Recent Developments in EU Merger Control

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I. Overview

For much of 2013, the global economy seemed somewhat lethargic. Activity in mergers and acquisitions (M&A) was patchy and, once the initial excitement of two prohibitions at the end of January and again at the end of February had faded, there was a sense that European merger control policy might be marking time. With the benefit of hindsight, however, 2013 was in fact a year rich in twists and turns.

Academics, advisers and policy-makers started the year sitting through the entrails of the Commission's press release in Hutchinson 3G Austria/Orange Austria 1 (in which H3G committed to divest radio spectrum and related rights to a new entrant to the Austrian market and, separately, to provide wholesale access to its network to up to sixteen mobile virtual network operators in the next ten years), for signs as to how the Commission would treat future mobile telecoms cases. In February 2013, we heard Commissioner Almunia bemoan the fact that, in mobile telephony, because spectrum is limited and building a network is expensive, there are only a few network operators in any Member State. 2 And we start 2014 wondering whether solutions can be found in four-to-three mobile telephone mergers in Germany 3 and, in a far smaller Member State, Ireland. 4 Plus ça change . . .

Sandwiched in between, there have been several important developments. The Commission continues to express its preference for a clear-cut eliminate-the-overlap commitment in horizontal cases if they are to be closed in Phase I, but has adopted decisions (eg Marine Harvest/Morpol and FrieslandCampina/Zijerveld) that show that it is capable of taking a more sophisticated and less dogmatic approach where the evidence is good and the solution intuitively sound. In Phase II cases, it has demonstrated again that it is open to thoroughly-prepared and economically-sound arguments, first, by accepting the little-used failing firm/division defence to bless two merger cases 5 and, secondly, by agreeing a bespoke divestment package in a two-to-one merger in Syniverse/Much on the grounds that, if part of the target business was spun-off, the market would remain contestable. We have also witnessed two further prohibitions decisions—one in a 'gap' case (where the proposed concentration does not create or strengthen a dominant position but nevertheless seriously impedes effective competition), 6 the other in the long-running saga involving Ryanair and Aer Lingus.

The court confirmed that even in Phase I the Commission has a margin of discretion when assessing complex economic matters, to which the court must have regard when determining if it has made a manifest error in its analysis, and that there is no obligation on the Commis-

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1 Case M.6497—Hutchinson 3G Austria/Orange Austria.
3 Case M.2018—Telefónica Deutschland/E-Max decision to initiate Phase II investigation taken on 20 Dec, 2013.
4 Case M.6992—Hutchinson 3G UK/Telefónica Ireland decision to initiate Phase II investigation taken on 6 Nov, 2013.
5 Case M.4586—Nynas/Shell/Herne Refinery Assets and Case M.6785—Agence/Olympic II.
6 Case M.6570—UPS/TNT Express.

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sion to show beyond reasonable doubt that a concentration does not give rise to competition concerns.

On questions of procedure, there is the prospect of infringement proceedings being brought against a business for failing to notify a concentration to the Commission⁷ and there has been a new derogation decision in the slowly recovering financial sector.⁸ New legislation has recently been adopted to expand the scope of the simplified procedure in non-problematic cases, and stakeholders have been consulted on the tricky question of the examination of minority stakes falling short of control.

II. M&A activity; trends and statistics

The number of notifications filed with DG COMP in 2013 was stable compared with 2012: down just six to 277. Over half, 59.9 per cent, of all cases were handled under the (old) simplified procedure. This percentage is on a par with the percentages in 2012 and 2011 (60.1% and 61.8% respectively) and it will be interesting to see whether the Commission’s objective—to increase the proportion of simplified procedure cases by 10% and so cut red tape for businesses—will be achieved.

Broadly speaking, the business-triggered referrals system introduced in 2004 has worked smoothly, with all eleven Article 4(4) requests by the parties to have their case examined by the authorities of a Member State granted, either in whole or in part. While the number of Article 4(5) referral requests for the transfer of a case from the authorities of one or more Member States to the Commission has fallen in absolute terms from its high watermark of fifty-one in 2007 to just twelve in 2013, eleven of the twelve requests that were made were agreed; the twelfth was outstanding at the end of the year. Two Article 9 requests from the Bundeskartellamt were filed with DG COMP towards the back end of 2013, and the decisions were pending at 31 December 2013.⁹

As noted earlier, the Commission published one Article 7(3) derogation from the suspension obligation decision. It also published one conditional clearance decision¹⁰ in which it expressly reserved its position on whether to initiate proceedings for a breach of the suspension obligation. The full text of its 2010 decision—the first formally modifying the terms of commitments given in an earlier (2003) merger case—was also posted on its website.¹¹

III. Phase II decisions: The failing firm defence, commitments, and prohibitions

Criticism is often levied at the Commission for the length of its procedures, especially in pre-notification, and the undertakings involved in Phase I cases are sometimes surprised by the almost-binary approach that the Commission takes to commitments in such cases. Some of that criticism and surprise is justified. Even the Commission’s most vocal critics recognise however that, in Phase II cases, the Commission regularly shows itself able to handle difficult concepts with dexterity and to reach equitable conclusions. In this regard, 2013 was a stellar year for DG COMP. Six Phase II decisions were taken: two were unconditional clearances (both on the basis of a failing firm/failing division defence), two were conditional approvals and two were prohibitions.

A. Unconditional Phase II clearances

In the space of five weeks in the autumn, the Commission took the highly unusual step of applying the failing firm defence to clear two Phase II deals unconditionally. The first case involved the proposed acquisition by Nynas of certain refinery assets of Shell Deutschland Oil located at Harburg in Lower Saxony; the second case concerned a revitalised proposal to combine two struggling Greek airlines, Aegaean and Olympic, less than three years after the Commission had substantially prohibited the same transaction.

The Nynas/Shell/Harburg Refinery Assets case¹² was announced in December 2011 and notified in February 2013. It concerned the proposed acquisition by Nynas (owned by Finland’s Neste Oil Oyj and the State-owned Petróleos de Venezuela) of base oil manufacturing assets (used to produce base oil from distillates) and certain parts of a Shell-owned refinery used to produce distillates from crude oil. Customer and supplier relationships were excluded from the scope of the transaction. Announcing its decision to conduct an in-depth investigation of the deal in March, the Commission expressed serious concern that, post-closing, Nynas would be the only remaining producer of naphthenic base and process oils in the EEA, and Europe’s largest producer of TFO (an insulating material for transformers). The merged business’s only significant competitor would be a US-based company called

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⁷ Case M.6850—Marine Harvert/Marpol.
⁸ Case M.6812—SIP/Dezzi.
⁹ We now know that both requests were rejected in Case M.2009—Fluor/Genex West because the Commission concluded that the scope of the affecteduren market is wider than Germany, and in Case M.7018—Telefónica Deutschland/T-Mobile because the Commission is anxious to retain jurisdiction to ensure the consistent application of the merger rules to telecoms cases across the EU.
¹⁰ Case M.66850—Marine Harvart/Marpol.
¹¹ Case M.2876—Nynas/Oil & Gas. A summary of charges made to the commitments accepted in Case M.4100—Gas de Franse/Soee was Published in the Official Journal in February 2013, but the fully-reasoned non-confidential version of the decision remains unpublished.
¹² Case M.5630—Nynas/Shell/Harburg Refinery Assets.
Ergon that had only started exporting into Europe in 2008.

Nynas passed on the opportunity to offer commitments in both Phase I and Phase II. Instead, from Day One the parties’ efforts concentrated on persuading the Commission that, but for the deal, it was inevitable that Shell would abandon the refinery (which had become financially unsustainable within the Shell group but which would be run by Nynas using a different business model) and that there were no alternative buyers for the refinery assets. Precise details of the financial evidence that Shell presented to the Commission and of the attempts made by Shell and its bankers to find an alternative purchaser for the business are unlikely to be reproduced in the Commission’s decision, but were clearly critical to the analysis, especially as, in earlier cases, the Commission had shown itself reluctant to allow a failing division defence where the parent company (in this case Shell) was not itself in financial difficulty. The Commission was ultimately persuaded that, if Nynas did not acquire the Shell assets, the most likely alternative outcome was that the refinery would close completely, that EEA demand would exceed local capacity and that European customers would inevitably pay higher prices to import the napthenic oils until then produced at the refinery. There was therefore no causal link between the proposed concentration and any harm to consumer welfare, and the transaction could be approved.

The second case in which the failing firm defence was applied was Aegenn/Olympic II. To the outside observer, this result was slightly surprising for two reasons. First, it came barely two and a half years after the Commission had blocked substantially the same transaction on the ground that it would have led to a quasi-monopoly on several domestic routes, and while, at the time, the parties had not expressly invoked the failing firm defence, the Commission made the point in its decision that none of the three criteria were met (in particular because Olympic’s shareholder Marfin was in a position to keep the airline solvent). Secondly, for much of the procedure, the indications were that the parties were trying to secure conditional approval for the deal on the basis of recent new entry and a commitments package that further lowered the barriers to entry for third carriers.

Traditional ‘slot release’ commitments were offered by Aegean and Olympic in Phase I. That offer, which relied heavily on recent actual entry by Cyprus Airways on the three busiest domestic overlap routes in Greece and on the prospect of new entry on several more routes, was market-tested at the end of March. The credibility of the proposal (which had been telegraphed in the press several weeks before being formalised) was however undermined by Cyprus Airways’ own poor financial condition and a Commission decision at the beginning of March 2013 to open an in-depth investigation into State aid allegedly given to Cyprus Airways.

Then during the summer months, the financial condition of Marfin deteriorated. More specifically, a €660 million convertible bond offering was unsuccessful and the company was forced to announce that it was not prepared to offer further financial support to Olympic. Fresh commitments were filed with the Commission in August 2013, extending the deadline for a decision until 16 October 2013. Little is known about this package and there were no press reports at the time indicating that the proposal was even market-tested. Instead, it is believed that the proposal was made principally to buy time for the Commission to test whether any other airline was interested in acquiring all or even some of the assets of Olympic—in other words, whether there was a less anticompetitive alternative purchaser, one of the three preconditions for a failing firm defence. On 9 October 2013, the Commission resolved to approve the deal without conditions, in its official press release admitting that Olympic was failing and would be forced to leave the market soon in any event. In briefings with journalists afterwards, Commissioner Almunia did however put Aegean/Olympic on notice that it would, in his view, be a dominant carrier on several Greek domestic routes and that he expected the Greek competition authority to ‘monitor very carefully’ any possible abuses of that dominance.

B. Conditional Phase II clearances

There was nothing controversial about the conditional Phase II approval of the specialty paper merger of Munksjø (a Swedish paper products manufacturer) and the label and processing business of Ahlstrom Corporation (which embraced decor papers, abrasive paper backings, and electro-technical papers).17

The Commission’s investigation focused on two product lines. In heavy weight abrasive paper backings, the merging parties were the only manufacturers with facilities in the EEA and the two leading players in the global market with a combined market share in excess of 80 per cent. The Commission found that there were high

13 See for instance Case M.3851—JCL/FEAMML.
14 Case M.6296—Aegenn/Olympic II.
17 Case M.6576—Munksjø/Ahlstrom.
barriers to entry in abrasive paper backings and that, without commitments, the merged business would not have been subject to a sufficient competitive constraint. In the market for pre-impregnated paper (or PRIP), which is used extensively in the furniture industry (e.g., IKEA), the operation brought together two of the three European manufacturers (the other being the German manufacturer Technocell), resulting in a market share in both the EEA and worldwide excluding China of over 70 per cent. The parties argued (i) that the relevant product market was wider than PRIP and included other forms of decor paper and (ii) that Technocell had significant unused production capacity which would be used if the merged business sought to increase prices. Both arguments were rejected.

To secure a Phase II approval, the parties therefore agreed to divest the entirety of Ahlstrom's heavy weight abrasive paper backings and PRIP businesses (located on a single Ahlstrom site at Osnabrück in Lower Saxony). The merged business was, however, allowed to retain and operate one Ahlstrom paper line at the facility making unrelated products.

The second—and by far more interesting—conditional approval was acquisition by Syniverse (a telecommunications service provider) of sole control of Mach, a Luxembourg-registered business offering a range of clearing and settlement, and billing services.18 Both parties are DCHs (data clearing houses) that settle the usage records of mobile telephone subscribers roaming on other operators’ networks. Mobile telephone companies then use the data from the DCHs to calculate the wholesale payments that they need to pay each other. The Commission was familiar with the industry, having examined an earlier (2007) merger between Syniverse and BSG (then number three), which it approved because Syniverse and BSG were not found to exert strong competitive pressure on each other and because of the competitive pressure that their merged business could be expected to face from Mach.

Predictably, the Commission's was suspicious of the new transaction which threatened to create what it later would call a world leader ‘with virtual monopoly market shares’ and the ability to raise prices and/or reduce the quality of its services. New entry was unlikely, said the Commission, and customers (even the larger mobile network operators or MNOs) would have insufficient buyer power to counteract the negative impact of the merger.

To persuade the Commission that the transaction could nevertheless be cleared, the parties commissioned a switching study that examined the behaviour of MNOs over a four-year period. The parties’ experts concluded that switching volumes were significant, suggesting that what mattered was not any given player’s (historical) market share but the fact that there was a contest for all contracts, new or to be renewed. Their report also showed that smaller providers were winning a disproportionately higher number of switching customers than might ordinarily be expected. The parties were unable to demonstrate, however, that smaller competitors exercised a significant competitive constraint on the larger players.

As a result, the Commission concluded that the transaction could only be approved if Syniverse effectively spun-off a business that would be ‘big enough’ to qualify as an alternative supplier to even the largest MNOs, and regardless of their location. The Commission conceded, however, that Syniverse did not have to ‘eliminate the overlap’ or ‘divest market share’, as is typically the case in horizontal mergers. What mattered, agreed the Commission, was that the divested business would be a fully-effective rival and therefore that demand from all MNOs, regardless of their size, was contestable. The proposed acquisition was therefore approved on condition that Syniverse divest all of Mach’s European businesses in data clearing (DC) and in ‘near trade roaming data exchange’ (NTRDE), including operational assets, proprietary software, the Mach personnel who had previously been dedicated to the delivery of these services, and contracts with a mix of major, mid-sized, and smaller customers. The Commission did not, however, insist on closing of the Syniverse/Mach deal being delayed until the identity of the purchaser was known or the terms of the divestment had been agreed.

C. Two prohibition decisions

So-called “gap cases” remain relatively unusual but the first of the Commission’s two prohibition decisions in 2013 falls into that category. In UPS/TNT Express,19 the Commission investigated the proposed merger of two of the world’s four ‘integrators’ in express delivery. Integrators like UPS and TNT own and operate extensive air and ground package delivery networks across Europe. The Commission found that Deutsche Post’s subsidiary, DHL, was the market leader in most European countries, that UPS and TNT were close competitors, that FedEx had low market shares in several European countries (because of a lack of density and scale) and that the competitive constraint exerted on the four integrators by
other market participants (notably the national postal operators) was limited, for example because their focus was on deferred delivery services, rather than express delivery. Accordingly it initiated a Phase II investigation into the proposed merger in July 2012.

It was accepted that, broadly speaking, the proposed merger would have a created a stronger Number 2 player in express delivery in Europe, rather than a business enjoying market dominance in its own right. The Commission was, however, concerned about upward pricing pressure (UPP). In building its case against the merger, the single most important piece of evidence on the Commission’s file would appear to have been a price concentration analysis commissioned by UPS that predicted that prices would increase in twenty-nine European countries, despite DHL’s market leadership in several of those countries.20 When the Chief Economist’s Team reproduced the study using UPS data, they reached broadly similar results (and indeed predicted larger price increases than in the UPS-commissioned report). The onus then shifted to the parties to prove that this loss of price competition would be more than made good by a series of efficiencies.

The Commission’s examination of the efficiency benefits claimed by the parties led (as had been the case in Deutsche Börse/NYSE Euronext) to patchy results. Efficiencies referable to savings in air network costs could be expected to materialise and were unlikely to be achievable by means other than the proposed concentration, acknowledged the Commission, and credit was therefore given for those gains. On the other hand, it was not clear that efficiencies in relation to ground transportation costs could be allocated to express deliveries (the affected product), and it was impossible, said the Commission, to verify that savings in management and administrative costs would be passed on to customers. Weighing up the economic evidence, the Commission concluded that the (qualifying and verifiable) efficiencies did not outweigh the price increases caused by the reduction in competition.

The Commission therefore ruled that the proposed acquisition was likely to lead to a SIEC for intra-EEA express small package delivery services in fifteen Member States where DHL would, were the deal to go ahead, be the only remaining viable competitor. UPS offered a wide-ranging package of commitments, including an offer to divest TNT’s subsidiaries in these fifteen ‘problematic’ Member States (thereby eliminating the overlap that would otherwise have been brought about by the merger), to divest TNT’s subsidiaries in Spain and Portugal in certain circumstances (to make the package more attractive to a potential purchaser) and to give the purchaser access to UPS’s air network for five years (should it not be an integrator itself).

FedEx—the only suitable integrator/purchaser—was commercially opposed to the deal and therefore an unwilling purchaser. UPS’s efforts to line the French postal service, La Poste, up as a viable potential purchaser of the divestment business also floundered in the face of Commission doubts that it could operate a viable and sustainable competing business without (i) upgrading its own ground network and (ii) investing in its own air transport solution beyond the first five years when UPS would give it access to its aircraft. The temporary nature of the air access remedy, and its characterisation as ‘non-structural’, troubled the Commission. In the absence of an upfront buyer solution (vetted by the Commission), the Commission concluded that it had no alternative but to prohibit the proposed deal.

Ryanair’s third attempt at acquiring sole control of its Irish rival Aer Lingus also failed.21 That stark assertion, however, disguises the serious attempts made by Ryanair to put together a commitments package that addressed route-by-route the Commission’s competition concerns and would have helped a second carrier (which was expected to be the regional airline, Flybe) to establish a base at Dublin airport.

The Commission’s 2012/2013 analysis was conducted from scratch. It found that the combination of the two carriers would have created an outright monopoly on twenty-eight routes and left the parties facing competition from charter airlines only on another eleven routes. On seven routes where other scheduled airlines would continue to compete with the merged business, the Commission concluded that the merging parties were very close competitors (because of the business model operated by their competitors).

Ryanair then made a series of commitments proposals to try to secure the Commission’s green light for their deal. In its final offer, it committed in substance to divest Aer Lingus’s operations on forty-three overlap routes to Flybe and to transfer slots at London Heathrow to allow British Airways to offer services on three more routes. Flybe and BA would commit to operate the routes for three years. Ryanair also indicated that it was prepared to make up to €100 million available to Flybe to support its flights in a start-up phase.

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20 UPP models tend to predict higher prices in cases involving close substitutes, as the corresponding efficiency gains are much harder on the whole to prove.

21 Case M.6665—Ryanair/Aer Lingus III.
Nonetheless, this wide-ranging proposal failed at market test. Flybe, which during the market test announced that it was being forced to make staff redundant, was found by the Commission not to be a suitable purchaser capable of constraining the merged business. The Commission was also concerned that neither Flybe nor BA would have any incentive to continue operations on any of the divested routes after three years. In a detailed 442-page decision, the Commission laid out its reasons for its decision to prohibit the deal again.

IV. Phase I conditional clearances

A. Food and drink cases

The food and drinks sector was particularly active in 2013. Several operations were cleared without conditions, but four were only approved on the strength of commitments.

The FrieslandCampina/Zijerveld merger involved horizontal overlaps between the parties in Dutch cheeses (Gouda, Edam, and Maasdam), in semi-hard goats' cheese, in a handful of dairy speciality products and in various cheese packaging services. The purchaser was a Dutch-based dairy cooperative; the target, Zijerveld, was the owner of several ripening warehouses and various packaging and logistics facilities in the Netherlands. Its packaging unit (known as Den Hollander) operated thirteen packaging lines and three grated-cheese lines. While FrieslandCampina was the Netherlands' leading producer of semi-hard goats' cheese, the target had the benefit of an exclusive supply agreement with Amalthea, the country's second biggest producer of goats' cheese. The market investigation demonstrated that customers had a clear preference for goats' cheese produced in the Netherlands from Dutch milk. To secure the Commission's approval of the deal, the parties therefore agreed to amend the target's supply agreement with Amalthea so that competitors would have access to a significant proportion of Amalthea's production. FrieslandCampina also agreed to stop outsourcing the production of FrieslandCampina semi-hard goats' cheese to Amalthea, freeing up this production capacity for third parties.

The second Phase I conditional clearance in food and drinks concerned the proposed acquisition by the Canadian frozen-food maker McCain of Pinguin/Lutosa's potato-products division. The Commission found that there were two distinct product distribution channels for potato fries and other potato-based products: the food services sector (out-of-home eating, institutional catering, and so-called Quick Service Restaurants or QSRs) and the retail sector. In its initial commitments proposal, McCain offered to grant to a suitable purchaser an irrevocable, royalty-free and exclusive licence of the Lutosa brand for use in the retail sector for five years (to allow loyal customer conversion), with a promise not to re-introduce the brand for at least five years thereafter. The purchaser would also be granted all tangible and intangible assets needed for the business including customer services and the technical support needed to move production to the purchaser's own production facilities or to those of a third-party co-packer or sub-contractor. The market test of this commitments package provoked scepticism as to the effectiveness and viability of the licence being offered by McCain. Respondents highlighted in particular the substantial investment in advertising and marketing that would be required for a successful rebranding and that a Belgium-only licence carried with it the risk that the purchaser invest significant sunk costs without any realistic prospect of recoupment; customers were worried about the value of the Lutosa brand if the rights to exploit the brand were to be split over different geographies; and there were grumblings about the efficacy of the five-year licence and the five-year blackout. McCain addressed the perceived deficiencies in its original proposal with an improved package: the licence was extended to the entirety of the EEA and its term extended from five to seven years, with a subsequent eight-year blackout. The final commitments package also provided that the purchaser should have sufficient financial resources to carry out the rebranding and either have proven experience with rebranding operations and co-packing or have direct access to Belgian potatoes or potato products.

One (unlikely) candidate for the most interesting case of the year (at least in terms of legal nuances) is the Phase I approval of Marine Harvest's proposed acquisition of Norwegian salmon processor Morpol. Marine Harvest is an Oslo-listed seafood company which produces farmed salmon and white halibut and various value-added fish products at processing facilities in Norway, Scotland, Ireland, and the Faroe Islands. The target, Morpol, is a producer and processor of salmon, mainly in Norway and Scotland. The Commission's 2005

22 For instance, Case M.6872: Barry Callebaut/Pepsi Foods Cocoa Ingredients, Case M.6876: Donnay/DeMaster Blenders and Case M.6709: Bolloré/Thy Marine/IV.
23 Case M.6722: FrieslandCampina/Zijerveld is Veldhoven and Den Hollander.
24 Case M.6813: McCain Foods/Lutosa Brands. The case was referred to the Commission under Article 4(5) of the EUMR by five Member States.
25 Case M.6850: Marine Harvest/Morpol.
investigation in Nutreco/Stolt-Nielsen\textsuperscript{26} had suggested that there was a market for Atlantic-farmed salmon but that there was no basis for a sub-division of the market according to the origin of the farmed salmon (Scottish, Norwegian, or Irish). Phase II decisions of the UK and French competition authorities in 2006 added a layer of complexity to the analysis: the UK competition commission thought that Scottish salmon might form a relevant market segment; the French authority concluded that farmed salmon from Scotland, Norway, and Ireland were 'imperfect substitutes'. In this case, the market investigation suggested that in Belgium, France and the United Kingdom, there was a 'strong customer preference' for Scottish salmon (over Norwegian) and that a 'significant number' of retailers had a Scottish salmon only policy (which made them easily identifiable to suppliers and therefore vulnerable to price discrimination). To support this qualitative analysis, the Commission conducted an econometric analysis (using price correlation techniques), which tended to show that, in most cases, the correlation between different sizes of Norwegian and Scottish salmon was lower than the benchmark correlation. In the face of the parties' robust defence of their merger, the Commission also conducted a more in-depth assessment of feasibility (and profitability) of an output restriction strategy, the ability of competitors to increase output to offset or challenge a price increase by the merged business, and the likelihood of timely and sufficient new entry (or expansion) to counteract a possible price increase. In the face of the economic evidence, and to avoid a Phase II investigation, Marine Harvest offered and the Commission accepted a divestment proposal that saw the parties remove 'approximately three quarters' of the overlap between the parties' Scottish salmon farming capacity.

The most recent Phase I conditional clearance in food and drink in 2013 concerned the proposed acquisition by Refresco of the UK-registered fruit juice bottler Gerber Emig/Pride Foods.\textsuperscript{27} Both companies are active in the production and bottling of non-carbonated soft drinks (N-CSDs) and in contract-manufacturing N-CSDs for brand owners. The Commission's market investigation showed that the deal would have eliminated an important competitor from the market for private label bottlers for supermarkets in Belgium, France, and Germany (especially in relation to aseptic PET-bottled fruit juices, fruit drink nectars, and still drinks). There were also concerns in relation to aseptic PET-bottled ready-to-drink teas. Refresco addressed these concerns by offering to divest one of the target's production and bottling plants, namely the plan at Walbstatd in Baden-Württemberg currently used by the target to deliver aseptic PET products in the three countries in which the Commission had competition concerns.

B. Aircraft component markets

GE's acquisition of Avio's aviation business\textsuperscript{28} raised competition concerns in two spheres: in relation to the Eurofighter military aircraft project and in relation to the supply of spare parts for engines used on commercial aircraft. For several weeks, press reports suggested that the deal would only be approved by the Commission if commitments were offered in both areas. During the procedure, however, GE entered into agreements with two of its competitors (UTC Pratt & Whitney and Rolls-Royce), guaranteeing that Avio (once controlled by GE) would continue to remain a reliable source of supply for these commercial aircraft engine manufacturers. As a result, the Commission, which is on record as having little appetite for monitoring behavioural commitments, concluded that no commitments were required. The Commission did, however, accept commitments from GE in relation to the Eurofighter consortium, Avio, Rolls-Royce (UK), MTU (Germany), and ITP (Spain) are all members of the Eurojet consortium, which designs and manufactures the Eurofighter Typhoon's EJ200 engine. Avio is, as such, a key supplier to Eurofighter, which competes with other combat aircraft powered by GE engines for sales in export markets. The Commission was concerned that GE's acquisition of Avio's aviation business would give GE access to strategic information about a major competitor in the export market for fighter aircraft and, to assure these concerns, GE offered and the Commission accepted a series of commitments designed to ensure that strategic information about Eurojet is properly ring-fenced and is not shared with GE. The Commission's decision approving the transaction has been posted on its website but for the time being, most of the text of the commitments is being treated as a business secret. Given the Commission's preference for structural remedies over behavioural commitments, and more generally its scepticism as to confidential but it is understood that the parties and the authorities sought to align timetables in Europe and in the United States as best they could, that there were joint EU/FTC tasks of work cells, that the authorities tried to send their RFOs on specific topics out at the same time, and that on two occasions an official from the FTC attended a meeting between the parties and DG COMP.
the efficacy of information barriers, counsel will be watching keenly to see on what basis the commitments in this case were found to be acceptable, how the ringfencing has been structured and how it will be policed, and whether such solutions can be transposed to other industries and/or to other scenarios.

C. Coin changers and dispensers

In the field of vending machine technologies, Crane's proposed acquisition of MEI (from Bain Capital and Advantage Partners) was approved in July and closed in December 2013. Neither the decision nor the commitments have been published and for the time being details of the transaction are sketchy. The parties manufactured unattended payment systems, coin changers and dispensers, coin hoppers and banknote recyclers, used at ticket vending machines in railway or metro stations and in car parks. Crane's expertise was in coin handling and MEI's in bill validation and early reports suggested that the parties hoped to secure unconditional approval for their deal on the ground that their businesses were largely complementary. Ultimately, however, the Commission required two divestments before it would approve the transaction: first, the sale by Crane of a coin changer product line manufactured in Germany to serve the market in the EEA; and secondly, the sale of a banknote recycler and acceptor product line and some related production assets in Canada. Crane also agreed not to close the transaction before concluding a binding sale and purchase agreement for the divestment businesses with a purchaser approved by the Commission.

D. Life sciences

Two of 2013's Phase I conditional approvals were in the field of life sciences: Baxter/Gambro concerned renal replacement therapy products and Thermo Fisher Scientific/Life Technologies was about cell cultures and gene silencing products.

Baxter is a diversified healthcare company that develops, manufactures, and sells products used to treat patients suffering from haemophilia, immune disorders, kidney disease, and other chronic or acute conditions. The target, Gambro, specialises in the development, manufacture, and sale of products for kidney and liver dialysis and other extra-corporeal therapies. Most chronic patients are treated by haemodialysis (or HD), a procedure which cleans blood by circulating it outside the body through an external filter or dialyser and then returning it to the patient. The Commission found that the parties were not close competitors in relation to HD, where they faced stiff competition from, inter alia, Fresenius Medical Care. A small number of patients—typically those suffering from acute renal failure and in need of intensive care—are cared for using a different technique called continuous renal replacement therapy or CRRT. In relation to CRRT equipment and CRRT consumables, the Commission found that in several Member States the merged business would have had very high market shares. To alleviate these concerns, Baxter committed (i) to sell the entirety of its global CRRT customer base, intellectual property, supply agreements, and marketing authorisations (in other words to remove the competitive overlap between the merging parties) and also (ii) to set up a production line at a Baxter facility in the EEA to produce fluids used in CRRT for the purchaser.

The second life sciences case cleared subject to Phase I commitments was Thermo Fisher's acquisition of Life Technologies. The case (which was also examined carefully by the US Federal Trade Commission and by the Australian CCC) brought together two important players in (i) water-based and blood-based liquids used to supply nutrients to cells growing in vitro (cell culture media and cell culture sera), (ii) gene silencing reagents and (iii) the supply of polymer-based magnetic beads used by OEMs in (downstream) instruments and kits. In each of these markets, the Commission found that there were high barriers to entry (linked to patent and other IP rights, to the limited availability of suitable blood or to the time and investment needed by a new business to establish itself as a reputable, reliable, and therefore viable supplier). To address these concerns, commitments were made (and accepted) to divest three businesses with their associated brands, IPRs, staff, and customer contracts.

E. US airline merger

The merger of American Airlines and US Airways (the smallest inter-continental carrier in the USA) raised competition concerns on just one transatlantic route: London—Philadelphia. Interestingly enough, the overlap did not exist because the parties themselves were in head-to-head competition on the route, but because AA's joint venture partner, British Airways, flies the route twice daily with a non-stop service against US Airways (daily service).

In line with established Commission precedent in airline cases, the deal was approved conditional, first, on a commitment by the merged entity to release (if necessary) slots at London Heathrow and Philadelphia air-
ports to enable a third-party carrier to launch a new non-stop service on the route; secondly, on contractual terms being agreed with the new entrant allowing it to access feeder traffic on certain services to Heathrow or Philadelphia on terms no less favourable than those enjoyed by the parties or their joint venture partners (to help the new entrant fill its aircraft and ensure the viability of its service); and thirdly, arrangements allowing for combinability between the new entrant’s flight and those of the merged entity and BA.

F. Aluminium extrusions

The creation of a joint venture between Norsk Hydro and Orkla/Sapa Holding in the market for soft-alloy aluminium extrusions was approved by the Commission in May 2013\textsuperscript{34} subject to two divestments. Soft-alloy extrusions are used in a range of applications, including in construction (eg for window frames, doorframes), automotive and various industrial uses; they are produced in a variety of shapes, including rods, bars, and tubing profiles. Multiport extrusions or MPEs are extruded tubes used in heat exchangers for automotive applications. In soft-alloy extrusions, where the relevant geographic market was found to be narrower (regional or national), the Commission expressed concern that customers in the Nordic region would struggle to switch suppliers, in particular because of higher transport costs compared to other parts of the EEA. In MPEs, the proposed transaction reduced the number of competitors in the EEA from four to three. Rather than face a Phase II investigation, the transaction was approved on the strength of commitments to sell Orkla/Sapa’s Dutch business in multiport extrusions (MPEs) and Norsk Hydro’s largest soft-alloy extrusions plant in Norway.

G. Ground handling services

Chronologically, 2013’s last conditional Phase I approval was the proposed acquisition by Swissport (owned by PAI Partners) of the ground and cargo handling service provider, Servisair.\textsuperscript{35} The Commission’s analysis of ground handling markets was conducted on an airport-by-airport basis in line with precedent and with the results of the market investigation (which confirmed that while several airlines organise tenders for ground handling services that cover several airports, a clear majority still professed to split tendered contracts selecting different suppliers for different airports). While the parties’ combined market share at London Stansted was in excess of 70 per cent, the Commission was satisfied that Servisair’s presence there was limited to airborne cargo and de-icing, and that it had effectively exited the market for the full spectrum of ramp, passenger, and baggage services. At other airports where the parties’ ramp, passenger, and baggage handling activities overlapped, the proposed transaction would have led to a monopoly at Newcastle (in the north-east of England) and to the elimination of an important competitor at Birmingham, Helsinki, and London Gatwick airports. Commitments whereby Swissport’s activities at Birmingham and Servisair’s businesses at Helsinki, London Gatwick, and Newcastle airports were offered for divestment were accepted by the Commission. In verifying the scope of the businesses to be divested, the Commission checked that while it was not possible for existing licences to be transferred to a purchaser, airport managers indicated that it would be possible for a suitable purchaser to obtain a license easily and within a reasonable timeframe.

V. Other things that caught the eye in 2013

Besides the large number of food and drinks cases cleared in 2013, two of the more interesting themes that caught the attention were, first, the impact of the financial crisis on Commission decisions and, secondly, the spectre of infringement proceedings being brought against Marine Harvest for failing to notify the acquisition of de facto sole control of Morpol to the authorities for approval.

A. Fallout from the financial crisis

Clearing the Aegean/Olympic II merger, Commissioner Almunia stressed that it was ‘clear that, due to the ongoing Greek crisis and given Olympic’s own very difficult financial situation, Olympic would be forced to leave the market soon in any event’. The effects of the financial crisis can be seen in different ways in several other cases too.

First, the only Article 7(3) derogation which surfaced in the course of the year concerned the banking sector, and more specifically the acquisition by the Belgian State investment company SFPI/FPIM of a 50.02 per cent controlling stake in the non-performing assets of what had been Dexia. Notwithstanding the sale of Dexia’s retail banking business (now called Belgis) at the end of 2011, the losses of what was left of old-Dexia continued to increase and in November 2012 the company’s board was forced to acknowledge that the group’s net assets had fallen below the thresholds permitted by Belgian corporate law. A deal to save Dexia had to be concluded

\textsuperscript{34} Case M.6756—Norsk Hydro/Orkla/JV.

\textsuperscript{35} Case M.7921—Swissport/Servisair.
by 31 December 2012 and on 12 December 2012, a request for a derogation was filed with the Commission. The Commission concluded that the derogation was appropriate, as otherwise there could be a `considerable effect' on Dexia, its creditors, its employees, and on the stability of the whole European financial system. Having satisfied itself that there was no obvious threat to competition (the horizontal overlaps between SIPI and Dexia were very limited and there were no readily identifiable vertical relationships), the Commission decided on the balance of interests to grant the derogation. The acquisition was subsequently notified to the Commission and, on 21 February 2013, approved without conditions.38

The financial crisis was also the backdrop to no fewer than nine separate Phase I clearances in 2013 involving Goldman Sachs and TPG Capital. In autumn 2012, LBG (Lloyds Banking Group; which had earlier had its restructuring plan approved under the State aid rules) struck a deal to sell a portfolio of underperforming corporate and real estate assets/loans, many of which had been acquired when Lloyds merged with HBOS in 2009. The portfolio was called 'Lundy', and while in several cases the turnover of the assets in the portfolio did not exceed €100 million, the fact that LBG's interest in the portfolio as a whole was acquired jointly by Goldman Sachs and a newly-created TPG fund called TPG Lundy meant that several operations needed to be notified to the Commission for approval. In a number of instances, Goldman Sachs and TPG Lundy together acquired a majority interest in the target business from LBG; in others, it acquired a minority interest and the Commission had to examine the contractual arrangements governing the target business on a case-by-case basis to ascertain whether other investors (frequently the managers who had invested alongside LBG) had veto rights over the appointment of senior management, or the business's budget and/or business plan. None of the Lundy portfolio cases was particularly difficult on the substance. The case that merits mention, however, is GS/TPG Lundy/Verna37 where the Commission found that the joint acquisition of a 19 per cent voting interest in Verna (which designs, manufactures, and supplies human waste management solutions for the healthcare industry), twinned with veto rights over the appointment and dismissal of senior management and the approval of the target's budget and business plan, meant on the facts that they alone could exercise decisive influence over the target business.

B. Breach of the Article 7(1) prohibition

As the Commission seeks to extend its jurisdiction to catch more transactions (including, see Section VII.B below, by taking jurisdiction over the acquisition of minority shareholdings falling short of control), so the number of (more or less) borderline cases where the parties might have failed or may fail to notify an operation that was subject to mandatory review is destined to increase. Advisers should therefore read with care the Commission's decision in IP P&C/Topdanmark38 and watch with interest as the Commission decides whether or not to initiate infringement proceedings against Marine Harvest for acquiring control of Morpol before filing Form CO with DG COMP.39

In the IP P&C case, the Commission's clearance decision narrates how, in May 2011, IP P&C increased its holding in TopDK from 14.74 per cent to 21.24 per cent and its voting rights in TopDK from 16.44 per cent to 22.75 per cent. The Commission then finds that while, since May 2011, the number of shares held by IP P&C in TopDK has not changed, as a result of a share buy-back programme launched by TopDK in 1998 (ie ten years before IP P&C first invested in TopDK), IP P&C's shareholding has increased to 25.18 per cent and its voting rights to 26.51 per cent. The Commission's analysis of historic voting patterns at shareholders' meetings indicated that IP P&C had (unwittingly) been able to pass resolutions at three recent general meetings of TopDK and that a 'prospective analysis' of the weight of a stake giving 26.51 per cent voting rights was that it would have been enough to control each of the last seven general meetings of TopDK. The Commission concluded that IP P&C passively acquired de facto sole control over TopDK and that 'the operation thus constitutes a concentration within the meaning of Article 3(1)(b). On the substance, the transaction was compatible with the single market and was cleared. Nothing further is said in the decision about the measures that IP P&C might or might not have taken so as not to fall foul of the suspension obligation; nothing is said about when the suspension obligation was triggered (after the first meeting where it had de facto control, or only after three); and nothing is said about the obligation (if any) that IP P&C had to explore whether it had de facto control of TopDK. On the facts, the Commission would appear to have been satisfied that IP P&C had not intended to acquire control of TopDK without first securing competition approval, and both the Commission and the parties are to

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36 Case M.6812—SIPI/Dexia.
37 Case M.6842—Goldman Sachs/TPG Lundy/Verna Group.
38 Case M.6957—IF P&C/Topdanmark.
39 Case M.6850—Marine Harvest/Morpol.
be congratulated for the adroit manner in which this matter was handled. In the light of the Marine Harvest case, the IF P&G decision does, however, pose more questions than it answers.

In Marine Harvest, the Commission’s conditional clearance decision (see Section IV, A) explains how in December 2012, Marine Harvest entered into a share purchase agreement pursuant to which it acquired a 48.5 per cent share in Morpol from entities owned by Mr Jerzy Malek. One month later, in accordance with Norwegian securities legislation, it made a mandatory bid for the outstanding 51.5 per cent stake held by other investors. When the public offer for shares in Morpol closed on 12 March 2013, Marine Harvest had 87.1 per cent of the shares of Morpol. It was however only in August 2013 that Form CO was filed with DG COMP. While Marine Harvest argued that, consistent with Article 7(2) of the EUMR, it would not exercise any voting rights or other forms of control over Morpol, the Commission stated that the Article 7(2) exemption was not applicable where a controlling stake is acquired by a purchaser of a single package of shares from one seller (in this case Mr Malek’s 48.5 per cent stake) and reserved its position on whether to initiate proceedings against Marine Harvest. While officials have not commented publicly on the case since September 2013 (when the decision was taken), it seems highly unlikely that the Commission will allow the matter to drop, as not only did the Commission ‘disclose’ the possible infringement in its decision, but the proposed acquisition raised competition concerns on the merits.

VI. Judicial control of Commission decisions

Two court rulings deserve to be mentioned in this year’s mergers survey: the judgments in the Cisco Systems case appealing the Commission decision authorising the Microsoft/Skype merger, and in the case where Spar Austria challenged the approval of REWE/Billa’s acquisition of Adeg.

On 11 December 2013, the General Court dismissed the appeal by Cisco Systems and Messagemet against the Commission’s decision of 7 October 2011 to clear Microsoft’s acquisition of Skype. The court confirmed the Commission’s conclusion that the merger does not raise horizontal competition concerns in the consumer communications market, where the parties’ activities overlapped, despite the combined entity’s very high market shares (between 80 and 90 per cent in the narrowest market). The key factors supporting the Commission’s decision were that the consumer communications sector is fast-growing and that it is characterised by short innovation cycles in which ‘large market shares may turn out to be ephemeral’. The General Court also confirmed the Commission’s finding that the merger was unlikely to result in harmful conglomerate effects in the enterprise communications market. The court recalled that the Commission may only prohibit a transaction if the significant impediment to effective competition is the ‘direct and immediate effect’ of the concentration. The evidence was that a network bridge between Lync and Skype would, at best, be completed in 2013, allowing the new product to be marketed no earlier than 2014. The anticompetitive effects feared by the applicants would therefore only arise if the marketing campaign was a major success (which was not guaranteed) and if a significant number of business customers switched almost immediately from Cisco or other systems to Lync so as to allow the merged business to foreclose the market. The court was satisfied therefore that the Commission did not err in finding that the market foreclosure effects of which the applicants complained were ‘too uncertain to be considered a direct and immediate effect’ of the merger and dismissed the applicants’ appeal.

Of general interest are some remarks made by the court on the standard of proof in merger cases. The applicants had argued that, when taking a decision under Article 6(1)(b), the Commission does not have any discretion and therefore that when the court reviews the legality of a conditional clearance given in Phase I, it must consider whether the concentration objectively gave rise to serious doubts requiring further investigation. It is not enough, argued the applicants, that the court checks whether the Commission committed a manifest error of assessment; it must also establish whether the Commission was entitled to conclude beyond any reasonable doubt that the concentration did not give rise to competitive concerns. Citing Bertelsmann and Sony v Impala, the court confirmed that there is no obligation on the Commission to show beyond reasonable doubt that a concentration does not give rise to competition concerns. If at the end of Phase I, the Commission harbours serious doubts, then it has an obligation to initiate a second phase investigation. However, said the court, in taking that decision the Commission must carry out
complex economic assessments, in relation to which it 'enjoys a certain margin of discretion of which the court must take account'.

Mention should also be made in passing of Spar’s action for annulment of the Commission’s 2008 decision to approve the proposed acquisition of Adeg by Billa (part of the REWE Group) subject to the divestment of supermarket outlets in twenty-four ‘critical’ districts in Austria. The court dismissed Spar’s claim that the Commission had erred in over-estimating the market power of competitors, noting that the Commission had acknowledged in its decision that some hard discounters only offered a limited range of branded goods, but that others (eg Hofer and Lidl) usually sold a full range of daily consumer goods, including fresh fruit and vegetables. The General Court highlighted the contradiction between Spar’s claim that the Commission had underestimated the competitive constraint imposed on Billa by Adeg and a second claim that, because REWE had held 24.9 per cent of Adeg before the transaction, Adeg exercised a weak competitive constraint on Billa. Claims that the commitments package (reducing the merged business’s share of turnover in a given district below a threshold) was inadequate were, likewise, dismissed. Spar also brought a series of due process claims, arguing that the Commission had breached Spar’s right to a fair hearing when it failed to market test the last set of commitments and to send it to the Member States. The court observed that Article 19 of the EUMR imposes obligations on the Commission to transmit certain documents to the competent authorities of the Member States, but dismissed the allegation that it had in some way breached Spar’s rights.

VII. Legislative changes, adopted and out to consultation

A. Changes effective as of 1 January 2014

The Commission is to be commended for the changes that it adopted in December 2013 that mean that, as of 1 January 2014, more cases qualify for examination under the simplified procedure. The burden of actually delivering those changes now falls on the Commission’s case teams and on the external advisers to the notifying parties. Heads of Unit, in particular, need to ensure that case handlers do not ask needless questions or concoct competition concerns that self-evidently do not exist; and counsel need to help their clients understand that cases will be processed more smoothly if the parties are forthcoming in offering the case team third-party reports (assuming they exist) that support or confirm their claims on market definition or their estimates of market shares.

From the perspective of the notifying parties, the single most significant change made by the Commission has been to increase, as of 1 January 2014, the threshold at which a market is deemed to be ‘affected’ for the purposes of the EUMR, from 15 to 20 per cent in relation to horizontal overlaps and from 25 to 30 per cent in relation to vertical relationships. It is very unusual for the Commission to have serious doubts about cases involving horizontal overlaps where the combined market share of the parties is less than 35 per cent, and alleviating the administrative burden on the notifying parties when preparing Form CO where their combined share in a given market is between 15 and 20 per cent is, therefore, both business-friendly and unlikely to expose any customers to an untested lessening of competition.

It is difficult to predict how ‘valuable’ a second change—whereby the Commission extends the benefits of the simplified procedure to cases where the parties’ combined market share is less than 50 per cent and the change in the Herfindahl-Hirschman Index is less than 150—will prove to be to notifying parties. As a matter of good regulation, the change sends a positive message to businesses, namely that the Commission is not predisposed to conducting unnecessary investigations into transactions that are unlikely to have an adverse negative effect upon competition. It is not clear, however, how often this change will, on its own, spare the parties an onerous data pull in Phase I. De minimis overlaps of less than 1 per cent will always pass the test in a two-party transaction, as will overlaps of less than 2 per cent when the second/larger merging party has a share of 37 per cent or less. But because the process is mathematical, there will also be anomalies. Where the parties’ market shares are 17 per cent and 5 per cent, the simplified procedure will not be available, but it will where their shares are 18 per cent and 4 per cent; where their market shares are 29 per cent and 3 per cent, the simplified procedure will not be available, but it will where their shares are 31 per cent and 2 per cent. It would, however, be petty to criticise the Commission for its efforts to streamline its procedures when, in other contexts, businesses and their advisers do not hesitate to call for the adoption of bright line tests.

43 Case T-405/08 Spar Österreichische Warenhandels v Commission.

The Commission estimates that the net effect of these reforms will be to increase the number of notifiable mergers that qualify for a simplified procedure by around 10 per cent. As noted earlier, in 2013, just short of 60 per cent of all cases qualified for a simplified procedure and at the end of this year commentators will no doubt want to look again to see what impact the change has in fact made.

In parallel, amendments to the Implementing Regulation are being rolled-out ostensibly to reduce, clarify, and tailor the information required from companies when notifying mergers. In the face of criticism that it verged on the absurd that a sophisticated competition authority like the European Commission took jurisdiction over transactions that were incapable of having effects in the EEA (eg over a gas pipeline located entirely in Vietnam, the operation of toll roads in Puerto Rico, or the running of a car dealership in Siberia), the Commission has created a new ‘super-simplified procedure’ for joint ventures entirely active outside the EEA that meet the EU thresholds by virtue of the activities of their parents.

Where a merger does not give rise to any horizontal overlaps or vertical links between the merging parties in the EEA, the Commission has indicated that it can be notified without pre-notification, although it is a moot point whether this process will be invoked frequently, as the notifying parties are expected to give the Registrar advance notice of a new matter and to request the nomination of a case team. Assuming the parties’ advisers prepare a good Form CO, and with goodwill on the part of officials, it is quite conceivable however that pre-notification can be shortened in simple cases to seven or eight working days.

One other modification made by the Commission concerns the volume of information needed when the parties ask for a Commission case to be referred to the competition authority of a Member State, or when they ask national authorities to surrender jurisdiction to the Commission (eg when at least three national filings would otherwise be required).

The Commission’s rules on filing Section 53 documents with the Form CO have, finally, also been re-cast so that, even in simplified procedure cases, there is an obligation on the notifying parties to file presentations made to any member of the boards of the companies acquiring control that analyse the notified concentration.

B. Review of the acquisition of minority stakes falling short of control

Alongside its review of merger control procedures, the Commission conducted its long-awaited consultation into proposals which, if passed, would extend the Commission’s jurisdiction to review cases involving structural links falling short of ‘control’. The consultation closed in September 2013 and the Commission is preparing a White Paper for publication in the course of 2014—although no one is sure whether it will be adopted before the end of Commissioner Almunia’s mandate or not.

When the EUMR was last subject to a root-and-branch review, there was talk of the possible extension of jurisdiction to the acquisition of minority interests falling short of control. At the time, however, amending the system to allow for a review of minority stakes was not considered necessary as ‘only a limited number of such transactions would be liable to raise competition concerns that could not be satisfactorily addressed under Article 81 and 82 EC. The Commission’s inability to force Ryanair to divest some or all of its stake in Aer Lingus after its 2007 prohibition decision and concerns associated with non-controlling stakes held by one company in a competitor disclosed in the context of a handful of merger investigations encouraged the Commission to re-visit the question with renewed verve.

Conceding that the Commission does not need to review every single case involving minority shareholdings, Commissioner Almunia has nonetheless referred on more than one occasion to an ‘enforcement gap’ in the current scheme. It is perfectly true that his concerns find some support in economic theory but the real question is how big any enforcement gap is and whether the EUMR is the most appropriate legislative tool to address the problem, however it is framed.

The Commission’s working paper considered two basic options: (i) a notification system that would extend the current system of ex ante merger control to cases involving structural links or (ii) a system whereby the Commission would be able to select which cases to investigate. The second option could, suggested the Commission, be achieved either through a ‘self-assessment system’ whereby the Commission would be able to decide whether and when to investigate a particular transaction or through a ‘transparency system’ requiring the parties to file a short notice with the Commission in cases presenting a prima facie problematic structural
link. Other questions broached in the consultation document included whether the threshold for review should be qualitative or quantitative, and whether the parties to a proposed merger should be given the right to seek approval of the acquisition of a minority shareholding from the Commission on a voluntary basis.

Professional and industrial responses to the Commission consultation were cautious and in several instances negative; while few rejected the proposition that non-controlling minority investments in a competitor can have an adverse effect upon competition, there was a broad consensus that any ‘enforcement gap’ did not merit a change in the EUMR that meant mandatory notification (with the attendant costs and delays). Many stakeholders argued that the proposed reform would have a chilling effect on investment, and would make minority investments less attractive to businesses and increase legal uncertainty and transaction costs. A recurring concern expressed in responses to the consultation concerned the perceived lack of proportionality between the new tools that a revised EUMR might give the Commission (entailing significant additional burden for business) and the limited number of ‘problematic’ acquisitions of minority stakes.

National competition authorities were more sympathetic to the extension of the Commission’s jurisdiction, but the UK and German authorities (which already have power to examine certain acquisitions of minority stakes that do entail an acquisition of control under national law) could not agree whether the system should be based on voluntary notification (the position advocated by the OFT and the Competition Commission) or on a mandatory filing and a suspension (the position of the Bundeskartellamt).48

Any legislative proposal to amend the EU Merger Regulation will require approval of the EU Member States (through the Council) and the European Parliament. Given the largely muted support for the proposal from the stakeholder community, the expectation is that the debate will be lively, so that it is now improbable that any changes will be agreed before the end of Commissioner Almunia’s mandate.49

C. Case referrals between the Commission and national competition authorities

One final area in which legislation is being considered is in relation to referrals between the Commission and national competition authorities.50 Until now, attempts to resolve minor problems arising from the referral system (e.g. inordinately long delays or the risk of forum shopping) have been addressed through soft law instruments, and most recently through changes to the ‘Best Practices on Cooperation between EU National Competition Authorities in Merger Review’ which relies on the merging parties’ cooperation rather than on institutional tools to improve the functioning of the referral system. The Commission staff working document published in June 2013 discusses whether merging parties should be permitted to notify a case that meets the jurisdictional thresholds of three Member States directly to the Commission without first completing a reasoned submission. It also mulls over the question whether, in cases referred by one or more national competition authorities to the Commission, the Commission’s review could cover the whole of the EEA rather than just the territory of the Member State(s) requesting the referral, in line with the ‘one-stop-shop’ principle. Industry is broadly supportive of such measures, as they have the potential to streamline merger review procedures, but it remains to be seen whether the changes will have the support of the Member States.

VIII. Perspectives

As we approach the end of Vice-President Almunia’s mandate, it is interesting to start to think about the evolution of European merger control policy under his tenure. While there have been no game-changing shifts in merger policy in the last four years—and admittedly the Commissioner’s mandate is not yet over—it is widely-acknowledged that he has made a significant personal investment in many of the cases examined by his services. He has earned a reputation as someone who is prepared to sit down and listen carefully (but critically) to the ‘solutions’ advanced by the merging parties, even if they do not come straight from the pages of the textbooks or are otherwise unorthodox. Where he has been personally convinced that those solutions can and are likely to work, he has shown himself to be a pragmatist: where he has sensed that the parties have been slow to bring forward constructive and convincing proposals, he has had the courage to put his foot down and block mergers.

At a more technical level, perhaps the most tangible change over which Commissioner Almunia has presided

48 See footnote 47 for link to the comments of national competition authorities.
50 These changes also need to be approved by the Member States in Council and the European Parliament.
has been in the design and validation of commitments packages. To secure a clearance, it is no longer sufficient for the merging parties simply to promise to put a business up for sale. Before adopting a clearance decision, the Commission now wants to be as confident as it possibly can be that the business to be divested is viable and complete (from a structural perspective) and will in fact—and not just in theory—exert an independent competitive constraint on the merging parties as soon as possible after closing. Where the identity of a suitable purchaser is crucial to the viability of the divestiture, the commitments package needs to reflect that industrial reality, even if that means the merging parties delaying closing until a suitable purchaser is found for the business. This tightening in policy has had a profound impact upon the way in which some businesses (and their bankers) prepare their M&A deals and it is no longer unusual for the notifying parties to be actively working on the architecture of possible divestitures before notification.

As mentioned earlier, laudable measures have been taken at the end of 2013 to alleviate the regulatory burden on businesses in unproblematic mergers. While the Commissioner is not personally responsible for the trend towards longer and longer pre-notification—that trend predates his mandate—there is a feeling at least in parts of the business community that little has been done to stem the tide towards longer and sometimes convoluted investigations and that the Commission’s instinct is still to ‘over-investigate’ cases. Looking forward, from the perspective of the businesses dealing with DG COMP (the notifying parties, their competitors, their customers and suppliers), there is hope that, having modernised its procedures in simple cases, the Commission will now be able to turn its mind to the thorny question of the way in which it collects information and investigates non-simplified procedure cases, hard or not.

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