EU Merger Control 2016: Behavioral Remedies, No Longer Taboo

By Paul McGeown*

2-I. Introduction

2016 is likely to be remembered as the year when the European Commission ("EC") took its first decision prohibiting a merger under Commissioner Margrethe Vestager's watch,[1] when staff in the Directorate-General for Competition ("DG COMP") systematically set about exploring in depth the likely effects of notified transactions on the incentives of industry participants to innovate post-merger,[2] and when the EC took its first real deep-dive into the relationship between merger policy and big data.[3] The modest purpose of this article, however, is to tease out of the EC's decisional practice in 2016 learning points on the shift in its thinking on behavioral commitments. In so doing, it can help advisors better gauge the feasibility of problematic transactions that cannot realistically be saved by a divestment, and the costs associated with compliance with such commitments.

The three cases from 2016 featured in this article are: *Dentsply/Sirona*,[4] a conglomerate effects case where the merging parties committed to extend until 2026 the term of licenses that allowed third parties to have their dental blocks carried on the parties' system software and to establish firewalls to prevent the flow of competitively sensitive information from third parties to competing parts of the merged entity; *Worldline/Equens/PaySquare*,[5] a verticals case where the merged business offered to license its Poseidon software, used by most payment network service providers in Germany, to third parties for the next ten years on fair, reasonable, and non-discriminatory ("FRAND") terms; and *ASL/Arianespace*,[6] where the EC accepted a stand-alone commitment by the merged business to establish and operate a myriad of screens to prevent the flow of confidential information from the target business to one of its jointly-controlling parents (and vice versa).

2-II. The EC's Default Position on Commitments

It is no secret that the EC—like many other agencies responsible for merger control—has a discernible preference for clear-cut structural remedies in unilateral effects cases. That message has been conveyed with clarity to business by Commissioner Vestager, several of

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[1] COMP/M.7612—*Hutchison 3G UK/Telefónica UK (O2)*, decision of May 11, 2016.

[2] COMP/M.7477—*Halliburton/Baker Hughes*, notice of abandonment dated May 2, 2016; and COMP/M.7801—*Wabtec/Faiveley Transport*, decision of Oct. 4, 2016. Notable pending cases at the start of 2017 include COMP/M.7932—*Dow/DuPont*.

[3] COMP/M.8124—*Microsoft/LinkedIn*, decision of Dec. 6, 2016.

[4] COMP/M.7822—*Dentsply/Sirona*, decision of Feb. 25, 2016, also referred to as *Dentsply*.

[5] COMP/M.7873—*Worldline/Equens/PaySquare*, decision of Apr. 20, 2016, also referred to as *Worldline*.

[6] COMP/M.7724—*ASL/Arianespace*, decision of July 20, 2016, also referred to as *ASL*.

her predecessors, and her officials. While the words sometimes change, the discourse is unambiguous: divestitures or the removal of links with competitors are the preferred remedy to eliminate competition concerns and "commitments relating to the future behavior of the combined entity may be acceptable only exceptionally in very specific circumstances. In any case, divestitures are the benchmark for other remedies in terms of effectiveness and efficiency."[7] The emphasis placed on structural remedies and the sometimes ambivalent remarks made about the efficacy of behavioral commitments should not however mask the fact that the EC does examine and accept suitably-crafted and properly-policed behavioral undertakings to remedy the risk of foreclosure in vertical or conglomerate mergers. In this regard, the EC's decisional practice in 2016 is rich.

2-III. *Dentsply/Sirona* and the EC's Conglomerate Effects Analysis

A. The EC's Substantive Analysis: Favoring an Affiliate that Produces Consumables Used with the Merged Entity's Dominant System

Dentsply/Sirona concerned the USD 13 billion acquisition of sole control of dental equipment supplier Sirona Dental Systems (based in Long Island City, NY) by Pennsylvania-based Dentsply International. Dentsply was active in the market for dental consumables for professionals; the target, Sirona, was active in the market for dental technology and equipment, and was the leading supplier of chairside computer-aided design ("CAD") and computer-aided manufacturing ("CAM") systems.

The activities of Dentsply and Sirona overlapped in respect of the sale of materials used in CAD/CAM systems, notably zirconia CAD/CAM blocks, and discs and glass ceramic CAD/CAM blocks, and in respect of small dental equipment such as contra-angle handpieces. The EC was satisfied that the horizontal overlaps were not problematic. In zirconia blocks and discs, even on a national basis, the merged business' proforma share only hit 25% in Germany and there was more-than-ample competition from Ivoclar Vivadent, Zirkonzahn, 3M and others. In the small dental equipment market for endotonic motors, the increase in market share contributed by Sirona was less than 5% (except in the island-state of Cyprus where it was in the 5% to 10% bracket). Finally, in contra-angle handpieces, where Dentsply was a re-seller only, the increment in market share was less than 5% in seven countries and between 5% and 10% in an eighth.

The principal focus of the EC's investigation therefore was the likely impact of the transaction in a number of markets where the parties' activities were neighboring,[8] and in particular in relation to dental CAD/CAM systems (and in particular Sirona's ceramic reconstruction ("CEREC") chairside system) and CAD/CAM blocks. The EC's concern was that Sirona's pre-existing dominant position in the market for chairside CAD/CAM systems—its share was between 50% and 100% in each of the 27 EEA states where it had a presence—would be used by the merged business to foreclose Dentsply's competitors in CAD/CAM blocks (all of whom needed access to Sirona's open CEREC system to be

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[7] *Dentsply*, at ¶ 159.

[8] Other closely related or "conglomerate" markets examined by the EC but found not to be problematic were: (1) the markets for treatment centers and small dental equipment; and (2) the markets for endodontic motors and contra-angle handpieces.

successful) for the benefit of its own CAD/CAM blocks businesses (which had until then had only moderate success and a combined market share in the EEA of less than 10%).

Dentsply argued that, in face of competition from Ivoclar, which had a pan-European share of approximately 80% and an unrivaled range of CAD/CAM blocks with different transparency levels, shades and sizes, the merged entity's more limited offer meant that any foreclosure strategy that it might pursue was destined to fail. The EC disagreed and found, "based on the results of the market investigation" that "Dentsply has the potential to rapidly become an important player in the chairside CAD/CAM blocks, in particular due to the fact that it is currently one of the strongest suppliers of dental materials globally and it recently announced intentions to expand its presence in materials." The EC concluded that, were the merged business to pursue a strategy designed gradually to foreclose competitors in CAD/CAM blocks, it is questionable whether its competitors—and presumably Ivoclar—would "continue to invest in research into new technologies" and indeed that it was likely that they would slow down or even stop innovation in blocks. The EC ruled therefore that a foreclosure strategy could be effectively implemented within a foreseeable timeframe after the lapse of existing agreements. Notwithstanding economic consultancy evidence (based on a framework that the EC recognized was "not unreasonable") that the merged entity would have no financial incentive to implement such a strategy, the EC found that "there exists a reasonable set of assumptions under which a foreclosure strategy would be profitable."

B. The Remedy: Offering Extended Licenses to Competitors

The initial package offered by Dentsply comprised a commitment to offer each existing licensed block manufacturer the right to continue to supply its CAD/CAM blocks under the terms of its existing agreements until January 2022 (*i.e.* for approximately six more years), subject to Dentsply's right to alter CEREC functionality to correct bugs and other implementation issues, and to remove third party CAD/CAM blocks in accordance with the terms of the competitor's existing license. Dispute resolution would be governed in accordance with the competitor's existing agreement.[9]

The market test of the proposed commitments confirmed that Dentsply's offer was, broadly speaking, likely to resolve the EC's concerns. Several "necessary improvements" were however suggested. First, certain third-party CAD/CAM block suppliers consulted by the EC pointed out that the duration of the proposed remedy prolonged existing agreements in some cases by just two years. Asked by the EC what a suitable period was, a small number of respondents appear to have said 15 to 20 years. Others—although it is not indicated how many—considered ten years to be "a necessary minimum." Second, a number of respondents, presumably fearing sleight of hand by the merged business, were alarmed by the absence of a specific dispute resolution mechanism in the commitments. Different agreements had different dispute resolution mechanisms (litigation, arbitration, *et cetera*) and in several cases the existing contract was in fact silent as to the forum for and nature of dispute resolution. That state of affairs needed to be addressed, according to the EC, and appointing a Monitoring Trustee and submitting disputes to a fast track resolution mechanism were mentioned by the EC as a more appropriate solution.

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[9] *Dentsply*, at ¶ 157 to ¶ 162.

The EC communicated its market test results to the parties and a revised set of commitments addressing the EC's remaining concerns was filed just two working days before the expiry of Phase I. The revised offer that the EC accepted, saw the parties promise that, within just one week of the EC's decision approving the transaction, Sirona would write to all existing licensees and offer to extend the duration of their agreements until March 1, 2026 (that is for ten years from closing of the main Dentsply/Sirona transaction), regardless of the contractual termination date. To safeguard the rights of existing block manufacturers, the content of their licenses would be fine-tuned. First, the merged entity undertook to continue to provide block manufacturers with the know-how they needed to ensure the continued use of their blocks with CEREC. Second, it promised to use commercially best efforts to ensure that future technical changes made to CEREC do not discriminate against third party blocks. Third, the merged entity committed to put in place firewalls and establish clean teams to ensure that commercially or technically sensitive information of a block manufacturer is not used to favor or develop the merged entity's own blocks. Finally, it agreed that disputes as to compliance with the commitments, but not the other terms of the licenses, should be subject to fast track arbitration under ICC rules, with special provision made for the EC to receive copies of all written submissions the parties made to the ICC panel, to file amicus curiae briefs, to be present at hearings, and to questions the parties, witnesses, and experts. It was agreed that the burden of proof to produce evidence of a *prima facie* case in any ICC proceedings would be borne by the licensee, but that thereafter the ICC panel was bound to find in favor of the licensee unless the merged business could produce evidence to the contrary.

2-IV. *Worldline/Equens/PaySquare* and Licensing Software on FRAND Terms

A. The EC's Substantive Analysis: Granting Favorable Access Terms to Industry-Standard Software to an Affiliate

Worldline/Equens/PaySquare concerned two interrelated transactions pursuant to which Worldline (listed on Paris Euronext but controlled by the digital service provider Atos) acquired: (1) sole control of Equens' subsidiary PaySquare for USD 81 million; and (2) a controlling interest of approximately 64% in Equens itself. PaySquare provides merchant acquiring services (accepting, processing, and making payments for payment cards) in the Benelux, Germany, Poland, Switzerland, and the United Kingdom; Equens offers payments processing and cards processing services in Finland, Germany, Italy, the Netherlands, and the United Kingdom.

The transaction led to multiple horizontal affected markets (notably in Belgium for merchant acquiring services), to one vertically-affected market (for the provision of software for the activities of network service providers in Germany), and to two conglomerate markets (concerning merchant acquiring services and the provision of POS terminals, in Belgium and in the Netherlands).

The EC was satisfied that the overlaps in merchant acquiring in the Netherlands and Luxembourg and in issuing processing in Germany were non-problematic, and likewise for possible conglomerate concerns in the Netherlands. It indicated however that it had serious doubts in respect of: (1) the overlap in merchant acquiring services in Belgium, where Worldline's share exceeded 80% (and was greater than 90% depending upon the definition

of the relevant market); (2) the related conglomerate market; and (3) the vertical market for the provision of software to German Network Service Providers ("NSPs"), where Worldline held a near monopolistic position on the upstream market for software and where PaySquare had a 5% to 10% share in the downstream markets for NSPs and domestic card schemes.[10]

In respect of the overlap in merchant acquiring in Belgium, Worldline offered to divest PaySquare's local merchant acquiring business, and at the option of the purchaser to provide an interim services agreement for transaction processing and certain other customer and acquiring services and various licenses. It also committed not to target customers that were part of the divested portfolio for three years after closing. Minor changes were made to the horizontal remedy as a result of the market test: the term of the interim services agreement was increased from 18 months to 24 months, and the duration of the non-compete was extended from three years (which is the longest period usually allowed under the EUMR) to five years. Those non-coordinated horizontal effects were therefore easily resolved.

Regarding the provision of software for the activities of NSPs in Germany, the alleged harm was that, post-closing, Worldline would be unwilling to continue to enter licensing agreements for its Poseidon software with NSPs on fair, reasonable and non-discriminatory terms. More specifically, feedback from the EC's market investigation suggested that Worldline would raise PaySquare's rivals' costs by increasing the fee it charged them, or offer its rivals less favorable access conditions in terms of technology updates or functionality. The overwhelming majority of respondents claimed that Worldline might and would provide PaySquare with a better version of its software, a better service, earlier updates or tailor-made functionality. As Poseidon is the *de facto* industry standard in Germany, the EC found that customers would struggle to react, and would need significant time and investment to develop an alternative software. Moreover, as almost all terminals in Germany are connected using Worldline's ZVT protocol, it would be impossible to develop an alternative software solution without access to that protocol too.

On Worldline's incentive to pursue such a strategy, the EC remarked that the revenue generated licensing Poseidon in the upstream market was modest—the precise number is redacted—but that the "comparatively very large size of the downstream market" for NSPs made it "very likely" that Worldline would be prepared to forego some upstream revenues to favor the downstream activities of PaySquare and help it gain lucrative market share.

B. The Remedy: FRAND Commitments to Address Licensing Concerns

Commitments to offer FRAND terms to counterparties have been a feature of a number of antitrust cases prosecuted by the EC, notably in the standard setting field, and references to the FRAND commitment given by Motorola Mobility in respect of certain mobile telephony standard essential patents ("SEPs") were critical to the EC's decision in *Google/Motorola Mobility*[11] not to insist upon commitments in that merger case. Before 2016, however, there was just one reported instance of FRAND terms being accepted as an integral part of a

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[10] *Worldline*, at ¶ 270.

[11] COMP/M.6381—*Google/Motorola Mobility*, decision of Feb. 13, 2012.

merger commitments decision. That case, *Liberty Global/De Vijver Media*[12] concerned the distribution of two popular Dutch-language commercial television channels, Vier and Vijf (owned by De Vijver) by cable operators in Belgium (including Liberty Global's Telenet cable network). To address concerns raised by competing cable operators, Liberty Global made a simple offer: to meet all reasonable requests from third party distributors, including those wishing to offer an over-the-top Internet service; and to distribute one or more of the channels in Belgium on FRAND terms, compared with those in place between the channels and Telenet and other distributors in terms of tariffs and the quality of the television signal. Liberty Global also undertook not to intentionally do anything that would significantly reduce the quality of programming on either Vier or Vijf.

Building on the model drawn up in *Liberty Global*, and in the face of charges that Worldline would not be prepared to enter licensing agreements on fair and non-discriminatory terms, Worldline offered to grant a license to use Poseidon and its modules to third party NSPs on FRAND terms and in particular on no less favorable terms than those offered to PaySquare for a period of ten years, supervised by a Licensing Trustee. As in *Liberty Global*, Worldline also had to enter into a package of additional commitments that reinforced the core FRAND offer, and reduced the scope for indirect conduct that might undermine the efficacy of the remedy. Specifically, Worldline committed:

- To cap the software maintenance fee for five years,
- To provide maintenance services under FRAND terms, and serve third party NSPs in priority to PaySquare in case of shortage, subject to "reinforced monitoring" by the trustee and an ad hoc users' group,
- To grant access to Poseidon source code for NSPs' internal business use in return for a one-off price-regulated fee,
- To externalize the governance of the ZVT protocol to an independent not-for-profit representing all market participants, and
- To create a fast track dispute resolution mechanism leading to ICC arbitration.

Third parties consulted during the market test agreed that the behavioral/FRAND commitments were "conceptually sufficient" to prevent Worldline post-merger from treating some Poseidon customers worse than PaySquare, but identified various shortcomings with the initial proposal. They argued first that capping the software maintenance fee should be for more than five years, and that the commitment to offer FRAND terms to third parties should extend to better performing versions of the software and to Poseidon updates and new modules that might be developed in the future. The "overwhelming majority" of respondents also argued that access to the NSPs source code should not be limited to the development of an in-house solution, because the development cost that NSPs would need to bear is substantial (if amortized over an in-house solution only) and the process relatively complex. Finally, respondents to the market test said that while divestment of the ZVT protocol and free access to it was crucial for the development of an alternative to Poseidon, the

[12] COMP/M.7194—*Liberty Global/Corelio/W&W/De Vijver Media*, decision of Feb. 24, 2015, sometimes referred to as *Liberty Global*.

development of competing software that was limited to in-house use would not be commercially viable for NSPs, threatening the effective implementation of the commitment.

To secure a Phase I clearance, Worldline made the "essential" changes suggested by market participants. First, the software maintenance fees cap was frozen for ten years, subject only to inflation; the scope of the commitments was extended to all Poseidon modules used by NSPs and their updates, as well as to modules of future software performing in essence the same functions. Second, copies of all Worldline licenses, contracts, pricing and invoicing conditions would be released to the trustee on a quarterly basis to allow it to conduct an initial review and thereafter an annual benchmarking exercise. Third, any NSP would be permitted proactively to submit its terms and conditions to the Licensing Trustee and to select FRAND terms (which included price conditions, quality of service, maintenance, new modules and upgrades) at its option should it consider the terms offered to PaySquare more favorable. Fourth, to dissuade Worldline from failing to comply fully with the FRAND commitment, it was determined that a material breach of these contractual arrangements would mean access to the source code becoming free of charge. Finally, it was agreed that governance of the ZVT protocol would be transferred to an independent not-for-profit, which would: (1) grant a license back to Worldline to allow it continue using the ZVT protocol; and (2) have the right to manage and sub-license the use of ZVT to third parties.

2-V. *ASL/Arianespace* and Screens as a Stand-Alone Remedy

A. Introduction

The third behavioral commitments decision from 2016 this article will consider is the EC's decision in *ASL/Arianespace*.[13] ASL, the purchaser, is a 50/50 joint venture between Airbus (the Dutch aerospace and defense giant) and Safran (a French-based aerospace contractor), bringing together their interests in space launchers, satellite propulsion, strategic missiles and tactical missile propulsion.[14] Airbus and Safran contributed their interests in Arianespace (for Airbus 28.5% and for Safran 10.6%) to ASL when it was founded, but the EC ruled that, at that time, they would not acquire *de iure* or *de facto* sole control over Arianespace, or joint control over Arianespace with CNES, the French space agency which held a 35% stake. Subsequently at the Paris Air Show in June 2015, it was announced that CNES would sell its stake to ASL, giving ASL a 74.1% controlling stake in Arianespace.

While trumpeting the benefits of structural commitments to remedy competition concerns in unilateral effects cases, as has been seen, the EC can be persuaded to accept suitably-crafted behavioral undertakings where the competitive harm is or is perceived to be the risk of foreclosure of a rival in a vertical or conglomerate merger. Examples of such commitments would include capacity or spectrum access remedies in telecoms cases,[15] interoperability guarantees,[16] or promises to provide competitors with information on future

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[13] COMP/M.7724—*ASL/Arianespace*, decision of July 20, 2016.

[14] See COMP/M.7353—*Airbus/Safran/JV*, decision of Nov. 26, 2014.

[15] See, for example, COMP/M.7758—*Hutchison 3G Italy/VimpelCom/Wind/JV*, decision of Sept. 1, 2016.

[16] See, for example, COMP/M.5984—*Intel/McAfee*, decision of Jan. 26, 2011.

versions of hardware extensions to the merging parties' consumer electronics devices.[17] More unusual by far however is the acceptance of a stand-alone commitment to establish screens to prevent the flow of confidential information between the controlling parents of a joint venture and the target business. Indeed until 2016 the only occasion when such a remedy had been accepted was in a defense industry case.

B. The EC's Ground-Breaking Decision in *GE/Avio*

In December 2012, GE and Avio (an Italian-registered aerospace manufacturer and service provider) signed a sale and purchase agreement pursuant to which GE would purchase a controlling interest in Avio's aviation business, comprising jet engine modules, control and automation systems, electrical systems, and MRO (maintenance, repair and overhaul). The EC was satisfied[18] that any adverse effect of the merger on markets for components sold by Avio to GE's competitors in various aircraft engine markets (such as UTC Pratt & Whitney and Rolls-Royce) was remote, as new agreements had recently been signed with these competitors to ensure a reliable source of supply to these competitors. It had concerns however that the deal would give GE (the new parent of Avio) significant influence over the Eurojet consortium. As a member of the Eurojet consortium alongside Rolls-Royce (UK), MTU (Germany) and ITP (Spain), Avio (and so post-merger, GE) helped design and manufacture Eurofighter Tycoon's EJ2000 engine, which competes with other combat aircraft powered by GE engines. The EC was worried that the transaction would give GE privileged access to strategic information of a competitor in the international market for fighter aircraft.

To avoid a Phase II investigation, GE offered and the EC accepted commitments that would ensure that the Eurojet consortium's strategic information was properly ring-fenced and that Eurojet and Eurofighter could continue to participate in future campaigns for export sales without GE's interference. A Monitoring Trustee was appointed to supervise compliance with the undertakings and to report regularly to the EC. Unhelpfully—and this may simply be because the case involved the defense industry—the public version of the commitments, which contained detailed language on the firewalls established to prevent the sharing of confidential information is so heavily redacted as to be incomprehensible to third parties, leaving advisors and commentators alike struggling to understand whether such a remedy would only be acceptable in sensitive cases (such as those involving the military) or might have broader application.

C. *ASL/Arianespace*: Confirmation that Ring-Fencing Confidential Information may be a Sufficient Remedy

The EC's 2016 decision in *ASL/Arianespace*, taken after a Phase II investigation, casts light on these open questions, because a meaningful non-confidential version of the commitments has been posted on the EC's website.[19] In Phase I, the EC harbored concerns

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[17] See, for example, COMP/M.6564—*ARM/Giesecke & Devrient/Gemalto*, decision of Nov. 6, 2012.

[18] COMP/M.6844—*GE/Avio*, decision of July 1, 2013.

[19] At the time of writing, *i.e.* at the end of January 2017, the redacted version of the reasoned decision has not yet been published.

that: (1) Arianespace (one of just three global launch service providers) might accord satellite-manufacturer Airbus privileged access to its launch services to the detriment of rival satellite companies such as OHB (Germany); (2) Arianespace would give preferential treatment to Ariane rockets developed and manufactured by ASL to the detriment of Vega launchers made by ELV (Italy); and (3) ASL/Arianespace would source payload adapters and dispensers exclusively from Airbus and ASL to the detriment of other component makers, such as RUAG of Switzerland. The commitments offered by Airbus, Safran and ASL in Phase I to address those concerns were deemed insufficient by the EC and the case was referred for an in-depth assessment.

The serious doubts the EC raised in Phase I were assuaged in the course of the Phase II investigation.[20] However, the EC continued to worry about the flow of commercially-sensitive information from Arianespace to Airbus about other satellite manufacturers, and from Airbus to Arianespace about other launch service providers. Accordingly, the parties offered and the EC accepted a complex web of largely-unilateral promises as to their future behavior.

First, Airbus, Safran and ASL made an over-arching commitment to separate the IT network of ASL/Arianespace from those of its parents within a specified but unpublished period following closing.

Second, regarding all personnel and managers affected by the commitments, Airbus and ASL promised to provide compliance training in the firewalls established to prevent the flow of confidential information between ASL/Arianespace and its controlling shareholders and, subject to applicable labor law, to have those employees sign confidentiality agreements.

Third, under the supervision of the Monitoring Trustee, Airbus and ASL agreed to set up an "adequate mechanism" to advise staff on an ongoing basis of the existence and operation of the firewalls.

Fourth, in respect of each information flow highlighted by the EC as problematic, one or more of the parties offered bespoke commitments. In respect of launch services, for instance, those commitments included:

- Promises by ASL and Arianespace not to exchange directly or indirectly confidential information concerning launch services and satellites with Airbus;
- A promise by ASL not to share launch services and satellite confidential information, as defined, with members of the board of ASL, save in those cases where the agreement does not materially comply with the financial objectives of Arianespace's pre-approved business plan when, exceptionally, the financial conditions of the agreement (but not the identity of the customer and satellite manufacturer, the technical specificities of the mission, the characteristics of the payload or the payload adapter or dispenser) may be reported to the board, and;

[20] On this point, the *ASL* decision serves a reminder to antitrust counsel that commitments offered by the parties in Phase I (to obviate the need for an in-depth Phase II investigation) do not necessarily have to form part of a commitments package in Phase II. Indeed, there are a small number of cases where commitments were offered and rejected in Phase I, and where the transaction was ultimately approved without conditions. See, for example, COMP/M.6796—*Aegean/Olympic II*, decision of Oct. 9, 2013.

- Promises by ASL and Airbus to ensure separate physical locations for the analysis and mission teams dedicated to Airbus satellites and ASL/Arianespace.

Fifth, to protect the flow of confidential information regarding still-to-be-negotiated agreements, the parties offered to add language to non-disclosure agreements with satellite prime contractors and launch service providers stipulating one arbitrator ICC arbitration in the event of a dispute.

Sixth, to reinforce the firewalls and ensure the operational independence of ASL/Arianespace from Airbus, it was agreed that no representative of Airbus would be appointed to the board of Arianespace, and that no representative of Airbus could become CEO of Arianespace or a member of Arianespace's executive or strategic committees. The parties also agreed to a no-hire ban, preventing certain staff of ASL/Arianespace from being recruited by Airbus for a period after the termination of their contract with ASL/Arianespace and vice versa.

The commitments, it was agreed, should be effective for 25 years (save the no-hire covenant, which would lapse after 15 years).[21]

2-VI. Behavioral Remedies at the EC: Five Takeaways for Antitrust Counsel

There is little appetite from competition enforcement agencies to become embroiled in the protracted supervision of businesses that are parties to a merger post-closing. Clear-cut structural solutions that reinstate competitive market structures likely to be distorted by mergers permit the agency to step back as soon as the divestment has closed and allow supply and demand to determine how any particular market will be organized and evolve. Behavioral commitments are nuanced, difficult for the agency to police without industry expertise, and demanding in terms of staff and resources. There are cases when business-to-business accommodations can be reached on a private basis with one or two partners. If these arrangements are brought to the attention of the merger control agencies, they may be able to conclude that, having agreed terms with the immediate or most likely "victims" of any foreclosure strategy, the merging parties have in fact deprived themselves, at least for the duration of the agreement, of the ability to pursue such a strategy.[22] At the same time, there are many cases where it is impossible or impractical to assuage the agency's concerns by contract, for example because there are too many counterparties for suitable terms to be agreed quickly. In these cases, a private arrangement will not suffice and an effective behavioral remedy will be needed. This begs the question: what do these three 2016 cases tell us about the design of behavioral remedies?

The first and perhaps most important lesson that can be drawn from the cases is that a behavioral commitments package can only lead to a Phase I conditional approval decision if the initial package is widely endorsed by the market participants consulted by the EC. Some of the parties' competitors, including the firms that are likely to be directly affected by the

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[21] There are cases where the monitoring trustee's mandate is unlimited in time. See, for example, the airline cases, COMP/M.3280—*Air France/KLM*, decision of Feb. 11, 2004 and COMP/M.3770—*Lufthansa/Swiss*, decision of July 4, 2005.

[22] See, for instance, in *GE/Avio*, the reference to new contracts being signed by Avio with UTC Pratt & Whitney and with Rolls-Royce to guarantee them security of supply.

merged entity's foreclosure strategy, will inevitably be hostile to the transaction and others may see the market consultation exercise as the opportunity to apply pressure to the merged entity to secure some other commercial advantage. It is crucial therefore that the original submission anticipates, calibrates and addresses all of their genuine fears, and that the parties have arguments ready-to-hand to rebut their gripes.

Second, recent cases seem to suggest that the EC may now have a preference for arrangements that are effectively self-policing, and do not require appointing a Monitoring Trustee, who may, notwithstanding his or her proven expertise, have moved from industry to consultancy work several years ago. What "effectively self-policing" means is a separate question but one plausible interpretation of the *Dentsply* case—where ultimately no Monitoring Trustee was appointed—is that the EC is more at ease with long-term contracts that protect the likely direct "victims" of any foreclosure strategy, twinned with the EC's "special" fast track arbitration procedure,[23] than a looser arrangement that needs to be proactively policed over time by a trustee.

Third, the jury is still out on the appropriate duration of any behavioral commitments. As the decisions in *Dentsply* and *ASL* show, 10, 15, 20, and 25 year commitments are still being discussed and agreed in merger decisions. When the merged entity's market power can be ascribed to a patent, a commitment for the unexpired term of the patent might well be justified; in many other cases however it is not clear what the relevant benchmark should be, especially when the EC readily acknowledges in multiple horizontal unilateral effects decisions that it is virtually impossible for a competition agency to predict with confidence how a market is likely to evolve in three years. Must it ask how long it would take a competitor to replicate the merged entity's critical input, and should it uncritically believe the responses of third party consultees? Does the precautionary principle always justify extended protection, or should there be a presumption that the commitment will lapse after, say, five years, leaving third parties to plead a breach of Article 102?

Fourth, as a careful review of the FRAND commitments in *Liberty Global* and *Worldline* demonstrates, careful attention needs to be given to crafting the specific and measurable obligations that support a FRAND commitment, to make it possible for the package to be accepted. There will be cases when it is fair to assume that the "best terms" will be those offered to the merging parties' in-house affiliate, but as *Liberty Global* shows, it is quite possible that better terms are (already) offered to one or more third parties for objectively justifiable reasons (*e.g.* because of economies of scale). In those circumstances, the parties and the EC need to establish whether it is appropriate to use the parent/affiliate's contract as the benchmark for all third party FRAND contracts, or to measure FRAND against another basket of contractual provisions, even if that reduces product differentiation among third parties and may mean better terms being offered to "less worthy" counterparties. One novel

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[23] In EU cases, once the aggrieved counterparty has produced evidence of a *prima facie* case, the standard language used in commitments is that the arbitral tribunal must find in favor of the third party unless the merged entity can "produce evidence to the contrary." This, combined with rules: (1) permitting the EC to file amicus curiae briefs and question the merged entity at any hearings; and (2) requiring the arbitral panel to shorten all procedural time limits as far as admissible and appropriate, is designed to ensure that the merged entity has no incentive to fail to deliver on its commitments.

feature of the *Worldline* case was the provision that when the commitment to provide maintenance services to NSPs is undermined by a "shortage," a form of reinforced monitoring by the trustee and an ad hoc users' group shall be triggered. For future cases, antitrust counsel need to consider whether such a commitment might be appropriate and if so to give careful thought to the composition of an ad hoc users' group and to the impact that compliance with the commitment could have on the merged entity.

Finally, antitrust counsel should welcome the EC's decision in *ASL* to confirm that the firewalls commitment in *GE/Avio* was not a one-off and that it has no dogmatic objection to firewalls, as there will from time to time be cases where such commitments are both appropriate and effective: appropriate because, on the facts, neither of the alternatives (unconditional approval or prohibition) is desirable; and effective because properly-established and properly-policed commitments do protect markets from anticompetitive outcomes and allow businesses to continue to innovate and compete. At the same time, the parties to future mergers need to appreciate from Day One that a firewalls commitment will not be a light-touch low-maintenance remedy, but instead is likely to be costly and intrusive in other respects. The package may entail one-off capital costs (for example, if the commitments effectively force the parties to establish a distinct IT network for one of the businesses, or if the parties need to physically separate two businesses that previously operated from the same site and/or shared production or services, as was the case in *ASL*); restrictions on the mobility of executives and staff between the two ring-fenced firms may be imposed; and the merged entity may be required to establish new rules governing flows of information to certain members of the board or board committees, which raises potentially thorny questions of corporate governance and fiduciary duty.