A review of 2019 EU merger control

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This is an overview of the main developments in EU merger control in 2019. We begin by highlighting what we view as the main developments and then discuss these and some other developments in more detail.

EC Phase II Prohibitions[1]

Without question, the development that generated the most publicity in 2019 was the European Commission's ('EC's') prohibition of Siemens' plan to acquire Alstom. The transaction would have created a European champion in supply of rolling stock and other railway equipment. The parties and a number of European politicians claimed that this was essential to meet competition from rapidly expanding Asian (mainly Chinese) competitors. The EC's decision analysed the strength of these Asian competitors and concluded that they were not realistic competitors in the EEA. The EC considered that the deal would have created dominant positions on numerous markets and that the parties' proposed remedies were not sufficient to address the resulting loss of competition.

The EC's reliance on the conventional merger control framework under the EU Merger Regulation ('EUMR') to block this transaction has been both widely praised and widely criticised. A small number of EU governments – but including both the French and German – have suggested that the EU's merger control rules be adjusted to take greater account of European industrial policy needs.[2] This debate about the interaction between competition law and broader strategic issues is likely to continue.

The extent of the competitive constraint that companies outside the EEA exercise on leading EEA players was also central to the EC's two other prohibition decisions *Wieland/Aurubis/Schwermetall* and *Tata Steel/ThyssenKrupp*.[3] In both decisions, the EC concluded that the need for just-in-time delivery and other factors meant that companies outside the EEA were not viable competitors.

EC Phase II Clearances[4]

The EC adopted six conditional phase II clearances in 2019.

Five of the six conditional clearances required structural remedies and *Vodafone/Liberty Global assets* also included behavioural commitments. The clearance of BASF's acquisition of Solvay's nylon business required that the parties enter a production joint venture ('JV') that will provide an essential input to the buyer of the divested business; this decision also was subject to an up-front buyer provision. In both *Nidec/Embraco*

1 See Section A below.

2 For example, see the German, French and Polish Government's *Modernising EU Competition Policy*, available at https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4 and *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, available at https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2.

3 In addition to these two prohibitions, the parties to the *Aperam/VDM* transaction withdrew their notification and abandoned their transaction.

4 See Section B below.

and *Novelis/Aleris*, the commitments included an obligation to invest in the divested business, which is unusual. *Nidec/Embraco* also contains an up-front buyer requirement while *Vodafone/Liberty Global assets* contained a fix-it first remedy.[5] *Telia/Bonnier* was conditional on behavioural commitments only.

As of 31 December 2019, there were five Phase II investigations ongoing.[6]

EC Procedural Enforcement[7]

The EC fined Canon €28 million for implementing its acquisition of Toshiba Medical Systems Corporation ('TMSC') before notifying it to the EC and before the EC's approval. The EC's decision notes that Canon had used a 'warehousing' structure to acquire TMSC with an interim buyer holding 95% of the shares until Canon received all necessary regulatory clearances. The decision relies on and builds on recent gun-jumping case law.

The EC also fined General Electric €52 million for providing incorrect information when it notified its acquisition of LM Wind to the EC.

The EC has alleged that Telefónica breached a behavioural commitment in the EC's clearance of its 2014 acquisition of E-Plus in Germany. This is the first time that the EC has initiated proceedings alleging failure to implement a commitment.

European Court Judgments[8]

The European Courts rendered two judgments relating to applications to annul EC decisions.

The Court of Justice of the EU ('CJEU') dismissed the EC's appeal of the General Court's ('GC's') 2017 judgment annulling the EC's decision prohibiting United Parcel Services ('UPS') from acquiring TNT Express N.V. The GC judgment had held that the EC had violated UPS's rights of defence by not providing it with access to an updated econometric model after sending the Statement of Objections.

The GC dismissed KPN's application for the annulment of the EC's approval for the creation of a JV on the Dutch television market in *Vodafone/Liberty Global/Dutch JV*. KPN's pleas related to market definition, analysis of input foreclosure and failure to state reasons.

Other Developments

Phase I Decisions: In 2019, the EC adopted several interesting conditional phase I clearance decisions.[9] However, neither time nor space permits a comprehensive analysis of these decisions

Waiver of a Phase II commitment: The EC partially waived the commitments agreed in its *Air France/KLM* decision.[10] Part of the commitment relating to the New York-Amsterdam route overlapped with a similar commitment adopted following an investigation under Article 101 of the Treaty on the Functioning of the European Union ('TFEU').

Legislative: There were no formal legislative proposals or other legislative developments in EU merger control in 2019. However, as noted above, mainly in response to the *Siemens/Alstom* decision, some governments suggested amending the EU's merger control rules to take greater account of state-control of and subsidies for non-EU companies that compete with EU-based companies. In addition, the debates about 'big data' and whether the EUMR's thresholds should be adjusted to catch 'killer acquisitions' have continued; notably Commissioner Vestager replied as follows to a written question from the European Parliament during the hearings on the appointment of the new Commission for 2019-2014: "*I am convinced that our merger enforcement must capture all mergers that can harm competition across borders in the Single Market. It will therefore be one of my priorities to examine whether the current merger rules allow us to sufficiently catch all important deals that can have this effect*".[11] In December,

5 In the absence of published decisions in all cases, it is not always clear if an up-front buyer condition was required. This appears to have been necessary in *Novelis/Aleris*.

6 Case M.9014, *PKN Orlen Grupa Lotos*; Case M.9097, *Boeing/Embraer*; Case M.9162, *Fincantieri/Chantiers de l'Atlantique*; Case M.9343, *Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering*; and Case M.9409, *Aurubis/Metallo Group Holding*.

7 See Section C below.

8 See Section D below.

9 See, for example, Case M.8851, *BASF/Bayer Divestment Business*; Case M.9331, *Danaher/GE Healthcare Life Sciences Biopharma*; and Case M.8988, *Energizer/Spectrum Brands (Battery and Portable Lighting Business)*.

10 See Section E below.

11 See *Answers to the European Parliament Questionnaire to the Commissioner-Designate Margrethe Vestager, Executive Vice-President-designate for a Europe fit for the Digital Age*, available at https://www.europarl.europa.eu/resources/library/me-

Commissioner Vestager also announced a review of the Market Definition Notice to check if the guidance is "*accurate and up to date, and sets out a clear and consistent approach to both antitrust and merger cases across different industries*".[12]

Phase II Prohibitions

- *Siemens/Alstom*
  - Attempt to create a European champion in supply of trains and railway equipment
  - Parties offered inadequate remedies
  - Criticism that EC did not take enough account of industrial policy considerations and competition from Chinese competitors
- *Wieland/Aurubis/Schwermetall*
  - 3 to 2
  - Risk of input foreclosure
  - Insufficient competitive constraint from entities outside EEA
- *Tata Steel/ThyssenKrupp*
  - Market leader in concentrated markets
  - Non-EEA suppliers not a constraint
- *Aperam/VDM* withdrawn

A. EC PHASE II PROHIBITIONS

In 2019, the EC prohibited three transactions.

In addition, in January, the parties to the *Aperam/VDM* transaction withdrew their notification and abandoned their transaction.[13] The EC had opened a Phase II investigation in November 2018 alleging that the deal would reduce competition in markets for the supply of nickel alloys.[14]

A.1 Siemens/Alstom

In probably the most high-profile decision of 2019, in February, the EC blocked Siemens' plan to acquire Alstom.[15]

Siemens and Alstom are leading suppliers of train rolling stock, railway signalling equipment and other products used in the rail industry.

In its detailed prohibition decision, the EC outlined how it considered the transaction would lessen competition on the markets for the supply of high-speed and very high-speed trains and on various markets for signalling systems.

High speed and very high-speed trains[16]

The EC defined a relevant market for high-speed trains, namely trains capable of reaching a speed of 250 km/h. Moreover, it thought that these were not substitutable with very high-speed trains, which were capable of reaching speeds of over 300 km/h. In the EC's view, the transaction raised competition issues regardless of whether the market was defined as being for all high-speed trains or only very high-speed trains.[17]

The EC deemed that the market was at least EEA-wide plus Switzerland and might even be global save for China, Japan and South Korea where insurmountable entry barriers existed.[18]

The EC found that, post-transaction, the parties would have had a combined market share of 70 to 80% on both the markets for high-speed and very high-speed trains in the EEA/Switzerland and 60 to 70% on these markets worldwide (excluding

dia/20190927RES62423/20190927RES62423.pdf, page 9.

12 See speech by Commission Vestager, *Defining markets in a new age*, 9 December 2019, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/defining-markets-new-age_en.

13 Case M.8907, *Aperam/VDM*. See 2019/C 9/01, 10 January 2019.

14 See IP/18/6628, 29 November 2018.

15 Case M.8677, *Siemens/Alstom*. The EC's decision is available on its website, as is a summary decision. See also IP/18/4527, 13 July 2018 and IP/19/881, 6 February 2019.

16 Decision, section 5.

17 Summary Decision, para. 15.

18 *Id.*, para. 16.

China, Japan and South Korea).[19] These market shares were for the 2008 to 2018 period and were calculated based on order intake.

The EC considered that the parties would have occupied a dominant position on these markets. It noted that their competitors had few, if any, sales of high or very high-speed trains to EEA customers outside their home countries.[20]

The most high-profile decision was the EC's blocking of the Siemens/ Alstom transaction.

The parties argued that the Chinese competitor, CRRC, was a significant competitive constraint.[21] However, the EC analysed bidding data and concluded that this was not the case. In particular, it noted that CRRC had never won a tender for high or very high-speed trains in the EEA and indeed had not been invited to participate in the UK's high-speed 'HS2' tender. Outside China, CRRC had secured a 2017 contract in Indonesia, however, this resulted from inter-governmental negotiations rather than a competitive tender. The EC therefore found that, outside China, CRRC was untested in competitive tenders against the leading suppliers.

The EC regarded the parties as each other's closest competitor due to their product offerings, geographic footprint, an analysis of their bidding data[22] and the parties' internal documents.[23]

The EC also determined that there were significant entry barriers.[24] These included the cost of developing high and very high-speed rolling stock, the need for an adequate track record in order to be viewed as a credible bidder and EEA-specific barriers. CRRC and other Asian suppliers confirmed the existence of these barriers to entry.

Signalling systems[25]

The EC defined a number of different markets for mainline and urban signalling products and projects.[26] It differentiated between legacy projects and projects under the European Train Control System ('ETCS') standard. The EC considered that most of the relevant signalling markets were EEA-wide but that some were national.[27]

The Commission conducted its assessment on the basis of market shares calculated over the 2008-2018 period (order intake by value) and found that post transaction the parties would have high combined shares on numerous different markets.[28]

The EC identified that, on a number of the markets,[29] the parties were closest competitors (again based largely on bidding data and the parties' internal documents); that they were significant innovators and that the transaction would therefore remove an innovator; that there were entry barriers; and that new entry was unlikely (including from the Chinese competitor CRSC, which has not bid for any ETCS OBU projects in the EEA).[30]

The EC also identified a risk of reduction in competition due to potential input foreclosure on the market for standalone interlocking projects in the UK.[31]

Inadequate remedies

The parties submitted three sets of commitments but the second and final sets were not market tested.[32] The EC stated that the commitments were submitted too late to be properly analysed (the first set of remedies was submitted on the deadline for submitting remedies in Phase II[33] but the second and third set were submitted after that

19 *Id.*, para. 24.
20 *Id.*, paras 25 to 26.
21 *Id.*, para. 27.
22 Annex I to the Decision contains a detailed economic analysis of the bidding data.
23 Summary Decision, paras 28 to 34.
24 *Id.*, paras 35 to 36.
25 Decision, section 6.
26 Summary Decision, paras 18 to 20.
27 *Id.*, paras 21 and 22.
28 *Id.*, paras 38 *et seq.*
29 See the list of markets in Decision, para. 1284.
30 Summary Decision, paras 38 to 53.
31 *Id.*, paras 54 to 58 and Decision, section 6.4.2.1.
32 Summary Decision, paras 60 to 69 and Decision paras 1306 and 1308.
33 Decision, para. 1301.

deadline) and that they were inadequate for a number of reasons, including:

- One of the alternative remedies on the market for very-high speed trains was an overly restrictive licence that did not include necessary production, manufacturing or R&D assets;[34]

- The alternative remedy on this market was a proposed divestment of an older train platform but its terms were again too restrictive and, among other things, subject to third-party agreement. Moreover, the train platform was for a high-speed train so its divestment would not restore effective competition on the market for very high-speed rolling stock;[35] and

- Some of the remedies on the signalling markets were a complex mix of Siemens and Alstom assets and licences and, in the EC's opinion, subject to implementation risks that could undermine their viability.[36] The proposed remedy would have resulted in some businesses and production sites having to be split and any acquirer would have been dependent on the merged company.

Industrial policy considerations

As was widely reported, this deal was intended to create a European champion[37] that would be able to compete globally with Asian competitors including CRRC[38] and the EC came under pressure to take account of broader industrial policy goals when making its decision. Instead, the EC prohibited the transaction on narrower (classic) competition grounds.[39] This did not go uncriticised (to give but one example, the French Finance Minister called the decision 'an economic mistake' and 'a political mistake'[40]).

The decision has provoked numerous articles and interventions from policy makers and governments. These have included a joint paper from the German, French and Polish governments calling for EU merger control to take greater account of 'the specificities of third countries' state control and subsidies', the 'financial power of state-controlled and subsidised undertakings', 'competition at global level' and the need to protect the 'strategic common European interest'.[41] The relationship between industrial policy and competition law more generally was also raised in Commissioner Vestager's European Parliament hearing when she was nominated as Executive Vice-President of the EC.[42]

A.2 Wieland/Aurubis/Schwermetall

In February, the EC prohibited Wieland from acquiring Aurubis, which would also have led to Wieland acquiring sole control of Schwermetall, a 50/50 JV between Wieland and Aurubis.[43]

In December 2018, the EC had approved KME's acquisition of MKM in the same relevant markets for copper products.[44] The approval of this earlier acquisition impacted the EC's assessment of Wieland's acquisition of Aurubis and Schwermetall.

Both Wieland and Aurubis manufacture rolled copper products. The EC's Press Release notes that post-transaction Wieland's market share would have been more than 50% by value in the EEA with only KME/MKM remaining as a significant large competitor with a market share of some 20%. The EC viewed this as a reduction in the number of large suppliers from three to two. The EC was also concerned that the transaction would have eliminated price competition between close

34 The relevant exclusions are often redacted but see *Id.*, paras 1431, 1457 and 1502 *et seq.*

35 *Id.*, paras 1366 *et seq.*

36 See IP 19/881 at page 2 and, for example, Decision, section 9.8.1.2.

37 Alstom's Chief Executive was later quoted as saying "*If I have one regret it is using that phrase 'European champion,' for the proposed deal that was vetoed by Brussels' competition enforcers*"; see Financial Times, *The blunders that derailed European train merger*, 7 February 2019.

38 Decision, para. 9.

39 See speech by Commission Vestager, *The champions Europe needs*, WELT Economic Summit, Berlin, 9 January 2019, available at https://ec.europa.eu/commission/commissioners/node/49/announcements/champions-europe-needs-welt-economic-summit-berlin-9-january-2019_en.

40 Financial Times, *EU blocks Siemens-Alstom rail merger, Le Maire says*, 6 February 2019.

41 See *Modernising EU Competition Policy*, available at https://www.bmwi.de/Redaktion/DE/Downloads/M-O/modernising-eu-competition-policy.pdf?__blob=publicationFile&v=4, at pages 1 and 2. See also *A Franco-German Manifesto for a European industrial policy fit for the 21st Century*, available at https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf?__blob=publicationFile&v=2.

42 See https://www.europarl.europa.eu/resources/library/media/20191009RES63801/20191009RES63801.pdf and https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/european-parliament-hearing-8-october-2019_en.

43 Case M.8900, *Wieland/Aurubis/Schwermetall.* The EC's decision is not yet published. See IP/18/4782, 1 August 2018 and IP/19/883, 6 February 2019.

44 Case M.8909, *KME/MKM.*

competitors in high value parts of the market for rolled copper products (e.g. electric connectors used in vehicles). The EC considered that the level of import duties and the need for just-in-time deliveries meant that EEA customers could not switch to imports from outside the EEA.

The Schwermetall JV manufactures pre-rolled strip, which is an input for rolled copper products. As well as supplying its parents, Schwermetall supplied other copper manufacturers and the EC's Press Release notes that it supplied over 60% of pre-rolled strip in Europe. Before the transaction, Schwermetall operated independently of its parents. The EC decided that the transaction would have eliminated this operational independence and enabled Wieland to raise input costs for its competitors and/or allowed Wieland to access their confidential information.

While the parties proposed divestments, the EC concluded that the proposed remedies did not fully address its concerns.[45] Notably, Wieland did not offer to divest Aurubis' 50% share in Schwermetall.

A.3 Tata Steel/ThyssenKrupp

In June, the EC prohibited the creation of a JV between Tata Steel and ThyssenKrupp.[46]

This transaction would have combined Tata Steel and ThyssenKrupp's flat carbon steel and electrical steel manufacturing in the EEA.

The EC's Press Release notes that it had particular concerns regarding the markets for metallic coated and laminated steel products for packaging. The transaction would have created a market leader in concentrated markets. In addition, the Press Release notes that the EC considered that effective competition would be eliminated on the markets for automotive hot dip galvanised steel products where an important competitor would have been eliminated.

The EC concluded that customers would not be able to turn to imports from outside the EEA to offset potential price increases. In particular, the Press Release notes the higher qualitative requirements for these products compared to other types of steel and the need to meet short delivery times.

The parties proposed remedies but the EC considered them insufficient. Notably, the proposed remedy in metallic coated and laminated steel products for packaging only covered a small portion of the overlap between the parties and it did not include the assets required to produce necessary inputs. Third parties raised similar concerns about the proposed remedy for the markets for automotive hot dip galvanised steel products.

Like *Siemens/Alstom*, this transaction raised industrial policy questions. The EC's Press Release notes that the EC had previously imposed anti-dumping and anti-subsidy duties in response to what it had perceived as unfair imports.

45 Wieland has appealed the EC's decision to the GC. See T-251/19, *Wieland-Werke v Commission*.

46 Case M.8713, *Tata Steel/ThyssenKrupp*. The EC's decision is not yet published. See IP/18/6255, 30 October 2018 and IP/19/2948, 11 June 2019.

Phase II Clearances

- Five clearances subject to divestments
  - *Vodafone/Liberty Global assets* – fix-it-first and also behavioural remedy
  - *Nidec/Embraco* and *Novelis/Aleris* – obligation to invest in the divested business as well as up-front buyer requirement
  - *BASF/Solvay's EP and P&I Business* – up-front buyer requirement and obligation to enter a production JV
  - *E.ON/Innogy*
- One clearance subject to a behavioural remedy
  - *Telia/Bonnier Broadcasting*

B. EC PHASE II CLEARANCES

In 2019, the EC adopted six Phase II clearance decisions subject to conditions.

B.1 Vodafone/Liberty Global assets

In July, the EC cleared Vodafone's purchase of Liberty Global's cable business in Germany, the Czech Republic, Hungary and Romania.[47] The clearance was subject to remedies including a fix-it first remedy.[48]

The investigation focussed mainly on German markets.[49]

First, the EC considered that the transaction would eliminate the competitive constraint that the parties exerted on each other in the market for retail supply of fixed broadband services.[50] In particular, Vodafone competed with Liberty Global through its wholesale access to Deutsche Telekom's network in areas served by Liberty Global's subsidiary Unitymedia.

Second, the EC concluded that the transaction would increase the parties' market power in the market for wholesale supply of signal for the transmission of TV channels.[51] The EC feared that this could degrade the quality of the channels offered to end customers and hinder broadcasters' attempts to provide innovative services such as streaming and interactive services.

Third, and following some initial concerns that the combined entity and Deutsche Telekom, the other main competitor, would coordinate their behaviour in a number of German markets, the EC concluded that the transaction would not significantly impede effective competition as a result of coordinated effects.[52]

Vodafone proposed four commitments:

- First, it committed to provide Telefónica with access to its cable network in Germany.[53] This was intended to replicate the competitive constraint that would otherwise have been lost as a result of the merger. Vodafone identified Telefónica as a suitable remedy taker so this is a 'fix-it-first' remedy[54] in which the EC approved Telefónica as a suitable new cable provider in the clearance decision.[55]

- Second, it committed not to restrict broadcasters' ability to distribute their content via a streaming/'Over-the-top' (OTT) service.[56] This commitment aimed to counter the merged entity's increased market power and its potential to prevent the emergence of innovative services.

- Third, Vodafone committed not to increase the fees paid by free-to-air broadcasters by extending existing agreements or, where

47 Case M.8864, *Vodafone/Liberty Global assets*. The EC's decision is available on its website and a summary is also available. See also IP/18/6772, 11 December 2018 and IP/19/4349, 18 July 2019.
48 See Decision, section IX and text of Commitments annexed to Decision.
49 The EC investigated other markets in Germany, the Czech Republic, Hungary and Romania and concluded that the transactions would not lessen competition on any of them. See Decision, sections VIII.D, E and F.
50 Summary Decision, paras 25 to 29.
51 *Id.*, paras 34 and 35.

52 See Decision, section VIII.A.3.
53 *Id.*, paras 61 to 63.
54 Decision, para. 1849.
55 *Id.*, paras 1974 *et seq.*
56 *Id.*, paras 64 to 66.

necessary, entering new agreements.[57] This is intended to prevent degradation of free-to-air TV offerings.

- Lastly, Vodafone committed to continue to carry Hybrid Broadcast Broadband TV-signals of free-to-air broadcasters.[58] This again is aimed at preventing Vodafone from hindering the development of innovative services.

The EC performed an elaborate market reconstruction to assess the parties and their competitors' market positions. This involved collecting and analysing subscriber data including at postcode level.[59]

B.2 Nidec/Embraco

In April, the EC cleared Nidec's acquisition of Embraco from Whirlpool conditional on Nidec divesting a business and making funding available to the buyer for future investment in that business.[60]

The parties both manufactured refrigeration compressors for household and light commercial appliances. The EC's investigation led it to believe that the proposed transaction would have reduced competition, raised prices and reduced choice on three markets.

First, Nidec and Embraco were the market leaders both worldwide and in the EEA in the market for fixed speed refrigeration compressors for light commercial applications. The transaction would have created a dominant position on the worldwide market and increased a dominant position in the EEA.

Second, the parties were the only manufacturers, active both in the EEA and worldwide, of variable speed refrigeration compressors for light commercial applications. Unlike fixed speed compressors, variable speed compressors adjust their speed to the level required to maintain the required temperature.
Third, the transaction would have increased Embraco's leading position on the market for variable speed refrigeration compressors for household applications. Nidec planned to enlarge its product offering on this market, which would have led to the parties becoming even closer competitors. The EC found that demand for variable speed refrigeration compressors for household applications would increase significantly but that there would only be limited new entry in the EEA.

> Unusually, Nidec also agreed to fund future investment in the business that would be divested.

Nidec proposed that it would divest its refrigeration compressor business. This business manufactured compressors for both household and light commercial use. This removed the overlap in the markets where the EC had concerns.

In addition, and more unusually, Nidec agreed to fund future investment in the business that would be divested. The amount was the equivalent of the amount that Nidec would have invested in two of the divested plants absent the transaction.

The remedy included an up-front buyer provision with the parties being required to divest the business to an identified and approved buyer before closing their deal.[61]

B.3 Novelis/Aleris

In October, the EC approved Novelis' acquisition of Aleris subject to divestment of an Aleris business.[62]

Both parties supplied aluminium flat rolled products and, in particular, aluminium automotive body sheets. The EC's Press Release notes that it concluded that aluminium flat rolled products

57 *Id.*, paras 67 to 68.
58 *Id.*, paras 69 to 73.
59 See Decision, Annex I.
60 Case C.8947, *Nidec/Embraco*. The EC's decision is not yet published. See IP/18/6597, 28 November 2018 and IP/19/2136, 12 April 2019.
61 See MLex, *Whirlpool and Nidec clear final hurdle to EU deal approval following asset sale*, 26 June 2019.
62 Case M.9076, *Novelis/Aleris*. The EC's decision is not yet published. See IP/19/1835, 25 March 2019 and IP/19/5949, 1 October 2019.

were part of a different market to other aluminium products. The EC considered that the parties had very high market shares and controlled a significant amount of the manufacturing capacity for aluminium automotive body sheets in the EEA. Smaller suppliers would not be able to counter a price increase since they had limited spare capacity. The EC also believed that the transaction would disincentivize the merged entity from investing in new manufacturing capacity.

The parties offered to divest Aleris' entire European aluminium automotive body sheet business, including a plant in Belgium. To maintain its viability, the divestment includes other products manufactured at this plant as well as R&D assets. In addition, the parties agreed to provide funding to the buyer to enable it to invest to improve its capabilities. Again, this funding aspect of the remedy is unusual. Although the Press Release does not say it, it is reported that the clearance was subject to an up-front buyer condition so the parties cannot close until after the divestment to the buyer.[63]

B.4 BASF/Solvay's EP and P&I Business

In January, the EC cleared BASF's acquisition of Solvay's nylon business subject to a comprehensive remedies package.[64]

The EC examined both parties' dominant or strong market positions throughout the nylon value chain[65] and access to a key input (Adiponitrile, ADN). The EC found that the transaction would have reduced the number of suppliers and was likely to lead to price increases in a number of EEA markets.[66] It also concluded that the merged entity would have had both the ability and the incentive to restrict access to essential inputs, including ADN.[67] The need to access essential inputs was also identified as a high barrier to entry.

To address the EC's concerns, the parties offered a range of commitments:[68]

- First, they offered to divest Solvay production facilities in France, Germany and Poland to a single buyer.
- Second, and more interestingly, they agreed to create a production JV between the merged entity and the buyer of the divested assets.[69] Among other products, the JV will produce adipic acid, which is an essential input for many nylon products. The buyer will have a 49% interest in the JV and be entitled to offtake 49% of the JV's production.
- Third, they proposed to enter three long-term supply agreements for ADN with the purchaser of the divested business.

The commitments contain an up-front buyer clause, which prevented the parties from closing their transaction until after the EC had approved the buyer of the divested assets and the parties had entered the sale agreement.[70]

B.5 E.ON/Innogy

In September, the EC conditionally cleared E.ON's acquisition of RWE's Innogy business.[71] This transaction is part of an asset swap between E.ON and RWE.[72]

The EC identified four markets on which the transaction would significantly reduce competition.

First, the parties were the two largest suppliers of electricity for heating purposes in Germany.

Second, the parties were two of a small number of companies who operated, or had plans to operate, charging stations for electric vehicles on German motorways. The EC's Press Release notes that, in many places, the parties' charging stations were located close to each other.

Third, E.ON and Innogy were strong suppliers and close competitors on the Czech market for the retail supply of gas to all customers and electricity

63 See MLex, *Novelis-Aleris deal shows little room for creativity in merger remedies*, 1 October 2019.
64 Case M.8674, *BASF/Solvay's EP and P&I Business*. The EC's decision is available on its website, as is a summary decision. See also IP/18/4291, 26 June 2018 and IP/19/522, 18 January 2019.
65 See Summary Decision, para. 7 and, for more detail, Decision paras 23 *et seq*.
66 *Id.*, para. 10.
67 *Id.*, para. 11.
68 *Id.*, para. 12.
69 See Commitments, page 2 and para. 6(v).
70 Decision, para. 1175 and Commitments, para. 3.
71 Case C.8870, *E.ON/Innogy*. The EC's decision is not yet published. See IP/19/1593, 7 March 2019 and IP/19/5582, 17 September 2019.
72 In February, the EC unconditionally approved another part of the swap, RWE's acquisition of certain of E.ON's generation assets.; see Case M.8871, *RWE/E.ON Assets*.

to households and small businesses.

Fourth, the parties were two of the largest three on the Hungarian market for the retail supply of electricity to unregulated businesses.

To resolve these issues, E.ON offered four categories of divestment:

- It agreed to divest most of its customers for heating electricity in Germany and, if the purchaser requests them, the assets needed to compete effectively on this market.

- It agreed to discontinue operating 34 electric charging stations on German motorways. In the future, these will be operated by a third party.

- It agreed to divest its retail supply of electricity to unregulated customers business in Hungary. The divestment includes all of the relevant assets and staff.

- It agreed to divest Innogy's business in the retail supply of electricity and gas in the Czech Republic. Again, this divestment includes all of the associated assets and staff.

B.6 Telia Company/Bonnier Broadcasting Holding

In November 2019, the EC conditionally cleared the acquisition of Bonnier Broadcasting by the retail TV distributor, Telia Company.[73]

The EC's investigation focused principally on the wholesale supply and retail distribution of TV channels in Finland and Sweden, where Bonnier owned TV channels, like TV4 and MTV Oy. The EC was concerned that consumers in these two countries would face reduced choice and higher prices.

First, the EC concluded that Telia's competitors in TV distribution could be foreclosed from the market by not having access to the combined entity's (i) free-to-air and basic pay TV channels and (ii) premium pay TV sports channels.

Second, it believed Telia could deny access to streaming services, namely advertising video on demand ('AVOD') and subscription video on demand ('SVOD') services.

Lastly, it concluded that Telia's competitors in telecom and TV distribution would be excluded through not having access to advertising space on the combined entity's TV channels.

To resolve the EC's competition concerns, Telia offered an extensive commitments package, applicable in Finland and Sweden for 10 years:

- First, it agreed to license, on FRAND terms, free-to-air and basic pay TV channels, premium pay TV sports channels, including ancillary rights, network personal video recorder ('NPVR') rights, and any existing and standalone over-the-top ('OTT') rights;

- Second, it committed not to limit access to the combined entity's streaming services and applications over the internet;

- Third, it agreed not to discriminate against rival telecoms providers and TV distributors in the sale of TV advertising space; and

- Fourth, it undertook to protect confidential information concerning rival TV broadcasters, TV distributors and telecom providers by maintaining information barriers between the combined entity's wholesale and retail businesses.

73 Case M.9064. The decision is not yet published. See IP/19/6271, 12 November 2019 and IP/19/2474, 10 May 2019.

EC Procedural Enforcement

- Canon fined €28 million for implementing TMSC transaction before notification and clearance
  - Legality of warehousing structure
- GE fined €52 million for supplying incorrect information
- Statement of Objections sent to Telefónica for alleged breach of E-Plus commitments
  - Failure to include products in benchmark calculation

C. EC PROCEDURAL ENFORCEMENT

C.1 Canon

In June, the EC fined Canon €28 million for implementing its acquisition of Toshiba Medical Systems Corporation ('TMSC') before notifying the acquisition to the EC and before receiving the EC's approval.[74]

In August 2016, Canon had notified its plan to acquire TMSC from Toshiba. The EC unconditionally cleared the transaction on 19 September 2016.[75]

Canon had used a 'warehousing' two-step transaction structure involving an interim buyer ('MS Holding').[76] First, under an 'interim transaction', MS Holding acquired 95% of the share capital of TMSC for €800 while Canon paid €5.28 billion for the remaining 5% of the shares and received share options over MS Holding's stake. Critically, this interim transaction was carried out in March 2016, before notification to, or approval by, the EC.[77] Second, in the 'ultimate transaction', after approval by the EC, Canon exercised its share options, acquiring 100% of TMSC's shares.

The EC ruled that this structure infringed both the notification obligation under Article 4(1) EUMR and the standstill obligation under Article 7(1).[78]

The decision analyses the concept of a 'concentration' under the EUMR and what constitutes its 'implementation'.[79] It takes account of the EC's Consolidated Jurisdictional Notice[80] and the judgments of the EU courts in *Marine Harvest*,[81] *Cementbouw*,[82] *Electrabel*[83] and *Ernst & Young*.[84]

The EC determined that the first and second steps in the Canon/TMSC transaction structure together formed a single notifiable concentration.[85] In particular, the decision concludes that the interim transaction was only undertaken in view of the ultimate transaction and that the sole purpose of MS Holding's involvement was to facilitate Canon's acquisition of control over TMSC. The EC noted that Canon actively participated in the setting up of MS Holding; that MS Holding had no economic interest in TMSC beyond its role as interim buyer for which it was remunerated; that only Canon could determine the identity of TMSC's ultimate buyer; and that it alone bore the economic risk of the overall transaction as of the interim transaction.

The decision found that the interim transaction contributed to a lasting change of control over TMSC and that it was necessary to achieve this change of control 'in the sense that it presented a direct functional link with the implementation of the concentration'.[86] For the EC, this meant that the interim transaction contributed 'at least in part' to the change of control over TMSC and that the interim transaction was therefore a partial implementation.[87]
The EC found that Canon acted 'at least negligently'

74 Case M.8179, *Canon/Toshiba Medical Systems Corporation (Art. 14.2 proc.)*. The EC's decision is available on its website. See also IP/19/3429, 27 June 2019. The EC's original clearance of Canon's acquisition is also available on the EC's website; see Case M.8006, *Canon/Toshiba Medical Systems Corporation*.
75 See Decision, paras 38 to 42.
76 See details in Decision, paras 17 to 30.
77 *Id.*, para. 32 and paras 162 to 168.
78 Canon has appealed to the GC. See T-609/19, *Canon v Commission*.
79 *Id.*, paras 70 to 80 and 81 to 98.
80 Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.
81 T-704/14, *Marine Harvest v Commission*, judgment of 26 October 2017, EU:T:2017:753.
82 Case T-282/02, *Cementbouw Handel & Industrie v Commission*, Judgment of 23 February 2006, EU:T:2006:64.
83 T-332/09, *Electrabel v Commission*, Judgment of 12 December 2012, EU:T:2012:672.
84 C-633/16, *Ernst & Young*, Judgment of 31 May 2018, EU:C:2018:371.
85 Decision, paras 101 to 142.
86 *Id.*, para. 143 and paras 143 to 161.
87 *Id.*, para. 143.

in that it 'knew, or at least should have known, that its conduct would infringe' EUMR Articles 4(1) and 7(1).[88] Among other facts, the decision highlights that Canon is a large multinational company with substantial legal resources and that it had previously been involved in merger control proceedings before the EC.[89]

The decision imposed two fines, each of €14 million, on Canon; one for breaching Article 4(1) EUMR's notification requirement and the second for breaching Article 7(1)'s standstill obligation.[90] The EC considered that the infringements were by their nature serious infringements that could 'undermine the effectiveness of the Union merger control system'.[91] When assessing the gravity of the infringements, the EC noted that Canon had acted at least negligently but also that the transaction did not raise any competitive concerns and had been cleared unconditionally.[92] The EC ruled that the infringement of the obligation to notify was instantaneous and lasted only one day.[93] Meanwhile, the infringement of the standstill obligation had lasted until the EC cleared the transaction so it had a duration of just over six months.[94]

C.2 General Electric

In April, the EC fined General Electric ('GE') €52 million for providing incorrect information to the EC when it notified its 2017 acquisition of LM Wind.[95]

The EC found that, when notifying the LM wind transaction, GE stated that it did not have any wind turbines with a power output higher than 6 megawatts in development for offshore applications. However, through information collected from a third party, the EC learned that GE was already offering a 12 megawatts turbine to potential customers.[96] Following further RFIs from the EC, GE withdrew its notification and re-notified.[97] The EC unconditionally approved the transaction in March 2017.

In its investigation, the EC confirmed that, contrary to its statements in its first notification where GE had described its development plans for a higher power output offshore wind turbine as essentially non-existent,[98] GE had been approaching customers and offering them a higher power output turbine even before the notification was filed.[99] The statement that it had no higher power output wind turbines for offshore applications in development was therefore incorrect and a breach of GE's obligation to submit correct information in the notification.[100] The EC noted, however, that the provision of the incorrect information had no impact on the EC's approval of the transaction as the approval was based on rectified information.

Under the EUMR, companies that intentionally or negligently provide incorrect or misleading information can be fined up to 1% of their aggregated turnover. The EC found that GE negligently provided incorrect information. In particular, the EC highlighted GE's extensive experience with EUMR proceedings and familiarity with the standards required in a EU filing.[101] The EC considered this breach as a serious infringement because it prevented the EC from having all relevant information for the assessment of the transaction.[102] Furthermore, the EC noted that GE's incorrect information had the effect of preventing the EC from correctly assessing the competitive landscape on the market for offshore wind turbines and GE's competitiveness.[103]

The EC concluded that a fine of €52 million was both deterrent and proportionate. The EC rejected some of GE's arguments for mitigating circumstances such as that it relied on its counsel or that it had mentioned certain aspects of its development plans on several occasions. On this point, the decision notes that the EC discovered the actual state of GE's development project through a

88 *Id.,* paras 172 to 178.
89 *Id.*, para. 174.
90 *Id.*, paras 180 to 226.
91 *Id.*, para. 193.
92 *Id.*, paras 201 and 202. The Press Release notes that Canon's infringement of the EUMR had no impact on the EC's approval of the transaction since the EC's assessment was independent of the facts relevant to the procedural infringements.
93 *Id.*, paras 208 and 209.
94 *Id.*, paras 210 and 211.
95 Case M.8436, *General Electric/LM Wind Power Holding (Art. 14.1 proc.)*. The EC's decision is available on its website. See also IP/19/2049, 8 April 2019. The fine relates to Case M.8283, *General Electric/LM Wind Power Holding*.
96 Decision, paras 36 to 43.
97 *Id.*, paras 42 to 50.
98 *Id.*, paras 78 to 80.
99 *Id.*, paras 83 to 112.
100 *Id.*, paras 157 and 158.
101 *Id.*, paras 164 to 171.
102 *Id.*, paras 176 to 178.
103 *Id.*, paras 181.

third-party intervention.[104]

GE also argued that its right to be heard was infringed because it was not heard before the College of Commissioners approved the fine amount. The EC rejected this argument on the basis that GE decided not to enter into a cooperation procedure. Moreover, during the course of the standard procedure, GE had submitted a full response to the EC's statement of objections and declined to participate in an oral hearing.[105]

C.3 Telefónica

In February, the EC announced that it had sent a Statement of Objections to Telefónica alleging that it had failed to implement commitments agreed when the EC cleared Telefónica Deutschland's 2014 acquisition of E-Plus.[106]

The EC's Press Release notes that the investigation relates to Telefónica's commitment to offer wholesale 4G services to all third parties at 'best prices under benchmark conditions'. The EC's preliminary conclusion is that Telefónica breached its commitment by not including certain wholesale agreements in the benchmark calculation; this allegedly increased the prices that were offered to third parties.

The Press Release recalls that failure to respect a commitment contained in a clearance decision could lead to a fine of up to 10% of an undertaking's global annual turnover and could also lead to the EC revoking its clearance decision. This is the first time that the EC has issued a Statement of Objections alleging breach of a commitment.

EU Court Judgments

- CCJEU dismissed EC appeal of GC annulment of UPS/TNT Express prohibition
- GC dismissed KPN's application to annul conditional clearance of Vodafone/Liberty Global/Dutch JV

D. CASE LAW

D.1 EC v UPS

In January, the CJEU[107] dismissed the EC's appeal of the GC's 2017 judgment[108] annulling the EC's 2013 decision prohibiting UPS from acquiring TNT Express N.V. ('TNT').[109]

This was a long running saga.[110] The EC's 2013 decision had found that the acquisition would have significantly impeded effective competition for intra-EEA express small package delivery services in 15 Member States ('SIEC States'). The GC 2017 judgment, however, ruled that the EC had breached UPS's rights of defence during the administrative procedure. In particular, to identify the SIEC States, the EC had relied on an econometric analysis based on a model adopted after the Statement of Objections. The details of this model were never communicated to UPS and the GC considered that the changes compared to the previous model were not negligible and that the EC was therefore required to have communicated the final econometric model to UPS. The GC held that UPS might have been better able to defend itself if the EC had communicated the revised model to UPS.

The EC's appeal alleged that the GC had made three errors of law.

First, the EC contended that the GC was wrong to have held that it was required to communicate the revised econometric model to UPS before adopting its prohibition decision.[111] The CJEU's judgment

104 *Id.*, paras 198 to 208.
105 *Id.*, paras 217 to 230.
106 Case M.9003, *Telefónica Deutschland/E-Plus (Art. 14(2)(d) proc.)*. See IP/19/1371, 22 February 2019. The investigation relates to Case M.7018, *Telefónica Deutschland/E-Plus*.
107 Case C-267/17 P, *UPS v European Commission*, Judgment of 23 May 2019, ECLI:EU:C:2018:628.
108 Case T-194/13, *UPS v Commission*, Judgment of 7 March 2017, EU:T:2017:144.
109 Case M.6570, *UPS/TNT Express*.
110 The EC approved FedEx's acquisition of TNT in early 2016. Case M.7630, *FedEx/TNT Express*.
111 Judgment, paras 21 to 44.

recalls that observance of the rights of defence requires that the notifying parties be able to make their views known effectively on the accuracy and relevance of all facts on which the EC intends to base its decision.[112] For the CJEU, it followed that the EC cannot modify the substance of an econometric model on which it intends to base objections without bringing the modifications to the notifying parties' attention and allowing them to submit comments.[113] The CJEU concluded that the GC had therefore not erred in law when it ruled that the EC had infringed UPS's rights of defence.

Second, the EC challenged the consequences that the GC had drawn from the infringement of UPS's rights of defence.[114] The EC submitted that, even if UPS's rights of defence had been infringed, this could not, in any event, have led to the annulment of the prohibition decision. In particular, the EC emphasised that its conclusions on the SIEC States were based on other factors and not only the econometric model.[115] The CJEU disagreed and stated that the GC had correctly held that "*the applicant's rights of defence were infringed, with the result that the [decision at issue] should be annulled, provided that it has been sufficiently demonstrated by the applicant not that, in the absence of that procedural irregularity, the [decision at issue] would have been different in content, but that there was even a slight chance that it would have been better able to defend itself*".[116]

Lastly, the CJEU rejected the Commission's plea alleging that the GC had failed to state reasons.[117]

D.2 KPN v EC

In May, the GC dismissed KPN's application for the annulment of the EC's conditional clearance decision for the creation of a JV on Dutch television markets in *Vodafone/Liberty Global/Dutch JV*[118].[119]

KPN raised three pleas concerning the EC's analysis of the JV's effects on markets for premium pay TV sports channels.

First, it argued that since the Ziggo Sport Totaal and Fox Sports channels were not substitutable, the EC had committed a manifest error of assessment by not further segmenting the market for the wholesale supply and acquisition of premium pay TV sports channels.[120] The GC disagreed noting that the EC's decision referenced the findings from its market investigation, which had found that the two channels competed for content and customers and were becoming increasingly substitutable.[121]

Second, KPN argued that the decision was vitiated by a manifest error of assessment regarding input foreclosure on the market for the wholesale supply and acquisition of premium pay TV sports channels.[122] The GC rejected this noting that the EC's finding that the JV would not have the ability to engage in an input foreclosure strategy was not a manifest error of assessment.[123]

Lastly, KPN had sought to argue that the EC's decision had breached the duty to state reasons.[124] Again, the GC rejected this plea.

E. AIR FRANCE/KLM: AMENDMENT OF A COMMITMENT

In February, the EC waived part of the commitments that Air-France and KLM had offered when the EC approved Air France's acquisition of KLM ('the EUMR Commitments').[125]

The relevant EUMR Commitment concerned the Amsterdam-New York route. It obliged Air France-KLM to offer slots, enter an interlining agreement and provide access to its frequent flyer programme on this route. No party had sought to avail itself of any aspect of the EUMR Commitments on this route.[126] The EUMR Commitments were unlimited in duration unless waived.[127]

In 2015, the EC adopted a decision under Article 101 TFEU making commitments offered by Air France, KLM and other airlines binding ('the Antitrust

112 *Id.*, para. 31.
113 *Id.*, para. 37.
114 *Id.*, paras 45 to 58.
115 *Id.*, para. 50.
116 *Id.*, para. 56.
117 *Id.*, paras 64 to 68.
118 Case M.7978, *Vodafone/Liberty Global/Dutch JV*. The decision is available on the EC's website.
119 Case T-370/17, *KPN v European Commission*, Judgment of 23 May 2019, ECLI:EU:T:2019:354.
120 *Id.*, paras 41 to 90.
121 *Id.*, para. 70.
122 *Id.*, paras 91 to 133.
123 *Id.*, para. 122.
124 *Id.*, paras 134 to 152.
125 Case M.3280, *Air France/KLM*, decisions of 6 February 2019 and 11 February 2004. Both decisions are available on the EC's website.
126 Decision, para. 6.
127 *Id.*, para. 5.

Commitments').[128] The Antitrust Commitments concerned the establishment of a trans-Atlantic JV for passenger air transport services between Europe and North America and last to 2025. The Antitrust Commitments relating to the Amsterdam-New York route overlapped materially with the EUMR Commitments.[129] Norwegian Air had successfully applied for slots and started running services on this route.[130]

KLM (on behalf of Air France-KLM) argued that the existence of two sets of commitments was unnecessarily duplicative and disproportionate given that the Antitrust Commitment had triggered entry on the Amsterdam-New York route.[131] KLM also submitted that market conditions had changed materially since the conclusion of the EU/United States Open Skies agreement.[132]

The EC agreed that the Antitrust Commitments were sufficient to resolve its EUMR-related concerns on the Amsterdam-New York route.[133] Therefore it waived the EUMR Commitments relating to this route. The EC noted that the waiver would not damage Norwegian Air, other actual or potential competitors on the route, or third parties more generally.[134]

128 *Id.*, para. 7.
129 *Id.*, see para. 10.
130 *Id.*, paras 11 and 12.
131 *Id.*, para. 14.
132 *Id.*, para. 15.
133 *Id.*, para. 34.
134 *Id.*, paras 35 to 50.