Survey

Recent Developments in EU Merger Control

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The confirmation of a new Commission, the installation of a new Competition Commissioner and the appointment of a new Director-General are all opportunities for the gentle realignment of European antitrust policy by the incoming administration. A review of the merger decisions adopted during 2015—Margrethe Vestager's first full calendar year as Competition Commissioner—attests to a subtle but potentially significant change in emphasis in merger assessment since her appointment and to the elevation of a reduction in innovation as a source of antitrust concern, putting it on a par in practice (and not just in theory) with price and output.

Clear evidence of this shift can be seen in the Commission's short but rich decision in Novartis/GSK Oncology; it underpins the decision in the Commission's first case on biosimilars: Pfizer/Hospira; it nourishes the debate in GE/Alstom Thermal Power; and it was mentioned in Commission dispatches on the Telenor/TeliaSonera case. Investment in innovation was one of the themes developed in Commissioner Vestager's speech at Concurrence's 'New frontiers of antitrust' conference in June 2015,[1] and 'Competition and innovation' was the title of DG Laitenberger's speech at CRA's annual conference in December 2015.[2] As the Commission develops and fine-tunes its thinking in this area, the expectation should be that the Commission will ask more questions about the allocation of the merging parties' R&D budgets, and that it may seek to apply its learning in these pioneering cases to other industries, such as agrochemicals (pharma-for-the-field) and perhaps even in the chemical industry at large.

Key Points

- In 2015, concerns about the possible reduction in innovation following a merger came to the fore in a handful of Commission decisions, notably Novartis/GSK Oncology and Pfizer/Hospira.
- Across industries, several of the Commission's more detailed decisions analysed non-horizontal relationships between the parties' activities (rather than plain horizontal overlaps) with an emphasis on the incentives that the merged business might have for pursuing a particular foreclosure strategy.
- In a small number of cases the Commission also sought to push the boundaries of its jurisdiction to explore markets where neither of the merging parties was present or where the transaction created a market leader without that market being affected.

I. The year in numbers

The merger units within DG COMP had a busy year, closing 320 files: 318 by decision and two following the abandonment of the proposed concentration by the parties. Of the 318 final decisions taken in 2015, 297 were unconditional Phase I clearances (222 were simplified procedure cases). Overall, 13 transactions were approved in Phase I subject to commitments, and another seven in Phase II. One Phase II case was closed with an unconditional approval. There were no prohibitions decisions. At the turn of the year, five Phase II investigations were pending.[3]

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1 Commissioner Vestager's speech, "The State of the Union", can be downloaded at: http://ec.europa.eu/commission/2014-2019/vestager/announcements/state-union-antitrust-eu-2015-2016_en. Protecting innovation has more recently been cited by Commissioner Vestager as one reason for reviewing the jurisdictional rules of the EUMR to allow the Commission to vet transactions that do not meet the turnover thresholds. See Margrethe Vestager's Dutch presidency speech, "Competition: the mother of invention", dated 18 April 2016. This speech can be downloaded at: http://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-mother-invention_en.

2 Johannes Laitenberger's speech can be downloaded at: http://ec.europa.eu/competition/speeches/text/sp2015_04_en.pdf.

3 The fate of the SOCAR/DEFSA inquiry (M.7095) is unknown. This proposed acquisition was notified on 1 October 2014. Proceedings were suspended by the Commission under Article 11(3) on 21 January 2015 but no notice of abandonment has been posted on the Commission's website.

It is not possible to conduct an exhaustive review of all of the Commission's long-form decisions in a survey of this length, and references to the Commission's practice in relation to commitments are intended to be brief.[4] We do, however, venture to offer comments on some of the more interesting points that we have detected in the Commission's decisional practice. This year we have grouped the cases by industry sector, mirroring in broad terms the allocation of cases to operational units within DG COMP.

II. Decisional practice in the energy industry

2015 cases in the energy sector were not, by and large, controversial. The joint acquisition of the assets of ailing UK-based TAG Energy Solutions by Bladt Industries (a Danish manufacturer of complex steel structures) and EEW Group (a German manufacturer of large steel tubes)[5] was interesting for its analysis of spill-over effects (Article 2(4) of the EUMR). While Bladt and EEW acquired joint control of the assets of TAG Energy (a manufacturer of offshore foundations that support wind turbines in wind farms), neither parent contributed assets to their joint venture. In the narrowest plausible market for primary steel tubes for offshore foundations, each of the parents would have a share of more than 20 per cent and the target a share between 0 and 5 per cent. The same was true of the market for complete foundations for offshore wind farms. Observing that the increase in market share of either parent through the acquisition of the TAG assets was marginal, the Commission concluded that the transaction did not give rise to a SIEC in either market. The Commission then turned to the cooperative effects of the joint venture, and to the risk that their joint venture could serve as a conduit for the coordination of the competitive behaviour of Bladt and EEW. The Commission recorded that the JV would be a forum for the parties to meet regularly, and to discuss and decide upon a variety of commercial matters, and that the structural link might therefore facilitate coordination not only in the UK where the JV was present but on projects elsewhere in Europe. The argument advanced by the parties—that the economic significance of the JV's activities was limited—while undoubtedly true was not determinative. Importantly the results of the market investigation were that it was common industry practice for producers to bid in consortia or to sub-contract certain parts of a project to another producer (i.e. any effects were not merger-specific). It is this that appears to have convinced the Commission that the creation of the JV itself was unlikely to alter market conditions.

One of the more interesting decisions handled by the Commission's energy directorate in 2015, Royal Dutch Shell/BG Group,[6] is notable not because the case was hard but because the Commission's investigation focussed on markets that were not affected within the meaning of Form CO. BG Group's two principal business areas are upstream gas (covering its exploration and production activities, and its interests in LNG liquefaction) and LNG shipping and marketing. It also has interests in upstream wholesale supply of crude oil and, to a limited extent, financial trading. In Form CO, the parties identified eight overlaps and four vertical relationships. While none gave rise to affected markets, the Commission nonetheless conducted a detailed investigation of several markets, on the grounds 'the proposed transaction would lead to market leadership of the merged entity notwithstanding the latter's limited market share".[7] There are elements in the body of the Commission's decision that suggest that it might have been corralled into taking a close look at the transaction by one or two articulate complainants. It is legitimate, however, to ask whether the Commission should allow itself to be cagouled by one or more complainants into conducting such an intrusive investigation and drafting such a long decision in markets that are, in the Commission's own words, fragmented. It is understandable that the Commission does not want to see its decisions challenged by third parties in the courts in Luxembourg. On the other hand, the parties to non-problematic transactions have a legitimate expectation that their notifications will be handled in line with law and best administrative practice, and not hi-jacked—and delayed in some instances—by third parties. It is also fair to ask whether the Commission should feel compelled to write a detailed decision addressing all of the third party's concerns, merely because those concerns have been articulated. In the context of vertically related markets in particular, the Commission must establish that the merged business will have the ability and incentive to pursue a foreclosure strategy and that

4 On commitments, see Christopher Cook, Vladimir Novak and Sven Frisch "Recent developments in EU merger remedies" JECLAP (2016) Volume 7, Issue 5, at page 349.

5 M.7464—Bladt Industries/EEW Special Pipe Constructions/TAG Energy Solution Assets, decision of 20 January 2015.

6 M.7631—Royal Dutch Shell/BG Group, decision of 2 September 2015.

7 Royal Dutch Shell/BG Group, see, for instance, paragraphs 9 and 44.

it would make sense for it to do so (because the strategy would be profitable) before it can block the transaction. Assuming there is no technical ability to foreclose, is it not enough for the Commission to find that it is simply not possible to pursue such a strategy when the parties' market position is small, rather than become bogged down in a detailed (and sometimes tenuous) account of the different ways that the merged business might foreclose competitors (upstream or downstream)?

The approach taken in Royal Dutch Shell/BG Group can be contrasted with the arguably more efficient analysis conducted in Varo/Argos DSE/Vitol/Carlyle/Reggeborgh[8] where the Commission noted that since the merged business would have a limited market share of less than 5 per cent in the upstream market (in that case for ex-refinery sales of LPG in the EEA), it was unlikely that Varo would have the ability to foreclose access to LPG to competitors of the merged entity's downstream business, notwithstanding the fact that their shares in two downstream national markets (Belgium and the Netherlands) were greater than 40 per cent. In this way, the Commission was able to rule that the transaction would not lead to a SIEC without also conducting an incentives analysis.

The Commission's decision in DCC/DLG Danish Energy[9] merits review in so far as it illustrates commonsense use of the closeness of competition test (on the facts, the different customer focus of the merging businesses) to clear a proposed transaction. DCC (Ireland) had entered the Danish market in 2009 when it was appointed Dansk Shell's sole distributor of Shell-branded commercial fuels in Denmark, save for certain reserved customers in the agricultural industry. It also operated in a handful of areas unrelated with Shell's activities, notably biofuels and lubricants. DLG Danish Energy's core business was the sale of Shell-branded commercial fuels to customers in the agricultural sector. Referring to these agreements with Dansk Shell, at the start of its competitive assessment, the Commission remarks that the transaction is 'unlikely to reduce the intensity of competition … as [the parties] target very different customer groups" and refers to the 'customary active sales restrictions in relation to the respective exclusive customer groups". This difference of focus became apparent on a close look at the parties' share of sales of niche diesel products. Coloured B0 diesel is exempt from certain energy levies and can only be used for forestry and agricultural purposes; on the other hand, uncoloured B0 does not contain any biodiesel and is therefore only well-suited for non-road use (e.g. as a motor fuel for non-road machinery). When the Commission examined the parties' shares in these niches, it discovered that DLG Danish Energy was a leading player in coloured B0 diesel because its 'reserved' customer base was agricultural, but that DCC was much better placed in uncoloured B0 precisely because many of its customers were industrial companies in the construction industry. As both niches were contested and as the share of the other merging party in each case was <5 per cent, the Commission was able to clear the transaction with ease.

Finally, the Outokumpu/Hernandez Edelstahl[10] stainless steel flat products decision is interesting from a technical perspective as the filing was triggered by a finding of *de facto* joint control in circumstances where the majority shareholder could vote 66.7 per cent of voting rights in the target and had the casting vote on the target's advisory board, which was responsible for the nomination of senior management and the adoption of the target's business plan. Paragraphs 20 and 78 of the Commission's consolidated jurisdiction notice make it clear that purely economic relationships may determine whether one undertaking does or does not control another, although the cases are few and far between.[11] On the facts, Outokumpu was a pre-existing major supplier to Hernandez Edelstahl and a major creditor. Hernandez Edelstahl appears to have been experiencing financial difficulties, and its erstwhile owners and its creditors agreed a package that saw 33.3 per cent of the shares of Hernandez Edelstahl being transferred to Outokumpu, a repayment plan in favour of Outokumpu being agreed, and a limited purchase option being granted to Outokumpu. Outokumpu did not, however, have any formal veto rights over Hernandez Edelstahl. The Commission decided nonetheless that Hernandez Edelstahl was 'economically dependent' upon Outokumpu (its principal creditor, to whom it had certain purchasing requirement obligations too). The majority shareholder's ability as a matter of law to exercise its casting vote was 'compromised' by the transaction, said the Commission and in fact the main shareholder and Outokumpu exercised de facto joint control over the target. When it came to conduct its substantive analysis of the case, and in particular to consider the vertical relationship between Outokumpu (which had a share just short of 30 per cent in the upstream market for the

8 M.7649—Varo/Argos DES/Vitol/Carlyle/Reggeborgh, decision of 21 August 2015.

9 M.7616—DCC/DLG Danish Energy Business, decision of 23 June 2015.

10 M.7839—Outokumpu/Hernandez Edelstahl, decision of 16 December 2015.

11 See also IV/33440—Gillette/Eemland, decision of 10 November 1992.

supply of flat stainless steel products) and Hernandez Edelstahl (which had a share of more than 40 per cent of the Hungarian market for flat stainless steel distribution via steel services centres), the counterfactual—the fact that Outokumpu was by far already Hernandez Edelstahl's largest supplier, offered it a wide portfolio of products and was in some instances its sole supplier—meant that the risk of customer foreclosure could be ruled out.

III. Decisional practice in information technology and communications

A common feature of the Commission's investigations in Intel/Altera and Avago/Broadcom (decided about six weeks later) was the concern that the incentives of the merged business to license its technology to third parties differed materially from the incentive of the company that owned and licensed out the technology pre-merger.

In Intel/Altera,[12] the focus of the Commission's investigation was the conglomerate dynamic surrounding the supply of CPUs (a market in which Intel is active) and the supply of FPGAs (in which Altera is active). These FPGAs or field programmable gate arrays are programmable logic semiconductor devices that can be configured by customers to perform certain logic or processing functions. In the case of servers in data centres, FPGAs can be inter-connected with CPUs of the type sold by Intel to accelerate certain tasks performed by the CPU. In light of Intel's high shares in CPUs (in some segments greater than 80 or 90 per cent), and Altera's well-established footing in FPGAs (with a share of more than 40 per cent, second behind Xilinx), the Commission investigated whether post-closing Intel would have the ability and incentive to pursue a tying or bundling strategy that would foreclose competitors in the market for CPUs for servers or in the market for FPGAs used for workload acceleration in servers. Evidence from third parties suggested that, were Intel to launch an integrated product, a sufficient number of alternative FPGA suppliers would continue to be able to compete with add-on solutions using PCIe (a cross-industry technology), or QPI, or KTI (both Intel-owned). However, there were worries that PCIe is not cache-coherent and is therefore technologically inferior to the solutions offered by Intel. Intel confirmed that it had licensed QPI and KTI to a number of FPGA suppliers, and offered to license others. On 30 September 2015, that is, on working day 15 of the Commission's investigation, it also made unconditional binding offers, open for 15 months, to two FPGA suppliers in respect of its KTI technology. While no binding agreement had yet been agreed, the Commission's decision relayed that negotiations were 'advanced', allowed two competitors of Altera to take the benefit of KTI interconnect technology and so deprived Intel of the ability to pursue a foreclosure strategy.

While the Avago/Broadcom[13] case concerned two suppliers of semiconductors solutions for wireline and wireless communications, the parties' portfolios were largely complementary (Avago producing custom-made chips and Broadcom off-the-shelf chips) and the Commission's investigation therefore focused on the licensing of SerDes IP by Avago to third parties, rather than traditional horizontal concerns. SerDes (or 'serializers/deserializers') are integrated circuit components that convert data streams from parallel to serial and consolidate multiple parallel series of bits into a single data stream. Once the data reaches its destination, it is de-consolidated from serial to parallel. SerDes are commonly used in Ethernet switch ICs and in physical layer devices that connect the physical medium of an Ethernet network and the digital processing functions of the network. As SerDes constitutes a separate block within a chip and requires specialist know-how, the IP for SerDes (which covers speeds of 1–50 G and is expected soon to reach 100 G) is usually licensed separately. The Commission established that Avago had licensed its SerDes IP to a number of third parties, many of whom use it to produce wireline communications ASSPs that compete with Broadcom products. Since pre-merger Avago did not produce its own ASSPs, its incentive was to generate revenues through the licensing of its IP to third parties. This was described by the Commission as 'an incremental, highly profitable revenue stream for Avago's ASIC product division'. As its licensees would, post-merger, be competitors of its subsidiary Broadcom, the question arose whether Avago might pursue a strategy that foreclosed its future competitors by withdrawing this input (namely the benefit of an IP license of SerDes technology), especially in relation to higher-speed 25, 50, and soon-to-be-delivered 100 G technologies. Relevant to the arithmetic was that the fact that annual licensing revenues were no more than USD 15 million, while Broadcom's revenues from sales of Ethernet switch chips (where its market share was reported as more than 70 per cent) exceeded USD 1 billion. Avago argued that it had neither the ability nor the incentive to adopt a foreclosure strategy, but, to

12 M.7688—Intel/Altera, decision of 14 October 2015.

13 M.7686—Avago/Broadcom, decision of 23 November 2015.

avoid a Phase II investigation, offered commitments to the Commission on 30 October 2015 to address these concerns. More specifically, it committed to make a firm, irrevocable and legally binding offer to extend the duration of a number of third party licenses. Conscious perhaps that the Commission is not keen on having to monitor commitments over time, in parallel, Avago completed the negotiation of agreements with certain licensees (so-called 'switch chip' manufacturers): one Ethernet switch ASSP customer was granted the option of extending the duration of its agreement; a second licensee concluded a new agreement in relation to a 56 G SerDes. Those agreements were communicated to the Commission on 2 November, and a further volley of newly signed agreements was sent a week later. The Commission examined these agreements and concluded that they meant that Avago had effectively deprived itself by contract of the ability to pursue a foreclosure strategy. It decided therefore that the offer of commitments was no longer required, and that the deal could be cleared unconditionally.

A more classical analysis in the semiconductor merger of NXP/Freescale[14] led to a more traditional divestment commitment. Both NXP and Freescale manufacture semiconductors, which are used in various electronic components (such as diodes and transistors) and are found in a very wide range of products. The Commission found that NXP and Freescale are the two largest players and close competitors in RF power transistors, which make RF signals more powerful and are predominantly used in base stations for mobile telecommunications (3 G, 4 G, LTE), as well as in radio and television broadcasting, microwave ovens, mobile radios, and air traffic control equipment. Rather than face an in-depth investigation, NXP offered to sell its own RF power business, and to enter into a manufacturing agreement with a third party foundry to perform so-called front-end services for the divested business. Having tested NXP's offer, the Commission granted conditional approval.

A similar outcome was reached in Telecity/Equinix Data Centres.[15] This case concerned Equinix, which provides colocation services (i.e. it rents out floor space and power in purpose-built data centres to customers who install their servers and data storage equipment on the site) in more than thirty major metropolitan areas worldwide, and UK-based Telecity which has 12 data centres in the EEA and Turkey. The Commission reached the provisional conclusion that the transaction would bring together two of the largest providers of colocation services in Amsterdam, Frankfurt, and London, and that the threat of new entry was unlikely to exert a competitive constraint on the merged business, because of the investment and deployment time needed to build data centres on a scale needed to compete effectively with the merged business. The case was settled with a commitment from Equinix to divest two data centres in Amsterdam, one in Frankfurt, and five in London.

Mention should, finally, be made of the Alcatel-Lucent/Nokia case.[16] Notwithstanding combined market shares of 30 per cent in a number of telecoms equipment markets, the presence of several household names as competitors (e.g. Ericsson, Huawei, Samsung,[17] and ZTE) and the fact that the merging parties had different geographic focuses (North America for Alcatel-Lucent and Europe for Nokia) satisfied the Commission that the transaction did not raise horizontal concerns. The Commission did, however, take the opportunity to test whether the concentration made the market more vulnerable to coordination between the remaining players. In respect of radio access network equipment, and more specifically RAN equipment for 3 G and 4 G LTE, the post-merger market structure would, broadly speaking, see three firms (the merged business, Ericsson, and Huawei) with shares of 30–40 per cent worldwide and in the EEA. The Commission decided that the concentration was unlikely to give rise to coordinated effects because (i) the increment in market share (less than 10 per cent in most cases) was not such as to make it easier for the remaining players to agree the terms of coordination, (ii) the grant of contracts by tender meant that the identity of competing bidders and price levels were not transparent, and (iii) the award of large, high value contracts made it difficult to establish a sufficiently deterrent retaliation mechanism (since the gain from deviating at the time could be large, certain and immediate, while the punishment was uncertain and would only materialise after several months or longer).

IV. Decisional practice in telecoms

Two telecoms cases were closed by the Commission subject to commitments in spring 2015: the merger between Altice and PT Portugal in April 2015 and, a month later, the Spanish fixed telephony and Internet merger between Orange and Jazztel. More dramatically,

14 M.7585—NXP Semiconductors/Freescale Semiconductor, decision of 17 September 2015.

15 M.7678—Equinix/Telecity, decision of 13 November 2015.

16 M.7632—Nokia/Alcatel-Lucent, decision of 24 July 2015.

17 It is interesting to note that Samsung's market share is modest. The Commission took the position however that Samsung could be expected to play a more significant role in the near future in relation to 4 G and 5 G mobile telecommunications equipment.

in September 2015, in the face of Commission's objections, the parties to a Danish mobile telecoms merger—TeliaSonera and Telenor—aborted their joint venture.

Altice/PT Portugal[18] concerned the acquisition of PT Portugal by Altice, a multinational telecommunications company. PT Portugal was active across all telecommunications segments in Portugal and offered services such as phone, Internet, and pay-TV services to residential customers, as well as a suite of services to corporate customers, such as data centre solutions, virtualization, and business outsourcing solutions; Altice provided similar services through its Portuguese subsidiaries, Cabovisão and Oni. The Commission's analysis was directed at: (i) retail supply of fixed voice services; (ii) retail supply of fixed internet access services; (iii) retail supply of pay-TV services; (iv) a possible market for the retail supply of multiple play services; (v) B2B telecommunications services; (vi) wholesale supply of leased lines; (vii) wholesale market for call origination services at a fixed location; and (viii) wholesale market for call transit services at a fixed location. The Commission was satisfied that obligations imposed by ANACOM, the Portuguese communications regulator, would prevent the merged business from restricting competition in the wholesale market for call origination services. To address concerns—expressed presumably in pre-notification by the case team—in all of the other markets (notably in multiple play services on the Cabovisão footprint where each party had a share in excess of 30 per cent), Altice agreed to divest its Portuguese subsidiaries. The commitments were—unusually—submitted with the formal notification at the end of February, and were market tested in early March. With minor improvements, the Commission was able to accept Altice's proposal in Phase I.

Orange/Jazztel[19] concerned the acquisition of Jazztel, a UK-based telecoms company mainly active in Spain, by Orange. Orange operated both fixed and mobile telecoms networks and Jazztel operated a fixed telecoms network and a mobile telecoms service on Orange's network. The Commission again raised concerns that the number of fixed telecoms network operators would be reduced from four to three and that the transaction would therefore reduce competition in the retail market for fixed Internet access and the merged entity's incentives to exert competitive pressure on the two remaining national operators (Telefónica and Vodafone). The Commission considered that these competition concerns could potentially be exacerbated if there was a distinct market for fixed-mobile triple-play offers. Both parties were considered to be dynamic operators and important competitors in this market; they were the only two operators that had significantly increased their market shares in recent years. While the Commission acknowledged that the merger would generate efficiencies as Orange would be able to provide mobile services directly to Jazztel's customers without Jazztel having to procure those services at the wholesale level (resulting in customers benefiting from more competitive multi-play services), those efficiencies did not, said the Commission, compensate for the loss of competition. The merger was ultimately cleared conditional upon commitments that facilitated the establishment of a fourth player, namely the divestment of an independent fibre-to-the-home (FTTH) network; wholesale access for the purchaser of the FTTH network access to Jazztel's national ADSL network for up to eight years (giving the purchaser immediate access to 78 per cent of the Spanish market); the right for the purchaser (if requested) to access Orange's mobile network on terms and conditions at least as favourable as those granted to Jazztel.

The third major telecoms case in 2015 was the Telenor/TeliaSonera deal.[20] It was notified in late February 2015, and sent for in-depth review at the start of April. The case concerned the proposed joint venture between the second and third largest operators in the Danish mobile retail market and would have reduced the number of MNOs from four to three, with the merged entity having a market share of around 40 per cent, on a par with the former national monopolist, TDC, and comfortably ahead of Hi3G (Hutchison). The Commission expressed concerns that the transaction would have reduced the merged entity's and its competitors' incentives to compete, resulting in higher prices, weakened innovation and lower quality on the Danish mobile retail market. It would have reduced the number of MNOs able to offer wholesale services and as a result reduced the choice of wholesale networks, weakening the negotiating position of mobile virtual network operators (MVNOs). The Commission also expressed concern that, post-merger, it would be easier for the JV to coordinate its behaviour with its rival TDC. Commitments were first submitted in mid-August whereby—according to press reports—the parties would make spectrum available to a third party to allow it to roll-out a self-standing mobile network, and grant the

18 M.7499—Altice/PT Portugal, decision of 20 April 2015. The Commission rejected an Article 9 referral request from the Portuguese competition authority.

19 M.7421—Orange/Jazztel, decision of 19 May 2015. Again, a request for the referral of the case to the Spanish competition authority was rejected.

20 M.7419—TeliaSonera/Telenor/JV, notification withdrawn on 11 September 2015.

new entrant wholesale access to the joint mobile network already operated by the parties. An improved offer was said to include the sale of an ownership interest in the shared mobile network with the right to use a corresponding share of the network's capacity, and the divestment of a number of secondary brands. Acknowledging that the second offer was a step in the right direction, the Commission was nonetheless worried that the new fourth player would be unable to exert an effective competitive constraint on the parties, and on 11 September 2015, the parties formally abandoned their proposed joint venture. In a press briefing, Commissioner Vestager said that, based on the Commission's analysis and evidence gathered, she was 'convinced that the significant competition concerns required an equally significant remedy. This means the creation of a fourth mobile network operator. What the parties offered was not sufficient to avoid harm to competition in Danish mobile markets'.

V. Decisional practice in communications and media

As far as media content is concerned, two cases can be cited: the Liberty Global/De Vijver Media[21] television case in Belgium and the PRSfM recording rights joint venture.

In Liberty Global/De Vijver Media, the Commission concluded that television distributors in Flanders and Brussels needed to offer Vier and Vijf (two commercial general interest channels) in their bouquets if they were to compete on an equal footing with Telenet (a cable distribution business controlled by Liberty Global). The Commission's vertical analysis found that it would be profitable for Telenet and De Vijver to withhold Vier and Vijf from Telenet's competitors (such as Belgacom and TV Vlaanderen) and that these competitors would find it harder to attract and retain customers without Vier and Vijf. It also found that new players, such as Mobistar (now Orange), would not be able to enter the market at all. Input foreclosure was therefore a major concern. The Commission also explored whether the proposed concentration might lead to customer foreclosure (i.e. whether other TV channels might be removed from Telenet's commercial offer). The Commission concluded that the transaction would not give Telenet the incentive to remove the general interest channels of VRT[22] (Flemish-language State broadcaster) and Medialaan (the other major commercial group, running VTM, and Be2) from its cable platform, as this would make Telenet's offer less attractive to customers and so lead to a loss of subscribers. During the course of the Commission's investigation, De Vijver and Telenet concluded agreements with several TV distributors to license the broadcasting of Vier and Vijf. It also offered to prolong its agreements with others. Telenet amended its agreement with VRT to ensure that VRT's content would not be disadvantaged compared to that of De Vijver Media services, and offered to amend its agreement with Medialaan in the same way. However, these actions (contractual and unilateral) only partly removed the Commission's concerns. To address the outstanding competition concerns, the parties assumed three additional obligations: (i) to offer FRAND terms for the carriage of Vier and Vijf to any interested TV distributor in Belgium, (ii) to license any new basic pay TV channel that De Vijver may launch in the future, and (iii) to license to distributors linked services such as catch-up TV and PVR (a service that allows users to record programs and view them at a later stage).

In PRSfM/GEMA/STIM,[23] the Commission was concerned that the recording rights joint venture would raise barriers to entry in the EEA-wide market for the copyright administration services offered to collective management organisations (CMOs) and so-called 'Option 3' publishers in relation to the administration of transactional multi-territorial licences. The argument was that it would be harder for other collecting societies to compete in offering copyright administration services to Option 3 music publishers (which typically license performing rights together with their mechanical rights pursuant to a mandate granted to them). The Commission found that the joint venture might give PRSfM an increased incentive to pressurise Option 3 publishers or their service providers, who are not yet customers of the joint venture, to purchase copyright administration services from the joint venture, because PRSfM controls the performing rights that match the mechanical rights that Option 3 publishers have withdrawn from the collecting societies system and license directly. The parties ultimately addressed the Commission's concerns by offering a set of behavioural commitments that enable other collecting societies to

21 M.7194—Liberty Global/Cornelio/W&W/De Vijver Media, decision of 24 February 2015.

22 The Commission decided that, while Telenet had a statutory obligation to offer the VRT channels on its cable platform, it also had the ability to disadvantage or harm the quality of the services offered by VRT and Medialaan in more subtle ways, e.g. by displaying their video-on-demand content less prominently than that of De Vijver.

23 M.6800—PRSfM/STIM/GEMA, decision of 16 June 2015.

enter the market for copyright administration services, by ensuring that the joint venture's customers will remain free to switch to competing providers.

VI. Decisional practice in the financial sector

In the financial sector, the one case that merits attention in 2015 is Sabadall/TSB.[24] In 2008, during the financial crisis, the UK government injected GBP 17 billion of public support into Lloyds Banking Group to enable Lloyds to absorb the ailing HBOS banking group. In 2009, the Commission approved state aid to Lloyds on condition that the group was restructured and certain banking assets (later organised under the TSB brand) were sold to offset the distortive effect of the bail-out and create a new independent challenger bank in the United Kingdom. In May 2014, the Commission agreed (retrospectively) to extend the deadline for the disposal of TSB from 30 November 2013 until 31 December 2015. Lloyds began the divestment process in June 2014, through an IPO of shares in TSB; other shares were later sold by way of private placement. Finally, in March 2015, Lloyds agreed terms whereby Banco de Sabadell—a Spanish banking and insurance services provider—would acquire sole control of TSB. As Sabadall had no pre-existing retail banking interests in the United Kingdom, the concentration was approved under the simplified procedure.

VII. Decisional practice in basic industries and manufacturing

GE's acquisition of Alstom Thermal Power[25] was one of the more highly visible decisions adopted in 2015. Announced in April 2014, the transaction secured French foreign investment control approval on 5 November 2014 and was notified to the Commission in January 2015. A significant proportion of the parties' activities were complementary in terms of product and/or geography but concerns were raised in relation to overlaps in the gas-related part of the thermal power business, and specifically in relation to heavy duty gas turbines, where GE (the global market leader) was to acquire the third largest player. The Commission's decision has not yet been published, but reports[26] indicate that its analysis bidding markets will be essential reading for the parties and their advisers in similar cases. Using bidding data, the Commission conducted a frequency analysis to establish how often the merging parties competed with each other. Because submitting a bid is costly in itself, the Commission assumed that only OEMs that had a reasonable prospect of winning the contract would actually go so far as to make a bid. Other more speculative bidders would pull out of contention before the final submission of proposals, suggested the Commission, to avoid the costs of making the final bid. The Commission found that there were virtually no projects for which GE and Alstom were the only bidders; and that Siemens bid for and won a significant proportion of projects for which each of the merging parties bid. It was forced to concede therefore that the merger did not eliminate each party's closest competitor.[27] The Commission maintained, however, that since Alstom had participated in and won more European tenders than Mitsubishi, the elimination of Alstom as a bidder would likely give rise to price increases post-merger. To measure the consumer harm associated with the merger, the Commission conducted two analyses: a so-called probit analysis (assessing the impact of the participation of Alstom and other firms in a bid on GE's probability of winning) and a margin-concentration analysis (estimating the impact of the participation of Alstom and other firms on GE's bidding behaviour). The Commission also found that Alstom's HDGT technology was one of the most advanced, flexible, and cleanest in the market, and that there was a serious risk—similar to the situation in GSK/Novartis Oncology—that the merged business would (absent commitments) discontinue some of Alstom's HDGT models and not bring to market the newly developed and most advanced model, the GT36. The transaction was blessed by the Commission on condition that the parties divest to Ansaldo (the fifth player in the global market) Alstom's HDGT technology for its GT26 and state-of-the-art GT36 turbines, existing upgrades, and pipeline technology for future upgrades, a large number of the Alstom R&D engineers who worked on the GT technology, test facilities, and long term servicing agreements for recently sold GT turbines.

The commitments package in ZF/TRW[28] is noteworthy because it includes a commitment by the

24 M.7597—Sabadell/TSB, decision of 18 May 2015.

25 M.7278—GE/Alstom Thermal Power, Renewable Power and Grid, decision of 8 September 2015.

26 See RBB Brief 52 "Estimating post-merger price effects in bidding markets: lessons from GE/Alstom", June 2016, available to download at http://www.rbbecon.com/downloads/2016/06/RBB_B52_Brief-Web.pdf.

27 M.7278—GE/Alstom Thermal Power, Renewable Power and Grid, press release IP/15/5606, dated 8 September 2015.

28 M.7420—ZF/TRW, decision of 12 March 2015.

merging parties not only to divest manufacturing facilities of the target in the Czech Republic and Germany and to transfer all licenses, key personnel, and customer lists, but also (what would appear to be a potentially expensive offer) to create suitable, separated premises for a research facility on an existing TRW site in Germany or to procure such a site within 40 km of the current site until the R&D facility can be relocated to a new permanent site selected by the purchaser. But the case is also fascinating from a substantive point of view. The horizontal aspects of the case were not particularly controversial: ZF is a German supplier of products and components for automotive and industrial applications, with a particular focus on powertrain and chassis technologies. The target, TRW, was a US supplier of automotive components focused on active and passive safety technologies. The Commission found that the transaction would have combined the two largest suppliers of chassis components for car and truck manufacturers in the EEA. Because it was, said the Commission, difficult for new players to enter the market (technical and financial barriers to entry), it was concerned that the proposed transaction would have led to price increases for car and truck chassis components. To address these provisional concerns, ZF committed to divest TRW's chassis components businesses in the EEA. From the outside, perhaps the more interesting parts of the decision are those on vertically related markets. There were two vertically affected markets. The first involved oil pumps (upstream), where TRW had a market share somewhere between 20 and 30 per cent, and transmissions (downstream) where ZF had a share of more than 50 per cent by volume and more than 70 per cent by value. The Commission's input foreclosure analysis was that TRW's upstream market share was 'unlikely to confer upon the merged entity a significant degree of market power for it to be able to significantly affect the availability of LV transmission oil pumps'. It noted too that LV transmission oil pumps accounted for less than 5 per cent of the price of a LV automatic transmission, and were not therefore a significant cost factor that could have a negative effect on downstream competitors of the merged business. As far as the risk of customer foreclosure was concerned, the Commission ruled that, notwithstanding ZF's relatively high market share downstream, TRW did not already produce LV transmission oil pumps that were compatible with ZF's transmissions, that the minimum lead time needed to develop such a product was more than 18 months, and therefore that ZF's ability to engage in customer foreclosure was limited. The second vertically related market involved LV tie rods (upstream), where both parties had interests and their combined share was more than 50 per cent by volume (and more again by value), and LV steering systems, where ZF had a share between 10 and 20 per cent. As ZF had offered to sell TRW's chassis components business, the Commission noted that post-divestiture the merged business would not have the ability to engage in input foreclosure. More interestingly, however, in considering the likelihood that the merged business would pursue a foreclosure strategy, the Commission examined the position that ZF had had in the recent past as a supplier to a joint venture (ZF Lenksysteme) with a comparable market position to TRW today. It found that, notwithstanding its structural links to the joint venture, ZF continued to sell significant volumes of LVtie rods to downstream competitors, suggesting that the merged business was unlikely to pursue a foreclosure strategy in the future.

The principal overlaps in Kingspan/Steel Partners (Joris Ide) case[29] were in sandwich panels (used in the construction industry as cladding or roofing, and made of polyurethane or mineral wool encased by two steel facings), in three geographies (the Benelux, the United Kingdom and Ireland, and Hungary), where the parties' combined shares were high (often over 40 per cent and sometimes in excess of 60 per cent). In deciding that the proposed transaction would not lead to an SIEC, the Commission deployed a series of tools. As far as the Benelux was concerned, the Commission was influenced, first, by evidence (adduced by the parties and verified by the Commission through a market reconstruction exercise) that there was sufficient unused capacity in the market in and around Benelux to defeat any attempt by the merged business (which would have had a proforma share of between 40 and 60 per cent) to restrict output to raise prices, and secondly, by internal documents that indicated that local capacity exceeded local demand. In the United Kingdom and Ireland, it was far easier for the Commission to approve the deal since Joris Ide's share was less than 5 per cent and its internal documents showed that its plans for expansion were 'modest'. A review of the parties' ordinary course of business documents also showed that the parties were targeting different groups of customers: the prescription market in the case of Kingspan and the open specification market in the case of Joris Ide. In Hungary, on a national basis, the merged entity would have had market shares in excess of 50 per cent and sometimes higher. The Commission was satisfied, however, that the relevant geographic markets were, what it called,

29 M.7479—Kingspan/Steel Partners (Joris Ide), decision of 16 March 2015.

'cross-border regional' in scope, and that 'imports' and 'exports' to/from Romania, Austria, Germany, Slovenia, and other neighbouring countries meant that the relevant geographic market was broader than national and that prices in Hungary could and would be constrained by rivals in those countries with spare capacity, which the Commission verified to be the case. A transaction involving undertakings with high national shares was therefore able to be approved without conditions.

Article 8(1) decisions—those where a Phase II investigation is started but the transaction is ultimately cleared unconditionally—are rare. For that reason, it is appropriate to take a few moments to consider the Siemens/Dresser-Rand[30] decision. The case concerned Siemens (whose portfolio of businesses included interests in gas turbines, steam turbines, generators, and compressors) and Dresser-Rand (a US-based supplier to the oil and gas industry, with centrifugal and reciprocating gas compressors, small gas, and steam turbines, gas expanders, gas, and diesel engines, and associated control panels in its customer offer). Announcing its decision on 13 February 2015[31] to conduct a Phase II inquiry into the proposed merger, the Commission homed in on two areas of possible concern: a reduction in the number of suppliers of aero-derivative gas turbine (ADGT) drivers, turbo compressors, and turbo compressor trains from three to two (the other player being GE), and a reduction of competition in relation to the supply of small (<5 MW) steam turbines. The Commission's Phase II investigation demonstrated, however, that those concerns were unfounded. As regards ADGT products,[32] the market investigation showed first that there were more than two players in the market and that the merging parties were not in fact close competitors: Dresser-Rand's strong focus was on upstream offshore applications while Siemens concentrated on midstream offshore and midstream pipeline applications where the target was comparably weak. Secondly, a detailed study of bidding data—where at least overtly the parties and the Commission disagreed on the framework for the analysis[33]—showed that the parties competed against each other on fewer than 30 per cent of projects, and that when they did compete there were very few cases where one of the merging parties won and the other also submitted a final bid.[34] In relation to small steam turbines, the Commission ultimately found that the parties had a different focus: Siemens on power generation and Dresser-Rand on oil and gas applications (which accounted for more than 80 per cent of Dresser-Rand's sales).

Finally, mention should be made of the second transaction that was abandoned by the parties in the face of Commission objections. The Mondi/Walki Assets transaction,[35] announced in May 2015, concerned the acquisition of two extrusion coatings plants located in Pietarsaari, Finland, and Wroclaw, Poland for EUR 60 million. Opening a Phase II investigation at the start of September, the Commission expressed concern that the removal of a key competitor might lead to less choice and ultimately higher prices for customers of wrapping materials which also serve as moisture barriers (these are used, e.g. in the paper industry or in boxes for fresh food products). While a commitments package was submitted to the Commission on 3 December 2015, the deal was abandoned and the notification was formally withdrawn on 14 December 2015.

VIII. Decisional practice in the agri-food sector

A year 2015 was a busy for the Commission's merger control activity in food and agriculture sector. The most notable cases were the two Phase 2 investigations in the coffee and chocolate industries, and a partial referral in the pig meat industry.

The first Phase 2 investigation concerned the DEMB/Mondelez coffee joint venture.[36] Douwe Egberts Master Blenders 1753—the owner of popular coffee brands such as L'Or, Douwe Egberts, Senseo, and Merrild—and Mondelez—spun-off by Kraft Foods in 2012 and the owner of popular coffee brands such as Carte Noir,

30 M.7429—Siemens/Dresser-Rand, decision of 29 June 2015.

31 The timing of the decision needs to be viewed against the backdrop of the then-pending investigation in GE/Alstom Thermal Power. The Commission's Article 6(1)(c) decision in that case was taken on 23 February 2015.

32 The Commission's ruling that the relevant geographic market for ADGT driven and light IGT driven turbo compressor trains for oil and gas applications was "worldwide but excludes projects taking place in ex-USSR countries" (see for instance paragraph 182) is the latest in a series of decisions (most notably M.6541 Glencore/Xstrata) where the Commission has carved one or more countries (often China) out of an otherwise global market.

33 Siemens argued that the appropriate framework for analysing the effects of the proposed transaction on price was an open-bid second price auction framework. The Commission disagreed, and ruled that the seal-bid first price auction framework was more appropriate. It conceded, however, that for certain projects, market participants can anticipate who else is participating and have reasonably good expectations as to their bids and their valuation by customers.

34 For reasons of confidentiality, the number of cases is redacted from the public version of the decision. See, for instance, paragraphs 246 and 247 of the Commission's decision.

35 M.7566—Mondi/Walki Assets, notice in the OJEU dated 22 December 2015.

36 M.7292—DEMB/Mondelez/Charger Opco, decision of 5 May 2015.

Tassimo, Jacobs, and Gevalia—agreed to merge their coffee business, so that post-merger, their joint venture would be active in all coffee formats, including filter pads for Senseo single-serve coffee machines, T-discs for Tassimo machines, and N-capsules for Nespresso machines. While the in-depth investigation confirmed the Commission's initial concerns that the transaction would lead to a SIEC in the roast and ground coffee markets, and in the filter pads market in a handful of national markets, the most interesting parts of the decision concern the market for single-serve coffee machines. DEMB and Mondelez sell the consumables (coffee pads, pods, and capsules) that are used in single-serve coffee machines, but do not manufacture those machines, which are made instead by Philips (for DEMB Senseo machines) and Bosch (for Mondelez Tassimo machines). The Commission nevertheless took the position that the parties had a clear interest in pushing the sale of 'their' single-serve machines, as this increases their sales of consumables, and that they could influence the final price paid by consumers for Senseo and Tassimo coffee machines, by offering cash-backs and coupons. Stressing the intrinsic link between single-serve machines and their consumables—one cannot be used without the other—the Commission concluded that it had to examine the effects of the transaction on the single-serve coffee machines, even though the parties did not manufacture or sell those products. There are signs in the decision that the theories of harm explored in the market for single-serve systems (machines and compatible consumables) may have been alimented by a complainant (quite possibly Nestlé which was defending French proceedings triggered by DEMB) which argued that Senseo and Tassimo were each other's closest competitors. Ten pages of the decision are dedicated to the evaluation of the closeness of competition between Senseo and Tassimo. Based on qualitative evidence (including the parties' internal documents, and the results of the market investigation on the ability and incentive of the parties to switch customers from one system to the other), the Commission concluded that closeness of competition is not only price-related but depends on a multiplicity of other factors, such as the image and functionalities of a given system. The Commission ultimately concluded that, on the continuum of single-serve systems, Tassimo, and Dolce Gusto are closer competitors to each other than either is to Senseo or Nespresso, because they have the same key selling point: offering a variety of drinks and utilising a multi-brand strategy for their consumables. The quantitative evidence, consisting of an entry analysis measuring the impact in several countries of Tassimo's entry on Senseo and Dolce Gusto also confirmed that it was unlikely that the parties had the ability or incentive to shift customers from Senseo machines and systems to Tassimo machines and systems. The important policy question that the case throws up is whether the Commission should have analysed the effects of the proposed concentration on a market (on the facts the market for single-serve coffee machines) where neither of the parties had sales[37] or was a realistic potential new entrant.[38] To block a transaction, the Commission must establish that the proposed concentration will significantly impede effective competition, and in its 2004 and 2008 guidelines the Commission maps out the analytical framework that it uses to assess concentrations: unilateral and coordinated effects, in markets where there is a horizontal overlap, or a vertical and conglomerate relationship between the parties' products. Beyond that, however, academics, practitioners, and industry participants are right to ask what justification there is for an analysis of the type conducted by the Commission in DEMB/Mondelez?

At the time of writing, the Commission's decision in the Cargill/ADM merger[39] in the chocolate industry[40] has not yet been published. An article in a recent edition of DG COMP's merger brief[41] indicates, however, that the main interest of the case was in the market reconstruction that the Commission had to conduct to understand the extent to which the competition was national, regional, or EEA-wide.

The scope of the relevant geographic market was also the principal issue at stake in the Danish Crown/Tican case.[42] Both companies were vertically integrated and

37 Moreover, on the facts, the approach adopted by the Commission is also subject to the criticism that Senseo's market share was not indicative of DEMB's sales in the consumables market because Senseo is an open-system where the consumables aftermarket is open to several producers of filter pads. Senseo's market share can thus not be indicative of DEMB's sales in the consumables and even if DEMB were to incentivize consumers to buy Senseo machines, it would only gain a portion of the filter pads revenues.

38 This situation is to be distinguished from the analysis of pipeline product competition, described in paragraph 8 of the Commission's horizontal merger guidelines.

39 M.7408—Cargill/ADM Chocolate, decision of 17 July 2015.

40 The case is linked to the case M.7510—OLAM/ADM Cocoa, decision of 10 June 2015, in which ADM sold its cocoa business to the Singaporean trader OLAM. The case was cleared unconditionally by the Commission because of the parties' moderate market shares and the existence of strong competitors.

41 DG COMP "Competition: Merger brief 3/2015", which can be downloaded at http://ec.europa.eu/competition/publications/cmb/2015/cmb2015_003_en.pdf.

42 M.7565—Danish Crown/Tican, decisions of 17 July 2015 taken pursuant to Article 6(1)(b) and Article 9(3) of the EUMR.

active throughout the value chain for pig meat. The parties' argued that the geographic market for fresh pig meat for further processing was at least EEA-wide on the basis of the international trade flows of pig meat and because the import share of pig meat in Denmark represented 78 per cent. This argument did not convince the Commission which ruled that the import figure was not reliable (imports were more likely to be around 12 per cent, it said) and that the parties' share differed significantly between Denmark and neighbouring countries like Germany. Moreover the market investigation indicated that the origin of the pig meat was important to Danish consumers and if the market for the sale of fresh pig meat was considered wider than national, the transaction would not give rise to any horizontally affected markets. On this basis, there was enough evidence that the Danish market had all characteristics of a distinct market and as a result the Commission referred the case to the Danish Competition and Consumer Authority for domestic review while clearing the rest of the transaction, given the parties' low to moderate market shares outside Denmark.

IX. Decisional practice in the health/pharmaceutical sector

The Commission is to be warmly congratulated on its work-rate in health and pharmaceutical cases in 2015.

It started the year with decisions in three interconditional transactions involving Novartis and GlaxoSmithKline: (a) Novartis's acquisition of GSK's oncology business,[43] (b) GSK's acquisition of Novartis' vaccines business (save for its influenza business), and (c) the combination of the parties' OTC consumer health businesses in a new venture owned as to 63.5 per cent by GSK, and over which Novartis had limited minority protections that were not decisive for the competitive strategy of the venture.[44]

The Novartis/GSK Oncology case concerned so-called 'targeted therapies' used in the treatment of cancer.[45] While a variety of treatments are used in the fight against cancer (surgery, radiation, and chemotherapy), in the course of the last decade or so, new therapies have been developed that seek to 'interfere' with specific molecules that are associated with tumour growth, and so slow down the cancer's progression. In this case, the Commission explored (a) the expected reduction from three to two (the merged business and Roche) in the number of firms developing and selling B-Raf and MEK inhibitors for advanced skin cancer in circumstances where B-Raf and MEK inhibitors were expected to become the standard of care when used in combination, and (b) a reduction in competition through innovation in respect of two clinical trial programmes for LGX818 and MEK16, treatments being trialled for ovarian, colorectal, and lung cancer. In its decisional practice to date, the Commission has limited its assessment of pipeline competition in pharmaceutical cases to products at an advanced stage of development (so-called Phase III products), on the grounds that these are the most likely to come to market. The parties argued that the efficacy and safety of products in Phase I or Phase II trials had yet to be established and that it was therefore difficult to predict in which disease or setting a pharmaceutical would ultimately be successful. The Commission acknowledged that the results of on-going clinical research were inherently uncertain, but ruled that 'uncertainty about the outcome of on-going clinical research does not preclude an assessment of the likely effects of the proposed transaction on the development of such products'. Evidence-based expectations in the scientific community were that B-Raf and MEK inhibitors will have a significant role in treating a number of cancer types in the next few years. Key opinion leaders were also of the view that, given the more advanced stage of development of GSK's programmes, post-merger, Novartis would

43 M.7275—Novartis/GSK Oncology, decision of 28 January 2015.

44 M.7276—GlaxoSmithKline/Novartis Vaccines business (excluding Influenza)/Novartis Consumer Health Business, decision of 28 January 2015. The Australian firm CSL bought the influenza business in a separate transaction: M.7583—CSL/Novartis Influenza Vaccines Business, decision of 17 July 2015. The CSL acquisition agreement was signed in October 2014—six months after the main Novartis/GSK agreements—but not notified until June 2015. The case was subject to an Article 4(5) request. In its final decision, in an unusual statement, the Commission noted that it "took a view in favour of the referral request so that the parties could benefit from the one-stop shop procedure and the costs and burdens associated of multiple filings be reduced" (paragraph 11). A closer look at the decision (paragraph 53) suggests that the 25% share of supply test in the United Kingdom was met for the supply of seasonal flu vaccines by volume (but not by value).

45 The Commission also looked carefully at the products marketed by the parties to treat advanced kidney cancer: Novartis' Afinotor and GSK's Vatrient. While the merging parties sold two of the three leading treatments, a closer examination revealed that the two products were used in different lines of treatment (a sequencing of medical actions based on clinical trial evidence of what works best for patients with similar conditions). It is often only if the first line treatment does not produce the expected results or stops working, that the medical prescriber will move to a second line treatment. The market investigation showed that currently GSK's closest competitors in the first line were Pfizer and Roche, and that Novartis' closest competitors in the second line were Pfizer and Bayer. The Commission concluded therefore that the overlap was not a cause for concern.

prioritise the development of GSK's programmes at the expense of its own programmes, and the net result would be a significant reduction of GSK's and Novartis' pre-transaction combined R&D effort, leading to a decrease in competition in those future markets. On the facts, the Commission found that the merger was likely to lead both to the abandonment of Novartis' efforts to launch its LGX818/MEK162 combination treatment for skin cancer, and the abandonment of the broader LGX818 and MEK162 clinical trial program. To address those concerns, Novartis offered two (in-the-alternative) sets of commitments. While the market test of the commitments was being conducted, it entered into an agreement to divest its LGX818 programme to a company called Array BioPharma (to whom it had already surrendered its interests in MEK162) and advised the Commission that it intended to proceed with the second commitments package, conditional upon the Commission's approval of a binding partnership agreement between Array and a suitable healthcare company to ensure the worldwide development of LGX818 and MEK162.

In GSK/ Novartis Vaccines/Novartis OTC, the Commission's analysis was more conventional and focussed on the loss in actual competition in various member states (i) between the parties' meningitis, diphtheria, and tetanus vaccines and (ii) in relation to consumer health products, between the parties' smoking cessation aids (such as patches), cold sore management products, cold, and flu products, and pain management products. To resolve the competition concerns relating to vaccines, GSK committed to grant a worldwide, exclusive, perpetual licence of GSK's Nimenrix vaccine for bacterial meningitis, and divest GSK's Mencevax vaccine for bacterial meningitis worldwide, and to enter into a raft of commercial agreements (exclusive distribution agreements, supply agreements, and marketing authorisation assignments agreements) for certain diphtheria and tetanus vaccines. Commitments were also given to divest one of the parties' businesses in adversely affected OTC markets (including the sale of GSK's nicotine patch business).

Alongside the Novartis/GSK Oncology decision, perhaps the most important decision in the pharmaceutical sector in 2015 was the Commission's analysis of the Pfizer/Hospira merger.[46] The two product areas where Pfizer and Hospira compete head-to-head are biosimilars and sterile injectables. Biosimilars are drugs that aim to have the same therapeutic mechanism as original patented biological pharmaceuticals; unlike generics, however, they are not exact copies of the originator drugs. Since biological drugs are some of the most expensive therapies available, the entry of biosimilars is expected to result in price decreases and so broader patient access to biological drugs. Infliximab, which is used to treat rheumatoid arthritis, Crohn's disease and other auto-immune diseases, is one of the three best-selling pharmaceuticals globally. To date, one biosimilar has been approved for use in the EEA and two firms have biosimilars in an advanced stage of development. The approved biosimilar is co-marketed by Celltrion and Hospira (the target in the proposed concentration); the biosimilars in development are paid for by Samsung Bioepis and Pfizer (the acquiring party). Accordingly, the Commission expressed concern that, as a result of the merger, Pfizer would either delay or discontinue development of its biosimilar drug in order to focus on Hospira's marketed product, leading to the net loss of future competition by one of only three differentiated biosimilars in advanced stages of development (Hospira/Celltrion's, Samsung Bioepis', and Pfizer's); or hand back Hospira's product to the developer Celltrion, leading to the loss of current price competition between Hospira and Celltrion. Both outcomes (the reduction of differentiated biosimilars from three to two or loss of price competition) would, said the Commission, be detrimental to competition in the infliximab drug market. As regards sterile injectables (the group of medicines administered with a hypodermic needle, frequently as chemotherapies in the treatment of cancer), the Commission's concerns were more traditional. It observed that the merging parties would have high market shares in a number of national markets, and that remaining competitors would struggle to exert a competitive constraint on the merged business. Those concerns concerned carboplatin in Belgium; cytarabine in Belgium, Italy, Portugal, and Sweden; epirubicin in Austria, Belgium, Italy, the Netherlands, and Spain; irinotecan in Belgium, the Czech Republic and Italy; vancomycin in Ireland and voriconazole in the EEA as a whole. To address the Commission's competition concerns, Pfizer agreed (i) to divest the development, manufacturing, and marketing rights of its own infliximab biosimilar drug currently under development (with its intellectual property, technology, and know-how)[47] and (ii) to divest the marketing authorisations and associated rights of Pfizer or Hospira in relation to each of the

46 M.7559—Pfizer/Hospira, decision of 4 August 2015.

47 Pfizer reserved to itself however the right to market the infliximab biosimilar outside the EEA.

problematic sterile injectable molecules in the relevant countries.

At the end of January 2015, the Commission had cleared Mylan's acquisition of Abbott's branded ex-originator drug business,[48] subject to the divestment of four drugs, Mebeverine, Pygeum africanum, Betahistine, and Delorazepam, in each case in one or two member states. At the end of March 2015, after a 6-month Phase II investigation, it approved Zimmer/Biomet,[49] subject to the divestiture of Zimmer's European knee implant business and Biomet's European elbow implant business,[50] the sale of Biomet's knee systems business in Denmark and Sweden and a pan-European non-exclusive licence to IP and know-how used to manufacture a copy of Biomet's 'Vanguard' knee system. In each of these markets, the Commission's findings at the end of Phase II were that the new business entity would have faced insufficient competitive constraint from the remaining (smaller) players in those markets, leading to less innovation, poorer choice, and higher prices. The parties also committed not to implement the transaction before one or more suitable purchasers are found and approved by the Commission for all of the divested businesses (i.e. up-front buyer commitment). Commitments were also needed for the Commission to clear the Merck/Sigma-Aldrich[51] transaction in Phase I. The Commission's concerns related to certain laboratory chemicals, particularly the markets for solvents and inorganics used in laboratories by companies and research centres, where the parties were the two leading suppliers in Europe, with the broadest portfolios and best-known brands. The parties therefore agreed to divest a business covering all the main steps in the manufacture, supply, and distribution of certain laboratory chemicals, and specifically Sigma's manufacturing assets in Seelze (Germany), where most of the solvents and inorganics sold by Sigma in Europe are manufactured and a number of brands and trademarks.

Other deals were approved unconditionally, including Becton Dickinson/CareFusion[52] (medical devices, including intravenous sets and accessories and closed systems used to prepare and administer drugs), and Actavis/Allergan[53] (overlaps in two areas of ophthalmology: anti-glaucoma treatments and artificial tears and ocular lubricants for the treatment of dry eyes).

X. Decisional practice in the markets for transport services

To illustrate the Commission's thinking in the transport sector, we propose to highlight one railway case, an airline merger, and an acquisition in maritime.

SNCF Mobilités/Eurostar International[54] concerned the Commission's conditional approval of the acquisition of sole control over Eurostar by one of its existing shareholders, SNCF. Since 2010, Eurostar had been a full-function joint venture controlled jointly by SNCF Mobilités and the UK government acting through Her Majesty's Treasury; the Belgian national railway company (SNCB) had been a non-controlling minority shareholder. The UK government sold its stake to a new investor, SNCB's stake was set at 5 per cent and a new shareholders' agreement was agreed giving SNCF sole control over Eurostar. There were no horizontal overlaps between the parties' activities. The Commission was, however, concerned that the planned transaction would impede the entry of competitors on the London–Paris and London–Brussels routes served by Eurostar, so perpetuating Eurostar's dominant position on these routes. These competition concerns were similar to the concerns raised in 2010, when the Commission reviewed the creation of Eurostar as a full-function joint venture.[55] The market investigation confirmed that there were significant barriers to entry, and that these hampered new operators seeking to offer international rail passenger transport services on both routes. Access to stations and to the services provided at these stations in France and in Belgium, and access to maintenance centres in France, Belgium, and the UK would, found the Commission, become more difficult as a result of the transaction, due to capacity limitations and the fact that Eurostar and its shareholders SNCF (controlling) and SNCB (non-controlling) manage the infrastructure concerned. Finally, due to Eurostar's status as the incumbent operator, the Commission also raised the issue of access to train paths at peak times. Interestingly, some of these concerns were articulated by the French competition authority which took part in the proceedings. To address these matters, Eurostar, SNCF Mobilités and SNCB offered behavioural commitments, similar to those given in 2010, ensuring effective access for new entrants to station and maintenance

48 M.7379—Mylan/Abbott EPD-DM, decision of 28 January 2015.

49 M.7265—Zimmer/Biomet, decision of 30 March 2015.

50 Seventeen EEA states were, found the Commission, likely to be adversely affected by the proposed transaction in knee implants, and thirteen EEA states in elbow implants.

51 M.7435—Merck/Sigma-Aldrich, decision of 15 June 2015.

52 M.7459—Becton Dickinson/CareFusion, decision of 13 March 2015.

53 M.7480—Actavis/Allergan, decision of 16 March 2015.

54 M.7449—SNCF Mobilités/Eurostar International, decision of 13 May 2015.

55 See M.5655—SNCF/LCR/Eurostar, decision of 17 June 2010.

depot facilities and, as necessary, to a certain number of Eurostar train paths. It is interesting to note that SNCB, which was not a party to the transaction, took 'on its own initiative' separate commitments. Given the structural relationship between Eurostar, SNCF, and SNCB, it is fair to ask whether SNCB really did offer the commitments on its own initiative; at the end of the day, however, these commitments helped resolve the Commission's concerns.

In the airline industry, in July 2015, the Commission conditionally approved the acquisition by IAG—the holding company of British Airways, Iberia, and Vueling (members of oneworld)—of sole control over Aer Lingus, whose shareholders included the Republic of Ireland, Ryanair, and Etihad Airways. Again applying its now classical O&D approach, the Commission defined the relevant markets on a route-by-route basis and found that the proposed acquisition would lead to high market shares on three routes, (i) Dublin–London, (ii) Belfast–London; and (iii) Dublin–Chicago, and that the merged entity would not face sufficient competitive constraints on any of those routes from the remaining players, leading ultimately, said the Commission, to higher prices. A less common theory of harm developed by the Commission in the case was a foreclosure theory raised by feeder traffic issues.[56] The theory was that IAG could deny or impede access to its flights from Dublin, Belfast, Cork, Knock, and Shannon, connecting at Heathrow, Gatwick, Amsterdam, Manchester, and Shannon to services operated by IAG's competitors on various long-haul routes. Complainants argued that the significant feeder traffic provided to third parties by Aer Lingus, which was not a member of oneworld, would be redirected for IAG's benefit to its hub airports at Heathrow and Gatwick to feed IAG/BA's long-haul operations. The Commission examined feed traffic data and concluded that IAG would have the ability to foreclose rivals on those long-haul routes as it would be able to terminate Aer Lingus' feeder traffic agreements with third carriers or impose less favourable terms. As regards incentives, IAG would face a trade-off between the profit lost in the upstream market (traffic feeding a competitor's hub) and the profit gained from expanding sales downstream or being able to raise prices to consumers. Looking at the parties' margins, the Commission came to the conclusion that, if IAG were to pursue a foreclosure strategy on a route and even a limited number of passengers diverted away from a competitor on to one of its long-haul flights, that would likely make the pursuit of the foreclosure strategy profitable. As this strategy was likely to have a detrimental impact on prices on the long-haul routes, the Commission accepted a commitment from IAG to carry passengers to connect to the long-haul flights of competing airlines.

In maritime, finally, the key decision was CMA CGM's acquisition of OPDR Oldenburg-Portugiessische,[57] approved conditionally in June 2015. The case is notable because it illustrates how hard it for the Commission to conduct its competitive assessment on a market where there are no reliable market share data. If the decision quite rightly explains the difficulties that the Commission faces in such cases, it also highlights the uncertainty faced by the parties in such circumstances: (i) in pre-notification, the parties are tasked with estimating their competitors' share and committing those numbers to paper when they may have no better knowledge than the Commission and (ii) during the market investigation, their estimates are challenged (honestly or mischievously, it matters not) by competitors, increasing the risks of a Phase II investigation. In the CMA CGM/OPDR case, during the market investigation, the Commission did not engage in a market reconstruction, but asked competitors to provide their volumes of shipment in order to confirm the market share and market size estimates provided by the parties. Based on these volume data, the Commission noted that in some cases the parties had overestimated the volumes shipped by their competitors (thus underestimating their own market shares) and in other instances the parties had underestimated their competitors' shipped volumes (and thus overestimated their shares). Because published market share data were unreliable, the Commission considered that they should be viewed critically and against the background of the functioning of the market. In this way, the Commission took into account the volumes and competitors that were not mentioned by the parties and concluded that given the size and experience of the carriers, they would exercise a sufficiently strong competitive constraint on the merged business. Finally, as it is rare for the Commission to limit the scope of its analysis in this way, it is also worth mentioning that a market where the parties had a combined market share of 90–100 per cent was excluded from the investigation, because it was a very small market. The relevant market was for traffic between Ireland and Morocco, and it was excluded from the

56 This foreclosure theory was also laid out by the Commission in M.6447—IAG/bmi, decision of 30 March 2012.

57 M.7523—CMA CGM/OPDR, decision of 29 June 2015.

investigation as it did not constitute a substantial part of the internal market.[58]

XI. Formal decisions on jurisdiction

More than 25 years after the entry into force of the original Merger Regulation, and notwithstanding the Commission's consultation on the extension of jurisdiction to the acquisition of minority stakes falling short of control, it is highly unusual for the Commission to take formal decisions on jurisdiction. There were nonetheless two decisions in 2015 that merit a mention. The first is a 'no jurisdiction' decision involving Knorr Bremse/Vossloh;[59] the second concerns the exercise of the Commission's jurisdiction over the acquisition of de facto control, through the purchase of stakes from a variety of investors over time, in Trafigura/Nyrstar.

In January 2015, Knorr-Bremse, which makes braking systems for rail vehicles and which already held 29.99 per cent of Vossloh, a listed company with interests in rail infrastructure and rail technology, and was Vossloh's biggest single shareholder, announced a public bid for the company, to secure a stable quorum at general meetings and so acquire 'control' over Vossloh within the meaning of the EUMR.[60] The proposed concentration was notified on 13 April 2015. In the filing, Knorr-Bremse indicated that it was unable to specify the exact number of shares that it would acquire but that it envisaged that it would acquire a sufficient number of shares to acquire 'control'. In fact, when the initial offer period ended on 2 April, it had acquired just 0.22 per cent of the voting rights in Vossloh. Knorr-Bremse argued that the notified transaction would nonetheless result in a de facto majority in future general meetings (if attendance rates did not change) and because it intended to acquire control. On this last point, Knorr-Bremse submitted that it had the intention to acquire further shares in the market or in over-the-counter transactions with institutional shareholders and so still had a good faith intention to acquire control (as soon as other barriers such as Chinese merger control approvals had been secured). The Commission considered whether, on the facts, a 30.21 per cent shareholding would be sufficient to give Knorr-Bremse de facto control over Vossloh, given the attendance or representation of voting shareholders at the last three AGMs. It concluded that there was 'no clear trend in shareholders' attendance rates' and that 'it cannot be predicted that a clear stable majority is likely to be achieved in the future' by Knorr-Bremse. It also noted that the shareholder attendance rate 'does not necessarily appear to reflect the importance of agenda items'. In respect of Knorr-Bremse's argument that it intended to acquire further shares post public bid on the stock market, the Commission ruled a 'mere statement that it has the intent to acquire further shares' is not sufficient to constitute a good faith intention within the meaning of the EUMR. As a result, the Commission adopted an Article 6 (1)(a) decision that the notified operation was not a concentration.[61]

The second notable decision on jurisdiction arose in Trafigura/Nyrstar.[62] This case concerned the acquisition by Trafigura (a leading independent commodity trader and the world's second largest trader in zinc metal) of de facto sole control over Nyrstar (an integrated mining and metals business with established positions in zinc and lead). In September 2014, Trafigura (which had no existing holding in Nyrstar) acquired a 10.19 per cent stake as part of a fund-raising round by Nyrstar. In November 2014, Trafigura announced that it had increased its stake to 15.3 per cent. By September 2015, its stake building had reached 20.02 per cent and by November 2015 had further increased by purchases in the market to somewhere between 25 and 30 per cent. Having analysed historical attendance rates at Nyrstar general meetings going back as far as 2009, Trafigura approached the Commission to ascertain whether its shareholding was 'highly likely' to lead to control over a stable majority of votes casts at future general meetings of Nyrstar. It formally notified its interest in Trafigura to the Commission on 11 November 2015. Trafigura

58 This approach is to be compared with the position in M.7777—Solvay/Cytec, decision of 2 December 2015. In that case the relevant geographic market was global. The parties submitted that the market for phosphor-based solvent extractants for cobalt and nickel was "very small" and that, notwithstanding their high combined market share (more than 70% by value), the transaction would not lead to a SIEC. The Commission ruled at paragraph 47 that there is no de minimis rule in the EUMR, whereby if a market is small a price increase will be considered to have an immaterial impact on competition.

59 M.7538—Knorr-Bremse/Vossloh, 21 May 2015. Under Regulation 139/2004, the only previous Article 6(1)(a) decision was in M.7253—Groupe Lagardère/SNCF Participations/JV, decision of 25 July 2014.

60 The German and Austrian NCAs had approved the acquisition of non-controlling minority stakes in 2012. See, for example, Bundeskarellamt decision B9—166/11, 15 March 2012.

61 In August 2015, Knorr-Bremse notified the transaction on the basis of an agreement to acquire shares from Deutsche Bank that would increase Knorr-Bremse's stake to 35.8%. The Commission considered whether this agreement was likely to give Knorr-Bremse de facto control over Vossloh's general meeting. It found that a stake of 35.8% would have constituted control at AGMs in 2012, 2014 and 2015 but not 2013, but that the remaining shareholdings were widely spread (the second largest shareholder had a stake of 5.68%) so that "it is highly likely" Knorr-Bremse will "acquire a stable majority in future general meetings". See M.7538 Knorr-Bremse/Vossloh, decision of 14 September 2015.

62 M.7779—Trafigura/Nyrstar, decision of 15 December 2015.

reported that it had not attended Nyrstar's December 2014 general meeting but had attended and voted at Nyrstar's general meeting in April 2015. The attendance rate at that meeting had been 35.35 per cent of which 10–20 per cent was attributable to Trafigura. The Commission observed that past attendance rates had fluctuated between 4 and 19 per cent (with a spike to 23.67 per cent at one meeting in 2012 when Glencore was Nyrstar's principal shareholder) and that there was no evidence that attendance rates were likely to increase in the future. The Commission ruled therefore that the acquisition of shares in Trafigura from different sellers in a series of market transactions at an undisclosed level somewhere between 25 and 30 per cent constituted a concentration. The decision is fascinating for what it does not say, notably on the question when Trafigura acquired control of Nyrstar. As a matter of policy, the Commission has no interest in determining that an undertaking has acquired de facto control of another business in breach of Article 4 or Article 7 of the EUMR when the firm has come forward in good faith to discuss the acquisition of a minority interest in another undertaking, especially when the analysis turns on attendance records at shareholders' meetings. On the other hand, why should a party in these circumstances be authorised to acquire more shares in the market, when the parties to plain vanilla acquisitions and joint ventures are required to comply with the suspension obligation? Are we to understand that the Commission allowed Trafigura to continue to accumulate shares in Nyrstar in the market in November 2015 on condition that it committed not to vote those shares until such time as it had EUMR approval, in line with Article 7(2) of the EUMR? And, if so, would it not have been better if the Commission had adopted an Article 7(3) derogation decision clarifying its thinking on this point.[63]

XII. Perspectives

The Commission walks a narrow tightrope: its mandate is to apply the competition rules of the treaty, within the limits of the law, to ensure that markets remain competitive. In the realm of merger control, it may intervene if—but only if—the proposed concentration threatens to significantly impede effective competition.

An effort has been made to simplify procedures in non-problematic cases and formal changes designed to alleviate the burden of notification in a number of cases were made to Form CO as of 1 January 2014. As a result, in the vast majority of cases, when a simplified procedure case is notified, the case is for all practical purposes 'decided'. There is nonetheless a degree of unease in industry and in parts of the legal profession that the Commission's procedures in 'ordinary' cases are longer and more onerous than they need to be, and that the leave-no-stone-unturned approach adopted in some cases—especially in pre-notification—is delaying the notification, review and ultimately closing of unobjectionable transactions. The goodwill that the Commission has generated by simplifying procedures for straightforward cases will be quickly be lost if other constructs are used as a pretext for further investigation. Taking a closer look at a market where the proposed transaction creates a market leader without creating an affected market (Royal Dutch Shell/BG Group) should rarely, if ever, be justified; the same is true for markets where neither of the merging parties is present (DEMB/Mondelez).

The Commission's heightened interest in innovation is entirely warranted, but the roll-out of the Commission's practice in this area must be undertaken with care. For every R&D dollar spent on the development of a new product or service, dollars are lost; for every R&D project started, others are abandoned and others still falter. There is a reasonable prospect that a pharmaceutical product in Phase 3 clinical trials will come to market. The chances of success fall away for projects that are still being tested in Phase 1 or Phase 2 trials. Before requiring a commitment to divest an R&D programme, the Commission should therefore have compelling evidence from a multiplicity of reputable sources that the programme will come to market but-for the merger before intervening. If there are to be more cases of this type, careful thought also needs to be given to the design of a R&D or pipeline commitment, especially if the staff responsible for the project in the 'problematic market' also work on other projects in non-controversial markets for the merging parties.

doi:10.1093/jeclap/lpw073
Advance Access Publication 13 September 2016

63 No Article 7 derogation decisions have been reported since M.7273—Gerdau Europe/Ascometal, decision of 13 May 2014.