

2017 EU MERGER ENFORCEMENT YEAR IN REVIEW

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Table of Contents

Key Highlights for 2017 and What to Expect in 2018	3
Innovation competition was, and will continue to be, at the top of the EC's merger enforcement agenda	3
The EC also continued to pursue foreclosure theories of harm in conglomerate cases	4
Heading for even more vigorous merger enforcement?	4
Due process and procedural fairness under the spotlight	4
Compliance by merging parties with procedural obligations has moved up the list of the EC's enforcement priorities	5
An EU initiative on screening of inbound foreign investments might add an extra layer of complexity in the review of acquisitions by non-EU companies	5
Statistical Overview	6
Summary of EC Cases	8
Phase II Cases	9
Three important mergers that are reshaping the agro-chemicals industry in Europe: Dow/DuPont, ChemChina/Syngenta and Bayer/Monsanto (pending)	9
Heightened scrutiny of conglomerate effects: Qualcomm / NXP Semiconductors and Essilor / Luxottica	11
Two prohibitions: Deutsche Börse / London Stock Exchange and HeidelbergCement / Schwenk / Cemex Hungary / Cemex Croatia	12
Important withdrawn cases	15
Other Pending Phase II cases to watch	16
Noteworthy Phase I Decisions	18
Innovation concerns	18
Cases that raised media plurality concerns	21
Other noteworthy conditional approvals	22
Noteworthy unconditional clearances	25
Increased Procedural Enforcement	27
Provision of incorrect or misleading information	27
Gun-jumping	28
Court Cases	29
Two important court defeats of the EC on procedural grounds	29
Gun-jumping issues	30



EU Merger Control – Year in Review



Key highlights for 2017 and what to expect in 2018*

Innovation competition was, and will continue to be, at the top of the EC's merger enforcement agenda.

Innovation concerns featured in a number of EC merger decisions in 2017. The most notable decision likely was the EC's approval in March 2017 of Dow and DuPont's merger, which was conditioned on the companies divesting almost all of DuPont's R&D activities. The EC relied on a theory of harm which many considered to be novel. The EC expressed the view that the merger between the two rivals would reduce innovation overall in the highly concentrated agrochemicals industry, leaving consumers worse off. This was not based on a traditional assessment of competition between pipeline projects, but on a much broader and hard to measure assessment of innovation competition without reference to specific product markets.

The decision has sparked a lively debate. EC official speeches have repeatedly stressed that the *Dow/DuPont* analysis was not new, but simply an application by analogy of the EC's own Horizontal Merger Guidelines (which primarily concern price competition between products on the market).

In June 2017, three months after the *Dow/DuPont* decision, the EC's own economists published a paper setting out a theoretical model for examining the impact of horizontal mergers on innovation efforts. The paper concludes that "a merger tends to reduce overall innovation" and consumers are always worse off.¹ In addition, the EC commissioned a feasibility study to assess the impact of competition policy enforcement on innovation.²

The criticism of its approach in *Dow/DuPont* notwithstanding, we expect that the EC will continue to scrutinize closely the impact of mergers on innovation competition in industries that are R&D intensive, in particular where there are just a few large competitors.

* The authors have taken into account developments up to 21 February 2018.

The EC also continued to pursue foreclosure theories of harm in conglomerate cases.

In 2017, the EC opened two Phase II investigations based on concerns of competitor foreclosure arising from the combination of the merging parties' complementary product portfolios (*Qualcomm/NXP* and *Essilor/Luxottica* (pending)). In *Qualcomm/NXP*, the EC imposed remedies to address concerns of, among other things, interoperability between complementary products of the parties and their rivals. As has traditionally been the case in other non-horizontal cases raising concerns, the remedies required by the EC were behavioral rather than structural.

Heading for even more vigorous merger enforcement?

Public debate has increasingly pointed to possible concerns that lax antitrust enforcement has contributed to higher market concentration levels and wealth inequality across the globe. For example, the American Antitrust Institute has stated that many industries have undergone significant consolidation over the past 30 years, raising concerns about harmful effects on competition and consumers. The AAI has noted that long-term trends of permissive antitrust enforcement is the source of concerns over declining competition.³ US Senator Elizabeth Warren has suggested that “*where a merger raises fundamental antitrust concerns, regulators need to stand tall and say no.*”⁴

The debate, originally initiated in the US, has spilled over to the EU. The European Parliament's resolution of February 14, 2017 on the EC's annual report on EU competition policy expressed “*its concern at the level of concentration in some sectors, such as the chemical sector, in light of recent mergers.*”⁵ A recent notable commentator expressing concerns along these lines is former EC Chief Economist Massimo Motta. He commented that agencies increasingly approve complex transactions subject to remedies that are often negotiated under very tight time schedules and may prove to be ineffective. He argued those transactions should instead be prohibited.⁶

In a presentation given at the end of the year, Tomasso Valletti, the EC Chief Economist, expressed concerns over higher margins and lower entry rates in a number of EU industries over the past few decades. Valletti suggested that the EC will engage with the public debate and collect further data to permit an evidence-based determination of merger policy.⁷

It is unclear if those concerns are warranted in Europe. The EC's enforcement track appears to remain firm, with a stable or increasing number of conditional approvals and prohibitions last year and over the past 3-5 years. Valletti's comments however prompt the question whether the EC may in the future increasingly look to profit margins, as a complement to market shares, in assessing market power.

Due process and procedural fairness under the spotlight.

New case law was developed last year on the extent of the EC's duty to observe due process and the parties' rights of defense in the merger proceedings. The General Court annulled the EC's decision prohibiting the *UPS/TNT* transaction because the EC had relied on an econometric model without giving the parties the opportunity to make their view on that model known. The Court thus sent a clear message to the EC that procedural fairness “*is a two-way street*” (to borrow language from a speech of Johannes Laitenberger, Director-General for Competition)⁸. Another area of merger control that has created much debate about procedural fairness and due process is around the EC's increasing emphasis on internal documents. Sweeping requests for documents have become the new norm in complex cases, resulting in mass productions of thousands and sometimes several hundreds of thousands of documents, often already at the pre-notification stage.

This focus on internal documents, while not unknown in other jurisdictions or as such surprising, is in tension with the continued reliance on the often very long and detailed notification form (the Form CO) and the short timeframes prescribed by the EU Merger Regulation and under which the EC needs to work. The tension with short timelines leads to unfortunate situations in which the parties may be given just a few working days to comply with second request-type document productions. Compliance with the requirement of completeness (i.e., submit *all* documents) is extremely challenging and may result in suspensions of the review period spanning several months. In 2017, the EC suspended Phase II proceedings in *Dow/DuPont* and *Qualcomm/NXP Semiconductors* for a total period of two months and 4.5 months respectively.

The broadly framed document requests have also created concerns for the merging parties that the protection of legal professional privilege may be compromised. There is no case law or EC guidance on the scope of legal professional privilege in merger proceedings and the EC instead applies the stringent standards set out by the EU Courts in two antitrust cases (*AM&S*, *Akzo* and *Hilti*). It takes the view that legal advice from external counsel unrelated to the competition proceedings, such as advice on tax or corporate issues or, presumably, alternative transactions, is not protected by legal professional privilege. The scope of legal professional privilege was a point of dispute between the EC and the parties in *Dow/DuPont*.

The EC's appetite for internal documents and detailed information is not expected to abate in 2018. In complex cases, merging parties should be prepared to hand in large volumes of internal documents, and factor into their closing timeline the possibility of suspensions of the review period. However, it has become apparent that the EC needs to fine-tune its best practices and strike a fair balance between the need for speed, its obligation to make an informed decision and the parties' rights of defense. In a recent speech, Commissioner for Competition Margrethe Vestager mentioned that a new set of best practice guidelines on requests for internal documents should come the legal world's way soon.⁹

At the same time, compliance by merging parties with procedural obligations has moved up the list of the EC's enforcement priorities.

The EC stepped up prosecution of procedural infringements under the EU Merger Regulation, sending a clear message to companies that this will be a key priority going forward. 2017 saw the EC imposing a hefty € 110 million fine on Facebook and prosecuting two other cases on allegations that the parties had misled the EC during its substantive merger review.

In parallel, the EC launched two investigations on suspicions that the parties "jumped the gun" before its approval on the merits. To date, the EC has imposed fines as high as € 20 million for breaches of the bar on closing imposed by the EU Merger Regulation. At the same time, a case is pending before the EU Court of Justice (CJEU) following a request for preliminary ruling by a Danish court seeking guidance on the circumstances that give rise to gun-jumping under the EU rules. Advocate General Wahl issued an opinion earlier this year, in which he argues for a more restrained approach to the prosecution of gun-jumping cases.

An EU initiative on screening of inbound foreign investments might add an extra layer of complexity in the review of acquisitions by non-EU companies.

In September 2017, the EC issued a proposal for a regulation which aspires to establish a framework for the screening of foreign direct investments into the EU. Currently, the power to approve foreign investments lies with the national governments of the EU Member States. Under the proposal, the Member States will retain the decision-making power, but the EC will have the power to intervene through advisory opinions.

It is far from certain that the initiative will acquire the necessary consensus, as several national governments have expressed concerns over its impact on the influx of capital and relationship with trading partners. If ultimately adopted into law, the regulation is not expected to affect the EC's powers to review and approve concentrations on competition grounds under the EU Merger Regulation (a power vested to the EC's Directorate-General for Competition). In practice, however, the potential involvement of the EC and Member States would add an extra layer of review that in some cases could delay closing of acquisitions by non-EU companies.¹⁰

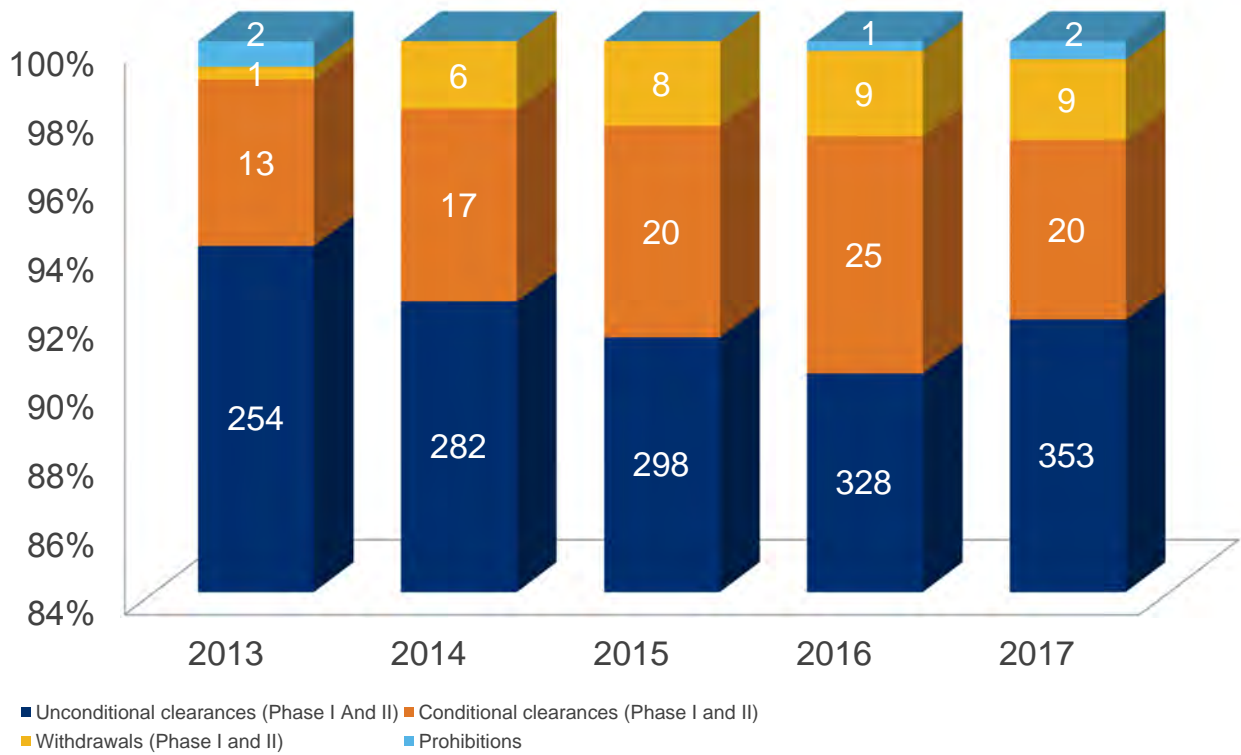


Statistical Overview

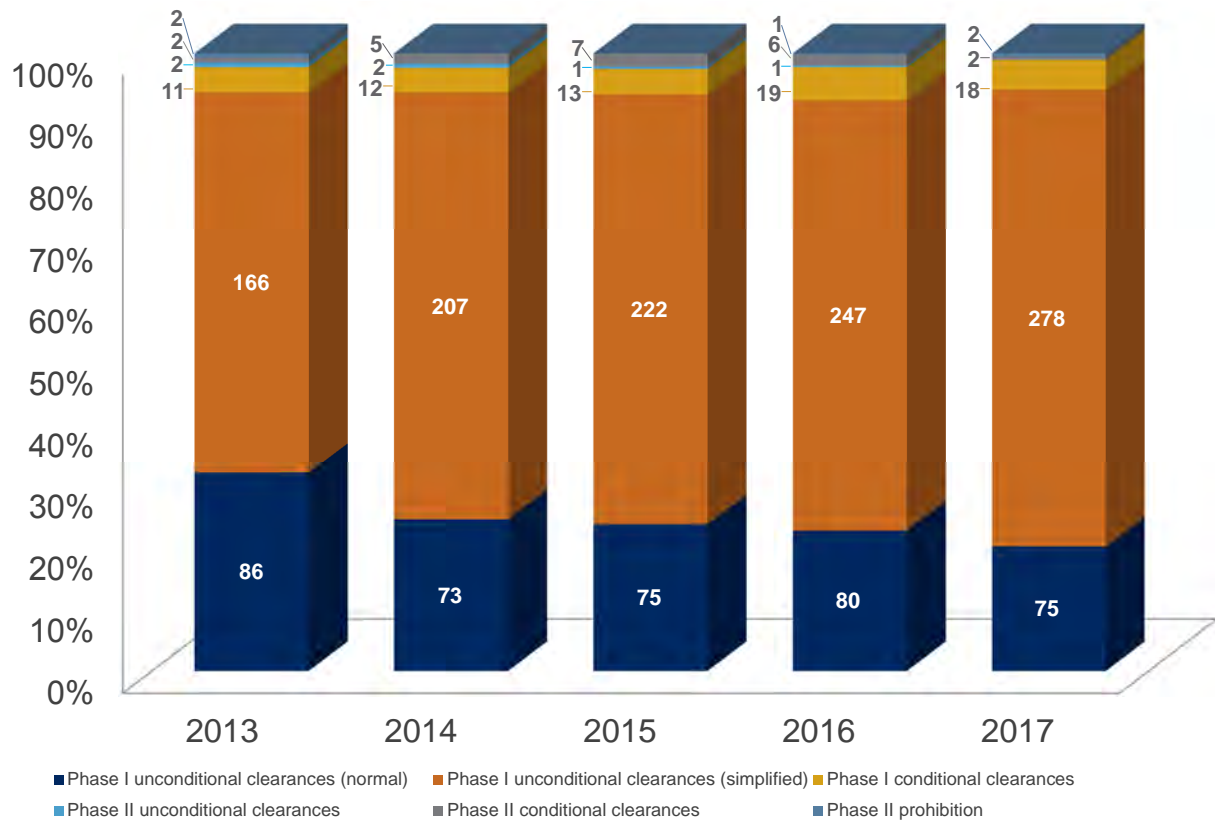
2017 summarized in statistics

- **380** transactions notified (5% increase over 2016)
- **353** unconditional Phase I decisions, of which
 - **278** under the simplified procedure (79% of decisions adopted)
 - **75** under the normal procedure (6% increase over 2016)
- **18** conditional Phase I decisions (compared to 19 in 2016)
- **7 Phase II** investigations opened (compared to 8 in 2016), in addition to **3 Phase II** investigations running since 2016
- **No** unconditional Phase II decisions (compared to 1 in 2016)
- **2** conditional Phase II decisions (compared to 6 in 2016)
- **2** Phase II prohibitions (compared to 1 in 2016)
- **No** no-jurisdiction decisions (compared to 1 in 2016)
- **5 Art. 7(3)** decisions on derogation from standstill obligation (compared to 0 in 2016)
- **1 Art. 14** decision imposing fines (compared to 0 in 2016)

EC decisions 2013-2017 – outcome



EC decisions 2013-2017 – decision type





Summary of EC Cases

In 2017, the EC investigated [three mega-deals](#) in the agrochemicals industry. Two cases were approved with significant divestments (*Dow/DuPont* and *ChemChina/Syngenta*). In one case, review is still pending (*Bayer/Monsanto*). In *Dow/DuPont* the EC set out what many think of as a novel analytical framework for the assessment of the impact of mergers on innovation competition.

Innovation also featured in a number of [Phase I conditional approvals](#), either as part of the EC's pipeline competition analysis (*J&J/Actelion*, *BD/Bard*) or as an underlying concern that determined the scope of an appropriate remedy (*Smiths/Morpho Detection*).

The EC also opened [Phase II investigations](#) into two conglomerate mergers (*Qualcomm/NXP*, *Essilor Luxottica* (pending)).

With [two Phase II prohibition decisions](#) (*Deutsche Börse/London Stock Exchange* and *Heidelberg Cement/Schwenk/CemexHungary/CemexCroatia*) and [two other deals abandoned](#) in the course of its in-depth investigation (*SOCAR/DESFA* and *Knorr-Bremse/Haldex*), the EC continued to signal that it will not shy away from blocking deals that in its view threaten competition, if the parties do not offer appropriate remedies on time. In addition, a number of [pending Phase II investigations](#) opened in the course of 2017 are expected to be resolved this year.

The EC issued decisions in a number of [noteworthy Phase I cases](#). It approved two mergers in the media sector (*Vivendi/Telecom Italia*, *Fox/Sky*), which however were met with opposition from Member States on media plurality grounds. It also came under political pressure when reviewing the sale of major assets of the bankrupt air carrier Air Berlin to German incumbent Lufthansa. The EC ultimately approved the transaction subject to remedies (*Lufthansa/Certain Air Berlin Assets* and related case *easyJet/Certain Air Berlin Assets*). Last, the EC [cleared unconditionally](#) a number of transactions, some of which involved industries with high levels of concentration.

On the procedural enforcement front, 2017 saw the EC imposing a fine on Facebook and prosecuting two other cases on allegations of [disclosure of incorrect or misleading information](#) during the EU merger proceedings. In parallel, the EC launched two investigations on suspicions that the parties “[jumped the gun](#)” before its approval on the merits.

At the same time, however, the EC lost two merger cases in court [on procedural grounds](#). Last, but not least, the EU courts provided important guidance on issues of [gun jumping](#) and the [application of EU merger rules on joint ventures](#).



Phase II cases

Three important mergers that are reshaping the agro-chemicals industry in Europe: Dow/DuPont, ChemChina/Syngenta and Bayer/Monsanto (pending)

Dow/DuPont¹¹

The transaction concerned a US\$ 130 billion merger between two US-based chemical giants, Dow and DuPont, active in crop protection, seeds, certain petro-chemical and specialty chemical products used in a broad range of applications.

The EC found that combined, Dow and DuPont would hold very high shares on a large number of national herbicide markets in the EEA, which were considered to be already highly concentrated. This was particularly the case in (a) selective herbicides for cereals, oilseed rape, sunflower, rice and pasture; (b) insecticides for chewing insects and sucking insects in fruits and vegetables, and other crops, particularly in Southern European Member States; and (c) rice blast fungicides.

The EC's innovation analysis: a novel theory of harm?

Most importantly, however, the EC raised concerns about the impact of the merger on innovation in the crop protection industry. The EC's theory of harm went beyond the traditional assessment of whether the merger would lead to the elimination of products in the parties' pipeline. It stipulated that the merger would lead to an overall reduction in innovation efforts for unidentified new crop protection products sometime in the future. In particular, the EC assessed competition taking place (a) at so-called "*innovation spaces*" within the crop protection industry, i.e., lines of research that transcend the downstream crop protection product markets, and (b) at the industry level *overall*.¹² There were no traces of this theoretical framework in past EC merger decisions. Instead, the EC drew inspiration from its own guidelines on technology transfer agreements and a DoJ/FTC proposal for IP licensing guidelines in the US.

According to the EC, the transaction would have taken place in an already concentrated industry characterized by "*oligopolistic innovation competition*" and high barriers to entry. Concentration at the level of innovation spaces was often higher. Dow and DuPont were two out of only five companies

active throughout the entire R&D process in the crop protection industry (i.e., from discovery of new active ingredients, to their development, testing and regulatory registration, to the manufacture and sale of final products), competing against BASF, Bayer and Syngenta. Relying on the parties' high shares in terms of patents and patent citations, and number of new active ingredients brought to the market, the EC viewed Dow and DuPont as two important and closely competing innovators, whose modest market shares at the existing downstream product markets understated their innovative prowess.

In the EC's view, the elimination of the competition between Dow and DuPont would have reduced their incentives to innovate and would have significantly reduced effective innovation competition on overlapping innovation spaces. In addition, the merged entity would have lower ability and incentives to achieve the same overall level of innovation than Dow and DuPont separately, leading to a significant loss of effective innovation competition in the industry overall. The parties would have cut back on the amount they spent on developing innovative products, and the three remaining integrated innovators would not have imposed sufficient competitive constraints on the combined Dow/DuPont. Unable to dispel EC's concerns in relation to crop protection, Dow and DuPont had to give very significant concessions to secure approval. They agreed to divest (i) almost the entire DuPont global R&D organization and pipeline in crop protection, as well as (ii) a significant part of DuPont's existing crop protection business.

DuPont's assets were sold to FMC, a generics manufacturer with activities in development but not discovery of active ingredients. This transaction was also deemed problematic because of the overlap and close competition between FMC and DuPont in certain categories of herbicides used to control broadleaf weeds in cereal crops. To address these concerns, FMC offered to divest its sulfonylurea and florasulam businesses in the EEA through exclusive licenses of the active ingredients and mixtures and the necessary personnel to run these businesses.¹³

Other issues

The EC also raised concerns in relation to the parties' overlaps in the markets for acid co-polymers, where the merger would have led to the reduction of competitors from four to three, and ionomers, where the merger would have strengthened DuPont's dominant position. To address these concerns, the parties divested two manufacturing facilities for acid co-polymers, as well as a supply contract for ionomers.

The transaction was notified on June 22, 2016. The EC's conditional approval was issued a little more than nine months later, on March 27, 2017 after several deadline suspensions, partially owed to disputes over the privileged nature of documents requested by the EC (see discussion in Introduction).

ChemChina/Syngenta¹⁴

The second transaction was announced almost three months after *Dow/DuPont* and was reviewed largely in parallel by the EC. This time, it was Syngenta that was being acquired by China National Chemical Corporation (ChemChina) a Chinese state-owned company. ChemChina is active in the European agrochemical sector through its subsidiary Adama, one of the largest suppliers of generic (i.e., off-patent) crop protection products. As the transaction was notified to the EC after *Dow/DuPont*, the EC assessed this transaction based on the market situation that would prevail if the *Dow/DuPont* merger went ahead, in line with its standard practice.

Unlike *Dow/DuPont*, the two companies had different business models and profiles: whilst Syngenta was one of the big five integrated R&D players, Adama only competed with off-patent products and had no discovery capabilities. It did, however, develop new crop protection formulations based on off-patent molecules.

For that reason, innovation was not core to the EC's competitive assessment. Instead, the EC focused on the parties' overlaps in existing crop protection product markets. The EC found that the transaction would have reduced competition in 115 national markets for crop protection products (including herbicides, fungicides, insecticides, seed treatments and plant growth regulators). In these markets the two companies held high combined shares with few competitors remaining, or were close rivals and imposed a strong competitive constraint on each other, or both.

To address these concerns, ChemChina offered significant divestitures. These included (a) a significant part of Adama's existing crop protection business, (b) some of Syngenta's fungicide and herbicide products, (c) 29 of Adama's generic pesticides under development, (d) a significant part of Adama's plant growth regulator business for cereals, and (e) all relevant intangible assets and personnel underpinning the divested products.

The transaction was notified on September 23, 2016 and the EC's conditional approval was issued a week after the *Dow/DuPont* decision, on April 5, 2017.

Bayer/Monsanto¹⁵ (pending)

In September 2016, German conglomerate Bayer announced its plan to acquire sole control of Monsanto, a US multinational agrochemical and agricultural biotechnology company. The deal was notified to the EC nine months later, on June 30, 2017.

The EC decided to open an in-depth investigation into this proposed acquisition on August 22, 2017. The EC's press release when opening Phase 2 stated the EC would investigate the following areas: (a) non-selective herbicides, where Monsanto's glyphosate has the majority of sales in Europe and Bayer competes with glufosinate ammonium; (b) seeds for vegetable and field crops; (c) seed traits, where the EC's preliminary investigation indicated that Monsanto holds a dominant position and Bayer is one of the few competitors; and (d) digital agriculture, an emerging technology consisting in the collection of data about farms with the aim of providing tailored advice or aggregated data to farmers.

According to its press release, the EC is looking into whether the proposed acquisition could reduce competition resulting in higher prices, lower quality and less choice as well as less innovation. It remains to be seen how the EC will apply the analytical framework developed in *Dow/DuPont* in this case.

Heightened scrutiny of conglomerate effects: Qualcomm / NXP Semiconductors and Essilor / Luxottica

Qualcomm/NXP Semiconductors¹⁶

The proposed acquisition of NXP by Qualcomm brought together two leading players in the semiconductor industry with largely complementary portfolios. Qualcomm makes baseband chipsets, while NXP offers near-field communication (NFC) and secure element (SE) chips, and both products used in smartphones. Despite the absence of overlaps, the EC scrutinized and approved the transaction with remedies designed to address conglomerate-type concerns.

According to the EC's investigation, Qualcomm and NXP had dominant or strong market positions in their respective markets and own a significant amount of intellectual property relevant to smartphone manufacturers, including standard and non-standard essential patents related to NFC chips. NXP has

also developed and owns MIFARE, a technology used as a ticketing/fare collection platform by several transport authorities in the EEA.

The EC's assessment thus focused on the potential conglomerate effects of the combination. The EC was concerned that (a) the parties would have the ability and incentive to refuse licensing or raise royalties for access of other suppliers to NXP's MIFARE technology; (b) they would also have had the ability and incentive to degrade the interoperability of Qualcomm's baseband chipsets and NXP's NFC and SE chips with rivals' products, leading to their marginalization; and (c) the combination of the two companies' significant IP portfolios related to NFC technology would have increased their bargaining power, allowing them to charge significantly higher royalties for its NFC patents.

To address these concerns, Qualcomm committed to (a) offer licenses to NXP's MIFARE technology and trademarks, for an eight-year period, on terms that are at least as advantageous as those available before the transaction; (b) provide competing products with the same level of interoperability as between its own baseband chipset and NXP's NFC and SE products for eight years; (c) not to acquire NXP's standard-essential and certain non-standard-essential NFC patents. For the set of non-standard essential NFC patents to be acquired by Qualcomm, the parties committed to grant worldwide royalty-free licenses.

The transaction was notified to the EC on April 28, 2017, and the EC's approval was issued on January 18, 2018. In the interim, Broadcom, a major semiconductor rival of the parties has launched a hostile bid to acquire Qualcomm (including NXP). The EC's approval is believed to raise significant antitrust hurdles for Broadcom's hostile bid as the combined Qualcomm/NXP is said to overlap with Broadcom in WiFi chips businesses.

Essilor/Luxottica (pending)¹⁷

The merger between French Essilor and Italian Luxottica brings together the largest supplier of ophthalmic lenses with the largest supplier of eyewear with brands such as Ray-Ban and Oakley. The parties offer their complementary products to opticians who then sell finished spectacles and sunglasses to consumers.

The EC's Phase II investigation focuses on the conglomerate effects of the transaction. The EC is assessing whether the merged entity could leverage Luxottica's powerful position in the eyewear market to promote Essilor's ophthalmic lenses and exclude other lens suppliers through bundling or tying practices, and vice versa. In addition, the EC is assessing whether the merger would remove important emerging competition from Luxottica in lenses and from Essilor in eyewear.

The transaction was notified to the EC on August 22, 2017 and entered into Phase II on September 26, 2017.

Two prohibitions: Deutsche Börse / London Stock Exchange and HeidelbergCement / Schwenk / Cemex Hungary / Cemex Croatia

Deutsche Börse/London Stock Exchange¹⁸

After two failed attempts in 2000 and 2004, Deutsche Börse's third bid to combine forces with the London Stock Exchange (LSE) was met with the EC's opposition. The merger would have created Europe's largest stock exchange, and would have brought together the parties clearinghouses (Deutsche Börse's Eurex and LSE's LCH.Clearnet clearinghouses).

The case is noteworthy for two reasons: first, it highlights the complexities of merger assessment in dynamic industries characterized by significant economies of scale and scope, and network effects.

Secondly, it illustrates that it is necessary for the parties to offer remedies capable of addressing the EC's concerns at an early stage of the proceedings, in order to allow sufficient time for market testing and improvements to the remedy package.

The EC found that the proposed transaction would have led to a *quasi*-monopoly in clearing of fixed income instruments (i.e., bonds and "repos") in Europe. Moreover, the EC had concerns that this *quasi*-monopoly would have also had a knock-on effect on the downstream markets for settlement, custody and collateral management, where Deutsche Börse's subsidiary Clearstream competes. Service providers in these markets depend on transaction feeds from clearing houses. The EC found that the merged entity would have had the ability and incentive to divert transaction feeds from its fixed income clearing house to Clearstream, and prevent competing service providers from accessing these feeds.

The EC also found that the merger would have resulted in a reduction of competition for the trading and clearing of single stock equity derivatives, another area of overlap between the parties' activities. Here, Deutsche Börse's Eurex offered an integrated product combining trading and clearing services, which competed against a bundled product combining Euronext's trading and LCH.Clearnet's (LSE's) clearing services. Because trading and clearing services for certain transactions are typically sold to customers in bundles, the EC assessed not only the vertical links between Deutsche Börse's trading and LSE's clearing activities, but also the horizontal overlaps on a "bundle-to-bundle" basis. The vertical link would have given the incentive to LSE to raise clearing service prices for the Euronext bundle in order to incentivize customers trading on Euronext to switch to Deutsche Börse, thus squeezing Euronext out of the trading markets. In addition, because LCH.Clearnet had significant pricing power over the bundled product, the EC found that the horizontal overlaps between the two bundles would have resulted in higher clearing prices.

To address the EC's concerns, the parties offered to sell the French branch of LCH.Clearnet to Euronext. Timing of remedy submission was of the essence in this case: even though remedy discussions had started relatively early in the process, the parties submitted the formal remedy to the EC on the last day of the final deadline to submit remedies in Phase II. The EC's market test revealed that the remedy was insufficient for the concerns arising from the creation of the *quasi*-monopoly in fixed income clearing. LCH.Clearnet alone would not have been a viable competitor in that market, as it was dependent on trading feeds from LSE's Italian fixed-income trading platform, MTS (which the merging parties would retain).

Without sufficient time to run a second market test, the EC encouraged the parties to also sell MTS, as this was the only solution that was sufficiently clear-cut to be accepted without a market test. The parties were, however, not prepared to go that far. Instead, they offered a set of behavioral commitments, including access of LCH.Clearnet to MTS trading feeds for a period of three years. The EC was not convinced and prohibited the proposed merger.

The transaction was notified to the EC on August 24, 2016 and the EC's prohibition decision was issued on March 29, 2017.

HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia¹⁹

With this transaction, HeidelbergCement and Schwenk sought to acquire, via their joint venture Duna Dráva Cement (DDC), joint control over the Croatian and Hungarian ready-mix concrete and cement production businesses of the Cemex Group (Cemex Hungary and Cemex Croatia). At the request

of the parties, the EC referred the review of the part of the transaction concerning Cemex Hungary to the Hungarian competition authority. The EC's investigation therefore focused only on the acquisition of Cemex' Croatian assets.

The case highlights that the divestiture of an existing viable business is the EC's remedy of choice, instead of remedies that simply aim at facilitating new entry.

The transaction would have combined the two largest cement importers in Croatia with Croatia's largest cement producer. Early on in the investigation, the EC expressed concerns regarding the supply of grey cement in southern Croatia, where three cement plants operated by Cemex Croatia in Split faced competition from DDC's imports from its plant in Bosnia and Herzegovina. In the EC's view, the transaction risked eliminating a significant competitor from an already concentrated regional market, where the combined shares of the parties would have reached around 45-50% in some markets and more than 70% in southern Croatia. This market power was unlikely to be offset by other suppliers, because these were located further away and would have had difficulties reaching their customers via seaborne imports, as all cement terminals in ports along the Croatian coast were controlled by two players only, Cemex Croatia and another domestic supplier LafargeHolcim. As a result, the EC found that the transaction would have led to higher prices for cement customers.

To address the EC's concerns, the parties proposed to transfer the lease of a cement terminal located in southern Croatia, in order to facilitate entry of a new competitor into the market. The EC, however, concluded that this access remedy was insufficient to allow other suppliers to compete effectively and on a lasting basis with the merged entity. There were two chief reasons behind this conclusion: first, the terminal lacked sufficient infrastructure to allow the lessee to operate at a competitive cost-to-market. The terminal was only accessible by vessels of limited draft as it did not have access to a deep sea port, and also lacked a functioning railway access. Second, the terminal's capacity was insufficient to enable a new lessee to compete effectively in southern Croatia.

In addition, the remedy did not change the parties' combined market position and entailed a high level of uncertainty, because it would have required the new lessee to set up its own cement operations from scratch. The EC preferred the divestment of an existing, viable cement business. Such structural remedies were in fact offered for the EC's approval of two earlier mergers in the cement industry, Holcim's acquisition of Lafarge in 2014 and HeidelbergCement's acquisition of Italcementi in 2016. However, the parties were not prepared to go that far, leaving the EC with no choice but to prohibit the transaction.

The transaction was notified to the EC on September 5, 2016 and the EC's prohibition decision was issued on April 5, 2017. HeidelbergCement and Schwenk have since challenged the EC's prohibition decision, and the case is pending before the General Court (GC).²⁰ The parties had previously also challenged the EC's decision to open a Phase II investigation, but their action for annulment was declared inadmissible on the grounds that such a decision is only a preparatory measure that cannot be challenged in court.²¹

The second part of the transaction—acquisition of Cemex Hungary—was cleared by the Hungarian Competition Authority in October, 2017. But to secure the clearance, the parties had to divest part of the business.

Important withdrawn cases

SOCAR/DESFA²²

This transaction would have seen a natural gas producer and wholesaler, the State Oil Company of the Republic of Azerbaijan (SOCAR) acquire the Hellenic Gas Transmission System Operator (DESFA), the state-owned operator of Greece's only high-pressure gas transmission network and LNG terminal. The sale of the network was part of the Greek government's privatization program agreed to under its latest international financial bailout and aimed at modernizing and liberalizing the energy markets. However, finding the right buyer was not an easy endeavor.

A sale to SOCAR, a supplier of gas, would have created vertical links to DESFA, the operator of the transmission network. The EC expressed strong concerns that, post-transaction, SOCAR would have been able to hinder access of competing gas suppliers to the Greek transmission system. SOCAR could have restricted inflows of gas into Greece by favoring its own supplies over its competitors'. The EC was also worried that SOCAR might also strategically limit investments in future expansions of the import capacity at the LNG terminal and at the interconnector between the DESFA network and the Trans Adriatic Pipeline, bringing Caspian natural gas to Europe via Turkey. In the EC's view, the Greek regulatory framework would not have provided sufficient safeguards against foreclosure. The more likely result of the transaction would have therefore been a reduction in the number of current and potential suppliers and the amount of natural gas being supplied in Greece, leading to higher gas prices for customers.

Announced in June 2013 and notified to the EC on October 1, 2014, the transaction was abandoned in February 2017, after being suspended for more than two years, while the parties and the EC were in search of a mutually acceptable solution. In June 2017, the Greek government relaunched the tender for the sale of DESFA in the hopes of finding another suitable buyer.

Knorr-Bremse/Haldex²³

The case relates to an unsuccessful hostile takeover attempt of Swedish listed company Haldex by its German rival Knorr-Bremse. The transaction would have combined two of the world's largest manufacturers of commercial vehicle brake systems and components. Through the acquisition of Haldex, Knorr-Bremse was hoping to get a stronger foothold in the new and fast evolving business of automated and autonomous driving.

Early on in the process, the EC identified several issues in a number of markets where the parties were found to compete, such as electronic braking systems (EBS) and air disc brakes for trucks and trailers, anti-lock braking systems (ABS) for trailers, as well as valves and air treatment systems. The EC's main concern was that the relevant markets were not only already very highly concentrated but also quite difficult to enter, leaving effectively only one other competitor, Wabco, to compete with Knorr-Bremse post-transaction.

Knorr-Bremse tried to alleviate the EC's concerns by offering commitments already in the first phase of the investigation. However, the EC deemed the proposal to be insufficient and launched an in-depth review, giving the EC time until at least end November 2017 to scrutinize the combination. However, Knorr-Bremse was running out of time.

Knorr-Bremse's public offer period for Haldex acquisition was open until September 26, 2017. To get more time to work through the EC (and the parallel US) in-depth probes, Knorr-Bremse asked the Swedish Securities Council for a five month extension - a request that was not granted. Although Knorr-Bremse had a year to make a new bid on Haldex, the Haldex board withdrew its support. Without Haldex' cooperation, Knorr-Bremse was unable to compile a satisfactory divestment package with assets from Haldex, and decided to withdraw.

The transaction was notified to the EC on June 1, 2017 and withdrawn on September 19, 2017, after Knorr-Bremse publicly announced it had dropped its public offer for Haldex.

Other Pending Phase II cases to watch

The EC has opened an in-depth (Phase II) investigation into a number of transactions in 2017, and is expected to issue decisions in the course of 2018. These cases raise a number of important issues.

Tronox/Cristal:²⁴ quasi-commodity markets under close EC and FTC scrutiny

In February 2017, Tronox announced a definitive agreement to acquire the titanium dioxide business of Cristal, a privately held chemical and mining company headquartered in Saudi Arabia. The parties' activities overlap in the manufacture of titanium dioxide pigment, which is used in numerous products, such as paints, paper and plastics. Titanium dioxide pigment can be manufactured using either a chloride or a sulfate process. The parties also own titanium feedstock facilities, from which they source the raw material for their pigment production.

The transaction is being heavily scrutinized both by the US and the EU agencies. On December 5, 2017, the US FTC filed a complaint before an Administrative Law Judge of the FTC against the transaction. The FTC claims that by removing one of the few competitors, the transaction would increase the likelihood of coordination for the supply of chloride-based titanium dioxide pigment in North America, and that the combined company would be in a position to unilaterally raise prices in North America.

A few weeks later, on December 21, 2017, the EC followed suit with a Phase II investigation. According to the EC's press release, the proposed merger would create the largest supplier of titanium dioxide produced via the chloride-based process in the EEA and globally. For some narrower applications of titanium dioxide, the EC's preliminary view is that the acquisition would reduce the number of effective competitors from four to three. Like the FTC, the EC appears to consider that sulfate-based titanium dioxide may belong to a separate market in so far as the supply in the EEA is concerned.

The transaction was notified to the EC on November 15, 2017, and entered into Phase II on December 20, 2017.

Celanese/Blackstone/JV:²⁵ coordination theories put to the test

The EC has opened an in-depth investigation to assess the proposed creation of an acetate flake and acetate tow joint venture between US specialty company Celanese and asset management group Blackstone. Acetate flake is a chemical derivative of wood pulp that is mainly used in the manufacture of acetate tow, which in turn is mainly used to manufacture cigarette filters.

According to the EC, this four-to-three merger would create a new market leader in a sector characterized by high barriers to entry, whereas the only two remaining major competitors, Eastman and Daicel, do not represent a sufficient competitive constraint on the merged entity.

What is noteworthy about this case is the EC's willingness to test coordination (collusion) theories of harm. The EC has expressed preliminary concerns that the proposed transaction may make tacit coordination between two suppliers more likely. The EC usually avoids relying on such theories to oppose a transaction, as the EU Courts have established a test that is very difficult to satisfy.

The transaction was notified to the EC on September 12, 2017 and entered into Phase II on October 17, 2017.

ArcelorMittal/Ilva:²⁶ in search for approval in a strategic EU sector

In November 2017, the EC opened an in-depth investigation to assess the proposed acquisition of Ilva, a state-operated producer of flat carbon steel in Italy, by an ArcelorMittal-led consortium. Ilva's steel plant in Taranto (Italy) is Europe's largest single-site integrated plant. Following failure to comply with environmental regulations and mismanagement, the company faced significant difficulties and entered into insolvency proceedings in March 2015. Because of its strategic significance for the Italian economy, Ilva was placed under an extraordinary administration appointed by the Italian government with the mandate to sell the company. In June 2017, Italy awarded most of Ilva's assets to an ArcelorMittal-led consortium.²⁷

The EC has expressed preliminary concerns that the transaction may increase ArcelorMittal's market leadership and allow it to raise prices in a number of flat carbon steel product markets (hot-rolled, cold-rolled and galvanized flat carbon steel products). Metallic coated steel for packaging has also been flagged by the EC as another potential area of concern.

The EC is concerned that customers, particularly those in Southern Europe, may face higher prices for steel inputs, possibly hinting to a separate geographic market for that region. It will be interesting to see how the EC approaches market definition in light of the stream of significant steel imports, especially from China, the largest steel producer in the world. The EC's announcement also highlights the potential pricing impact on small-medium size enterprises (SMEs), many of which compete against foreign products in the EEA or in the export markets.

These statements should be seen in the context of the EC's policy concerning the steel sector. Steel production is considered strategic for the EU economy, and is closely linked to many downstream industries such as automotive, construction, electronics and engineering. Boosting the sector's competitiveness is an important priority for the EC's Directorate-General for Growth, which has taken a number of actions following the economic crisis and related downturn in steel demand.²⁸ Overcapacity is one of the industry's main challenges, and steel site closures have led to a corresponding loss of jobs.²⁹ In addition, the EC has on several occasions taken anti-dumping measures against countries like China and Russia, to counter imports of subsidized steel products into the EU and protect EU steel producers. The EC's competition unit seems eager to ensure that EU steel customers, many of which are SMEs, do not suffer from high domestic steel prices and lose their competitive edge vis-à-vis their foreign competitors with access to cheap steel.

During the Phase II investigation, Marcegaglia, a 6% shareholder in the consortium and an important manufacturer of galvanized steel, has dropped out of the consortium. ArcelorMittal has also agreed to sell its steel mill in Piombino, Italy to Italian steelmaker Arvedi. These moves may help secure the EC's approval.

The transaction was notified to the EC on September 21, 2017 and entered into Phase II on November 8, 2017. In parallel, the EC carried out a separate state aid investigation and found that two loans granted to Ilva by the Italian government in 2015 were not compatible with EU's state aid rules and granted an undue benefit to Ilva. Italy is now under the obligation to recover about € 84 million from the company.³⁰



Noteworthy Phase I decisions

Innovation concerns

The EC's focus on innovation continued throughout 2017 and is prevalent in a number of Phase I decisions.

Smiths Group/Morpho Detection³¹

This case concerned the combination of two major manufacturers of threat detection equipment. The EC's concerns were focused on the parties' overlap in the development and manufacture of explosive trace detectors (ETD). ETDs detect and identify explosives and narcotics in very small quantities. The EC distinguished between an EEA market for ETDs used in regulated sectors (air transportation), and a worldwide market for other, non-regulated end uses, including ports and borders, critical infrastructure, military and emergency response services. A further segmentation between desktop and handheld devices was made for ETD for non-regulated uses.

The EC had concerns that the acquisition would result in higher prices and reduced innovation in the regulated and non-regulated markets, both of which were highly concentrated. The parties had combined market shares above 50%. In addition, internal documents and market participants indicated that the parties were close competitors. Remaining competitors faced high entry barriers and did not have any sufficient entry or expansion plans.

The most noteworthy aspect of the case concerns the way underlying innovation concerns played a role in the final outcome of the case: although not at the epicenter of the EC's analysis, these concerns had an impact on the design of an acceptable remedy package. Specifically, Smiths offered to divest Morpho Detection's global ETD business, thus removing the overlap entirely. In addition to that, the EC (in coordination with the DoJ) requested the parties to divest (a) the target's pipeline technology for ETD, as well as (b) R&D facilities and personnel. The EC required that the purchaser have an industrial background, in order to ensure that the purchaser would have the ability to develop new technologies and would be committed to pursuing R&D efforts. These elements were deemed necessary add-ons to ensure the near and long-term competitiveness and viability of the divested business, and help it keep pace with this dynamic and rapidly evolving sector.

The case is interesting on two additional counts. First, the competitive landscape changed during Smiths' informal pre-notification discussions with the EC. In an unexpected turn of events, Implant Sciences, the parties' main competitor for ETDs, sold its assets to rival L-3 and declared bankruptcy. Given the uncertainty, timing of the formal notification and EC review was aligned with the calendar of the bankruptcy proceedings and the subsequent merger review by the DoJ. This gave more clarity about L-3's plans for Implant Sciences' ETD business and allowed the EC to coordinate with the DoJ. The EC concluded that, at the time of its formal review, it was unclear whether L-3 would continue to compete as aggressively as Implant Sciences on the market for ETD supplied to air transportation end-users, and assessed the *Smiths/Morpho Detection* combination on that basis.

Second, in the absence of reliable data from the parties, the EC engaged in a market reconstruction exercise. Because of the concentrated nature of the market, it managed to collect data from all ETD suppliers (10 active and a few additional non-active suppliers), which enabled the calculation of precise market shares in the relevant markets and sub-segments. In fact, the market reconstruction exercise revealed that the parties were the only two significant players in the worldwide market for non-regulated desktop ETD, in which the parties considered that they had a combined share below 20%.

The transaction was notified on November 23, 2016 after a request for referral of the case to the EC and the approval decision was issued on January 19, 2017.

Johnson & Johnson/Actelion³²

This case concerned the acquisition of Swiss drug manufacturer Actelion Pharmaceuticals by Johnson & Johnson (J&J). The transaction did not give rise to overlaps between the parties' existing products; instead, the EC's concerns focused on the parties' overlap in R&D activities in treatments for insomnia.

The EC looked at the impact of the transaction on future competition from the parties' competing pipeline products. At the time, both companies were developing products in this area based on a novel mechanism of action. More specifically, J&J was co-developing with a third party, Minerva Neurosciences, a compound for the treatment of primary insomnia and depression (called JNJ-7922). Once developed, Minerva Neurosciences would commercialize it in the EEA and pay royalties to J&J. Actelion was developing a compound for primary and secondary insomnia (called ACT-541468).

The EC has traditionally performed pipeline-to-pipeline competition analysis in mergers between pharma companies. But two aspects of the *Johnson & Johnson/Actelion* case are noteworthy: the first one is that J&J would not acquire full control over both compounds following the transaction. Pursuant to the parties' merger agreement, Actelion's discovery and early-stage clinical development operations, including ACT-541468, would be spun off into a new company, Idorsia, in which J&J would acquire only a minority interest of up to 32%.

The second one is that both pipeline compounds were in Phase II of clinical development. For years, the EC took into consideration only pipelines that were at advanced stages of development (Phase III), as they were sufficiently close to commercialization to be considered likely entrants into the market. This approach changed in 2015 with its decision in *Novartis/GSK Oncology*, where the EC extended its review to earlier stages of development (Phases I and II). The EC applied this new approach in the case at hand.

The EC took issue with the potential reduction of R&D through a rationalization of the competing R&D programs following the transaction (in the form of delaying, terminating or redirecting of one of the two).

First, the EC noted that J&J could influence the development of both programs. For JNJ-7922, this was because it had the final decision-making authority with respect to product development and manufacturing. Despite owning only a minority stake, J&J could also *de facto* influence strategic decisions on the development of ACT-541468 because of the strong long-term economic and structural links created with Idorsia (in which it would hold a 32% stake). These links included a significant loan and credit facility, licenses of IP rights for Idorsia to operate its R&D business, and J&J's right to nominate up to two board members and thus access commercially sensitive information. Second, J&J would have every incentive to rationalize R&D: because the two pipelines competed directly, the sales of one product would risk cannibalizing the sales of the other.

The EC also found that remaining competition would be insufficient, as no other treatments with this novel mechanism of action were marketed in the EEA, and only a very limited number of products were in the development pipeline.

To secure the EC's approval, J&J offered to sever some of the links with Idorsia in order not to acquire influence over the global development of ACT-541468. Among other commitments, J&J agreed to limit its shareholding below 10% (or up to 16% provided that it is not the largest shareholder), and refrain from nominating any board member or getting commercially sensitive information on ACT-541468. Also, J&J offered to grant Minerva Neurosciences control over the global development of JNJ-7922 and waive its royalty rights on Minerva's sales in the EEA.

The transaction was notified on April 12, 2017 and the EC's conditional approval was issued on June 9, 2017.

BD/BARD (decision not published yet)³³

In this case, the EC approved medical device supplier Becton Dickinson's (BD) acquisition of US competitor Bard subject to significant divestitures. The EC's investigation focused on the overlaps in core needle biopsy devices and tissue markers. These are two types of devices used in biopsies for the diagnosis and treatment of serious medical conditions.

The EC had concerns that the acquisition would have eliminated a credible future competitor of Bard, and so was likely to reduce product choice and innovation in both markets. In the market for core needle biopsy devices, Bard and BD competed closely and faced limited competitive pressure. In the market for tissue markers, Bard was the market leader and BD was developing a tissue marker product that could potentially compete with Bard in the near future.

In order to address these concerns, BD committed to divest its worldwide core needle biopsy business, and the pipeline (development) projects related to core needle biopsy products and tissue markers.

The transaction was notified on August 30, 2017 and the EC's conditional approval was issued on October 18, 2017. The public version of the decision is not available yet.

Cases that raised media plurality concern

The EC has exclusive jurisdiction to assess the impact of transactions with "Community dimension" on competition in the EEA. However, Article 21(4) of the EU Merger Regulation enables Member States to take appropriate measures in order to protect other legitimate interests, such as media plurality. Review

on media plurality grounds typically assesses whether and how a merger would impact the diversity of viewpoints available and consumed across the media. Member States rarely exercise this option, but two high profile cases approved by the EC this year show that an EC approval on competition law grounds is not the only regulatory hurdle the parties have to overcome.

Vivendi/Telecom Italia³⁴

The EC approved Vivendi's acquisition of *de facto* control³⁵ over Telecom Italia (TIM) subject to remedies. Vivendi is a French media company active in the music, TV, cinema, video sharing and games industries. TIM is the Italian telecommunications incumbent. Vivendi held a significant non-controlling minority stake (29.9% of voting rights) in Mediaset, the largest broadcaster in Italy and owner of important network infrastructure. TIM had a stake in Persidera, a joint venture with Gruppo Editoriale L'Espresso.

Both Mediaset and Persidera provided wholesale access to networks for the transmission of digital terrestrial TV signals (DTT). Combined, they accounted for 50% of the available transmission capacity in Italy. The EC found that, post-transaction, Vivendi/TIM would have had an incentive to raise prices charged to TV channels for wholesale access to DTT. Vivendi/TIM would profit from such a strategy either directly through Persidera or indirectly via the minority shareholding in Mediaset (since TIM's lost profits from raising prices to TV channels would be recovered through Vivendi's minority shareholding in Mediaset). Other network operators active in the market did not represent a viable alternative for TV channels. Vivendi agreed to divest TIM's stake in Persidera, thus eliminating the overlap in the Italian DTT market.

During the EC's review, the Italian Communications Authority (Agcom) opposed the transaction on media plurality grounds on the basis that Vivendi would hold equity stakes exceeding 10% in both TIM and Mediaset following the transaction.

Italian media plurality rules are designed to prevent any one media company from having excess influence over the national public debate and political agenda. They prohibit companies accounting for a market share of more than 40% in the electronic communications sector from holding a market share of more than 10% in the media sector (consisting of press, audiovisual media and radio services, cinema, advertising and other activities). Agcom concluded that, following the transaction, Vivendi would be able to exercise significant influence on both Mediaset and TIM, and consequently attributed both TIM's and Mediaset's market shares to Vivendi. TIM held a share of 56% in the electronic communications sector, whereas Mediaset held a share of 13.3% in the media sector and was considered one of the leading companies in audiovisual media services.

On that basis, on April 18, 2017, Agcom found that Vivendi infringed the plurality rule and ordered it to remedy the violation within 12 months. Vivendi argued to the EC that compliance with Agcom's decision would have required divestiture of its shareholding in Mediaset, thus mooted the EC's concerns. The EC did not agree, given that (a) Agcom's decision was not final, and Vivendi had announced its intention to challenge it, and (b) Agcom did not specifically require the divestiture of Mediaset; instead, it was left to the parties to determine the appropriate remedy.

The transaction was notified on March 31, 2017 and the EC's conditional approval was issued on May 30, 2017.

Fox/Sky³⁶

Media plurality concerns also arose in relation to the *Fox/Sky* transaction, which the EC cleared unconditionally. Sky is the leading pay-TV operator in Austria, Germany, Ireland, Italy and the UK, with activities in TV channel broadcasting as well as fixed-line telephony and broadband services in the UK and Ireland. Twenty-First Century Fox (Fox) is one of the six major Hollywood film studios, with TV channel broadcasting activities. Together with its sister company News Corp., it is ultimately controlled by the Murdoch family.

The transaction resulted in limited overlaps in the acquisition of TV content (the demand side of broadcasting), the wholesale supply of basic pay-TV channels (the supply side of broadcasting) and the retail supply of TV services to end users (where Fox competed against Sky's pay-TV operations with a free-to-air channel). Despite the relatively high combined shares of the parties in these markets, the EC did not raise any concerns as the increments were very limited and sufficient competition would remain post-transaction. The EC also dismissed potential foreclosure concerns in the supply of content or pay-TV services to end consumers.

The transaction was notified to the EC on March 3, 2017 and the EC's clearance was issued on April 7, 2017.

Just two weeks into Phase I, on March 16, 2017, the UK Secretary of State for Culture, Media and Sport intervened and asked Ofcom, UK's communications regulator, to assess the effect of the merger on media plurality and the parties' commitment to broadcasting standards. Ofcom's report, issued on June 20, 2017, identified a risk of increased influence by members of the Murdoch Family Trust over the UK news agenda and the political process. The Trust holds interests in radio, television, print and online media.

Based on recommendations from Ofcom and the CMA (UK's antitrust authority), the Secretary of State issued a formal referral to the CMA for an in-depth (Phase II) investigation on public interest grounds.

In its January 2018 findings, the CMA provisionally concludes that Fox's proposed acquisition of Sky is not in the public interest due to media plurality concerns. According to the CMA, Sky News and the News Corp titles currently provide news to nearly a third of the population in the UK and have a combined share of consumption significantly greater than all other news providers, with the exception of the BBC and ITN. Following the transaction, the Murdoch Family Trust will be the only person with control of media enterprises across broadcasting, newspapers, online and radio platforms, thus having the ability to exert excessive influence over public opinion and the political agenda.³⁷

The CMA has until March 2018 to provide its final report to the Secretary of State, who will then decide whether or not the merger can proceed, and impose conditions if deemed necessary.

Other noteworthy conditional approvals

Lufthansa / Certain Air Berlin Assets³⁸ and EasyJet / Certain Air Berlin Assets³⁹

In the summer of 2017, Germany's second largest air carrier, Air Berlin, filed for insolvency and exited the market after several years of financial difficulties. The insolvency administrator appointed by the German government struck a deal to sell the majority of Air Berlin's assets to Lufthansa, the nation's incumbent air carrier, and the remainder to easyJet, a UK-based airline operating short-haul routes primarily in Western and Northern Europe.⁴⁰

The EC reviewed both transactions. While it cleared the easyJet acquisition unconditionally, Lufthansa's path to approval required significant concessions. In both cases, the EC focused on the potential impact on competition of Lufthansa's and easyJet's acquisition of slots at congested airports. This can result in higher barriers to entry or expansion for airlines wanting to operate to and from those airports, and in turn lead to higher fares for passengers.

The easyJet package included slots at Berlin Tegel airport and some destination airports, and other related assets. The EC concluded that the transaction would enable easyJet to grow its presence at Berlin airports and start competing on new routes to the benefit of consumers. EasyJet would continue to face strong competition from large carriers like Lufthansa and Ryanair on routes from and to Berlin. The accumulation of slots at congested airports, particularly in Berlin, was unlikely to have a negative effect on competition.

Lufthansa's initial acquisition proposal included airlines NIKI (an Austrian holiday carrier), LGW (a regional low-cost carrier) and additional Air Berlin aircraft, crew and slots in European airports. Early on in Phase I, the EC expressed concerns that the transaction could result in a *quasi*-monopoly on a large number of routes, as Air Berlin was Lufthansa's biggest competitor.

Following EC's warnings that the deal was geared for a Phase II review, Lufthansa pulled out of the NIKI purchase on December 13, 2017, only eight days before expiration of Phase I. A day later, NIKI grounded its operations and filed for insolvency, prompting the German government to state that it regretted "*the decision of the EC regarding NIKI*."⁴¹ EU Commissioner Vestager responded that the EC had forewarned the insolvency administrator of Air Berlin that Lufthansa's bid would face significant antitrust hurdles.

After NIKI had been excluded from the asset package, the EC concluded that the increase in Lufthansa's slot portfolio at Düsseldorf airport through the acquisition of LGW was likely to adversely affect competition. To secure approval, Lufthansa offered to reduce the number of transferred slots, such that its slot portfolio at the Düsseldorf airport would only increase by 1%.

Derogation from standstill obligation

The EC also allowed Lufthansa to derogate from the obligation not to close the transaction pending merger review ("standstill obligation"). It allowed Lufthansa to temporarily operate a number of Air Berlin aircraft pending review in order to prevent repossessions, flight cancellations and staff layoffs.⁴² In the past 10 years (2008-2017), the EC granted derogation in 25 cases, representing less than 1% of all notified transactions in the same period.⁴³

Lufthansa has reportedly appealed the EC decision granting a derogation from the standstill obligation in its takeover of Air Berlin's NIKI assets.

The two transactions were notified to the EC on October 31 and November 7, 2017 respectively. The EC's clearance of easyJet's acquisition was issued on December 12, 2017, and its conditional approval of Lufthansa's acquisition was issued on December 21, 2017.

Abbott Laboratories/Alere⁴⁴

The transaction combined two US-based manufacturers of medical diagnostics products. Both Abbott Laboratories and Alere make in vitro diagnostics (IVD) systems for clinical tests using blood, urine or other samples.

The EC raised horizontal and foreclosure-type concerns in two broad categories of IVD systems: (a) point of care systems, used in emergency rooms, hospital wards, ambulances and other near-patient settings;

and (b) laboratory systems used in hospitals and laboratories. The horizontal concerns arose as the parties' activities overlapped in a number of point of care IVD market segments for human and veterinary use. The transaction resulted in high combined market shares in those segments, reaching 70-80% in certain Member States. In addition, the EC's investigation indicated that the parties were significant players in the market, and their products competed closely.

The EC's foreclosure concerns were supported by a complaint from Danaher, a competitor to Abbott in laboratory IVD systems running so-called B-type natriuretic peptide (BNP) tests. Danaher relied on Alere for the manufacturing and commercialization of BNP reagents (consumables necessary to run tests on its IVD systems). On the basis of an exclusive contractual relationship, Danaher procured from Alere BNP antibodies, an essential input for the production of BNP reagents. Danaher manufactured the BNP reagents, and supplied them exclusively to Alere, which in turn commercialized them under its own brand. Danaher's systems are closed in that they cannot run tests on other BNP reagents. As Abbott competes with Danaher in laboratory IVD systems, the EC was worried that after the merger, Alere would have stopped selling BNP reagents for Danaher's systems, thus foreclosing the latter from the laboratory IVD market.

To allay these concerns, Abbott offered to divest three Alere business lines: the sale of two businesses, Epop and Triage, which eliminated the overlap in point-of-care IVD. In addition, Triage manufactures the BNP antibodies supplied to Danaher. The sale of Alere's BNP reagents marketing business eliminated the foreclosure concern. The EC required the buyers to be identified and approved up-front as condition to closing.

The transaction was notified on November 29, 2016 and the EC's decision was issued on January 25, 2017.

Maersk Line/HSDG⁴⁵

The proposed acquisition of the German container liner shipping company HSDG by Danish Maersk Line A/S would have combined number nine and number one container liner shipping companies globally. Container shipping companies offer services on trade routes through cooperation agreements with competitors, known as "*consortia*" or "*alliances*". Consortia members share vessels and decide jointly on important parameters of competition such as capacity, scheduling and ports of call.

The EC's concerns focused on five consortia in which HSDG (but not Maersk) participated, covering five trade routes which connected Europe and the Mediterranean with Central and South America. The EC concluded that the transaction would have created new links between Maersk and these five consortia, allowing the merged entity to influence key parameters of competition in the corresponding trade routes. Ultimately, the transaction would have hampered competition in these routes.

To address the EC's concerns, Maersk offered to terminate the participation of HSDG in the five consortia.

The transaction was notified to the EC on 20 February 2017 and the EC's conditional approval was issued on April 10, 2017. The public version of the decision is not available yet.

Noteworthy unconditional clearances

Siemens/Gamesa⁴⁶ and GE/LM Wind⁴⁷

In 2017, the EC cleared unconditionally two transactions in the wind power generation industry which ran almost in parallel and led to enforcement action on procedural grounds (see below Section 6).

The first transaction concerned Siemens' acquisition of wind turbine manufacturer Gamesa. The second concerned the acquisition of LM Wind, a Danish manufacturer of blades for wind turbines by General Electric (GE). While the first transaction resulted in horizontal overlaps, the second one was purely vertical in nature.

Siemens and Gamesa manufacture onshore and offshore wind turbines and various components (gearboxes and generators). The EC's investigation focused on the EEA offshore wind turbine market, where only five suppliers were active, with Siemens and MHI Vestas being the leading players. Gamesa sold offshore wind turbines through Adwen, formerly a 50/50 joint venture with Areva, which Gamesa acquired 100% in order to complete the deal with Siemens.

Apart from high levels of concentration, the wind turbine market also has a number of other characteristics. In particular, the suppliers' competitiveness is determined by three aspects, also described as "bankability": technology, track record and a solid balance sheet. Another characteristic is its highly dynamic nature and the technological trend towards higher output turbines.

The EC received a number of complaints from market participants claiming that the transaction would reduce offshore turbine competition. However, the EC's investigation did not verify these allegations despite combined shares in excess of 50% and Siemens' leading position in the market. Siemens was losing share to MHI Vestas, which had introduced a 8MW turbine. Adwen was not a competitive constraint on Siemens, and more generally was viewed as a weak competitor, whose "bankability" could no longer be supported by its main investor to the JV (Areva). Last, as Adwen (unlike Siemens) was not developing a higher output turbine, it would be unable to follow the industry trend towards 10MW+ turbines. The EC thus concluded that Adwen's window of opportunity was closing in the EEA.

After protracted pre-notification discussions, the transaction was notified on February 6, 2017, and the EC's clearance was issued on March 13, 2017.

In *GE/LM Wind Power*, the EC assessed in detail whether the transaction would result in foreclosure of competitors either on the upstream market for wind turbine blades or on the downstream markets for onshore and offshore wind turbines.

The EC concluded that the transaction did not entail such risks overall: in the upstream market, although LM Wind had a significant market share in blades in the EEA, its position had been declining in the past few years, whereas LM Wind's main competitor, TPI, had been gaining share. In the downstream market, GE had relatively small market shares in both onshore and offshore wind turbines, and faced significant competition from Siemens, MHI/Vestas, Nordex, Senvion and other manufacturers, who did not depend on LM Wind for blade supplies. The major manufacturers had their own in-house blade production capabilities. Even though LM Wind would have the ability to foreclose certain manufacturers, including Adwen, for which it manufactured blades for its 8MW offshore turbine, it would not have the financial incentives to do so.

The EC also dismissed concerns expressed from market participants in the course of the investigation that GE would have access to commercially sensitive information of its competitors through LM Wind. Cross-selling to competitors was customary in the industry, and GE had already put in place appropriate safeguards to prevent sharing of sensitive information of LM's customers.

The transaction was originally notified to the EC in January 2017, subsequently withdrawn, and re-notified on February 13, 2017. The EC's clearance was issued on March 20, 2017.

GE/Baker Hughes⁴⁸

The transaction concerned the acquisition of a 62.5% controlling stake in Baker Hughes by GE. Both parties were active in the provision of oilfield services to oil & gas exploration and production companies worldwide.

What is particularly interesting about this case is that a year earlier, Halliburton, a major oilfield service rival of the parties, had also attempted to acquire Baker Hughes. Its bid, however, would have combined the world's second and third largest oilfield services providers, and was met with strong opposition from both the EC and DoJ. The EC had expressed concerns that the deal would have hurt competition and innovation. Faced with these antitrust hurdles and a failing oil industry, Halliburton ultimately abandoned the deal in May 2016.

The EC's unconditional clearance of the *GE/Baker Hughes* combination is in stark contrast with the earlier outcome, mainly because GE was not among the oilfield service majors. The transaction resulted in overlaps and vertical links in a number of product and service markets. In particular, the EC investigated overlaps in electrical submersible pumps (ESP), inline inspection services, wireline tools and wireline logging services, sensors and drilling and wireline services, downstream and upstream chemicals, electric motors and cementing services, pressure transmitters and service data logging services, permanent downhole gauges and ESP sensors.

In the majority of overlap markets, the parties' market shares were moderate to high (in the 20-40% range). However, the EC did not raise concerns given that (a) the increment added by one or the other party was small; (b) there was strong competition from other players, some of whom had market-leading positions; and (c) the EC's market investigation did not identify any particular concerns: overall, customers confirmed that the markets were competitive and/or that they were able to switch to other suppliers, which they considered to be viable alternatives.

The EC's investigation also looked at vertical relationships between upstream products supplied by GE, in particular gamma and neutron sensors used in oilfield service applications, and downstream oilfield services such as drilling and cementing. The EC assessed whether GE could harm Baker Hughes' competitors by stopping, disturbing or otherwise restricting the supply of such sensors. Its closer scrutiny of these vertical ties was fueled by a complaint from Halliburton, a GE customer for gamma sensors. Despite GE's high shares and its importance as a gamma sensor supplier, the EC dismissed any concerns given (a) the existence of alternative suppliers and the ability of customers to switch suppliers; (b) the absence of capacity constraints in the industry; and (c) the feasibility of entry in the market.

NKT/ABB High Voltage Cable Business⁴⁹

This transaction involved the acquisition by NKT of ABB's high voltage power cable and cable accessories businesses. The EC cleared the transaction unconditionally. What is interesting about this case is the prior history of collusion in the industry. In 2014, the EC found that the main producers of high voltage power cables, including NKT and ABB, were involved in a cartel to allocate customers and markets. Asian producers who participated in the cartel had agreed to refrain from entering the European market. The entry of these producers in the European market following the EC's prosecution of the cartel was pivotal in the approval of the *NKT/ABB* combination.

The transaction was notified to the EC on January 23, 2017 and the EC's clearance was issued on February 27, 2017.



Increased procedural enforcement

Provision of incorrect or misleading information

The EC opened three investigations alleging that parties to merger proceedings provided or might have provided incorrect or misleading information. According to Art. 14 of the EU Merger Regulation, the EC may impose a fine of up to 1% of the notifying party's revenues for such an infringement.

Facebook⁵⁰

On May 17, 2017, the EC levied a € 110 million fine on Facebook for providing incorrect or misleading information in relation to the review and unconditional clearance of its acquisition of WhatsApp in 2014.

In the course of its review, the EC (prompted by a third-party complaint), had asked the parties whether it would be possible to match WhatsApp users' profiles automatically and reliably with those users' profiles on Facebook (and vice versa). In its notification and response to the EC's subsequent requests for information, Facebook stated that such cross-platform communication was not technically possible. However, in 2016, WhatsApp updated its terms of service and privacy policy, including the possibility of linking WhatsApp users' phone numbers with Facebook users' identities. Facebook informed the EC accordingly.

The EC considered that the information had been relevant to its assessment, as the ability to link accounts might help Facebook gain market power. It also considered that Facebook was aware of this, and was aware of the technical possibility to link the data. The information in the filing and in replies to a requests for information therefore was misleading.

Interestingly, the misleading information did not have an impact on the outcome of the EC's assessment. The EC's 2014 decision had included an "even if" assessment of the transaction that assumed user matching as a possibility. Yet, the EC imposed a hefty fine which it considered "*proportionate and deterrent*", for information that was only "*relevant*" for its analysis.

GE and Merck and Sigma-Aldrich (pending)⁵¹

Only two months later, the EC sent Statements of Objections to General Electric and Merck and Sigma-Aldrich on the same procedural grounds.

Gun-jumping

2017 also saw the EC taking action on allegations of gun-jumping in two cases. The common feature of both cases is that they concerned partial implementations of the respective transactions, as opposed to clear-cut situations of failing to notify a transaction that has already closed.

Altice/PT Portugal⁵³

The EC launched a formal investigation against French telecommunications company Altice in relation to the acquisition of PT Portugal. Altice had notified the EC of its plans to acquire PT Portugal, and obtained conditional approval on April 20, 2015.

The EC's preliminary view is that the merger agreement between the parties enabled Altice to exercise control over PT Portugal before notification and clearance of the transaction, and in certain instances, Altice actually exercised control over the target. According to Commissioner Vestager, *"[i]t appears that Altice had already been acting as if it owned PT Portugal. It seems that it gave instructions on how to handle commercial issues, such as contract negotiations. And it also seems to have been given sensitive information. Information that only PT Portugal's owner should have had - and without any safeguards to stop it misusing that information."*⁵⁴ What reportedly prompted the EC's investigation was news reports that executives from Altice had been visiting PT Portugal.⁵⁵ The EC's statement of objections (the formal charges sheet) was issued on May 17, 2017, the same day as its decision to fine Facebook.

Canon/Toshiba Medical System Corporation⁵⁶

Two months later, the EC sent a statement of objections to Canon for implementing its acquisition of Toshiba Medical System Corporation. The Japanese company had obtained the EC's unconditional clearance for the acquisition in September 2016.⁵⁷

The EC's preliminary view is that Canon partially implemented the transaction before even notifying the transaction to the EC, through the use of a "warehousing" two-step deal structure involving an interim buyer. As a first step, the interim buyer acquired 95% in the share capital of Toshiba Medical Systems for a nominal amount (€ 800), whereas Canon paid € 5.28 billion for both the remaining 5% and share options over the interim buyer's stake. This first step was carried out prior to notification to or approval by the EC. As a second step, following approval of the merger by the EC, the share options were exercised by Canon, acquiring 100% of the shares of Toshiba Medical Systems.

What is interesting about this case is that in its own guidelines, the EC mentions that it would treat "warehousing" structures as a single transaction and will disregard the first-step sale to the interim buyer.⁵⁸ In the case of Canon, however, the EC appears to be treating implementation of the first step as gun-jumping, even though the second step was not implemented before clearance.



Court Cases

Two important court defeats of the EC on procedural grounds

This year the EC suffered defeat before the GC in two merger cases. By way of background, appeals against EC merger decisions are infrequent. Moreover, the EC rarely loses on the merits of the case, as it is afforded a broad margin of appreciation on matters that involve complex economic analyses. But in both cases, the appellants managed to win on procedural grounds.

UPS v Commission⁵⁹

On March 7, 2017, the GC annulled the EC's prohibition decision against the proposed acquisition of TNT Express by UPS. The EC had blocked the proposed UPS/TNT Express transaction in January 2013, concluding that it would have restricted competition for express delivery of small packages in 15 Member States, by reducing the number of significant players to only 3 or 2, in some cases leaving DHL as the only alternative to UPS.

UPS appealed the decision claiming that its rights of defense had been breached. It argued that the EC's prohibition had relied on an econometric model that was presented to the parties only after the oral hearing of the case, i.e., at a very late stage of the administrative proceedings. UPS was not given the opportunity to rebut the model's findings.

The GC sided with UPS and annulled the EC's decision. In particular, it considered that UPS's right to a fair hearing required that the company should have been given the opportunity to make known its views on the truth and relevance of the alleged facts and circumstances, and on the documents used by the EC to support its claims. The EC made changes to the analyses previously discussed with UPS which were "*non-negligible*". In view of those changes, the EC should have communicated the final econometric analysis model to UPS before adopting the contested decision. By failing to do so, the EC infringed UPS' rights of defense: if UPS had had access to the final version of the econometric model, it would have been better able to defend itself.

This is considered a serious defeat for the EC that raises issues of procedural fairness. Director-General for Competition Johannes Laitenberger stated that, "*the Commission is committed to fully respect the parties' rights of defence, such as their right to be heard. [...] That is why we take the concerns underlying*

the UPS/TNT judgement very seriously. After careful analysis of the judgment, we decided to appeal it: we seek that the Court of Justice re-examines the ruling of the General Court and, if appropriate, develops and/or clarifies its legal doctrine."⁶⁰

The case is currently pending before the CJEU.⁶¹ In the interim, TNT Express has been acquired by FedEx. UPS has filed a claim for damages against the EC following the annulment of its decision.

KPN v Commission⁶²

On October 26, 2017, the GC annulled the EC's conditional approval of the acquisition of Dutch TV operator Ziggo by Liberty Global following an appeal from a third-party complainant. The EC has not appealed the GC's decision.

The EC had approved the combination in 2014 subject to remedies. During the EC's review of the transaction, rival pay-TV operator KPN complained about the risk of Liberty Global, foreclosing pay-TV operators' access to one of the only two premium pay-TV sports channels in the Netherlands. In its market definition, the EC defined premium pay-TV channels as a separate product market. However, it left open the possibility of a further segmentation between premium pay-TV film and sports channels, noting that even under this narrower segmentation, the EC's assessment of the proposed transaction would remain the same.

KPN challenged the approval decision before the GC claiming *inter alia* that the EC had failed to state the reasons for not carrying out a vertical effects analysis in the putative premium pay-TV channel market. The GC sided with KPN: the EC should have explained, at least briefly, the reasons why the proposed transaction did not raise any competition concerns, so as to enable the persons concerned to ascertain the reasons for that view, and the EU courts to exercise their power of judicial review. It reasoned that the EC was allowed to leave the definition of the relevant product market open only if it could "clearly and unequivocally" demonstrate that there would be no anti-competitive effect following the transaction under any plausible segmentation.

The ramifications of this decision remain unclear. It will probably mean that, going forward, the EC will need to elaborate its competitive assessment under all plausible segmentations of the relevant markets, especially when third parties complain about the transaction's adverse effects on narrower markets. The EC has not appealed the GC's decision before the CJEU.

Gun-jumping issues

Marine Harvest v Commission:⁶³ **watch out for acquisitions of significant minority stakes in publicly listed companies**

The GC upheld a 2014 EC decision which fined salmon farmer and processor Marine Harvest € 20 million for "jumping the gun" and acquiring *de facto* control of its rival Morpol prior to the EC's approval. The EC had found that Marine Harvest had acquired control of Morpol, a publicly listed company at the time, when it acquired 48.5% of the company's shares in December 2012. The stake was sufficient to give Marine Harvest a clear majority at the shareholders' meetings given the wide dispersion of the remaining shares and previous attendance rates. Crucially, Marine Harvest had not exercised its voting rights before clearance.

Marine Harvest challenged the fine, arguing *inter alia*, that the acquisition of the minority stake in December 2012 was exempted from the standstill obligation under Article 7(2) of the EU Merger Regulation

because it was conditionally linked to the subsequent public bid for the remaining shares of Morpol.⁶⁴ In other words, this was a single transaction composed of two stages, and the obligation to notify arose only at the time of the second stage of the public bid.

In its October 26, 2017 judgment, the GC dismissed Marine Harvest's arguments and upheld the imposed fine. It agreed with the EC's view that Marine Harvest had indeed acquired sole control of Morpol in December 2012. Neither of the two exemptions of Article 7(2) was applicable in this case, as the purchase of the 48.5% stake was neither a public bid nor a "series of transactions", because it was made through a single private transaction from just one seller. More importantly, the GC concluded that, although Marine Harvest refrained from exercising its voting rights in Morpol after the December 2012 acquisition, it formally had the *possibility* of exercising decisive influence, and that alone triggered the notification requirement to the EC.

***Ernst & Young P/S v Konkurrencerådet* (pending):⁶⁵ AG Wahl proposes a restrictive interpretation of gun-jumping**

This January, Advocate General N. Wahl delivered an opinion on a request for preliminary ruling on the interpretation of the standstill obligation under the EU Merger Regulation. The case springs from a dispute between E&Y and the Danish competition authority in relation to E&Y's acquisition of KPMG Denmark. Under the merger agreement, KPMG Denmark would terminate its cooperation with KPMG International, and the target did so before the authority's green light. The authority approved the transaction but took the view that the termination amounted to partial implementation of the transaction since it was (a) merger-specific and a step in the implementation of the EY deal, (b) irreversible, and (c) potentially had an impact on the market structure. It bears mention that the EC (intervening in support of Denmark) has argued in favor of a case-by-case analysis instead of detailed pre-determined criteria.

According to AG Wahl, a measure will amount to gun jumping only if it contributes to the change in control effectuated by the merger. Conversely, merely preparatory acts that precede and are severable from the measures actually leading to the change of control are outside the scope of the standstill obligation. In other words, the mere fact that a measure is taken in connection with a merger is not sufficient to qualify it as gun-jumping, as long as it is not intrinsic to the change of control. In AG Wahl's view, whether the measure is irreversible in itself or has an impact on the market are irrelevant criteria. On that basis, AG Wahl opined that although the termination was a prerequisite for the EY/KPMG Denmark merger to take effect, it was not inextricably linked to the transfer of control between KPMG and E&Y.

Overall, AG Wahl's opinion recommends a significantly narrower interpretation of the standstill obligation than that applied by the Danish competition authority in this case, and the EC has argued for. Notably, AG Wahl observes that, while the standstill obligation might be useful, it would seem excessive to classify it as an "indispensable tool for merger control."

This is the first time the CJEU will rule on the interpretation of standstill obligation under the EUMR. If the opinion is followed by the Court, it will likely curb the EC's and national authorities' appetite for increased enforcement action in this area.

***Austria Asphalt v Bundeskartellanwalt*:⁶⁶ important guidance on the application of EU Merger Regulation in joint ventures**

On September 7, 2017, the CJEU ruled that a change from sole to joint control over an existing business only needs to be notified to the EC under the EU Merger Regulation if the resulting joint venture meets

the criteria of “full-functionality”, i.e., performs all the functions of an autonomous economic entity on a lasting basis.

In the case at hand, an asphalt plant in Austria belonged exclusively to a construction company. The plant was not “full-functional” because its production was intended for the parent group. Austria Asphalt sought to acquire joint control together with the original owner of the plant. The plant would continue to supply most of its production to the original parent and Austria Asphalt, and thus would lack full-functionality also under joint ownership.

The judgment was issued following a request for preliminary ruling from the Austrian Supreme Court, and settles an unclear point under EU law. Even though the creation of a new jointly controlled business is subject to the EC’s approval under the EU Merger Regulation only when it is “full-functional”, it was not clear whether the transition from sole to joint control over a pre-existing business was subject to the same full-functionality test.

The CJEU ruled that a joint venture is notifiable only if it “*performs on a lasting basis all the functions of an autonomous economic entity*”; in other words, if it is an independent player in the marketplace. According to the judgment, the purpose of the EU Merger Regulation is to ensure that changes in the control of undertakings do not result in permanent damage to competition in the internal market. In this context, a change from sole to joint control is not a notifiable transaction if the target business does not meet the full-functionality criteria.

The CJEU’s judgment clarifies an important point of uncertainty in the EC’s decisional practice. It remains to be seen whether the EC will revise its own guidelines.

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Endnotes

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- 4 Senator Elizabeth Warren, *Reigniting Competition in the American Economy*, Keynote Remarks at New America's Open Markets Program Event June 29, 2016, available at https://www.warren.senate.gov/files/documents/2016-6-29_Warren_Antitrust_Speech.pdf
- 5 European Parliament resolution of 14 February 2017 on the annual report on EU competition policy (2016/2100(INI)), at para. 174.
- 6 Massimo Motta, CRA Annual Brussels Conference, December 12, 2017.
- 7 Professor Tommaso Valletti, *Concentration trends in Europe*, CRA Annual Brussels Conference, December 12, 2017. The presentation is available at https://ecp.crai.com/wp-content/uploads/2017/12/Valletti-Concentration_Trends_TV_CRA-002.pdf
- 8 Speech of Director-General for Competition Johannes Laitenberger, The many dividends of keeping markets open, fair and contestable, International Competition Law Forum St. Gallen, April 27, 2017.
- 9 Speech of Commissioner for Competition Margrethe Vestager, *Fairness and competition*, GCLC Annual Conference, Brussels, January 25, 2018.
- 10 APKS Advisory, EU Commission Proposes a Framework for Screening Foreign Direct Investments into the EU, September 29, 2017, see <https://www.apks.com/en/perspectives/publications/2017/09/eu-commission-proposes-a-framework-for-screening>
- 11 COMP/M.7932 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7932)
- 12 The EC's concerns were partially fueled by some unfortunately worded internal documents playing with the idea of discontinuation of a pipeline product following the merger, that the EC attributed very high probative value to.
- 13 COMP/M.8435 (see http://europa.eu/rapid/press-release_IP-17-2182_en.htm)
- 14 COMP/M.7962 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7962).
- 15 COMP/M.8084 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8084).
- 16 COMP/M.8306 (see http://europa.eu/rapid/press-release_IP-18-347_en.htm)
- 17 http://europa.eu/rapid/press-release_IP-17-3481_en.htm
- 18 COMP/M.7995 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7995).
- 19 COMP/M.7878 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7878).
- 20 Case T-380/17 – HeidelbergCement and Schwenk Zement v Commission (pending)
- 21 Cases T-902/16 – HeidelbergCement v Commission and T-907/16 – Schwenk Zement KG v European Commission, Order of the General Court (Eighth Chamber) of November 27, 2017.
- 22 COMP/M.7095 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7095).
- 23 COMP/M.8222 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8222).
- 24 http://europa.eu/rapid/press-release_IP-17-5386_en.htm
- 25 http://europa.eu/rapid/press-release_IP-17-3984_en.htm
- 26 http://europa.eu/rapid/press-release_IP-17-4485_en.htm
- 27 The EC has also carried out a separate state aid investigation to assess whether Italian government support for Ilva contravened EU state aid rules. On December 21, 2017, the EC found that a state guarantee on a €400 million loan and a €300 million public loan granted in 2015 to keep the company afloat constituted illegal state aid, and ordered the Italian government to recover € 84 million from the company. See http://europa.eu/rapid/press-release_IP-17-5401_en.htm.
- 28 https://ec.europa.eu/growth/sectors/raw-materials/industries/metals/steel_en
- 29 Communication from the Commission to the Parliament, the Council, the European Economic and Social Committee and the Committee of Regions, Action Plan for a competitive and sustainable steel industry in Europe, COM/2013/0407 final.
- 30 http://europa.eu/rapid/press-release_IP-17-5401_en.htm
- 31 COMP/M.8087 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8087_2149_3.pdf)
- 32 COMP/M.8401 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8401_740_3.pdf)
- 33 http://europa.eu/rapid/press-release_IP-17-4024_en.htm
- 34 COMP/M.8465 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8465_568_3.pdf)
- 35 Vivendi progressively acquired a participation of 23.93% in TIM and at the last shareholders' meeting before notification, it was in a position to appoint the majority of TIM's Board of Directors. TIM's shareholding was widely dispersed (no other shareholder held more than 5%). Apart from Vivendi, there was no other industrial shareholder having a significant stake in TIM; the next largest shareholders were financial investors that were deemed unlikely to have in-depth knowledge of the markets where TIM was active. On that basis, the EC concluded that Vivendi had acquired de facto control over TIM.
- 36 COMP/M.8354 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8354_920_3.pdf)
- 37 https://assets.publishing.service.gov.uk/media/5a71fe2be5274a7f9c5862d4/provisional_findings_report.pdf
- 38 COMP/M.8633 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8633_2370_3.pdf)
- 39 COMP/M.8672 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8672_673_5.pdf)
- 40 While negotiations were ongoing, the German government provided a € 150 million temporary bridging loan to keep Air Berlin afloat. The EC cleared the loan under the EU state aid rules for rescue and restructuring aid in September 2017. See http://europa.eu/rapid/press-release_IP-17-3083_en.htm.

- 41 See <https://www.bundesregierung.de/Content/DE/Pressemitteilungen/BPA/2017/12/2017-12-13-erklaerung-airberlin-tochter-niki.html>
- 42 COMP/M.8633 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8633_1376_4.pdf)
- 43 T-1/18 - *Deutsche Lufthansa v Commission* (pending)
- 44 COMP/M.7982 (see http://ec.europa.eu/competition/mergers/cases/decisions/m7982_2118_3.pdf)
- 45 http://europa.eu/rapid/press-release_IP-17-904_en.htm
- 46 COMP/M.8134 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8134_807_3.pdf)
- 47 COMP/M.8283 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8283_596_7.pdf)
- 48 COMP/M.8297 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8297_1485_3.pdf)
- 49 COMP/M.8239 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8239_331_3.pdf)
- 50 COMP/M.8228 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8228_493_3.pdf). The original EC decision providing unconditional clearance was issued in 2014, COMP/M.7217 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7217)
- 51 http://europa.eu/rapid/press-release_IP-17-1924_en.htm
- 52 COMP/M.7435 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7435)
- 53 http://europa.eu/rapid/press-release_IP-17-1368_en.htm
- 54 Speech of Commissioner for Competition Margrethe Vestager, *Competition and the rule of law*, Romanian Competition Council Anniversary Event, Bucharest, May 18, 2017.
- 55 *Idem*.
- 56 http://europa.eu/rapid/press-release_IP-17-1924_en.htm
- 57 COMP/M.8006 (see http://ec.europa.eu/competition/mergers/cases/decisions/m8006_241_3.pdf)
- 58 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings (2008/C 95/01), para. 35.
- 59 Case T-194/13 – *United Parcel Service, Inc. v Commission*, Judgment of the General Court of March 7, 2017.
- 60 Speech of Director-General for Competition Johannes Laitenberger, *EU competition law in innovation and digital markets: fairness and the consumer welfare perspective*, Brussels, October 10, 2017.
- 61 Case C-265/17 P - *Commission v United Parcel Service* (pending)
- 62 Case T-394/15 – *KPN v Commission*, Judgment of the General Court of October 26, 2017.
- 63 Case T-704/14 – *Marine Harvest ASA v. European Commission*, Judgment of the General Court of October 26, 2017.
- 64 Pursuant to Article 7(2) of the EU Merger Regulation, the standstill obligation does not apply if a party (a) acquires control of a company through a public bid or (b) acquires shares in a series of transactions from various sellers – so long as the transaction is notified without delay and the voting rights attached to the acquired shares are not exercised or only exercised after a formal derogation is obtained from the EC.
- 65 Case C-633/16 - *Ernst & Young P/S v Konkurrencerådet*, Request for a preliminary ruling from the Sø- og Handelsretten (Denmark) lodged on December 7, 2016.
- 66 Case C-248/16 – *Austria Asphalt GmbH & Co OG v Bundeskartellanwalt*, Judgment of the Court (Fifth Chamber) of September 7, 2017.