The Mergers & Acquisitions Review

Eighth Edition

Editor
Mark Zerdin

Law Business Research

The Mergers & Acquisitions Review

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This article was first published in The Mergers & Acquisitions Review - Edition 8
(published in August 2014 – editor Mark Zerdin).

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Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-16-5

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

AABØ-EVENSEN & CO ADVOKATFIRMA

ÆLEX

AGUILAR CASTILLO LOVE

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CONTENTS

EDITOR'S PREFACE

There is cause for optimism and caution in light of the past year's events.

First, we can be tentatively optimistic about Europe. The possibility of a euro breakup appears to have faded, and European equities markets performed, on the whole, exceptionally well in 2013. Indeed, the euro/dollar basis swap has moved sufficiently to open up euro capital markets to borrowers wishing to swap proceeds to dollars; the World Bank sold its first euro benchmark bond for more than four years in November 2013, and non-European companies like Sinopec and Korea Natural Gas have issued large euro bonds in recent months. If the European economy continues to grow (and analysts are expecting growth to quicken), it is hoped that the prospect of crisis will continue to fade.

Second, though 2013 was a comparatively languid year for global M&A, the buoyancy of the credit and equity markets cannot be ignored. In terms of financing, the seeming willingness of banks to allow for looser borrower constraints, to underwrite jumbo facilities in small syndicates, and to offer flexible and fast bridge-financing for high-value acquisitions, presents a financing climate that should be particularly amenable to corporate M&A. It is also notable that continued political and economic instability did not impede the completion of some standout deals in 2013, including the *Glencore/Xstrata* tie-up and Vodafone's disposal of its shareholding in Verizon Wireless. These deals show that market participants are able, for the right deal, to pull out all the stops. After a period of introspection and careful balance sheet management, corporates may be increasingly tempted to put cash to work through M&A.

There remains, however, cause for prudence. There is considerable uncertainty as to how markets will process the tapering of quantitative easing (QE) by the US Federal Reserve. The merest half-mention by Ben Bernanke, in May 2013, of a possible end to QE was enough to shake the markets, and to nearly double the 10-year US Treasury yield in a matter of months. Emerging markets are particularly sensitive to these shocks. The oncoming end of QE may already have been priced into the markets, but there is a possibility that its occurrence will cause further, severe market disruption. In addition, there are concerns around how the funding gap left by huge bank deleveraging will be filled, and centrifugal pressures continue to trouble European legislators. Finally, there are broader concerns as to the depth of the global economic recovery as growth in the BRIC economies seems to slow. Optimism should, therefore, be tempered with caution.

I would like to thank the contributors for their support in producing the eighth edition of *The Mergers & Acquisitions Review*. I hope that the commentary in the following chapters will provide a richer understanding of the shape of the global markets, together with the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
August 2014

Chapter 2

EUROPEAN COMPETITION

Götz Drauz and Michael Rosenthal[1]

I INTRODUCTION

While the European Commission's highly visible antitrust and cartel investigations arguably dominated the headlines during the past 12 months, the EU's merger control regime, even without a single prohibition decision, still produced a number of important precedents as well as a procedural reform relevant to deal-makers active in the European Union.

On the legislative front, the Commission issued measures to alleviate the regulatory burden on businesses in unproblematic mergers, while its original proposal to extend the scope of the EU Merger Regulation (EUMR) to the acquisition of certain minority shareholdings below the change-of-control threshold was pushed into the long grass.

On the adminisitrative front, aside from the usual jurisdictional struggle around the EU's referral system, the Commission, in the case *Marine Harvest Morpol*, cleared the transaction but left the sword of Damocles hanging over the parties' heads by opening a fine proceeding against them for failing to notify their deal to the Commission.

Last year again generated hard-fought clearance decisions with the Commission extracting far-reaching remedies from the parties. In particular, the parties to the INEOS/Solvay JV had to give (much) more than originally planned in order to secure clearance – one year after the pre-notification discussions with the Commission had started.

This chapter will address these and other notable developments that have taken place during the past 12 months, along with a brief summary of the most important rules that practitioners need to understand when faced with the possibility of an EU merger control filing.

1 Götz Drauz is a senior competition counsel and Dr Michael Rosenthal is the managing partner of Wilson Sonsini Goodrich & Rosati LLP's Brussels office.

I JURISDICTION

i Overview

The Commission has exclusive jurisdiction to review 'concentrations with a Community dimension'. Pursuant to Article 3(1) of the EUMR,[2] a 'concentration' is deemed to arise 'where a change of control on a lasting basis'[3] results from either the merger of two or more previously independent undertakings, or the acquisition of control (direct or indirect) of the whole or part of one or more undertakings by one or more other undertakings.

The 'Community dimension' test is turnover-based, and takes into account both the worldwide and EU turnover of the undertakings concerned with the transaction.[4] Concentrations that do not have a Community dimension may be reviewed by the competition authorities of the Member States applying national law. This 'bright-line' allocation mechanism is complemented by the possibility for cases to be reallocated from the Commission to the Member States and vice versa, under a system of referrals.

The case reallocation scheme provides that a referral may be triggered after a notification and, since the new Merger Regulation took effect in 2004, also before a filing is made: Article 4(4) and (5) of the EUMR provide for the possibility of pre-notification referrals at the initiative of the notifying parties;[5] while Articles 9 and 22 of the EUMR provide for the (more burdensome) possibility of post-notification referrals triggered by one or more Member States.

ii Recent developments

The downsides of the post-notification referrals highlighted in previous cases (including in *Hutchison 3G Austria/Orange Austria* and, more recently, in Holcim's cement mergers)[6]

2 Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings.

3 The use of warehousing schemes, whereby assets are held temporarily by a financial institution pending their transfer to the ultimate purchaser, may not require notification in certain strictly defined circumstances. See Case T-279/04 – *Editions Odile Jacob v. Commission*.

4 Article 1(2) and (3) of the EUMR.

5 Of particular importance in this regard is the '3-plus rule' set out in Article 4(5) of the EUMR, pursuant to which the notifying parties in a concentration that does not have a Community dimension may nevertheless apply to have the Commission review the transaction, in order to avoid having to file in multiple jurisdictions within the EU, provided that the transaction is notifiable under the laws of at least three Member States, and no Member State objects to the referral.

6 See case M.6497 – *Hutchison 3G Austria/Orange Austria* which involved two transactions that triggered two separate merger control filings – one at EU level and one in Austria. Instead of agreeing on a referral to a single competition authority, the Commission rejected a referral request by the Austrian authority under Article 9 and the Austrians were equally unwilling to refer 'their' part of the deal to the Commission under Article 22. Luckily, the parallel reviews did not result in diverging outcomes. In a more recent 'interlinked deal' involving two transactions notified respectively to the Commission and to the Spanish competition authority pursuant

led the Commission to launch a public consultation on a reform proposal aimed at making the system 'more business friendly by streamlining and shortening procedures but without fundamentally changing [its] basic features'. So far, there has been no reform and the Commission is merely relying on the parties' cooperation.[7]

In the same consultation, the Commission sought comments from stakeholders on a proposal to extend the scope of the EUMR to the acquisition of certain non-controlling minority shareholdings.[8] The lack of jurisdiction over non-controlling shareholdings has been termed an 'enforcement gap' by Commissioner Almunia in the past. So far, minority shareholdings are only caught by the German and Austrian merger control systems.

Following closure of the consultation in September 2013, the Commission is preparing a White Paper, which should be published in the course of 2014. Stakeholders have questioned the merits of such a reform, particularly in light of the lack of proportionality between the new tools a reform would give the Commission and the limited number of acquisitions of minority stakes that raise competition issues.

Finally, for purposes of the change-in-control test currently applied by the Commission, in *Goldman Sachs/TPG Lundy/Verna*, the Commission found that the joint acquisition of a 19 per cent voting interest in Verna, combined with veto rights over the appointment, 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.[9]

II PROCEDURE

i Overview

When the jurisdictional test is met, notification to the Commission is mandatory and must be made prior to implementation. The notification itself can be made at any time once a recognised 'triggering event' has occurred. There is no filing deadline. The formal notification of a concentration to the Commission is usually preceded by confidential contacts with the Directorate-General for Competition, in which the proposed transaction and the filing requirements are discussed, frequently in great detail.[10]

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to jurisdictional rules, the Commission accepted the Spanish competition authority's upward referral under Article 22 but rejected Germany's request for a downward referral pursuant to Article 9, thereby limiting the risk of conflicting outcomes (see case COMP/M.7054 – *Cemex/Holcim* assets and case COMP/M.7009 – *Holcim/Cemex West*).

7 See, e.g. amendments to the Best Practices on Cooperation between EU National Competition Authorities.

8 See http://ec.europa.eu/competition/consultations/2013_merger_control/index_en.html.

9 See Case M.6842 – *Goldman Sachs/TPG Lundy/Verna*. For an example of the acquisition of *de facto* sole control based on the analysis of historic voting patterns at shareholders' meetings see Case M.6957 – *IF P&C/Topdanmark*.

10 See 'DG Competition Best Practices on the conduct of EC merger control proceedings', 20 January 2004, available at: http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf.

Once notified, the vast majority of cases are cleared by the Commission (sometimes subject to remedies) after what is called a Phase I inquiry (lasting 25 to 35 working days); more complex cases can be subject to an in-depth Phase II review (lasting a further 90 to 105 working days). The EUMR makes provision for further extensions of up to 20 working days in Phase II, at the request or with the consent of the parties, and such extensions are now common.

Notifying parties must not implement a notifiable concentration before having received clearance, unless a derogation pursuant to Article 7(3) is granted by the Commission. Violation of the suspension obligation can lead to the imposition of a fine of up to 10 per cent of the aggregate turnover of the notifying party or parties (Article 7 of the EUMR). The Commission has a policy of imposing fines in such circumstances.

ii Recent developments

1 January 2014 marked the entry into effect of the Commission's reform to simplify its review of concentrations under the EUMR. In particular, the Commission revised the Notice on Simplified Procedure (enabling a greater percentage of reportable mergers to benefit from simplified review) and the Merger Implementing Regulation (detailing the information required in the context of a merger notification). In parallel, it also updated its Model Text for divestiture commitments.

The new regime allows for a less burdensome filing in cases that *prima facie* do not give rise to anti-competitive effects by raising the horizontal threshold from 15 to 20 per cent and the vertical threshold from 25 to 30 per cent.[11] Cases where the combined market shares are between 20 per cent and 50 per cent, and where the actual increase in market shares as a result of the merger is nominal also qualify for simplified review.[12]

Furthermore, following the amendment to the Implementing Regulation, the Commission now considers that simplified merger cases that do not give rise to horizontal overlaps or vertical links in the EEA can be notified without pre-notification contacts between the parties and the Commission's case handlers. However, in most cases, pre-notification contacts will still be useful to assess what is considered necessary by the Commission in order for the notification not to be considered incomplete.

11 Under the former regime, mergers and acquisitions of control were eligible to file under the simplified procedure where the combined market share of all the parties to the transaction engaged in business activities in the same product and geographical market was less than 15 per cent, and the individual or combined market shares of all parties to the concentration on any market upstream or downstream of any product market in which any other party was active were below 25 per cent.

12 In 2013, close to 60 per cent of all cases were handled under the former simplified procedure regime. The Commission expects that following the reform the percentage of cases dealt with under the simplified procedure will increase by 10 per cent. The reform attempts to address criticism resulting from the EU's lengthy and cumbersome pre-notification process by allowing mergers that do not give rise to any horizontal or vertical links in the EEA to be notified without pre-notification.

The Commission has also created a new 'super-simplified procedure' for joint ventures entirely active outside the EEA that meet the EU thresholds as a result of the activities of their parent companies. While those changes are welcome, they are relevant to a limited number of cases only. The parties to a notifiable merger will in many cases therefore still be exposed to arguably excessive data requests and unpredictable timetables.

Finally, with regard to the Commission's fining powers, the Commission's *Marine Harvest/Morpol* investigation merits mention.[13] After having cleared the deal subject to conditions, six months later, in March 2014, the Commission sent a statement of objections charging Marine Harvest for early implementation of its acquisition of competitor Morpol. In cases of violation of the suspension obligation, the Commission enjoys broad discretion in setting the level of the fines.[14]

III SUBSTANTIVE ASSESSMENT

i Overview

The substantive test under the EUMR is whether the proposed transaction would lead to a 'significant impediment of effective competition, in particular as a result of the creation or strengthening of a dominant position' (the SIEC test). The substantive assessment of a notified concentration by the Commission thus requires the careful examination of the likely effects of the proposed transaction on every affected market.

This analysis starts by identifying the various types of competitive effects brought about by the concentration (which may coexist in a single transaction): horizontal effects, arising when the parties to the concentration are actual or potential competitors; vertical effects, arising where the parties are active at different levels of a supply chain; and conglomerate effects, arising when the parties are active on different but related markets.

When the Commission reaches the preliminary conclusion that a concentration raises competition concerns, the parties will be invited to offer commitments (commonly referred to as 'remedies') with a view to securing conditional approval. In fact, being able to design effective remedies that address the Commission's concerns (without jeopardising the value of the transaction)[15] could make the difference between clearance and prohibition.

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13 Case COMP/M. 6850 – *Marine Harvest/Morpol.*

14 See case T-332/09 – *Electrabel v. Commission*. In its judgment of 12 December 2012, the General Court dismissed an action brought by Electrabel for the annulment of a fine of €20 million that had been levied on Electrabel by the Commission for acquiring *de facto* sole control of a competitor without notifying the operation in Brussels. The General Court ruled that the fact that the merger did not raise competition concerns could not be a factor used to determine the gravity of the infringement, where this is only discovered after implementation; nor was the fact that the breach was committed negligently rather than deliberately sufficient to justify a reduction in the fine.

15 Two prominent examples of withdrawals due to concerns in relation to the scope of the requested remedies are BHP Billiton's attempted acquisition of Rio Tinto (Case COMP/M.4985) and

The Commission prefers structural remedies to behavioural remedies.[16] More specifically, the Remedies Notice distinguishes 'between divestitures, other structural remedies, such as granting access to key infrastructure or inputs on non-discriminatory terms, and commitments relating to the future behaviour of the merged entity'.[17] Divestitures and the 'removal of links between the parties and competitors' are considered as the 'preferred remedy'.[18]

However, the assessment of the effectiveness of a remedy in a particular case cannot be based on a theoretical framework resulting in a preference for one kind of remedy over another. Instead, an effects-based assessment is required which, on a case-by-case basis, selects the appropriate and proportionate remedy depending on the theory of harm identified by the Commission. Recent cases suggest that the Commission is willing to adopt a more flexible approach, at least in certain industries.[19]

ii Recent developments

During the past 12 months, in the absence of any prohibition decision, the negotiation and design of successful remedy packages took centre stage, resulting in a number of conditional clearance decisions. In this context, it can be observed that the up-front buyer approach continues to be used more and more frequently by the European Commission – which effectively means that parties may have to start working on the architecture of possible divestments before notification.

A notable exception to this tightening in remedy policy was the Commission's *Syniverse/Mach* decision on a merger, which, according to the Commission, combined 'the first and the second-largest supplier, creating a dominant player with virtual monopoly market shares'. Following a sophisticated economic analysis (including a switching analysis that examined customers' sourcing patterns over a four-year period

OMV's failed attempt to acquire MOL (Case COMP/M.4799). Furthermore, in March 2011, Merck and Sanofi abandoned their animal health care joint venture before notification, citing 'the extent of the anticipated divestitures' as a major obstacle to closing. Also in 2011, SC Johnson had to withdraw its notification of the planned acquisition of Sara Lee's household insecticide business (Case COMP/M.5969). In 2012, the most notable withdrawal was the decision of the three founding members of Compagnia Italiana di Navigazione (CIN) to abandon their joint acquisition of the passenger and freight business of the troubled Italian ferry group, Tirrenia (Case COMP/M.6362).

16 See, for example, Remedies Notice, paragraphs 10, 15, 17 and 69.

17 Remedies Notice, paragraph 17.

18 Remedies Notice, paragraphs 58–61 ('Whilst being the preferred remedy, divestitures or the removal of links with competitors are not the only remedy possible to eliminate certain competition concerns').

19 The Commission's seemingly less hostile approach to behavioural remedies reflects policy in the United States where the Department of Justice's guide to merger remedies (June 2011) recognises that conduct remedies can preserve a merger's potential efficiencies while remedying competitive harm, and are therefore more flexible than simple structural remedies (i.e., divestitures).

that suggested that demand for all contracts was contestable and, accordingly, that the parties' historical market share did not matter), the Commission ultimately cleared the deal (without upfront buyer solution) subject to the divestment of a business that was big enough to qualify as an alternative supplier to even the biggest customers.[20]

In *Hutchison 3G UK/Telefonica Ireland*,[21] Hutchison benefited from the experience gained in its previous acquisition[22] in order to push yet another four-to-three merger through – subject to the parties' implementation of remedies ensuring (1) the short-term entry of two mobile virtual network operators, with an option for one of them to become a full mobile network operator (MNO) by acquiring spectrum at a later stage; and (2) that Eircom, the third-largest player post-merger, remained a competitive MNO.

The Commission's decision in *GE/Avio* will be remembered, in particular, for the successful design of a behavioural remedy in the form of information barriers ('firewalls') that allowed the parties to remove the Commission's concerns relating to GE's alleged access to strategic information about a competitor (Eurojet), and for providing a roadmap to the successful timing of a parallel EU-US review.[23]

Furthermore, in two recent cases, the Commission accepted the failing division/firm defence.[24] While the Commission had traditionally been reluctant to accept the failing division defence in cases where the parent company was not itself in financial difficulty, in *Nynas/Shell/Harburg Refinery Assets*, the Commission acknowledged that the most likely counterfactual would have been the exit of Shell's asset, which would have resulted in customers having to purchase their requirements outside the EEA at a higher price.

In cases where it is possible to identify a suitable and viable divestment business, the sale of which addresses the Commission's concerns and eliminates the competitive overlap between the parties in the problematic markets, such as *Refresco Group/Pride Foods*,[25] the Commission is able and willing to clear a transaction involving horizontal overlaps without the need for a time-consuming Phase II investigation.

Finally, the General Court upheld the Commission's clearance of the *Microsoft/Skype* merger confirming, in particular, the Commission's market definition (not viewing the Skype platform as a separate market) and its finding that, in fast-growing sectors that are characterised by short innovation cycles, 'large market shares may turn out to be ephemeral'. In that case, the Commission found that foreclosure effects invoked by Cisco were 'too uncertain to be considered a direct and immediate effect' of the merger.

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20 Case COMP/M.6690 – *Syniverse/Mach*.

21 Case COMP/M.6992 – *Hutchison 3G UK/Telefonica Ireland*.

22 Case COMP/M.6497 – *Hutchison 3G Austria/Orange Austria*.

23 Case COMP/M.6844 – *GE/Avio*.

24 Case COMP/M.6360 – *Nynas/Shell/Harburg Refinery Assets* and Case COMP/M.6796 – *Aegean/Olympic II*.

25 Case COMP/M.6924 – *Refresco Group/Pride Foods*. For more complex (and less dogmatic) remedy solutions in Phase I cases see, in particular, Case COMP/M.6722 – *FrieslandCampina/Zijerveld & Veldhuyzen and Den Hollander* and Case COMP/M.6850 – *Marine Harvest/Morpol*.

Appendix 1

ABOUT THE AUTHORS

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Götz Drauz's practice is focused on EU and German competition law. He has represented companies in some of the most significant merger matters. Named an 'elite' practitioner by *Global Competition Review*, Mr Drauz is recognised in all the principal directories as a leading competition lawyer. Prior to entering private practice, he served at the European Commission for 25 years, most recently as the deputy director-general for competition and previously as the head of the merger task force.

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