2015 Year in Review – EU Merger Control

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Last year marked the 25th anniversary of European Union (“EU”) merger policy, which came into force on September 21, 1990, and the first year in office for new Competition Commissioner Margrethe Vestager.

So far, there have been no prohibition decisions under Commissioner Vestager, but two transactions - Telenor/TeliaSonera and Mondi/Walki Assets - were abandoned in the midst of a Phase II review following serious concerns raised by the European Commission (“EC”). Also, we have seen a marked increase in the number of Phase II investigations, with the highest number of Phase II investigations (11) being opened since 2007 and the highest number of conditional Phase II decisions (7) since 2001. In its merger decisions, press releases and public statements, the EC has put more emphasis on the need to preserve innovation, which has affected both its substantive analysis and the crafting of remedies.

We continue to see a trend towards longer and more data-intensive investigations, including several months’ suspension of a number of merger investigations for incompleteness of the formal filing, and increasingly long Phase II investigations.

At the same time, there has been a marked increase in the frequency and intensity of multilateral cooperation between the EC and foreign antitrust agencies. In almost two thirds of complex cases last year, the EC cooperated with several jurisdictions globally - including Australia, Brazil, Canada, China, Israel, Japan, South Africa, Switzerland, and the United States. Needless to say that apart from the effect on timing, this can significantly impact substance and remedies discussions and requires careful coordination by the notifying parties with the several agencies involved.

Noteworthy also in this respect is the Best Practices Framework for Cooperation in the Review of Mergers that the EC agreed with China’s Ministry of Commerce (“MOFCOM”) on October 15, 2015. Similar to framework agreements previously concluded with other countries, this enables both authorities to communicate during the review process on topics such as the definition of relevant markets, competitive impact assessments, theories of harm and remedies. It also foresees that both agencies “may, where necessary, coordinate information requests to the merging parties and third parties, including exchanging draft questionnaires”.

Last year again saw a proportionally high number of telecom cases and some public statements by Commissioner Vestager which - arguably - may indicate a stricter stance on remedies involving mobile virtual network operators (“MVNO”) and on efficiencies arguments. Meanwhile, the EC continues to refuse requests by Member States (three in 2015) for a downward referral of transactions filed at the EU level. Amongst the cases investigated, the Orange/Jazztel Phase II case is a rare example of a so-called “gap” case in substantive EC merger analysis.

Finally, there was a high rate of EC intervention in life sciences cases, with the sector accounting for more than a third of conditional Phase I clearances, but no Phase II investigations.

This report is based on publicly available versions of merger decisions (not all of them being available at the time the authors published this article), official press releases, and public speeches by DG COMP officials.
2015 Summarized in Statistics

- 337 transactions notified (11% increase)
- 305 decisions adopted on substance (6% increase)
- 222 simplified proceedings decisions (73% of decisions adopted)
- 62 unconditional Phase I decisions (in total, 93.5% of decisions were unconditional)
- 13 conditional Phase I decisions (compared to 12 in 2014)
- 11 Phase II investigations opened (compared to 8 in 2014, highest since 2007)
- 1 unconditional Phase II decision (compared to 2 in 2014)
- 7 conditional Phase II decisions (compared to 5 in 2014)
- 1 no jurisdiction decision (as in 2014, none between 2003-2013)
- 1 refusal to accept a request for referral to the EC of a transaction that did not have a Community dimension
### PRSfM/STIM/GEMA/JV

This transaction concerned the creation of a joint venture—by three national music collecting societies (from the UK, Germany, and Sweden, respectively)—for the provision of multi-territorial online music licensing and copyright administration services. Collecting societies manage the copyrights of authors, performers, and writers of musical works, grant licenses on their behalf, and collect the revenues derived from the exploitation of their copyrights. The joint venture would provide licenses for the combined music repertoire of PRSfM, STIM, and GEMA on a multi-territorial basis (i.e., for use in several countries). In addition, it would provide copyright administration services to collecting societies (including its parents) and to so-called “Option 3 publishers” (large music publishers that have started to license some of their rights directly instead of licensing through collecting societies). The services included the collection and processing of royalties from online platforms and the provision of database services.

Commissioner Vestager noted that “the proposed joint venture would make it easier for online music platforms such as iTunes, YouTube or Deezer to get the licences they need to offer cross-border music services to consumers” and the investigation found that the joint venture would not be able to charge higher royalties—hence, she saw no issue with the joint licensing.

The EC did, however, raise concerns about the joint provision of copyright administration services. It was concerned that PRSfM would be able to force Option 3 publishers or their service providers to only use the joint venture’s copyright administration services, rather than sourcing these services from a third party. The EC found that the joint venture, providing a new multi-territorial service, would be able to stifle competition from other emerging forms of co-operation offering copyright administration services by bundling its services or making it difficult for customers of its database services to take their data to a competitor. In this respect, the EC conducted a detailed analysis comparing significant existing barriers to entry with barriers to entry and expansion resulting from the proposed transaction.

Interestingly, the EC also looked at the concern expressed by some third parties regarding the possible exchange of commercially sensitive information through the JV but concluded that it would not impede effective competition.
To address the EC's concerns, PRSfM committed not to use its control over the performing rights that it manages to force Option 3 publishers or their service providers to purchase copyright administrative services from the joint venture. The joint venture would offer its copyright administration services on a FRAND basis (when compared to the terms offered to its parents). In addition, it would not enter into exclusive agreements with customers for copyright administration services other than database services. Finally, the joint venture would also facilitate the switching of collecting societies relying on its copyright database to a competitor's database services and allow them to terminate their contract with the joint venture for these services at any time.

The case was notified on November 28, 2014 and the EC's decision was issued on June 16, 2015.

- **Liberty Global/Corelio/W&W/De Vijver Media**

  This case concerned the acquisition by U.S. company Liberty Global, through its Belgian subsidiary, cable company Telenet, of joint control over De Vijver Media Company together with the company's existing Belgian shareholders, Corelio and W&W.

  The EC had concerns that, post-transaction, De Vijver would refuse to license its Vier and Vijf channels to TV distributors that compete with Telenet, itself a TV distributor. This would be an issue, as the EC found that in Flanders and Brussels De Vijver's Vier and Vijf channels were a must-have for these TV distributors and that it would be profitable for Telenet and De Vijver to withhold Vier and Vijf from these competitors. The EC also investigated whether the transaction would give Telenet the incentive to remove the channels of Medialaan and VRT, two broadcasters competing directly with De Vijver, from its platform. The EC concluded that this would not be a profitable strategy for Telenet as it would make its offer less attractive and lead to a loss of subscribers.

  During the Phase II investigation, the notifying parties entered into agreements with certain TV distributors to license Vier and Vijf and to extend existing license agreements with others. This partly addressed the EC's concerns, which also required the parties to commit for a duration of 7 years to offer to license under FRAND terms to any interested TV distributor in Belgium: (a) the channels Vier and Vijf; (b) any new basic Pay TV channel that De Vijver may launch in the future; and (c) linked services.

  The case was notified on August 18, 2014 and the EC's decision was issued on February 24, 2015.

- **Zimmer/Biomet**

  (not yet published) — This transaction combined two of the five leading manufacturers of orthopedic implants, both U.S. companies. The parties had significant combined shares for partial knee implants in a large number of EU Member States - i.e., above 50% and up to 90%, with increments of up to 40%. In order to address the EC's concerns, Zimmer accepted to divest its own knee-implant business and Biomet's elbow-implant business across the EEA, as well as Biomet's knee-implant business in Denmark and Sweden.

  In defining the relevant product markets, the EC looked separately at knee implants, elbow implants and hip implants. Geographically the EC defined national markets, as in prior cases, on the basis of the existence of different reimbursement systems, hospital purchasing patterns and a need for a local sales force. The EC conducted an investigation into 500 affected national markets and identified 31 markets in which the merger would either create or strengthen a dominant position.

  The EC worked closely with the U.S. Fair Trade Commission and the Japan Fair Trade Commission, which were conducting parallel investigations into the transaction. For the EC, the case “is a good example of competition agencies working together early on in the process with a view to identifying potential risks of inconsistent remedy implementation outcomes and possible ways to avert these”.
Apparently, the parties had initially considered a global remedies package and some of the potential purchaser candidates might have raised *prima facie* competition concerns in the EEA and/or the U.S. Ultimately, the parties proposed different buyers for the U.S. and EEA divestment businesses.

The case was notified on August 29, 2014 and the EC’s decision was issued on March 30, 2015.

**Siemens/Dresser-Rand**

This transaction is the only one that the EC approved in 2015 after a Phase II review without imposing remedies. It concerned the proposed acquisition of rotating equipment manufacturer Dresser-Rand by Siemens. The products at issue were turbo compressors, the engines that drive these compressors (“drivers”), and the combination of a turbo compressor with a driver (“turbo compressor train”). Turbo compressor trains are used, amongst others, in the exploration and production of oil and gas, their transport and storage, as well as for the refining and production of various oil and gas products. They can be driven by aero-derivative gas turbines (“ADGT”), industrial gas turbines (“IGT”), steam turbines and electric motors.

The EC’s initial investigation had indicated that serious concerns existed with respect to (i) ADGT driven compressor trains, where the transaction would reduce the number of competitors from three to two main suppliers - Siemens/Rolls-Royce/Dresser-Rand and General Electric, and (ii) small steam turbines below 5 megawatts (“MW”), where post-transaction Siemens and Dresser-Rand would face competition from few competitors with limited presence and which would not pose a significant competitive constraint on the parties.

However, upon further examination, the EC excluded both concerns.

With respect to ADGT driven compressor trains, the investigation showed that the activities of Dresser-Rand and Siemens were largely complementary because (i) they largely focus on different oil and gas applications; and (ii) the parties rarely bid against each other. In addition, the EC’s in-depth investigation showed that ADGT driven compressor trains are largely substitutable with light (below 23 MW) IGT driven compressor trains, where Solar was the market leader and Siemens had a limited offering, thus leaving three, instead of two, competitors post-transaction.

With respect to small steam turbines below 5 MW, the in-depth investigation showed that the two companies are not close competitors, as their activities are largely complementary, and, in addition, that a number of smaller competitors were, and would remain, active in this field with capacity to expand their production.

The case was notified on January 9, 2015 and the EC’s decision was issued on June 29, 2015.

**General Electric/Alstom**

This transaction attracted much media attention in 2015 due to the intervention of the French government in the sale of Alstom’s energy branch to GE. On substance, the EC raised concerns in relation to heavy duty gas turbines about which it concluded that the merged entity would account for more than 50% of the EEA market and bring together two of the three main competitors.

The EC alleged that Alstom was a significant and close competitor of GE and Siemens in the technologically most advanced large and very large heavy duty gas turbines segments, both from a technological and a commercial point of view, especially in the EEA. The EC argued that its economic analysis of bids for heavy duty gas turbine tenders over the last five years showed that there was significant competitive interaction between the bids by GE and Alstom and a risk of price rises.

In addition, it considered that the transaction risked eliminating an important innovator arguing that Alstom’s heavy duty gas turbine technology was one of the most advanced, flexible, and cleanest
available, particularly well-suited to meet European customers’ requirements for operational flexibility. It was concerned that post-transaction certain Alstom heavy duty gas turbine models would be discontinued, and that the newly developed and most advanced model (GT 36) would not be commercialised.

The EC also raised concerns that post-transaction competition would be eliminated from Alstom’s servicing subsidiary Power System Manufacturing (PSM) for the servicing of certain GE heavy duty gas turbines.

To address these concerns, GE agreed to divest Alstom’s most recent heavy duty gas turbines technology, including engineers and testing facilities, as well as a number of existing service contracts to an upfront buyer, Ansaldo. GE also agreed to divest Alstom’s PSM servicing business.

The case was notified on January 19, 2015 and the EC’s decision was issued on September 8, 2015.

**DEMB/Mondelēz/Charger Opco**

— This case concerned the creation of a joint venture to create the largest stand-alone coffee company, combining the coffee businesses of DEMB and Mondelēz, including all coffee formats: roast & ground, soluble and single-serve machine consumables (soft pads for DEMB’s Senseo, T-discs for Mondelēz’s Tassimo and capsules compatible with Nestle’s Nespresso).

The EC’s investigation concerned overlaps in roast & ground in certain national markets, and the impact of the transaction on competition for single-serve coffee systems. Neither DEMB nor Mondelēz manufactured or sold coffee machines directly, but they worked closely with the manufacturers of coffee machines - e.g., DEMB owned the Senseo brand under which the Philips machines are sold and Mondelēz owned the Tassimo brand under which the BSH machines are sold. The EC found that the coffee companies were able to influence the retail price paid for Senseo and Tassimo coffee machines and their penetration through promotional support (e.g., offering coupons, cash-backs or free consumables). It also found that the parties had a clear incentive to increase the level of penetration of the machines that used their pads and capsules, as greater machine uptake in turn increased sales of compatible consumables. Due to the strong indirect involvement and interest of coffee manufacturers in the sales of machines, the EC concluded that competition takes place not only within the consumables and machines markets separately but also at system level.

In its analysis of this primary market, the EC first looked at closeness of competition between single-serve coffee machines and, in particular, whether Senseo and Tassimo were a stronger constraint on each other than competing systems. An assessment of internal documents, evidence of consumer preferences and views of market participants showed that Senseo and Tassimo were not each other’s closest competitors. The EC also found that the combination of Senseo and Tassimo through the proposed joint venture would not lead to loss of competition enabling the merged entity to increase prices of single-serve coffee machines. It concluded, therefore, that no issue arose in relation to these machines.

The EC did, however, have concerns with the parties’ overlaps in (a) the supply of soft pads for Senseo machines in Austria and in France (Senseo being an “open” system), and (b) the supply of roast & ground coffee in France, Denmark and Latvia.

In response to the EC’s various concerns, the parties revised their initial commitments and offered to sell Mondelēz’s Carte Noire business (to address both the coffee and the Senseo pads issues in France), and DEMB’s Merrild business (to address the coffee issue in Denmark and in Latvia). The parties also agreed to license the Senseo brand for five years for use in connection with soft pads and Nespresso-compatible capsules. This will be followed by a five-year period during which neither the

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joint venture nor the purchaser would be able to use the Senseo brand in Austria for such purposes (to address the Senseo pad issue in Austria).

The case was notified on October 27, 2014 and the EC’s decision was issued on May 5, 2015.

- **Cargill/ADM Chocolate Business** (not yet published) — This case involved two of the three major vertically integrated suppliers of industrial chocolate in Europe. Industrial chocolate is an intermediary product which is used as an input for end-consumer chocolate products (e.g., chocolate bars and tablets).

The EC concluded that the transaction would reduce competition in the already concentrated market for industrial chocolate and that it risked increasing prices and reducing choice for customers located near the parties’ German plants, where their combined share exceeded 55% and where the market was found to be highly concentrated. The EC rejected the parties’ argument that post-transaction the increase in capacity by competitors would constrain any price increase by the merged entity.

Key to the EC’s assessment was whether competition took place at national, regional or EEA-wide level. For this, the EC conducted an extensive market reconstruction exercise. This showed that industrial chocolate was sold over relatively short distances (less than 500-550km) and that cross-border purchases were limited. The EC used actual transaction-level data from the parties and from third parties to reconstruct market shares at national level and around groups of customers and plants. It is worth noting that market reconstruction is not feasible in all transactions, as it requires that products be homogeneous enough, a limited number of competitors, and the active cooperation of competitors. In addition to the market reconstruction, the EC also conducted a detailed competitive assessment, looking in particular at any future capacity expansion and new entry into the market.

The EC eventually cleared the transaction conditionally upon the divestment of the ADM plant in Germany. The case also involved strong vertical links but the EC concluded that these did not give rise to competition concerns.

The case was notified on January 19, 2015 and the EC’s decision was issued on July 17, 2015.

- **Orange/Jazztel** — This case concerned a four-to-three merger in the fixed telecommunication services in Spain, including internet access services, and is a rare so-called “gap case” in substantive merger control assessment. Although the merged entity would not be in a dominant position and coordinated effects would not arise, the EC was concerned that the transaction would lead to a significant loss of competitive pressure for fixed internet access services and fixed-mobile multiple play offers. Its concern arose from its findings that the parties were the two most dynamic operators in the market and that they would have lower incentives to compete aggressively post-transaction. In addition, the remaining major competitors would have been unlikely to replace the competitive pressure formerly exercised by Orange and Jazztel because they would have stood to benefit from the reduced price pressure. Moreover, barriers to entry were high and consumers would have no countervailing buyer power.

In looking at market definition, the EC first looked at whether multiple play offers (i.e., offers combining two or more of fixed voice services, internet access services, mobile voice services, and/or TV services) constitute one or separate product markets (in previous cases, the EC had left open whether multiple play services formed a market separate from the markets of the individual components). Possible multiple play services markets could be a general market for all multiple play products, individual markets for dual-, triple- or quadruple- play products, or combinations thereof. However, the EC
ultimately left the market definition open since the transaction gave rise to concern regardless of the precise market definition.

Another noteworthy point is that the EC endorsed the parties’ efficiency claim regarding the elimination of double margin since Jazztel would not have to pay Orange for wholesale access to its mobile network post-transaction. The EC did find, however, that the accepted efficiencies only marginally offset the estimated anti-competitive effects of the merger and, as such, were not sufficient to take away the loss of competition caused by the merger. The EC also examined the parties’ claim that the transaction would increase the parties’ roll-out of its Fiber-to-the-Home (“FTTH”) network, thus creating a further efficiency. However, after a forward-looking analysis of this argument, the EC rejected the claim.

To address the EC’s concerns, the parties offered commitments based on two different technologies. They agreed to divest an independent FTTH network (optical fiber) similar in size to Orange’s pre-merger FTTH network in Spain and to give the purchaser wholesale access to Jazztel’s national ADSL network (copper) for up to eight year so as to replicate the effects of a divestiture as closely as possible. In addition, should the purchaser not have wholesale access to a mobile network including 2G, 3G and 4G services, Orange would provide such wholesale access on terms at least equal to the terms it had granted to Jazztel.

The case was notified on October 16, 2014 and the EC’s decision was issued on May 19, 2015.

**Noteworthy Phase I Decisions**

- **Novartis/GSK’s Oncology Business**— This acquisition was part of a three-part inter-conditional deal between Novartis and GSK, which also included the acquisition by GSK of Novartis’ global human vaccines business (except for the influenza vaccines business) and the creation of a new venture, controlled by GSK, combining the parties’ global consumer health businesses. The EC’s decision is interesting in three respects.

  First, it was noteworthy with respect to the way it assessed closeness of competition between the parties’ drugs for the treatment of kidney cancer. Whilst the market investigation indicated that GSK, Novartis, and Pfizer were the undisputed market leaders in this area, a closer inspection showed that the parties’ treatments were not each other’s closest competitors, in particular when looking at lines of treatment (first versus second - and later - line(s) of treatment).

  Second, to assess the impact of the transaction on competition in innovation, the EC extended its analysis of pipeline products beyond those that are in advanced stages of development (i.e., Phase III). Both GSK and Novartis were conducting early-stage clinical trials (Phase I and Phase II) regarding the use of B-Raf and MEK inhibitors for the treatment of a number of cancers. Besides the parties, Roche was the only other competitor with an alternative pair of B-Raf and MEK inhibitors. The EC concluded that the transaction would have lessened competition in innovation by curtailing the parties’ R&D efforts given the likely risk that one of the parties’ clinical research programs would be abandoned.

  Third, the design of the remedy was complex, as it involved third-party rights. Novartis’ MEK inhibitor is owned by Array BioPharma Inc. Array exclusively licensed the drug to Novartis in 2010. To address the EC’s concerns, Novartis agreed to return the rights over the licensed MEK inhibitor to Array, and
to divest its B-Raf inhibitor to Array. Both commitments were conditional upon Array itself entering into an EC-approved binding partnership agreement with a suitable healthcare company in order to ensure the development and commercialisation of these products.

- **Pfizer/Hospira** — This transaction also raised competition concerns as regards competition in innovation. The issue concerned biosimilar drugs for *infliximab*, a rheumatoid arthritis and Crohn’s disease treatment, which is one of the top three best-selling pharmaceuticals globally. Biosimilar drugs aim to have the same therapeutic mechanism as original patented pharmaceuticals, but, unlike generics, are not exact copies of the originator biological drugs. Like generics, biosimilars are expected to lower prices. One biosimilar, developed by Celltrion but co-marketed by Hospira and Celltrion, has been approved for use in the EEA, while Pfizer and another company, have biosimilars in advanced stages of development. The EC expressed concerns that following the merger, Pfizer would be likely to delay or discontinue the development of its biosimilar drug in order to focus on Hospira’s marketed product, or alternatively stop marketing Hospira’s product in Europe. To address these concerns, Pfizer agreed to the full divestiture of the development, manufacturing, and marketing rights of its *infliximab* biosimilar pipeline product (including IP, technology and know-how), with marketing rights outside the EEA remaining with the merged entity.

- **Merck/Sigma-Aldrich** — This case is interesting in several respects. First, this is the first time that the EC looked at so-called “laboratory chemicals”, a market characterised by hundreds of thousands of products and where most players have different business models, both in terms of manufacturing and distribution. Market definition in this case was therefore a crucial issue. Second, laboratory chemicals is a sector where there is no reliable source of share data. As a result, the analysis of the closeness of competition between the parties played an important role in the EC’s analysis. Closeness of competition was assessed on the basis of a number of qualitative elements, ranked consistently by market participants amongst the main drivers of competition, i.e., product quality, brand image, and efficiency of the distribution network. This led to the conclusion that both parties were not only the leading suppliers of laboratory chemicals, but also each other’s closest competitors in two relevant sub-segments, solvents and inorganics. Finally, to secure clearance, Merck had to agree to a comprehensive remedy package covering the entire supply chain of these products, i.e., manufacturing assets, brands, IP, sales and customer relationship, as well as logistics and distribution, as all of these elements are key factors for success in the laboratory chemicals’ sector. In addition, given that the divested business was deeply embedded in Sigma’s laboratory chemicals’ business, and that the remedy package therefore involved some implementation risks, Merck had to agree to an upfront buyer clause.

- **Knorr Bremse/Vossloh** — In January 2015, Knorr Bremse, which already held a 29.99% stake in Vossloh, announced a voluntary public bid for the rest of the shares in Vossloh. At the expiry of the offer on April 2, 2015, Knorr Bremse had acquired only 0.22% of additional shares, thus increasing its stake in Vossloh to only 30.21%. On May 21, 2015, the EC considered that the additional shares acquired through the public bid were insufficient to give Knorr Bremse sole control over Vossloh, and that the transaction therefore fell outside the scope of the EU Merger Regulation (“EUMR”). Later in 2015, Knorr Bremse signed an agreement with Deutsche Bank to acquire another 5.59% stake in Vossloh, which would raise its total share to 35.8%. The EC then concluded that this would give Knorr Bremse de facto control over Vossloh and accepted jurisdiction over the transaction. The EC held that it was highly likely that Knorr Bremse would acquire a stable majority in the future shareholders’ meetings of Vossloh following the implementation of the transaction. It based its assessment on a
number of elements, in particular the average attendance rate in recent years at the shareholders’ meetings of Vossloh, and the wide dispersion of Vossloh’s remaining shareholding (the second largest shareholder owning only a 5.68% share). The EC also noted the clear intent of Mr. Heinz Hermann Thiele, who indirectly controls Knorr Bremse, to acquire control over Vossloh.

Other Noteworthy Phase I Decisions with Commitments:

- **Solvay/Cytec**, where the EC found that the parties’ activities were mostly complementary and focused its investigation on one product where the parties had a high combined share: phosphor-based solvent extractants used in the mining and refining industry to separate cobalt from nickel. The EC considered that the transaction would eliminate a significant competitive force and that customers would have few alternatives as existing competitors were small and their products’ reputation is weaker than the parties’. To remedy these concerns, Solvay agreed to divest the entirety of its activities in this market and to provide the purchaser of the divested business with the product under a transitional toll manufacturing agreement until the purchaser has its own manufacturing line.

- **Mylan/Abbott EPD-DM**, where the EC raised concerns with regard to five generic products in certain EU Member States, in particular because of the parties’ high combined shares on narrow markets (typically, at the molecule level), a lack of substitutable products, and a low likelihood of entry. To address these concerns, Mylan agreed to divest its local businesses in the areas concerned.

- **NXP/Freescale**, where the EC raised concerns in relation to radio frequency (“RF”) power transistors used in mobile telecommunication base stations, where NXP and Freescale were the two largest players and close competitors. To remedy these concerns, NXP agreed to divest its own RF power business. However, instead of divesting the entire business as a going concern, NXP carved out certain assets that it would continue to use for the so-called “front-end” manufacturing of these products. In return, NXP offered to conclude a manufacturing agreement with a third-party foundry and to provide the divested business with the transitional agreements to guarantee business continuity.

- **SNCF/Eurostar**, where the EC found that the transaction, as originally notified, may have hindered the entry of competitors on the London-Paris and London-Brussels routes on which Eurostar is currently the only operator. To remedy these concerns, Eurostar and its shareholders SNCF and SNCB agreed to offer any new entrant fair and non-discriminatory access to: (i) standard cross-channel areas and services they manage in France and Belgium (e.g., ticket offices), (ii) maintenance centers that they manage in France, UK, and Belgium for services such as the cleaning of trains, and (iii) train paths currently used by Eurostar at peak times, should a new entrant not be able to obtain such access through the usual procedure for path allocation by the infrastructure managers.

Mergers Withdrawn Due To Competitive Concerns

- **Telenor/TeliaSonera** — This case concerns the aborted joint venture bringing together the Danish mobile telecom operations of Telenor and TeliaSonera. The tie-up would have brought together the second and third mobile network operators in Denmark, creating the largest player in terms of subscribers and revenues, with a 40% share in Denmark. Other players in Denmark included incumbent TCD and a smaller player Hi3G (Hutchinson) with shares of 40% and 20%, respectively. As has been the case in other recent four-to-three telecom mergers, the parties offered to establish a new MVNO as a remedy. In a recent speech, Commissioner Vestager expressed some skepticism about such remedies, noting that in the present case “an effective remedy in the Danish case would
have been the creation of a fourth mobile network operator (MNO). This would have replaced the competitive pressure eliminated by the merger.” She further added that it is “too early to conclude on the effectiveness of the remedies in those cases [i.e., the creation of a MVNO, rather than that of a MNO] as they are still being implemented. The remedies in the German case are also under appeal before the Court” and concluded that “[t]he more structural the remedy, the better.”

This case was notified on February 27, 2015 and withdrawn on September 11, 2015.

- **Mondi/Walki Assets** — The parties decided to terminate the acquisition agreement of two industrial packaging plants after unsuccessful negotiations with the EC, where the parties tried to alleviate the EC’s concerns that the transaction would remove a key competitor in wrapping materials (that also serve as moisture barriers) and lead to less choice and ultimately higher prices for customers. In its press release announcing the opening of a Phase II investigation, the EC expressed concerns that the remaining competitors would have ended up with a considerably lower production capacity than the merged entity and may not have been able to match the merged entity’s product offering or proximity to key customers.

This case was notified on July 29, 2015 and withdrawn on December 14, 2015.

**Mergers before the EU Courts**

- **Niki Luftfahrt GmbH v European Commission** — On May 13, 2015, the General Court upheld the EC’s decision of August 28, 2009 to approve Lufthansa’s acquisition of Austrian Airlines. The transaction was part of Austrian Airlines’ restructuring and privatization process mandated by the Austrian government and cleared by the EC in 2009.

In the case at hand, Austrian low-cost airline Niki Luftfahrt challenged the EC decision, *inter alia*, on the grounds of manifest error of assessment in the definition of the relevant market. Notably, Niki Luftfahrt questioned the classic O&D (point of origin/point of the destination) approach adopted by the EC for the purposes of defining the relevant market in airline merger cases, suggesting that the EC should have instead, or also, considered regional markets covered by Lufthansa and Austrian networks (i.e., flights between Germany and Austria or within Central Europe). The General Court dismissed the applicant’s arguments considering that there was abundant case law confirming the
validity of the O&D approach and that the applicant failed to demonstrate the EC’s error of assessment when choosing this approach.

■ Deutsche Börse v European Commission<sup>24</sup> — On March 9, 2015, the General Court upheld the EC’s decision of February 1, 2012 to block the Deutsche Börse/NYSE Euronext merger.

In this decision, the EC assessed the effects of the proposed merger on the markets for certain European exchange-traded derivative financial instruments and concluded that the merger was likely to lead to a significant impediment to effective competition by creating a dominant or near-monopoly position. According to the EC, the merger would have led to a single vertical structure, conducting the trading and clearing of more than 90% of the global transactions of European exchange-traded derivatives. The transaction resulted in one of the few prohibition decisions adopted by the EC in recent years.

Deutsche Börse lodged an action for annulment before the General Court. On substance, the General Court dismissed all three pleas, which alleged errors of law and assessment regarding the analysis of competitive constraints, efficiency gains and the proposed commitments.

The General Court found that the EC had correctly concluded that the so-called over-the-counter derivatives were not in the same market as the exchange-traded derivatives, and thus that the merger would have indeed led to a near-monopoly.

It also found that the EC did not err in finding that the claimed efficiencies would not outweigh the significant restriction of competition that would have resulted from the merger. In this regard, the General Court provided some guidance as to how the principles relating to the assessment of efficiencies set out in the Horizontal Merger Guidelines should be applied.

The General Court rejected Deutsche Börse’s complaint that the EC had infringed its rights of defence because it changed its analysis on efficiencies between the statement of objections and the final decision without giving Deutsche Börse the opportunity to submit observations. In this regard, the General Court noted that a statement of objections is a "procedural and preparatory document" and the EC is not obliged to maintain the factual or legal assessments set forth in the statement of objections, nor to explain any difference with its final decision.

The General Court upheld the EC’s finding that the remedies submitted were inadequate, as the scope of the remedy was insufficient to entirely address all competition concerns identified and a timely and sufficient entry would not have been likely. Furthermore, the General Court also endorsed the EC’s finding that the uncertainty as to the grant of regulatory approvals required for the divestment could cause delays and lead to an increased risk regarding the execution and valuation of the divestment.

■ T-Mobile Austria v Telekom-Control-Kommission<sup>25</sup> — This preliminary ruling of the Court of Justice of January 22, 2015 came in the aftermath of the EC’s decision of December 12, 2012 authorizing the Hutchison 3G Austria/Orange Austria merger subject, inter alia, to the parties’ commitment to divest radio spectrum in the Austrian mobile telephony market. Spectrum divestitures are a frequent remedy in telecom deals. This spectrum divestiture took place through an auction held by the Austrian telecom regulator that granted the right to use the divested radio frequencies to A1 Telekom Austria.

T-Mobile challenged the award decision before the Austrian authorities but its standing to challenge the outcome of these procedures was questioned in the Austrian Administrative Court, which referred the matter to the Court of Justice. On substance, the Austrian court asked whether the European directive regulating the attribution of radio frequencies would have to be interpreted in a way that confers a competitor standing to challenge the outcome of spectrum transfer authorisation procedures.
The Court of Justice ruled in the affirmative, stating that a competitor of undertakings that are parties to the authorisation procedure may be regarded as an “affected” person insofar as the award decision is likely to have an impact on that competitor’s position on the market. As a result, such company has standing to challenge the spectrum award decision. The process of implementing remedies that have been agreed with the EC in telecom transactions may have become more difficult following this judgment, primarily due to further delays resulting from litigation by competitors.

Pending Cases Before the EU Courts

There are currently five appeals concerning mergers pending before the General Court:

- **United Parcel Service v European Commission** — In this appeal of April 5, 2013, the parties are challenging the EC’s decision of January 30, 2013 to block the proposed acquisition of TNT Express by UPS. In the contested decision, the EC found that the merger would have restricted competition in 15 Member States in the market for international express delivery of small packages in the EEA. The main concern was that the transaction would reduce the number of significant players to three or even two. The remedy package offered by UPS according to which UPS would have divested TNT’s subsidiaries in all the affected 15 countries and allowed the buyer to access its intra-European air network for five years was deemed not to be enough to address the serious competition concerns identified. In the proceedings, the General Court will deal with the assessment of likely price effects of a transaction, the concept of closeness of competition, efficiencies, and access to evidence.

- **Marine Harvest v European Commission** — This appeal of October 3, 2014 brought by Marine Harvest concerns an action for annulment of the EC’s decision of July 23, 2014 whereby the EC imposed a fine of EUR 20 million on the company for acquiring its rival Morpol without having received prior authorisation under the EUMR. The transaction had two stages: first, the acquisition of a 48.5% stake in Morpol in 2012, followed by a mandatory public offer for the remaining 51.5% stake in 2013. A merger control notification was filed with the EC only in the second stage of the transaction.

  In the course of evaluating the effects of the notified merger, the EC found that the acquisition of a 48.5% stake in Morpol already conferred upon Marine Harvest *de facto* sole control over the company and that the whole transaction should have thus been notified earlier.

  In the appeal proceedings, Marine Harvest is basing itself on the novelty of the factual and legal issues in its case and different handling of a comparative case that was not pursued by the EC.

- **KPN v European Commission** — In its action brought on July 17, 2015, a third-party Dutch TV and telecom operator KPN is asking for annulment of the EC’s decision of October 10, 2014 authorising the acquisition of Dutch cable TV operator Ziggo by its international rival Liberty Global. KPN is claiming that the EC committed errors when assessing the vertical effects of the transaction on the market for Premium Pay TV sports channels.

- **1&1 Telecom v European Commission** and **Airdata v European Commission** — The two appeals brought on June 5, 2015 by third party German internet providers 1&1 Telecom and Airdata concern the EC’s decision of March 13, 2015 authorising the *Telefonica Deutschland/E-Plus* transaction. The appellants claim that the EC committed serious errors of law and manifest errors of assessment when it failed to conduct an analysis of the vertical effects of the transaction and accepted
the commitments offered by Telefonica even though the remedies failed to address the significant competition concerns arising from the transaction. Amongst others, Airdata questions whether the commitments are sufficient to allow the acquirer of the divested assets to effectively compete with the merged entity. 1&1 Telecom, on the other hand, claims that the EC has based its decision on policy considerations unrelated to competition.

**Policy Developments**

As noted in our previous merger report dated July 9, 2014, in 2014 the EC published a White Paper that set out ideas for updating parts of the EUMR, including as regards referrals between national competition authorities and the EC and the extension of the EUMR to cover non-controlling minority interests.

In a speech given on March 12, 2015, Commissioner Vestager noted that interested parties had expressed concerns regarding the proportionality of the White Paper’s approach towards the review of acquisitions of minority shareholdings and concluded that “the balance between the concerns that this issue raises and the procedural burden of the proposal in the White Paper may not be the right one and (...) the issues need to be examined further”. In the same speech, Vestager also mentioned that the EC’s consultation on the White Paper beefed up the idea of extending the filing thresholds to include transactions where the target does not have a large turnover, but the transaction value is high.

We expect a further consultation process in the course of 2016 to discuss these points.
Endnotes

1 The authors wish to thank Erling Estellon and Laurent Cenatiempo for their contributions in the preparation of this overview.

2 Case COMP/M.6800 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_6800)

3 Case COMP/M.7194 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7194)

4 Case COMP/M.7265 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7265)

5 Case COMP/M.7429 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7429)

6 Case COMP/M.7278 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7278)

7 Case COMP/M.7292 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7292)

8 Case COMP/M.7408 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7408)

9 Case COMP/M.7421 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7421)

10 Case COMP/M.7275 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7275)

11 Case COMP/M.7276 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7276)

12 Case COMP/M.7559 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7559)

13 The transaction also raised concerns in the area of sterile injectable drugs. To remove the EC’s concerns, Pfizer therefore also agreed to divest certain sterile injectable drugs.

14 Case COMP/M.7435 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7435)

15 Case COMP/M.7538 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7538)

16 Case COMP/M.7777 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7777)

17 Case COMP/M.7379 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7379)

18 Case COMP/M.7585 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7585)

19 Case COMP/M.7449 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7449)

20 Case COMP/M.7419 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7419)

21 See “Competition in telecom markets”, a speech delivered at the occasion of the 42nd Annual Conference on International Antitrust Law and Policy Fordham University, on October 2, 2015.

22 Case COMP/M.7566 (see http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7566)


