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EU Merger Control

2016 Year in Review

Niels Christian Ersbøll, Justin P. Hedge, Yasmine L. Harik

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# Table of Contents

- Introduction ..... 3
- 2016 Statistical Overview..... 4
- Phase II Decisions ..... 5
  - Prohibited Transaction**..... 5
  - Cleared Without Conditions** ..... 6
  - Divestiture and Commitment Conditions**..... 8
  - Commitments to Address Information Sharing**..... 10
  - Telecommunications**..... 12
- Noteworthy Withdrawn Cases ..... 14
- Noteworthy Phase I Decisions..... 16

# Introduction

The European Commission (EC) continued to pursue longer and more data-intensive investigations in 2016. At the same time, Commissioner Margrethe Vestager signaled a desire to implement reforms that lessen the burden of investigations, particularly for non-substantive transactions.

Last year was notable in particular for the first prohibited merger since Commissioner Vestager took office in 2014, *Hutchison 3G UK/Telefónica UK*, and the abandoned *Baker Hughes/Halliburton* transaction that went through an intensive Phase II review. And while the total number of Phase II investigations decreased slightly from last year, there were still a significant number that materialized. Only a single transaction was cleared without any remedies in Phase II in 2016.

The *Hutchison 3G/Telefónica UK* case also was noteworthy as one of three telecoms cases that received a Phase II investigation, and because it was a vertical case where remedies were insufficient. *Hutchison* and the other Phase II telecommunications cases confirm that mergers involving mobile virtual network operators and proposed remedies in those cases will receive careful scrutiny, as previewed by statements from Commissioner Vestager in 2015. Moreover, *Hutchison 3G* and other cases this past year signal that access commitments will not always be sufficient to remedy potential vertical foreclosure concerns, such that parties should carefully consider concentrations at all levels of competition implicated by potential transactions.

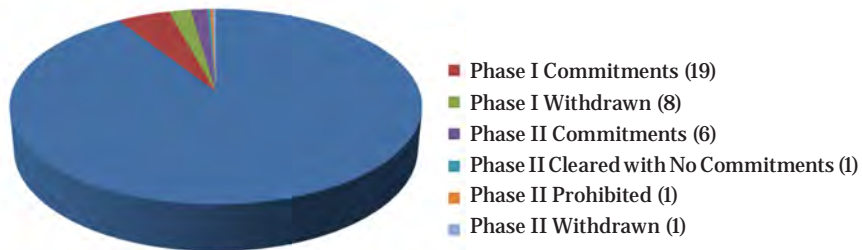
2016 also saw some interest in potential enforcement against minority shareholders, but there is no suggestion that this will be a top priority in the EU moving forward. In a speech in March 2016, Commissioner Vestager confirmed that the EC is continuing to look at issues related to minority shareholdings, but said that it was still too early to announce a policy direction. She noted that “only a handful of [minority acquisition] deals are likely to raise issues” and expressed a need to proceed cautiously, i.e., only once there is “compelling evidence that the system could work at European level - without creating a lot of complexity.”<sup>3</sup>

Lastly, in October 2016, the EC announced that it was seeking comments on various potential revisions to the EU Merger Regulation.<sup>1</sup> The changes under consideration have the potential to both increase enforcement and reduce regulatory burdens. In the first instance, the EC also is considering whether a purely turnover-based notification threshold results in relevant types of transactions in certain sectors of the economy, such as digital services and pharmaceuticals, passing without review for potential concerns across the EU Single Market. However, the EC also is considering processes for more efficient review via the Member State referral mechanism and by reducing burdens for non-problematic cases with a more simplified procedure. Specifically, the EC has asked what can be done beyond the simplifying procedures adopted in 2013 and those proposed in its 2014 White Paper “Towards More Effective EU Merger Control.”<sup>2</sup>

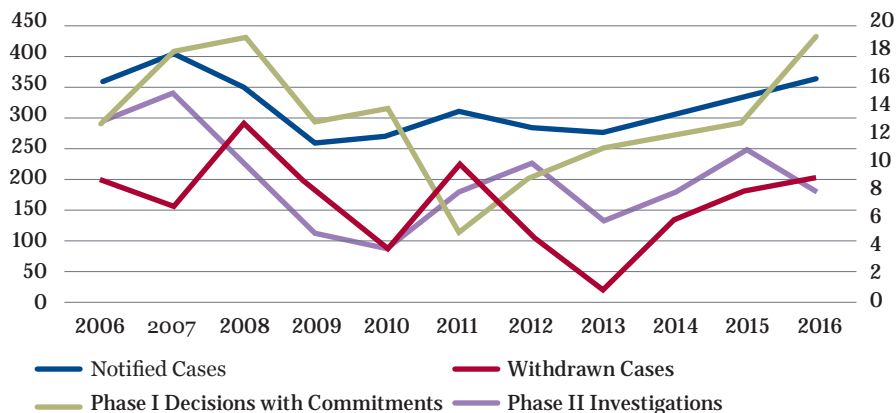
# 2016 Statistical Overview

- 362 transactions notified (7% increase over 2015)
- 335 decisions adopted on substance (10% increase over 2015)
- 245 simplified proceedings (73% of decisions adopted)
- 63 unconditional Phase I decisions (92% of substantive decisions were unconditional)
- 19 conditional Phase I decisions (compared to 13 in 2015)
- 8 Phase II investigations opened (compared to 11 in 2015)
- 1 unconditional Phase II decision (as in 2015)
- 6 conditional Phase II decisions (compared to 7 in 2015)
- 1 prohibited Phase II decision (compared to zero in 2015)
- 1 no jurisdiction decision (as in 2015 and 2014)
- 0 refusals to accept a request for referral to the EC due to lack of community dimension

## 36 of 362 Notified Transactions Faced Substantive Concerns



## EU Merger Control 2006-2016



## Phase II Decisions



### Prohibited Transaction

- *Hutchison 3G UK/Telefónica UK*<sup>4</sup> — This is the only transaction that the EC fully prohibited after a Phase II investigation in 2016. The transaction would have been a four to three merger. It sought to combine Hutchison 3G UK’s “Three” and Telefónica UK’s “O2” mobile network operating services. The EC expressed strong concerns that the transaction would cause harmful horizontal and vertical effects, resulting in UK mobile customers having less choice and paying higher prices if the transaction unfolded as planned.

Hutchison’s takeover of Telefónica would have left only two other mobile network operators in the UK market—Vodafone and BT’s Everything Everywhere (EE)—to challenge the combined company. Combined, Three and O2 would have held more than a 40% share of the market. And according to the EC’s analysis, customers would have paid higher retail mobile prices across all UK operators as a result of the transaction.

The EC also had concerns about competition with respect to network infrastructure. In the UK, EE and Three had combined their networks to create the Mobile Broadband Network Limited (MBNL). Similarly, Vodafone and O2 combined their networks to set up Beacon. This allowed EE/Three and Vodafone/O2 to share the costs of expanding their networks while continuing to compete against each other and “mobile virtual network operators” for retail customers. Mobile virtual network operators, such as Virgin Media and Talk Talk, compete in the UK retail market by renting network access at wholesale rates from the four mobile network operators (listed above). Virtual operators do not own a mobile network, but sell mobile contracts to end customers through retail outlets.

The EC concluded that, because the merged entity would have been part of both network sharing agreements (MBNL and Beacon), it would have had an interest in the network plans of its two remaining competitors, Vodafone and EE. The merged entity’s role in both networks could have slowed the development of future mobile infrastructure in the UK, such as the roll-out of next generation technology (5G), to the detriment of UK consumers and businesses.

The EC was also concerned that the transaction would have decreased the number of mobile network operators willing to host virtual operators on their networks in an effort to foreclose competition in the retail market for mobile plans.

While the parties proposed remedies, ultimately they were insufficient to alleviate the EC's competition concerns. Hutchison proposed to give access to a share of the merged entity's network capacity to one or two mobile virtual network operators; to divest O2's 50% stake in the Tesco Mobile joint venture, established in 2003 upon Tesco's entry into mobile services as a virtual network operator renting capacity on the O2 network; to offer a new wholesale agreement to Tesco Mobile for capacity on the merged entity's network; and to offer a wholesale agreement for a share of the merged entity's network capacity to Virgin Media.

As Hutchison's remedies package included largely access commitments, the EC took the position that it suffered from significant uncertainty with respect to implementation and monitoring. Mobile virtual operators would have been commercially and technically dependent on the merged entity, the EC said, with limited ability or incentive to differentiate their offerings, including in terms of network quality. Moreover, Three and O2 would have kept their respective stakes in the two network sharing agreements, MBNL and Beacon, thus not alleviating concerns of the combined company having an interest in both network providers.

Rejecting Hutchison's proposed remedies, Commissioner Vestager said, "We had strong concerns that consumers would have had less choice finding a mobile package that suits their needs and paid more than without the deal. It would also have hampered innovation and the development of network infrastructure in the UK, which is a serious concern especially for fast moving markets. The remedies offered by Hutchison were not sufficient to prevent this."

The case was notified on September 11, 2015 and the EC's decision was issued on May 11, 2016.



## Cleared Without Conditions

- *FedEx/TNT Express*<sup>5</sup> – This transaction brought together two companies that offer worldwide small package delivery services, and after an in-depth investigation of potential horizontal overlaps, was cleared without any conditions or commitments. The EC concluded first that FedEx and TNT were not particularly close competitors, as FedEx had a limited presence in Europe compared to TNT which focused on intra-Europe markets, and second, that sufficient competition would remain from other rivals in each relevant market.

The Phase II investigation arose due to concerns with two markets related to the international delivery of small packages (up to 31.5kg) in the European Economic Area (EEA): international intra-EEA express delivery of small packages that are picked up in an EEA country and delivered to another EEA country; and extra-EEA delivery of small packages that are picked up in an EEA country and delivered to a destination outside the EEA. In particular, the EC's concerns were that the merger would leave only two remaining competitors, DHL and UPS, to compete for business customers and consumers.

As part of its investigation, the EC undertook a market reconstruction exercise, following precedent set in its review and ultimate prohibition of UPS's proposed acquisition of TNT in 2013. At that time, the EC found that the *UPS/TNT* takeover was likely to harm customers because FedEx, as a remaining competitor, did not exert sufficient competitive pressure in several national markets for intra-EEA express delivery services. In the present case, the EC found that at the EEA-level, the merged entity would have a market share below 30% and would still be the weakest of the three remaining competitors, behind DHL and UPS. At the country level, the merged entity would not have a market share exceeding 40% nor become the number one player in any of the 30 national markets in the EEA.

The EC further concluded that the parties were not particularly close competitors. FedEx's business focus was on customers with significant extra-EEA delivery needs. TNT's focus on the other hand was on customers with international intra-EEA and domestic delivery needs. TNT has a substantial road and air network in the EEA and a higher proportion of sales in the domestic segment. Only a limited proportion of TNT's revenues were derived from customers with extra-EEA delivery needs. The EC's conclusions were bolstered by internal documents and customer opinions. The parties' internal documents confirmed that the parties did not perceive each other as particularly close competitors, and a clear majority of the parties' customers also did not see them as close competitors in relation to several dimensions of competition (pricing, range and quality of services, reliability, geographic reach, etc.) for both intra-EEA delivery services and extra-EEA delivery services. According to the EC's investigation, customers viewed FedEx as weaker than the other three competitors for international intra-EEA express delivery services. Overall, the vast majority of customers who responded to the EC's inquiries expressed a neutral or positive view about the effects of the transaction.

Lastly, the EC found that FedEx's acquisition of TNT would give rise to verifiable, merger-specific efficiencies. For intra-EEA delivery services, integrating FedEx's less efficient European operations into TNT's network would result in pick-up and delivery (PUD) cost savings and air network cost savings (after pass-through) that could not be achieved to a similar extent by alternative measures. For extra-EEA delivery services, the EC posited that packages would be transported through TNT's cheaper, intra-EEA network at origin and delivered through the lower cost network of either FedEx or TNT at destination. Additional synergies would be realized over time, as the majority of inter-continental air transport shifted to FedEx.

The case was notified on June 26, 2015 and the EC's decision was issued on January 8, 2016.



## Divestiture and Commitment Conditions

- *Staples/Office Depot*<sup>6</sup> – This transaction sought to combine two of the largest suppliers of office products. Both Staples and Office Depot distribute office products through wholesale, retail, and direct sales (online and catalogue) channels, as well as through national or international supply contracts. Ultimately, the EC’s horizontal concerns focused on competition in the supply of office products to business customers through international contracts in the EEA and through national contracts in the Netherlands and Sweden.

Through its investigation, the EC concluded that distribution of office supplies via the contract channel constitutes a separate market, relying on a finding of limited substitutability between the contract channel and other sales channels for high-volume and high-frequency business customers. Those customers expressed a strong preference to purchase office supplies through contracts, as well as the inability or lack of incentives to switch to other channels. Those views were supported by the EC’s conclusion that competitors active in other sales channels are not capable of offering the same customer service, pricing models, and logistics required by business customers purchasing under contracts.

At the EEA level, the EC concluded that there were only three suppliers of traditional office supplies through international contracts with large business customers: Staples, Office Depot, and Lyreco. These three suppliers were found to be each other’s closest competitors and accounted for almost all sales in the relevant market. According to the EC, Lyreco would not be a sufficient constraint on the merged entity’s incentive and ability to raise prices after the transaction. Similarly in Sweden, the EC concluded competition was limited with only Lyreco, Ocay, and Wulff Supplies offering a selection of office supplies comparable to the merging parties’ inventory and required by business customers, and each of these competitors were less significant (lower turnover) than the merging parties. In the Netherlands, the only competitors active in the contract market for office supplies were Lyreco, Hedera, and Manutan. The EC determined that the activities of the latter are relatively minimal, and that Hedera especially is unable to win large contracts in the Netherlands. Therefore, only Lyreco would pose a credible competitive constraint on Staples and Office Depot, reinforcing Staples’ leading position and widening the gap between Lyreco and the combined entity.

High barriers to entry in the international contracts channel also contributed to the EC’s analysis. The EC concluded that setting up contract distribution operations in new EEA countries or entering into an international business alliance were not readily available options to national suppliers due to the



significant costs and business risks. Interestingly, the EC decided that online commerce companies, such as Amazon, could not be considered as competitors in the contract market in Europe because they only sell through the online sales channel.

Staples and Office Depot agreed to divest Office Depot's entire contract distribution business in the EEA and Switzerland to address competition concerns regarding international contract sales and national contract sales in Sweden and the Netherlands. The parties also agreed to divest all of Office Depot's business operations in Sweden to address competition concerns in Sweden's wholesale market for office products.

Commissioner Vestager said of the parties' divestitures: "The substantial remedies package offered will ensure that effective competition is maintained, in particular in the EU's international office supplies market. This will allow European companies to continue to benefit from the Single Market by procuring their office supplies internationally and to reduce costs."

The case was notified on August 21, 2015 and the EC's decision was issued on February 10, 2016.

The merger ultimately was abandoned after the US FTC obtained an injunction in federal court on May 10, 2016.

- *Ball/Rexam*<sup>7</sup> — This case concerned the combination of the two largest beverage can manufacturers in the EEA. Both Ball and Rexam, which held market-leading positions worldwide, supplied beverage cans (and to a lesser extent aluminum bottles) to soft drinks, beer, and energy drinks manufacturers, prompting horizontal concerns from the EC.

The EC concluded that beverage cans constitute a separate market from other forms of beverage packaging solutions such as glass, polyethylene terephthalate (PET), and cartons. While beverage cans are manufactured in two separate parts, a can body and a lid (the can end), the EC considered them as part of the same relevant market, regardless of whether they are different materials (steel or aluminum) or different sizes.

The EC found that post-transaction, the merged entity would have a dominant position, with approximately 60-70% of sales volumes and 60-70% of manufacturing capacity of beverage cans in the EEA. According to the EC, Can-Pack and Crown, the two remaining major players in Europe, would not be able to compete sufficiently with the merged entity because of their much smaller size and geographic footprint. The EC further found that competition from other forms of packaging would fail to keep sufficient competitive pressure on the merged entity and on prices, and that barriers to entry and expansion were high.

As such, the parties undertook commitments to divest ten can body plants and two can end plants located in the EEA. Ball agreed to divest three plants in the UK, four in Germany, and one each in the Netherlands, Poland and France, while Rexam agreed to divest plants in Austria and Spain.

The deal received the approval of Brazil's competition authority, CADE, subject to the divestment of between 1.5 and 2.5 billion cans of manufacturing capacity per year at plants in Alagoinhas and Jacareí. The US FTC also granted conditional approval of the deal, requiring the parties to divest eight Rexam plants across the US.

Under the final divestiture agreement, Luxembourg-based Ardagh acquired all of the aforementioned plants, in addition to innovation and support functions in Brazil, Britain, Germany, Switzerland, and the US, making it the world's third-largest beverage can maker.

The case was notified on June 15, 2015 and the EC's decision was issued on January 15, 2016.

- *Wabtec/Faiveley Transport*<sup>1</sup> — (decision not yet published) After an in-depth investigation and an agreement to divest part of Faiveley's business, the EC cleared Westinghouse Air Brake Technologies Corporation's (Wabtec) \$1.8 billion acquisition of Faiveley Transport SA. US-based Wabtec and France's Faiveley Transport are significant suppliers of train equipment.

The EC had concerns that by eliminating one of only three suppliers of sintered friction materials for train brakes (Knorr-Bremse of Germany being the third), the transaction would have caused price increases for these products. The presence of a single remaining competitor to the merged entity would have been insufficient to maintain adequate competitive pressure.

In deciding to open a Phase II investigation, Commissioner Vestager said: "Millions of Europeans rely on trains every day to commute between work and home. Europe is also home to many manufacturers of locomotives and other rolling stock. The EC must make sure that Wabtec's takeover of Faiveley does not restrict effective competition and lead to less innovation in this technology-driven market, or to price increases for manufacturers, train operators and ultimately passengers."

The supply of complete brake systems and various brake components is a market difficult to enter, as several technical and regulatory requirements apply to safety-critical train equipment in different countries. The EC noted that significant investment in research and approval of new products is therefore required to enter or quickly expand in these markets.

To address the EC's competition concerns, the parties offered to sell Faiveley Transport's entire sintered friction material business, Faiveley Transport Gennevilliers. This company specializes in the development and production of sintered friction materials for various purposes, including train brakes.

The US DOJ also required significant divestitures when it approved the transaction. Faiveley's entire US freight car brakes business had to be sold, including the manufacturing of air brake control valves, hand brakes, slack adjusters, truck-mounted brake assemblies, empty load devices, and brake cylinders. The divestiture also included Faiveley's FTEN control valve, a freight car brake control valve under development that will be available for full commercialization after approval from the Association of American Railroads.

Wabtec proposed that the US divestiture be sold to Amsted Rail Company in Chicago. Amsted Rail's revenues in 2015 totaled approximately \$2 billion.

The case was notified on April 4, 2016 and the EC's decision was issued on October 4, 2016.



## Commitments to Address Information Sharing

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- *ASL/Arianespace*<sup>8</sup> — (decision not yet published) This case involved the acquisition of French satellite launch company Arianespace by Airbus Safran Launchers (ASL), a joint venture between Dutch-based Airbus and French aircraft engineering company Safran.

Particularly noteworthy about the ASL/Arianespace transaction was the EC's concern that it would give rise to sharing of competitively sensitive information about other satellite manufacturers and launch service providers between the parties. This potential flow of information could result in less competitive tenders and less innovation in the markets for satellites and launch services, the EC said.

To resolve this issue, the parties offered to implement firewalls between Airbus and Arianespace. The companies committed not to share information about third parties with each other, except for what is normally required for the everyday operation of the business. Additionally, the parties offered to put in place measures restricting employees' mobility between the companies, and to provide for an arbitration mechanism in all future non-disclosure agreements signed with third parties to foster the effective implementation and monitoring of the firewalls.

The EC concluded the proposed measures would prevent any exchange of sensitive information between Airbus and Arianespace.

The EC initially explored a number of other horizontal and vertical competitive concerns, but ultimately found none of them to be substantiated by the results of its investigation. These other concerns involved potential discrimination in satellite manufacturer access to Arianespace's launch services; favoring Ariane launchers, manufactured by ASL, over competitor products; and Airbus and ASL becoming the only suppliers of payload adapters and dispensers to the European Space Agency.

The case was notified on January 8, 2016 and the EC's decision was issued on July 20, 2016.



## Telecommunications

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- *Liberty Global/BASE Belgium*<sup>9</sup> – Another Phase II transaction, in addition to *Hutchison*, involving mobile network operators, this case concerned the combination of Belgian mobile company BASE and Belgian cable operator Telenet. BASE is one of Belgium’s three mobile network operators, and Telenet, controlled by Liberty Global, also offers mobile services as a mobile virtual network operator, thus prompting both horizontal and vertical concerns by the EC.

The EC’s investigation revealed that BASE competed aggressively on the Belgian retail mobile market and has challenged other operators with attractively priced offers. Similarly, Telenet had been a successful mobile virtual network operator (it does not own a network but rents that of other operators), and its mobile offers had contributed to bringing mobile prices down. The EC concluded that the transaction, as planned, would be a significant impediment to continued effective competition in a market already considered to be highly concentrated, creating a greater risk of increased prices and less innovation.

The EC rejected claims that the transaction would be harmful due to bundling concerns. Competitors raised such concerns claiming that the transaction would facilitate Liberty Global’s ability to exclude them from the market by bundling fixed and mobile Telenet services in packages. The EC did not find these concerns justified, since Telenet already offered both fixed and mobile services prior to the transaction.

With respect to the wholesale market that provides access to mobile networks, the EC then analyzed whether the merger would lead to the foreclosure of other mobile virtual operators from the BASE network. The EC concluded that the transaction would not change the merged entity’s *ability* to engage in input foreclosure (an ability it already possessed) nor the *incentive* to engage in such foreclosure, as sufficient network access competition would remain.

To resolve the concerns arising from the overlap in mobile network operator activities, Liberty Global offered remedies designed to create another mobile virtual network competitor. Liberty Global committed to sell BASE’s share in Mobile Vikings, a mobile virtual network operator that uses BASE’s network, to Belgian broadcaster Medialaan along with a part of BASE’s customer base and agreed to provide Medialaan access to BASE’s mobile network on terms that would allow Medialaan to compete effectively as a mobile virtual network operator.

The EC ultimately found these remedies sufficient to ensure that a new virtual network operator will enter the Belgian retail mobile market (Medialaan) to compensate for the exit of Telenet.

The case was notified on August 17, 2015 and the EC’s decision was issued on February 4, 2016.

- *Hutchison 3G Italy/Wind (Joint Venture)*<sup>10</sup> — This transaction completes the trio of retail mobile network cases that underwent a Phase II investigation in 2016. The deal combined the third and fourth largest operators in the Italian retail mobile market - VimpelCom's subsidiary WIND with Hutchison's subsidiary H3G - and was cleared by the EC with remedies facilitating the entry of French competitor Iliad into the Italian market as a new mobile network operator.

Commissioner Vestager stated, “We can approve the deal because Hutchison and VimpelCom have offered a strong remedy that enables a new mobile network operator, Iliad, to enter the Italian market. This case shows that telecom companies in Europe can grow by consolidation within the same country, provided effective competition is preserved. It also shows they can grow by cross-border expansion, such as Iliad in this case.”

The EC's preliminary concerns were that the transaction would have created the largest network operator in the Italian retail mobile market and leave only two mobile network operators, TIM and Vodafone, to challenge the joint venture. Moreover, it would have created a market with three competitors with similar market shares, which according to the EC, would have made it easier and more likely for the three competitors (the joint venture, TIM and Vodafone) to coordinate their behavior in the retail mobile market. Finally, the transaction could have reduced the number of mobile network operators effectively willing to host virtual network operators.

The parties proposed divesting assets sufficient to allow a fourth network operator to successfully enter the Italian retail mobile market and suggested that French company Iliad serve as the divestiture buyer. Specifically, the remedies included part of the joint venture's mobile radio spectrum from different frequency bands; the transfer/colocation to Iliad of several thousand mobile base station sites; and a transitional agreement (for access to 2G, 3G and 4G, and new technologies), allowing Iliad to use the joint venture's network to offer customers nationwide mobile services until it has built its own mobile network.

The EC's decision cleared the transaction conditional on the proposed divestitures and approved Iliad as the buyer.

The case was notified on February 5, 2016 and the EC's decision was issued on September 1, 2016.



## Noteworthy Withdrawn Cases

- *Halliburton/Baker Hughes*<sup>19</sup> — The *Halliburton/Baker Hughes* transaction would have combined two of the three largest oilfield services suppliers globally, and in the United States. Facing intense scrutiny in Europe and the US, the transaction was assigned to an in-depth investigation six weeks after notification to the EC. Commissioner Vestager said, “The Commission has to look closely at this proposed takeover to make sure that it would not reduce choice or push up prices for oil and gas exploration and production services in the EU. Efficient exploration and production of oil and gas resources within the EU form an important element of our Energy Union strategy in terms of ensuring security of supply.” The EC’s investigation showed serious potential harm to competition in more than 30 product and service markets, both offshore and onshore. European and US authorities were especially concerned that a reduction of the number of competitors could in turn reduce the parties’ incentive to innovate, especially given that Halliburton and Baker Hughes currently compete fiercely with each other in developing new products. In talks with the EC, the parties had offered to divest Baker Hughes’ offshore drilling-and-completions fluids division as well as the bulk of its completion systems, over and above additional divestitures offered to assuage US concerns.

The case was notified on November 27, 2015 and withdrawn on May 2, 2016. On April 6, 2016, the US Department of Justice filed a lawsuit seeking to block the proposed acquisition, as it would “eliminate head-to-head competition in markets for 23 products or services used for on- and off-shore oil exploration and production in the United States.” The parties abandoned the transaction shortly thereafter.

Other notified transactions that were later withdrawn (and have not been re-notified and cleared) include Fosun International/Tom Tailor; Metro AG/Colruyt France; and Polynt/Reichhold.

- *Valeo/FTE Group*<sup>18</sup> — This transaction sought to bring together French automotive equipment manufacturer Valeo SA and Germany’s FTE Group Holding GmbH, also a manufacturer of automotive parts and systems. While the two parties do not overlap entirely in their offerings, i.e., Valeo designs and manufactures thermal systems, powertrain systems, driving assistance systems, and visibility systems, while FTE designs and manufactures brake actuation products, electric transmission oil pumps, and other components for powertrain systems, they both have

major sales and manufacturing footprints in the EEA. In response to the EC's concerns during the Phase I review, the parties decided to withdraw their merger notification and intend to re-notify the acquisition with a view to closing the deal in 2017.

The case was notified to the EC on October 10, 2016 and withdrawn on November 29, 2016. CADE cleared the acquisition on November 3, 2016.

## Noteworthy Phase I Decisions

- *Statoil Fuel/Dansk Fuels*<sup>12</sup> — This case concerned the acquisition of Shell's Danish retail and wholesale fuels business, known as Dansk Fuels, by Alimentation Couche-Tard of Canada, which operates in Denmark under the Statoil brand via its subsidiary Statoil Fuel and Retail (SFR). The transaction combined the first and second largest players in the Danish wholesale markets for diesel, gasoline, light heating oil, and heavy fuel, and the first and third largest players in the petrol station (retail) market in Denmark. The EC was concerned that the remaining players would be unable to prevent the merged entity from raising prices in both channels.

The EC also investigated vertical concerns arising from the transaction, namely that the merged entity would have the ability and the incentive to shut out competing resellers or retailers from access to these fuel products, due to its high market share on the upstream markets and the higher margins to be made on the downstream markets.

Ultimately, the parties offered and the EC accepted a substantial divestiture package to address competition concerns. The package consisted primarily of 205 fuel stations, a supply agreement with an independently owned Shell refinery valid until the end of 2016, access to two third-party oil terminals and to SFR's oil terminal in Aalborg, approximately two thirds of Dansk Shell's business-to-business customers, and the ability issue and accept euroShell cards.

The case was notified on February 4, 2016 and the EC's decision was issued on March 23, 2016.

- *Teva/Allergan Generics*<sup>13</sup> — (decision not yet available) Two of the four largest generic pharmaceutical manufacturers worldwide combined when Israel's Teva acquired the generics business of Ireland-based Allergan. Obtaining the EC's approval required the divestiture of several assets, chief among them the majority of Allergan's generics business in the UK and Ireland.

The EC's investigation focused on generic molecules currently marketed or in the development pipeline in 24 EEA countries where the parties' activities overlap either horizontally or vertically due to out-licensing relationships. In Iceland, Ireland, and the UK in particular, the EC found that remaining players would have been unable to compete effectively with the merged entity due to current distribution models and the structure of the national generics market.

In order to address the EC's concerns, the parties offered to divest each of the molecules giving rise to competition concerns in the 24 identified EEA countries; Teva's portfolio of marketed molecules and molecules in the development pipeline in Iceland; the majority of Allergan's marketed generics, generics in development, and related activities in Ireland and the UK (including the manufacture, supply, and distribution of these products); Allergan's manufacturing plant in Barnstaple, UK, where most of the generics it sells in Ireland and the UK are manufactured.

The case was notified on January 21, 2016 and the EC's decision was issued on March 10, 2016.

On July 27, 2016, the merging parties reached a settlement with the US FTC requiring them to sell all rights and assets related to 79 pharmaceutical products— the largest drug divestiture in an FTC pharmaceutical merger case to date. The divested products included anesthetics, antibiotics, weight loss drugs, oral contraceptives, and treatments for a wide variety of diseases and conditions, including ADHD, allergies, arthritis, cancers, diabetes, high blood pressure, high cholesterol, mental illnesses, opioid dependence, pain, Parkinson's disease, and respiratory, skin, and sleep disorders.



- *Dentsply/Sirona*<sup>14</sup> — This transaction concerned the combination of Dentsply’s dental materials business with Sirona’s dental equipment business. The companies are both US-based, yet their activities overlap in the EEA with respect to CAD/CAM (“computer-aided design and computer-aided manufacturing”) systems to produce dental restoration ceramics and related materials, small dental equipment, dental imaging systems, and dental implant systems. Sirona is the leading supplier of CAD/CAM systems in several Member States.

The EC concluded that the transaction potentially would give the merged entity the ability and incentives to foreclose competitors from Sirona’s CAD/CAM system in order to favor Sirona’s dental blocks (ultimately used for dental prostheses). The investigation also revealed that Dentsply’s offering of CAD/CAM blocks was limited but could expand in the near future to replace other CAD/CAM blocks suppliers.

To remedy concerns, the parties committed to supply CAD/CAM systems to competitors through a ten-year extension of the existing licensing agreements with competing CAD/CAM block suppliers. In addition, Sirona committed to supplying know-how, firewalls, and fast track arbitration procedure for dispute settlement.

The case was notified on January 7, 2016 and the EC’s decision was issued on February 25, 2016.

- *AB InBev/SABMiller*<sup>15</sup> — (decision not yet published) AB InBev, the world’s largest brewer, obtained clearance from the EC for its acquisition of SABMiller, the world’s second largest brewer, after the parties agreed to sell nearly the entire SABMiller beer business in Europe where the parties were the third and fourth largest brewers by volume behind Heineken and Carlsberg. From the outset, the EC had serious concerns that the transaction would lead to higher beer prices in Member States where SABMiller is currently active, by removing a strong competitor and paving the way for coordination between large brewers—particularly given evidence of “follow the leader” pricing at the national level.

AB InBev first offered to divest SABMiller’s entire business in France, Italy, the Netherlands, and the UK to preempt the EC’s concerns, and at the same time proposed Japanese brewer Asahi as the divestiture buyer. To address the EC’s additional concerns after a preliminary investigation, the parties offered to divest SABMiller’s entire business in the Czech Republic, Hungary, Poland, Romania, and Slovakia.

Accepting the parties’ broadened offer, Commissioner Vestager said the divestiture “ensures that competition is not weakened in [the relevant] markets and that EU consumers are not worse off. Europeans buy around 125 billion euros of beer every year, so even a relatively small price increase could cause considerable harm to consumers.”

The case was notified on March 30, 2016 and the EC’s decision was issued on May 24, 2016.

On July 20, 2016, the US DOJ announced a similar settlement, allowing the acquisition to move forward only after the divestiture of SABMiller’s entire US business, including SABMiller’s ownership interest in MillerCoors. The settlement also prohibits ABI from instituting or continuing practices and programs that limit the ability and incentives of independent beer distributors to sell and promote the beers of ABI’s rivals, including high-end craft and import beers. It precludes ABI from acquiring beer distributors or brewers – including non-HSR reportable craft brewer acquisitions – without allowing for department review of the acquisition’s likely competitive effects.

- *Abbott Laboratories/St Jude Medical*<sup>16</sup> — (decision not yet published) This transaction concerned the combination of two US-based medical device companies, Abbott Laboratories and St. Jude Medical. The EC focused on two areas of cardiovascular devices where Abbott and St Jude compete: vessel closure devices, used to close holes made in arteries during the treatment of a vascular disease, and

transseptal introducer sheaths, used for introducing and removing catheters during treatment of heartbeat abnormalities.

Prior to the merger, St. Jude Medical was the leader in the transseptal sheaths market. Abbott had developed a product, Vado, to challenge St. Jude's market position, which caused the EC to worry that Abbott might abandon the launch of Vado after the transaction, and in doing so, remove an additional choice from doctors and patients.

In response to this concern and others, Abbott offered to divest Abbott's Vado business, including its interest in Kalila Medical, the company which developed Vado, and fully divest St. Jude's global vessel closure devices business, including its manufacturing site in Puerto Rico. With these commitments in hand, the EC approved the transaction.

During its investigation, the EC worked particularly closely with the US FTC, which reached its own settlement with Abbott and St. Jude, requiring the parties to divest two additional medical device businesses to Tokyo-based medical device manufacturer Terumo Corporation. The order requires both companies to assist Terumo with establishing its manufacturing capabilities.

The case was notified on October 3, 2016 and the EC's decision was issued on November 23, 2016.

- *Microsoft/LinkedIn*<sup>17</sup> — (decision not yet published) Microsoft's acquisition of LinkedIn was cleared by the EC after the parties agreed to a series of commitments that will apply in the EEA for a period of five years and will be monitored by a trustee.

Although Microsoft and LinkedIn are mainly active in complementary businesses (with the exception of minor overlaps in online advertising), the EC investigated whether after the merger, Microsoft could use its market position in operating systems (Windows) for personal computers and productivity software (including Outlook, Word, Excel and Power Point) to strengthen LinkedIn's position among professional social networks.

The EC expressed concern that Microsoft would pre-install LinkedIn on all Windows PCs, integrate LinkedIn into Microsoft Office, and combine, to the extent allowed by contract and applicable privacy laws, LinkedIn's and Microsoft's user databases. It found that Microsoft could substantially enhance LinkedIn's visibility to the detriment of competing professional social networks, which could be denied the same pre-installation and integration. The EC concluded that as a result of the merger, LinkedIn would have a vastly expanded user base (that it would likely not have generated independently), making it harder for new professional social networks to enter the EEA market.

Furthermore, the EC studied whether Microsoft could cause customers buying LinkedIn's sales intelligence solutions to also purchase Microsoft's customer relationship management software, or in the alternative, deny competitors access to the full LinkedIn database. The EC ultimately concluded these scenarios to be unlikely.

To address the EC's concerns, Microsoft agreed to ensure that personal computer manufacturers and distributors would be free not to install LinkedIn on Windows and allow users to remove LinkedIn from Windows should PC manufacturers and distributors decide to pre-install it. The company also agreed to continue allowing competing professional social network service providers to maintain current levels of interoperability with Microsoft's Office suite of products through the so-called Office add-in program and Office application programming interfaces.

The case was notified on October 14, 2016 and the EC's decision was issued on December 6, 2016. Regulators in the United States, Canada, and Brazil cleared the deal several months before the EC.

## Endnotes

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- 1 [http://europa.eu/rapid/press-release\\_IP-16-3337\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3337_en.htm)
- 2 [http://ec.europa.eu/competition/consultations/2014\\_merger\\_control/mergers\\_white\\_paper\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf)
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- 11 [http://europa.eu/rapid/press-release\\_IP-16-3305\\_en.htm](http://europa.eu/rapid/press-release_IP-16-3305_en.htm)
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- 15 [http://europa.eu/rapid/press-release\\_IP-16-1900\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1900_en.htm)
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# Arnold & Porter Kaye Scholer Contacts

## EU Contacts

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### Niels Christian Ersbøll

Partner  
Brussels

+32 (0)2 290 7829  
niels.christian.ersboell@apks.com



### Axel Gutermuth

Partner  
Brussels

+32 (0)2 290 7832  
axel.gutermuth@apks.com

## US Contacts

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### Jonathan Gleklen

Partner  
Washington, DC

+1 202.942.5454  
jonathan.gleklen@apks.com



### Michael B. Bernstein

Partner  
Washington, DC

+1 202.942.5227  
michael.b.bernstein@apks.com

**BRUSSELS**

1, Rue du Marquis -  
Markiesstraat, 1  
Brussels  
BELGIUM

**CHICAGO**

70 West Madison Street  
Chicago, IL 60602-4231

**DENVER**

Suite 4400  
370 Seventeenth Street  
Denver, CO 80202-1370

**FRANKFURT**

Bockenheimer Landstrasse 25  
60325 Frankfurt

**HOUSTON**

Suite 1600  
700 Louisiana Street  
Houston, TX 77002-2755

**LONDON**

Tower 42  
25 Old Broad Street  
EC2N 1HQ  
UNITED KINGDOM

**LOS ANGELES**

44th Floor  
777 South Figueroa Street  
Los Angeles, CA 90017-5844

**NEW YORK**

250 West 55th Street  
New York, NY 10019-9710

**SAN FRANCISCO**

10th Floor  
Three Embarcadero Center  
San Francisco, CA 94111-4024

**SHANGHAI**

Suites 3808-3811, CITIC Square  
Shanghai 200041  
People's Republic of China

**SILICON VALLEY**

3000 El Camino Real  
Five Palo Alto Square, Suite 500  
Palo Alto, CA 94306-3807

**WASHINGTON, DC**

601 Massachusetts Ave, NW  
Washington, DC 20001

**WEST PALM BEACH**

Phillips Point, East Tower  
Suite 1000  
West Palm Beach, FL  
33401-6152