemingly argued that Google would be able to favour Motorola Mobility over other Android OEMs, the Commission concluded that none of the theories of harm were merger-specific. Again, a thorough examination of Google's internal documents confirmed that Google had strong incentives to favour its higher-margin Android business over a less well performing Motorola Mobility devices business. The Commission concluded therefore that it was unlikely that Google would have the incentive to foreclose OEMs from access to its Android OS.

3. Telefónica/Vodafone/Everything Everywhere

The final case in this trilogy is the Phase II approval granted in September 2012 to the creation of a mobile commerce joint venture between *Vodafone*, *Telefónica*, and *Everything Everywhere*.[45] In April 2012, the Commission had opened an in-depth investigation on the back of concerns that the transaction could potentially impede effective competition in the market for the supply of mobile payment applications (or 'mobile wallets'), mobile advertising, and related data analytics services, where the joint venture could potentially have high market shares. More specifically, the Commission highlighted foreclosure concerns, namely that the parent companies would have the ability and incentive to block future competitors from offering their own mobile wallet services to customers in the UK or to degrade the quality of competing mobile wallets in order to make them less attractive. The Commission's decision has not yet been published but it is already clear that the market investigation revealed that several competitors were planning to enter this nascent market, that sufficient competitive pressure would be exercised on the joint venture by existing and future alternatives and that none of the companies involved had the ability or incentive to foreclose the market.

VI. More rarely used enforcement tools in merger control

In a small number of cases, the Commission has invoked procedural instruments—other than those governing standard requests for information—to assemble evidence for its examination of a proposed merger. The use of these procedural tools does not necessarily mark a conscious shift in Commission policy; it may be incidental or fact-specific; but it serves as a timely reminder to businesses of the gamut of fact-finding powers that the Commission has at its disposal.

The first example is the use of Article 11(3) decisions to compel the production of evidence to the Commission, on pain of fines and periodic penalty payments. The Commission has had this power since the entry into force of the original merger regulation in 1990[46] but has, quite properly, used it sparingly.[47] Nonetheless in the course of the last year or so, the Commission adopted Article 11(3) decisions in a number of cases.[48]

44 The starting point of the Commission's analysis was that 'cross-licenses are, in general, not anti-competitive' and therefore the fact that 'Google may have incentives to engage in cross-licensing based on Motorola Mobility's SEPs is not a competition concern in itself'. Later, it observed that even if the 2.25% rate charged by Motorola Mobility was contrary to FRAND, that would not be a merger-specific problem, because Motorola Mobility applied that FRAND policy before the proposed merger.

45 Case COMP/M.6314—*Telefónica/Vodafone/Everything Everywhere*.

46 Under Regulation 4064/89, Article 11(5), the power to compel the production of evidence could only be exercised once the addressee of the request had failed to meet a deadline or had provided incomplete information. Under Regulation 139/2004, there are no statutory preconditions to the exercise of the power to compel document production.

47 In Case T-145/06 *Omya v Commission*, the GC reminded the Commission that in using its powers to require the production of evidence under Article 11(3), it is bound by the principle of proportionality and, more specifically, cannot impose a disproportionate burden on the undertaking to whom the decision is addressed.

48 While, strictly speaking, just before the period covered by this survey, it should be noted that in Case COMP/M.6106—*Caterpillar/MWM*, Article 11(3) decisions were addressed during Phase I to an industry organisation that produced market statistics data and during Phase II to

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In *Google/Motorola Mobility*, on working day 10 of Phase I (and almost four months after the transaction was formally announced), the Commission adopted two decisions under Article 11(3) of the EUMR requiring Google to disclose certain documents/information to the Commission. The 25 working day deadline for the assessment of a proposed concentration was ultimately delayed by 24 working days.[49] In a second case, *CIN/Tirrenia Business Branch*, shortly after the initiation of its in-depth investigation, the Commission sent Article 11(3) requests to the companies that were to invest in and jointly control the target. The requests went unanswered—presumably because the parties were deciding whether to abandon the proposed joint venture in the face of the Commission's serious doubts investigation—and ultimately the transaction was aborted.

A second rarely-used instrument in the Commission's toolbox is the dawn raid (or 'unannounced inspection'). In the course of its Phase II investigation of the proposed combination of two major industrial engine makers (Caterpillar from the USA and MWM from Germany),[50] the Commission stopped the clock (for six weeks in total) and conducted raids at the premises of the parties in the UK and Germany under the EUMR and at the premises of competitors under the antitrust rules, to collect bidding data for the merger analysis and seek to gather evidence of a suspected cartel. While this is an unusual development in a merger case, the confidence that the Commission displayed in taking the initiative of launching raids suggests that it will not hesitate to invoke the rules again should it suspect that evidence is being withheld.[51] The proposed acquisition was ultimately cleared without conditions and according to press reports, the cartel investigation was discontinued.[52]

VII. New 'soft law' on cooperation between competition agencies

No changes were made to the principal regulations governing EU merger control in the period under review. The principal developments in the area of 'soft law' arose in relation to European and international cooperation, and more specifically the adoption of Best Practices on Cooperation between EU National Competition Authorities in Merger Review and revised EU–US Best Practices on Cooperation in Merger Investigations.

1. Best Practices on Cooperation between EU National Competition Authorities in Merger Review

At the European level, in November 2011 the heads of European national competition authorities and the European Commission agreed a set of non-binding best practices aimed at fostering competition and information sharing between the NCAs in the European Union in relation to mergers that require clearance in several EU member states (multi-jurisdictional filings) but that fall outside the Commission's jurisdiction. The rationale for adopting these best practices was to address perceived inefficiencies that arise out of the EUMR's system for allocating cases between authorities and, incidentally, the risk that decisions of several NCAs may lead to conflicting results and/or result in additional costs and delays for the merging parties.

The best practices not only rely on NCAs to take action to improve cooperation, but also set out a number of steps that the merging parties and indeed third parties are encouraged to take in order to facilitate cooperation between the NCAs, which '*can reduce burdens on merging parties and third parties by facilitating . . . the alignment of timing and the overall efficiency, transparency, effectiveness and timeliness of the merger review process*'.[53] Cooperation between NCAs mainly involves the exchange of basic non-confidential information, notifying any other NCA about any decision to commence a second-phase review and any final decision, including with remedies. The NCAs may also decide, where this is helpful, to discuss the substance of their respective analyses.

The effectiveness of the best practices also relies on the parties' willingness to cooperate and the merging parties are extolled, in case of notification in more than one jurisdiction, to contact each of the NCAs concerned '*as soon as practicable*'[54] and provide them with certain basic information, including, for example, the

the notifying party (Caterpillar) and to a major competitor (General Electric).

49 As noted above, the Commission later referred to 'exculpatory' Google internal documents in its unconditional clearance decision.

50 Case COMP/M.6106—*Caterpillar/MWM*.

51 It is understood that the Commission also conducted dawn raids in relation to euro interest rate derivatives when it was reviewing the *Deutsche Börse/NYSE Euronext* merger, although the links—if any—between the two cases are unclear.

52 See Ana Rita Rego 'EC's engine-sector raids covered merger, antitrust aspects', mlex, 25 November 2011.

53 Best Practices on Cooperation between EU National Competition Authorities in Merger Review, available at: <http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf> last accessed on 14 February 2013.

54 *Ibid.*

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name of the jurisdictions where they intend to file and the date of proposed filing. Cooperation from the merging parties is also expected if remedies are discussed to ensure that the remedies in different Member States do not lead to inconsistent results.

2. EU–US cooperation

One of the achievements of successive Commissioners has been to promote and intensify cooperation between the Commission and its US counterparts, and in October 2011, the competition authorities of the EU and the USA agreed to further strengthen cooperation in cases where either the Federal Trade Commission (FTC) or the Department of Justice (DoJ) and the European Commission are reviewing the same merger. The revised best practices build on the principles laid down in the EU–US bilateral agreement on cooperation in competition matters of 23 September 1991 and include, in particular, further details on timing, collection of evidence, and remedies.[55]

Like the rules on cooperation between NCAs, the EU–US best practices underline the crucial role the merging parties can play in facilitating cooperation, including by notifying both agencies at the same time, which can be in the interest of the notifying parties in order to reduce the risk of having inconsistent results/remedies. Notwithstanding these remarks, there are of course circumstances where it may be in the interest of the parties to the merger to seek early clearance in one jurisdiction rather than seeking a coordinated outcome.[56]

VIII. Judicial control of Commission decisions

While a number of merger challenges, filed by the merging parties themselves (eg in the *Olympic/Aegean Airlines* case) or by third parties, are pending, in 2011–2012 the most noteworthy merger-related judgments delivered in Luxembourg concerned access to documents, the Commission's refusal to accord more time to EDF to implement the commitments it made when it secured approval to acquired Segebel in 2009, and confirmation of the €20 million fine imposed on Electrabel for failing to notify its acquisition of *de facto* control of CNR.

1. *Commission v Agrofert* and *Commission v Editions Odile Jacob*

On 28 June 2012, the ECJ handed down two judgments concerning access to documents in merger cases.[57] In *Odile Jacob*, the applicant had asked the Commission to grant it access to documents concerning the *Lagardère/Naxtexis/VUP* merger and the subsequent decision to approve Wendel Investissement as a purchaser of the divestment business. The Commission had granted access to just one document and, on appeal, the GC annulled the decision to refuse access to other documents, on the ground that the Commission had not conducted a concrete, item-by-item review of each document to ascertain if it was or was not covered by an exception to disclosure. In *Agrofert*, the applicant had asked the Commission to disclose all unpublished documents concerning the *PKN Orlen/Unipetrol* case. The Commission refused access to four families of documents and the GC annulled the decision, again on the basis that the Commission could not rely on general assumptions and needed to examine the actual content of individual documents.

The ECJ set aside the lower court's judgments in each case. It noted that the access regulation (Regulation 1049/2001) and the EUMR pursue different objectives, but that neither has precedence over the other and therefore they must be applied in a way that enables their coherent co-existence. However, because generalised access pursuant to the access regulation would jeopardise the balance in the EUMR between the obligation on the merging parties to disclose business secrets to the Commission and the guarantee that such commercially sensitive information would be protected, the ECJ ruled that the GC should have recognised the existence of a general presumption that disclosure of documents exchanged between the Commission and undertakings during merger control proceedings undermines both the protection of the objectives of investigation activities and the commercial interests of the undertakings involved in the procedure. It found, therefore, that the Commission could quite properly refuse

55 The Best Practices are available on the European Commission's website at <http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf>. See also Götz Drauz *et al.*, 'Best Practices on Cooperation in Merger Investigations', 8 November 2011, available at <http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert-european-union-united-states-antitrust-authorities-update.htm> last accessed on 14 February 2013.

56 This may be the case, for example, where there are valid reasons to believe that early clearance will be granted in one jurisdiction and not in the other.

57 C-477/10 *Commission v Agrofert Holdings (PKN Orlen/Unipetrol)* and C-404/10 *Commission v Editions Odile Jacob (Lagardère/Natexis/VUP).*

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access to documents relating to a merger procedure unless the applicant could demonstrate that there is an overriding public interest justifying disclosure of a document or that a particular document is not covered by any presumption.

2. *EDF v Commission* (Segebel commitments)

In November 2009, the Commission approved EDF's acquisition of control of Segebel subject to two commitments: first, to dispose of its interest in a power plant project (which it did) and, secondly, to decide by 30 June 2012 whether to invest in another project (Nest-Energie) or to sell its interest in the project to a third party. The value of the investment is estimated at €800 million. Claiming that there have been significant, permanent, and unforeseeable changes in the Belgian electricity market since 2009, EDF argued that it was impossible for it or indeed for any third party to take a final investment decision in relation to Nest-Energie by the deadline fixed in the Commission's merger decision and sought the postponement of the deadline to 31 December 2014. The Commission refused the request (while granting a brief stay until mid-October 2012) and EDF applied to the GC for annulment of the decision and for interim measures. On 11 October 2012, the President of the GC ruled that any harm that EDF might suffer was financial only and that it had not demonstrated to the requisite standard that its financial viability would be in peril were it to be forced to take a decision (invest or divest) before the GC's judgment on the substance.[58] At the end of November 2012, an appeal was lodged with the ECJ.

3. *Electrabel v Commission* (Compagnie Nationale du Rhône)

In April 2008, the Commission approved Electrabel's acquisition of control of the French electricity generation/supply company CNR. In June 2009, however, it adopted a second decision ruling that Electrabel had in fact acquired *de facto* sole control of CNR in December 2003 and that it had given effect to that concentration before it had been cleared by the Commission. A fine of €20 million was levied on Electrabel, which subsequently appealed to the GC. On 12 December 2012, the GC dismissed an application by Electrabel for the annulment of the Commission's decision and for a reduction in the amount of the fine.[59]

On the question as to when it acquired control of CNR, Electrabel argued that it had been prohibited as a matter of French law from acquiring *de iure* sole control prior to 2007, and that it only became possible for it to analyse whether it might have *de facto* sole control in June 2007, when it had access to attendance data for three years' general shareholders meetings. It insisted that attendance at AGMs prior to December 2003 was irrelevant to the analysis. For its part, the Commission submitted that attendance rates prior to Electrabel's acquisition showed that Electrabel could be confident of having *de facto* sole control from the time its stake in CNR increased to 49.95 per cent. Siding with the Commission, the GC ruled that the Commission's 1998 concentration notice described the situation where a shareholder was almost certain to enjoy a majority of voting rights because of the fragmented nature of other stakes in the target business, and that this could be shown by reference to attendance at earlier shareholder meetings.

As to the level of the fine imposed on Electrabel, the GC ruled that the fact that the merger did not raise competition concerns could not be a factor used to determine the gravity of the infringement, where this is only discovered after implementation; nor was the fact that the breach was committed negligently rather than deliberately sufficient to justify a reduction in the fine.

The Commission—which has in the past imposed nominal fines for late notification[60]—welcomed the judgment, which it says confirms its discretion in setting the level of fines under the EUMR.

IX. Gazing into the crystal ball

The early signs are that 2013 may prove to be particularly interesting. As the year starts, there are reports that the Commission is to prohibit the proposed acquisition of TNT Express by the global logistics specialist UPS. Ryanair's third attempt since 2006 to win approval for the acquisition of its Irish rival Aer Lingus is slated for a decision at the end of February and press reports suggest that Ryanair has filed an extensive commitments package with the Commission (including upfront buyers for certain businesses) in a bid to win over the Commission. The outcome of that case will in turn have a bearing on the likely success of revived efforts by two Greek airlines (Olympic and Aegean) to merge barely two years after a Commission prohibition decision.[61] And finally, the Commission has recently

58 Case T-389/12R *Électricité de France v Commission*.

59 Case T-332/09 *Electrabel v Commission*.

60 For instance, COMP/M.969—*A.P. Møller (Art 14 proceedings)*.

61 Case COMP/M.5830—*Olympic/Aegean Airlines*. The Commission's decision is analysed in last year's survey; see Götz Drauz *et al.* 'Recent Developments in EU Merger Control' (2012) 3 JECLAP 52 at 55. The full

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embarked on what is expected to be a challenging Phase II examination of (yet) another technology merger between Syniverse and Mach, both of whom provide technology services to telecommunications companies and act as data clearing houses (DCHs) that settle usage records for subscribers who roam on mobile operators' networks.

On the legislative front, it is expected that the Commission will solicit the views of stakeholders on its proposals to extend the reach of the EUMR to certain—as yet unspecified—acquisitions of non-controlling minority stakes. In March 2011, referring to a '*possible enforcement gap*'[62] in the current EU merger control regime, Commissioner Almunia announced that the Commission was considering whether EU merger control should be extended to the review of acquisitions of significant minority stakes that do not constitute 'control'.[63] The debate on the subject was ignited after the GC's judgment in *Ryanair/Aer Lingus*[64] and has been fed by a number of economic studies examining the impact that the minority stakes of strategic investors (be they suppliers, competitors, or customers) may have on the conduct of particular companies. While the Commission has not formally indicated how any reform would be likely to be structured, in a speech in November 2012[65] Commissioner Almunia stated that his (provisional) preference would be for a selective system covering cases which '*prima facie* may raise competition problems', rather than a change to the legislation that would make notification mandatory for all minority stake acquisitions. It is far from clear whether the Member States (whose support would be needed for any modification of the EUMR) would agree to any whole scale extension of the Commission's jurisdiction, and parts of industry and the investment banking community would presumably oppose any change that involved mandatory notification and a standstill that prevented closing pending a Commission clearance decision, in particular because of the perceived inadequacies of the pre-notification procedure in many Commission cases.[66] Changes designed to further simplify merger procedures in cases which clearly pose no substantive concerns are in gestation, as are modifications to the rules governing the referral of cases from the NCAs to the Commission (presumably to shorten the deadweight time lost while the Member States decide whether to oppose the transfer of jurisdiction to DG COMP or not). The debate—especially on the question of minority stakes—promises to be fascinating.

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text of the Commission's decision was published on DG COMP's website on 13 July 2012.

62 See Vice-President Joaquín Almunia, 'EU merger control has come of age', European Commission/IBA Antitrust Committee conference, Brussels, 10 March 2011; available as SPEECH/11/166.

63 While the merger control rules of most Member States follow the contours of the EUMR, in some countries (and notably in Germany and the UK), NCAs have jurisdiction to review acquisitions of minority stakes that do not confer *de iure* or *de facto* control over another business. In Germany, for example, an acquisition resulting in an interest of 25% or more is subject to mandatory review (assuming the turnover thresholds are met) under the Act against Restraints of Competition of 1958 (as amended).

64 Cases T-342/07 and T-411/07 *Ryanair/Aer Lingus*.

65 See Vice-President Joaquín Almunia 'Merger review: Past evolution and future prospects', Conference on Competition Policy, Law and Economics, Cernobbio, Italy, 2 November 2012; available as SPEECH/12/773.

66 Commissioner Almunia's sensitivity to this issue can be discerned in the reference in his speech to striking the right balance between effective enforcement and 'the need to keep the regulatory burden light'.

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