A review of 2020 EU merger control

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SUMMARY

European Court Judgments[1]

Without doubt, the General Court's ("*GC's*") judgment annulling the European Commission's ("*EC's*") 2016 prohibition of *Hutchison's planned acquisition of Telefónica UK's O2* was the most important development in EU merger control in 2020.

In this judgment, the GC considered the application of the EU Merger Regulation ("*EUMR*") to transactions in oligopolistic markets, that do not create a dominant position, yet may raise concerns over non-coordinated/unilateral effects. The GC required that, when the EC's theory of harm is based on unilateral effects, its decision must show that the transaction would eliminate important competitive constraints that the merging parties previously exerted upon each other and reduce competitive pressure on other competitors. Moreover, the judgment requires that an EC prohibition decision in this context must demonstrate with a *"strong probability"* that a significant impediment to effective competition would result.

The GC's judgment criticises multiple aspects of the EC's decision including its analysis of closeness of competition, in particular its use of the concept of *"important competitive force"*, which would, in the GC's view, have led to an impermissible widening of the EC's ability to prohibit transactions. The judgment also criticises the EC's quantitative analysis, its failure to take account of efficiencies in this analysis and its analysis of the effects of network sharing agreements on the relevant markets.

The judgment is of critical importance and the EC has appealed it to the Court of Justice of the EU ("*CJEU*").

In another important judgment, the CJEU dismissed an appeal of the GC's judgment upholding the legality of the fines that the EC had imposed on *Marine Harvest* for gun-jumping contrary to Articles 4(1) and 7(1) of the EUMR. The judgment endorses the GC's narrow interpretation of the exception for public bids/series of transactions under Article 7(2) EUMR and dismisses arguments regarding the principle of *ne bis in idem*, the set-off principle and the principles governing sanctioning of concurrent offences.

The GC also issued a significant judgment dismissing *HeidelbergCement's and Schwenk Zement*'s attempt to annul the EC's 2017 decision prohibiting the proposed acquisition of Cemex Hungary and Cemex Croatia through a full-function joint venture. The judgment provides important guidance on identifying the *"undertakings concerned"* when applying the EUMR in the context of acquisitions by full-function joint ventures. It also contains interesting analysis on geographic market definition and the concept of a substantial part of the internal market.

In the other court judgment relating to merger control, the GC rejected *American Airlines'* application to annul an EC decision granting Delta grandfathering rights over slots that had been divested when US Airways and AMR Corporation merged. The judgment provides important guidance on the interpretation of commitments.

EC Phase II Decisions[2]

The EC adopted four phase II decisions in 2020. None of these were prohibitions but two other concentrations were abandoned following the EC opening phase II investigations.

The EC unconditionally cleared the acquisition of *Metallo by Aurubis*; like two other recent EC phase II investigations, this decision concerned copper markets.

In its *PKN Orlen/Grupa Lotos* decision, the EC accepted structural and behavioural remedies to address concerns that it had identified in its phase II investigation of the purchase of Grupa Lotos, an integrated Polish oil and gas company. One of the more notable aspects of the remedy is a commitment to build a new jet fuel import terminal and transfer this to an independent logistics operator.

In *Google/Fitbit*, the EC accepted a commitments package with a duration of 10 years concerning use of

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1 See Section A below.
2 See Section B below.

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data in Google Ads, access to Web Application Programming Interface in the market for digital healthcare and interoperability with Android smartphones.

In its *Fiat Chrysler/Peugeot* decision, the EC found that the proposed behavioural commitments would resolve its concerns in the market for light commercial vehicles.

As of 31 December 2020, there were seven phase II investigations ongoing.[3] Some of these investigations have been ongoing for longer than usual in part because of the COVID-19 pandemic.

Other Developments[4]

The EC adopted several interesting conditional phase I clearance decisions in 2020. Neither time nor space has allowed a comprehensive analysis and summary of these decisions and these are not discussed further below. However, the decisions in *Assa Abloy/Agta Record* (divestment and commitment to supply product on fair, reasonable and non-discriminatory terms),[5] *Danaher/GE Biopharma* (divestment to an approved purchaser),[6] *AbbVie/Allergan* (divestment of a pipeline product),[7] *Vodafone Italia/Telecom Italia/INWIT JV* (making space on telecommunications towers available to third parties),[8] *Alstom/Bombardier* (divestment and commitment to supply on-board units to competitors)[9] and *Mann Mobilia/Tessner Holding/Tejo/Roller* (analysis of upstream effects in the market for the procurement of furniture and alleged buyer power)[10] are all noteworthy. Another deal that attracted much attention in 2020, although not always for competition-related reasons, was *LVMH/Tiffany*;[11] after a long pre-notification, the EC unconditionally approved LVMH's acquisition of Tiffany.

The EC adopted a rare decision rejecting Suez' request that it intervene against Veolia's purchase of a 29.9% stake in Suez. The EC's decision clarifies that a two-step transaction can be exempted from the EUMR's standstill obligation.

The EC adopted three decisions amending commitments that had been provided to secure clearances under the EUMR. In all these decisions, the EC pointed to material changes to market conditions, which meant that the original commitments were no longer required.

The EC issued a press release noting that no concentration arose when an individual acquired joint control of a joint venture (*I. Kaindl/P. Kaindl/M. Kaindl*).

Lastly, while the EC did not make any formal legislative proposals and no new legislation was adopted in the area of EU merger control, in a recent speech, Executive Vice-President Vestager has suggested that Member States' competition authorities should be able to make greater use of the ability to refer transactions to the EC. Among other things, this would allow the EC to review transactions that do not currently qualify for review under the EUMR's jurisdictional thresholds yet may potentially be important and involve competitively significant companies. In addition, the EC has recently initiated a formal consultation on its 1997 Market Definition Notice; the EC aims to publish the results of this consultation in 2021.

A. CASE LAW

EU Court Judgments

- *CK Telecoms UK Investments v EC*: GC annulment of EC's 2016 decision prohibiting Hutchison's acquisition of Telefónica UK's O2
  * Key judgment imposing higher burden on EC
  * Legal test for when a transaction raises non-coordinated (unilateral) effects on an oligopolistic market but does not create a dominant position
  * Correct standard of proof in this context
  * Criticism of the EC's use of the concept of "*important competitive force*", its quantitative analysis and its analysis of the effects of network sharing agreements
  * Under appeal to CJEU
- *Mowi v EC*: CJEU dismissed Marine Harvest's appeal of GC judgment upholding fine for gun-jumping
  * Narrow interpretation of Article 7(2) EUMR
  * Rejection of arguments based on *ne bis in idem*, the set-off principle and the principles governing sanctioning of concurrent offences
- *HeidelbergCement and Schwenk Zement v EC*: GC dismissed appeal against EC's 2017 prohibition of proposed acquisition of Cemex Hungary and Cemex Croatia
  * Identification of undertakings concerned under EUMR when a full-function joint venture is the acquirer: need to analyse who the "*real players*" were

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3 See Section C below.

4 See Section D below.

5 Case M.9408, *Assa Abloy/Agta Record.*

6 Case M.9331, *Danaher/GE Healthcare Life Sciences Biopharma.*

7 Case M.9461, *AbbVie/Allergan.*

8 Case M.9674, *Vodafone Italia/TIM/INWIT JV.*

9 Case M.9779, *Alstom/Bombardier Transportation.* In 2019, the EC had of course prohibited Siemens' proposed acquisition of Alstom; case M.8677, *Siemens/Alstom.*

10 Case M.9609, *Mann Mobilia/Tessner Holding/Tejo/Roller.*

11 Case M.9695, *LVMH/Tiffany.*

  * Analysis of relevant geographic market and substantial part of the internal market
- *American Airlines v EC:* GC dismissed application to annul decision granting grandfathering rights over slots that had been divested under a 2013 commitment
  * Important guidance on the interpretation of commitments
  * Obligation to highlight divergence from the model text in the Form RM when offering commitments

A.1. CK Telecoms UK Investments Ltd v EC

In May, the GC annulled the EC's 2016 decision prohibiting Hutchison's (now CK Telecoms) proposed acquisition of Telefónica UK's "*O2*".[12] The judgment is the GC's first interpretation of the EUMR's application to transactions raising non-coordinated (unilateral) effects on an oligopolistic market.[13]

The proposed transaction would have combined Telefónica UK's O2 network with Hutchison's "Three" network. There were two other mobile network operators ("*MNOs*") in the UK: EE (now owned by British Telecom) and Vodafone.

The EC's decision found that the transaction would have caused non-coordinated effects on (i) the retail market due to the elimination of important competitive constraints, which would have led to an increase in prices, (ii) the retail market due to network sharing agreements, which would have decreased the quality of services for consumers and (iii) the wholesale market for network access due to the elimination of important competitive constraints.[14] The EC considered that the claimed efficiencies were not verifiable and that the commitments that were offered were inadequate.[15]

In key introductory paragraphs, the GC's judgment sets out the applicable legal test and the correct standard of proof.

The GC considered that mergers in oligopolistic markets that do not create or strengthen a dominant position should be prohibited only if they enable the merged entity to determine the parameters of competition, particularly by becoming a price maker instead of a price taker.[16]

The GC interpreted recital 25 and Article 2(3) of the EUMR together and identified two cumulative conditions that are required to establish that the non-coordinated effects of a merger would result in a significant impediment to effective competition ("*SIEC*"). First, the merger must eliminate important competitive constraints that the merging parties previously exerted upon each other. Second, the merger must reduce competitive pressure on the remaining competitors.[17] Accordingly, the judgment holds that, on its own, *"the mere effect of reducing competitive pressure on the remaining competitors"* is not enough to demonstrate a SIEC when the EC's theory of harm is based on non-coordinated effects.[18]

Turning to the standard of proof required to show a SIEC, the judgment holds that the EC must adduce evidence to demonstrate with a *"strong probability"* that a SIEC would occur.[19] This is a more onerous requirement than showing that a SIEC was *"more likely than not"*, on the basis of a "*balance of probabilities"*, as the EC argued.

After setting out this background, the GC assessed CK Telecoms' pleas relating to the three theories of harm in the EC's decision.

First, beginning with the effects on the retail market, the GC disagreed with CK Telecoms' argument that the EC had considered the parties' market shares as "*an indicator of the loss"* of an important competitive constraint. The GC considered that the EC had viewed the parties' market shares only as a *"first indication"* of the parties' competitive importance and of the extent of the competitive constraint that they exerted.[20]

The GC found, however, that the EC's decision had erred in law in finding that an *"important competitive force"* need not necessarily stand out from its competitors in terms of its impact on competition.[21] The judgment notes that the EC's defence conceded that an important competitive force must have more of an influence on competition than its market share would suggest.[22]

The GC also noted that the decision considered that the mere decline in the competitive pressure resulting from the loss of *"an undertaking having more of an influence on competition than its market share would suggest"* was sufficient to prove a SIEC.[23]

However, the GC concluded that the EC's use of the concept of an important competitive force, as an

12 Case T-399/16, *CK Telecoms UK Investments v Commission,* judgment of 28 May 2020, ECLI:EU:T:2020:217. For the EC decision, see case M.7612, *Hutchison 3G UK/Telefónica UK*.

13 Judgment, para. 85.

14 *Id.*, paras 20-22.

15 *Id.*, paras 23-24.

16 *Id.*, para. 90.

17 *Id.*, para. 96.

18 *Id.*, para. 97.

19 *Id.*, para. 118.

20 *Id.*, paras. 151-152 and 154.

21 *Id.*, para. 158.

22 *Id.*, para. 170.

23 *Id.*, para. 171.

alternative to and in addition to the concept of an important competitive restraint, would lower the standard of proof required to establish a SIEC[24] and wrongly broaden the scope of Article 2(3) of the EUMR.[25]

The GC considered that the EC's decision had confused three concepts: a SIEC under Article 2(3); the *"elimination of* [an] *important competitive constraint"* in recital 25 of the EUMR; and the elimination of *"an important competitive force"*, which is a term used in the EC's Guidelines on the assessment of horizontal mergers.[26] The GC concluded that this confusion *"considerably broadens the scope of Article 2(3) of Regulation No 139/2004, since any elimination of an important competitive force would amount to the elimination of an important competitive constraint which, in turn, would justify a finding of a significant impediment to effective competition"*.[27]

The GC therefore agreed with CK Telecoms that the EC had distorted the concept of an *"important competitive force"*. According to the judgment, the EC's interpretation would have allowed it to treat any player that exerted competitive pressure on an oligopolistic market as an important competitive force.[28] This would have enabled the EC to prohibit a merger on an oligopolistic market due to that fact alone and without regard to the elimination of the competitive constraints that the merging parties exerted upon each other.[29]

As noted above, the GC considered that there were two cumulative conditions needed to establish that a merger's non-coordinated effects would lead to a SIEC: the elimination of important competitive constraints that the merging parties previously exerted upon each other; and the reduction of competitive pressure on other competitors.

The GC also upheld CK Telecoms' plea that the EC had committed several errors of assessment when it had concluded that Three was an important competitive force on the basis of (i) Three's share of new customers won,[30] (ii) the evolution of Three's market share,[31] (iii) Three's pricing policy[32] and (iv) the historic role that Three had played on the market.[33]

The GC then examined the EC's analysis of the closeness of competition between Three and O2 on the overall retail market. The GC noted that the decision had shown that the parties might be relatively close competitors in some market segments but considered that this was not sufficient to prove that the parties were particularly close competitors or sufficient to show the elimination of important competitive constraints exerted by the parties upon each other such as to amount to a SIEC.[34] According to the GC, the EC's approach would have meant that, in principle, any four-to-three merger would have to be prohibited, which would be incorrect.[35]

The judgment is critical of the EC's quantitative pricing analysis and concludes that this lacked probative value.[36] Notably, the GC observed that all concentrations lead to efficiencies[37] but that the EC did not take such efficiencies into account in its quantitative analysis.[38] The GC therefore ruled that the EC's analysis did not demonstrate with a sufficient degree of probability that prices would increase significantly following the transaction.[39]

CK Telecoms' second plea concerned the EC's analysis of non-coordinated effects arising from network sharing agreements.[40] The EC's decision had concluded that the anti-competitive effects that it had identified on the retail market would be exacerbated by each of the four UK MNOs having teamed with another MNO to achieve better network quality and the merging party being party to both resulting network-sharing agreements.[41]

The GC found that the post-merger termination or renegotiation of network sharing agreements could be pro-competitive and did not necessarily mean that a SIEC would result.[42]

The GC noted that the EC's decision did not analyse whether the merged entity would degrade the quality of its own network services.[43] The GC also considered that the EC had not proven to the requisite legal standard that the transaction would have made it impossible for EE and Vodafone to compete effectively.[44]

24 *Id.*, para. 172.
25 *Id.*, para. 173.
26 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (OJ 2004 C 31, p. 5).
27 Judgment, para. 173.
28 *Id.*, para. 174.
29 *Id.*, para. 175.
30 *Id.*, paras. 188-189.
31 *Id.*, paras. 193-197.
32 *Id.*, paras. 209-216.
33 *Id.*, paras. 219-225.
34 *Id.*, paras. 242-249.
35 *Id.*, para. 249.
36 *Id.*, paras. 264-283.
37 *Id.*, para. 277.
38 *Id.*, para. 278.
39 *Id.*, para. 282.
40 *Id.*, para. 323.
41 *Id.*, para. 296.
42 *Id.*, paras. 340-347.
43 *Id.*, para. 358.
44 *Id.*, paras. 362-397.

The judgment criticises the timeframe that the EC had used to analyse the transaction's effects. The EC's decision had assumed that the merged entity would maintain two separate network sharing agreements. The GC considered that the EC should have analysed the transaction's coordinated or unilateral effects over a longer period of time since the telecommunications sector was characterised by long-term investments and consumer contracts that lasted several years.[45] The EC had assumed the continued existence of two separate networks even though in the long-term the merged entity could have focused on one of the two network-sharing agreements.[46]

CK Telecom's third plea challenged the EC's findings of restrictive effects in the wholesale market.[47] The GC first emphasised that the reduction of the number of competitors from four to three on the wholesale market was not capable in itself of establishing a SIEC.[48] The GC also found that the EC had not adduced sufficiently convincing evidence that the transaction would have had a significant effect on effective competition. Notably, even though the EC had considered that Three's influence on competition was greater than its market share would have suggested, this was again not in itself sufficient to establish a SIEC.[49] Moreover, even if the evidence was capable of showing that Three was an important competitive force, this did not show that Three and O2 had previously exerted important competitive constraints on each other.[50]

The GC therefore upheld CK Telecoms' three pleas and annulled the EC's decision.[51]

Without question, this landmark judgment makes it harder for the EC to block a merger in an oligopolistic market when the merger does not lead to individual or collective dominance. EC officials have, unsurprisingly, criticised the judgment and the EC has appealed it to the CJEU.[52]

A.2. Mowi v EC

In March, the CJEU upheld the GC's judgment dismissing Marine Harvest's appeal against the EC's decision fining it for gun-jumping in relation to the acquisition of Morpol.[53]

Marine Harvest (now trading as "*Mowi*") acquired 48.5% of Morpol's shares through a private transaction ("*the December Acquisition*") in December 2012. In January 2013, Marine Harvest launched a public bid to purchase the remaining shares ("*the Public Offer*") in conformity with the Norwegian Securities Trading Act and the EU Directive on takeover bids. In September 2013, the EC approved Marine Harvest's acquisition of Morpol but the decision noted that Marine Harvest had already obtained *de facto* sole control over Morpol via the December Acquisition.[54] In July 2014, the EC fined Marine Harvest € 20 million for infringing (a) the standstill obligation in Article 7(1) EUMR and (b) the notification requirement in Article 4(1) EUMR.[55] Marine Harvest appealed the EC's decision but, in October 2017, the GC dismissed the appeal in its entirety.[56]

On appeal to the CJEU, Marine Harvest/Mowi argued that (i) the GC had incorrectly interpreted the exemption in Article 7(2) EUMR regarding public bids and series of transactions in securities and (ii) by imposing two separate fines, the GC had infringed the principle of *ne bis in idem*, the set-off principle and the principles governing sanctioning of concurrent offences.

The CJEU first confirmed the GC's narrow interpretation of Article 7(2) EUMR. This provision provides that the standstill obligation shall not prevent the implementation of a public bid, or a series of transactions in securities, by which control is acquired from various sellers, provided that (i) the concentration is notified to the EC without delay and (ii) the acquirer does not exercise its voting rights before the EC's clearance.

Mowi argued that, based on recital 20 of the EUMR and paragraphs 43 and 45 of the Jurisdictional Notice, all transactions that are closely connected, in that they are linked by a condition, should be treated as a "*single concentration*". Mowi maintained that the December Acquisition and the Public Offer were linked both *de jure* and *de facto* and therefore they only had to be notified to the EC following the Public Offer.[57]

However, the CJEU recalled that the recitals to an EU act do not have binding legal force and cannot be the basis either for derogating from the actual provisions of an act or for interpreting those provisions contrary to their meaning.[58] It therefore ruled that recital 20

45 *Id.*, paras. 408-415.
46 *Id.*, para. 411.
47 *Id.*, para. 424 *et seq.*
48 *Id.*, para. 434.
49 *Id.*, para. 446.
50 *Id.*, para. 453.
51 *Id.*, para. 455.
52 Case C-376/20 P, *Commission v CK Telecoms UK Investments.*
53 Case C-10/18 P, *Mowi ASA v European Commission*, Judgment of 4 March 2020, ECLI:EU:C:2020:149.
54 Case M.6850, *Marine Harvest/Morpol*, see, in particular, Decision, para. 8.
55 Case M.7184, *Marine Harvest/Morpol*, Decision under Article 14(2) EUMR.
56 Case T-704/14, *Marine Harvest v Commission*, Judgment of 26 October 2017, ECLI:EU:T:2017:753.
57 In particular, Judgment, paras. 23, 25-31.
58 Judgment, paras. 43 and 44.

could not be relied on to extend the scope of Article 7(2) EUMR.

The CJEU clarified that the exemption under Article 7 (2) EUMR should be interpreted by reference to Article 3 EUMR, which requires a lasting change of control. In the present case, the Public Offer was not necessary to enable a change of control since Marine Harvest had already obtained *de facto* sole control over Morpol via the December Acquisition.[59]

The CJEU concluded its analysis of the first ground of appeal by confirming that the GC had correctly observed that the concept of a "*single concentration*" in recital 20 of the EUMR is not intended to apply when sole *de facto* control is acquired from only one seller by means of a single transaction as had happened in the December Acquisition.[60] Consequently, the question of any *de jure* or *de facto* conditionality between the December Acquisition and the Public Offer was irrelevant.

Second, the CJEU rejected the arguments regarding the *ne bis in idem* principle. The CJEU considered that this principle only prevents an undertaking from being found liable, or proceedings being brought against it afresh, because of conduct for which the undertaking has either already been penalised or declared not liable in an earlier decision that can no longer be challenged.[61] Therefore, the principle could not be infringed when two fines were imposed in a single decision, even if those fines were imposed because of the same actions.[62]

Third, the CJEU held that Mowi had not substantiated why the GC had made an error in law in failing to apply the set-off principle, which, according to Mowi, meant that the second penalty that was imposed had to take account of the first.[63] Moreover, the court ruled that Mowi could not rely on the set-off principle to challenge the disproportionate nature of the fine imposed since this aspect was specifically addressed in different parts of the GC's judgment in relation to which Mowi had not raised any objection.[64]

Fourth, the CJEU dismissed Mowi's claim that the GC infringed the principles regarding concurrent offences by concluding that the EC correctly fined Mowi for two different infringements.[65] The CJEU agreed with the GC that the EU legislator had not identified either of the infringements in Articles 4(1) or 7(1) EUMR as being more serious than the other.[66] The CJEU recognised that there was a link between the two provisions since an infringement of Article 4(1) automatically results in an infringement of Article 7(1). However, the CJEU noted that the opposite is not true.[67] The CJEU also emphasised that Articles 4(1) and 7(1) EUMR pursue different objectives, which is also confirmed by the existence of Articles 14(2)(a) and (b) of the EUMR, which provide for the imposition of separate fines.[68] The CJEU rejected other arguments that Mowi had raised as these would have rendered Article 14(2)(a) redundant.[69]

Finally, the CJEU rejected as inadmissible a ground of appeal that Mowi had raised at the CJEU hearing regarding the alleged illegality of Article 14(2) EUMR. The CJEU recalled that it can only review findings of law on the pleas argued before the GC.[70]

A.3. HeidelbergCement/Schwenk/Cemex Croatia v EC

In October, the GC dismissed HeidelbergCement's and Schwenk Zement's action for annulment of the EC's 2017 decision prohibiting the proposed acquisition of Cemex Hungary and Cemex Croatia through Duna Drava Cement ("*DDC*").[71]

The 2017 decision had considered that HeidelbergCement and Schwenk, rather than DDC,[72] were the "*real players*" behind the acquisition and were therefore the "*undertakings concerned*", which meant that the EC had jurisdiction over the transaction.[73] Following its in-depth investigation, the EC concluded that the transaction would raise competitive concerns in Croatia, which were not addressed by the proposed remedies and the EC prohibited the transaction.

HeidelbergCement and Schwenk ("*the Applicants*") brought an action for annulment of the EC's decision before the GC. The GC's most notable findings relate to (i) the identification of the undertakings concerned when applying the EUMR in the context of acquisitions by full-function joint ventures; (ii) the GC's consideration of the EC's definition of the relevant geographic

59 *Id.*, paras. 47-51.
60 *Id.*, para. 64.
61 *Id.*, para. 76.
62 *Id.*, paras. 78 and 80.
63 *Id.*, para. 73.
64 *Id.*, paras. 83-86.
65 *Id.*, paras. 87-96.
66 *Id.*, para. 98.
67 *Id.*, paras. 101 and 102.
68 *Id.*, paras. 103, 114 and 115.
69 *Id.*, paras. 108-116.
70 *Id.*, para. 126.
71 Case T-380/17, *HeidelbergCement and Schwenk Zement v Commission*, Judgment of 5 October 2020, ECLI:EU:T:2020:471.
72 DDC is a Hungarian full-function joint venture equally owned and jointly controlled by cement, clinker and ready-mix concrete manufacturers HeidelbergCement and Schwenk Zement.
73 Case M.7878, *HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia.*

markets, (iii) the GC's consideration of the EC's competitive assessment and (iv) the GC's analysis of pleas relating to the proposed remedies.

First, the Applicants argued that the EC had not correctly identified the undertakings concerned.[74] According to the Applicants, the undertakings concerned were DDC, a full-function joint venture, as the acquirer, and the target companies and that these entities' turnovers would not trigger the EUMR's jurisdictional thresholds.[75]

The GC rejected the Applicants' argument that a full-function joint venture should be regarded as an undertaking concerned because it has its own legal personality or its own economic resources. The GC considered that this would disregard the numerous ways in which a parent company could influence the conduct of its subsidiary, either formally or informally.[76]

More specifically, the GC noted that a joint venture may be full-function from an operational point of view, but this would not necessarily entail that it has autonomy over the adoption of its strategic decisions.[77]

In the context of merger control reviews, the GC concluded that it was necessary to take into account the economic reality behind the transaction on a case-by-case basis, namely the way in which the acquisition process was initiated, organised and financed.[78]

In addition, the GC clarified that even if the full-function joint venture may have its own strategic interest in a merger, this would not necessarily prevent the parent companies from being classified as undertakings concerned on account of being the real actors behind the transaction (for example, in light of their significant involvement in the initiation, organisation and financing of the transaction).[79]

While the GC's approach is understandable, its emphasis on a case-by-case assessment could lead to considerable uncertainty in some proceedings.

Furthermore, the GC rejected the Applicants' specific arguments claiming that they were not the real players behind the transaction despite HeidelbergCement's significant involvement in the transaction.[80] Among its conclusions on these arguments, the GC ruled that DDC's participation in the steering committee did not necessarily show that it was closely involved in the decisions relating to the transaction.[81] The GC emphasised that DDC failed to provide evidence of its participation in a number of decisions taken by HeidelbergCement in relation to the transaction, or of its opposition to, or non-adherence to, any decision taken by HeidelbergCement; similarly the Applicants had not shown that DDC had voting rights or a casting vote in the steering committee and they had not demonstrated that HeidelbergCement did not have veto rights in that committee.[82]

Second, the Applicants challenged the EC's reasoning on the definition of the geographic market, which the EC concluded was a catchment area of 250 km surrounding the merging parties' plants.[83] The GC rejected the Applicants' claim that it was contradictory for the decision to assert both that the conditions of competition within the catchment area were "*sufficiently homogenous*" and "*geographically differentiated*" at the same time.[84] The GC noted that because of the nature of the sale of grey cement, transport costs and security of supply concerns would always give rise to geographic differentiation within a relevant geographic market.[85]

The Applicants further argued that the decision did not establish that the relevant geographic market constituted a substantial part of the internal market. Moreover, they argued that it was not sufficient for the decision to show that the relevant geographic market was a substantial part of the common market; rather, they argued, it was necessary to show that the part of the relevant market affected by a competition issue was itself a substantial part of the common market. According to the Applicants, neither Dalmatia nor southern Croatia, the parts of the relevant geographic market affected by the SIEC, constituted a substantial part of the internal market.[86]

The GC disagreed and noted that the concept of a SIEC did not mean that all parts of the catchment area around the target's plant in Split (Croatia) had to be equally affected by the impediment.[87] The GC emphasised that, despite the competitive concern being more

74 Case T-380/17, *HeidelbergCement and Schwenk Zement v Commission*, Judgment of 5 October 2020, ECLI:EU:T:2020:471, paras 95 and 97.

75 HeidelbergCement and Schwenk previously brought two actions seeking to annul the EC's decision to open an in-depth investigation on the basis that only DDC's revenues should have been taken into account when assessing if the EUMR's turnover thresholds were exceeded. The GC dismissed both actions as inadmissible because the EC's decision to open an in-depth investigation was not a challengeable act. See case T-902/16, *HeidelbergCement v Commission*, Order of 27 November 2017, ECLI:EU:T:2017:846; and case T-907/16, *Schwenk Zement v Commission*, Order of 27 November 2017, ECLI:EU:T:2017:858.

76 Judgment, para. 99.

77 *Id.*, para. 112.

78 *Id.*, para. 116.

79 *Id.*, para. 125.

80 *Id.*, paras. 153 *et seq.*

81 *Id.*, para. 180.

82 *Id.*, paras. 181-186. Also see paras. 212 and 247-248.

83 *Id.*, paras. 283, 286-289.

84 *Id.*, para. 325.

85 *Id.*, paras. 325-326.

86 *Id.*, para. 345.

87 *Id.*, para. 347. Similarly, see para. 366.

extensive in the Dalmatia region, the impediment affected the entire territory in the relevant geographic market.[88]

The Applicants challenged the EC's finding that the Split catchment area markets were a significant part of the internal market. According to the Applicants, the areas were insignificant compared to the entire EU internal market in view of their population of two million and surface area of some 30,000 km^2. They also argued that the area's regional cement consumption was not relevant.[89]

The GC noted that the EC's decision had relied on four factors to conclude that each potential relevant geographic market was a substantial part of the common market: surface area; population; cement consumption; and imports and exports.[90] In particular, the GC ruled that the relevant market's surface area and population would constitute a substantial part of the internal market under the EU's case law and in comparison to the population of some Member States.[91] The GC also noted that the area's consumption of grey cement was comparable to that of several Member States.[92]

Third, the Applicants argued that the EC's competitive assessment was flawed, claiming that, among other things, the cumulative constraints of competitors in and around the relevant region were sufficient to rule out a SIEC.[93] The GC rejected the Applicants' arguments based on criticism of the decision's treatment of spare capacity,[94] lack of incentives for competing suppliers to expand their sales[95] and the decision's reliance on a retaliation theory under which the threat of retaliation from the merged entity would discourage competitors from operating in the relevant markets.[96]

Fourth, the Applicants argued that the EC made manifest errors of assessment in respect of the proposed remedy. The GC rejected these arguments and emphasised that it was incumbent on the Applicants to offer remedies that were not affected by the defects that the EC had discussed with the Applicants during a state-of-play meeting. The GC noted that the EC is under no obligation to ask parties to remedy defects identified in commitments.[97]

Finally, the GC rejected an argument based on the EC's alleged lack of jurisdiction to prohibit the part of the transaction relating to the acquisition of Cemex Hungary due to the EC having made a partial referral to the Hungarian national competition authority.[98] The GC observed that while the referral meant that the EC no longer had jurisdiction to rule on the assessment of the transaction's effects in Hungary, the EC still was competent to rule on the parties' acquisition of Cemex Hungary more generally.[99] In addition, the GC rejected arguments alleging breach of essential procedural requirements and the Applicants' fundamental rights.[100]

A.4. American Airlines v EC

In December, the GC dismissed American Airlines' action seeking annulment of the EC's 2018 decision granting grandfathering rights to Delta Airlines ("*Delta*") over the airport slots released by the applicant as part of the commitments given in the merger of US Airways and AMR Corporation in 2013.[101] Delta had been operating these slots since 2015 on the London-Philadelphia route on which the EC had raised concerns in its 2013 decision. The grandfathering rights allowed Delta to begin using these slots for any route.

The commitments in the 2013 merger decision defined the terms "*grandfathering*", "*misuse*" and "*utilisation period*". In essence, the acquirer of the slots could apply for grandfathering rights once they had used the slots appropriately during the utilisation period. The commitments did not, however, define "*appropriate use*" of the slots.

In the decision granting Delta the grandfathering rights, the EC concluded that Delta had made appropriate use of the slots.[102] The EC considered that "*appropriate use*" meant the absence of "*misuse*" as this term was defined in the commitments.[103] Before the GC, American Airways argued that "*appropriate use*" had to be interpreted by reference to the bid that Delta had submitted to obtain the slots and that the EC's decision granting Delta the grandfathering rights was vitiated by an error of law.[104]

88 *Id.*, para. 347.
89 *Id.*, para. 349.
90 *Id.*, paras. 351-358.
91 *Id.*, para. 352.
92 *Id.*, para. 353.
93 *Id.*, para. 438.
94 *Id.*, para. 445 *et seq.*
95 *Id.*, para. 458 *et seq.*
96 *Id.*, para. 487 *et seq.*
97 *Id.*, paras. 596-597.
98 *Id.*, paras. 683 *et seq.* and 696.
99 In June 2017, following the EC's prohibition decision, HeidelbergCement and Schwenk notified the acquisition of Cemex Hungary on its own to the EC (Case M.8533, *HeidelbergCement/Schwenk/Cemex Hungary/Readymix Hungary*). Following a referral from the EC, the Hungarian Competition Authority conditionally cleared the acquisition.
100 Judgment, para. 627 *et seq.*
101 Case T-430/18, *American Airlines Inc. v Commission*, Judgment of 16 December 2020, ECLI:EU:T:2020:603.
102 Case M.6607, *US Airways/American Airlines*, decision of 30 April 2018 on the implementation of commitments. Also see sase T-430/18, para. 69.
103 Case T-430/18, para. 67.
104 *Id.*, paras. 92-93.

The GC considered that both the EC's and American Airlines' interpretation of "*appropriate use*" were reconcilable with the wording of the provisions in the commitments. A literal interpretation of those provisions was not therefore decisive.[105]

The GC clarified the relevant principles for interpreting the term "*appropriate use*". It did this by taking account of the general principles for interpreting EU law,[106] the specific rules of interpretation in the commitments and by reference to the general framework of EU law, particularly the EUMR, the EC's Notice on remedies acceptable under the EUMR,[107] the Form RM submitted by the parties to the 2013 merger[108] and the Airport Slots Regulation.[109]

In the light of these principles, the GC first interpreted the provisions in light of the Form RM. The GC noted that the parties had stated in the Form RM that the commitments were, aside from some "*minor linguistic changes and clarifications*", largely similar to the commitments submitted to the EC in the IAG/bmi merger ("*IAG Commitments*").[110] The IAG Commitments had referred to "*appropriate use*" but did not state that the released slots must be used "*in accordance with the bid*". In the section of the Form RM relating to the changes from the model text, the parties had not highlighted any changes relating to the grandfathering provisions.[111] Noting this, the GC agreed with the EC's finding that the difference in wording between the commitments and the IAG Commitments was only a "*minor linguistic change*".[112]

The judgment also states that parties are obliged to declare all changes from model texts in the Form RM.[113] Since the parties had failed to bring the alleged substantial change relating to the requirement that use be "*in accordance with the bid*" to the attention of the EC in the Form RM, they could not rely on it to support their interpretation of the commitments.[114] The GC considered that if the parties had intended to diverge from the grandfathering rights in the IAG Commitments, they could and should have informed the EC by clearly indicating that in the Form RM.[115]

Under a systemic interpretation of the relevant provisions,[116] the GC considered that it would be contrary to the scheme of the provisions to consider a clause relating to the "*utilisation period*" to contain a *de facto* definition of the conditions for granting grandfathering rights.[117]

Finally, the GC conducted a purposive and contextual interpretation of the relevant clauses.[118] It dismissed the applicant's argument that the object of the commitments was to ensure maximum competitive constraints. Rather, the GC concluded that the EC's contested decision was correct to consider that the grandfathering rights furthered the object of making the slots more attractive to an acquirer.[119] As part of a contextual interpretation, the GC noted the need to interpret the commitments in light of the Airport Slots Regulation.[120]

B. EC PHASE II DECISIONS

In 2020, the EC adopted four phase II clearance decisions.

Phase II Decisions

- 1 unconditional clearance: *Aurubis/Metallo*
- 3 clearances subject to commitments
  - *PKN Orlen/Grupa Lotos* – structural and behavioural commitments including commitment to build a new jet fuel import terminal
  - *Google/Fitbit* – behavioural commitments regarding use of data in Google Ads, access to Web API in the market for digital healthcare and interoperability with Android smartphones
  - *Fiat Chrysler/Peugeot* – behavioural commitments
- No prohibitions but 2 transactions abandoned

The EC did not prohibit any transactions in 2020.

However, in April, Johnson & Johnson informed the EC that it would not acquire Tachosil, the dual haemostatic patch product manufacturer, which was owned by Takeda.[121] In March, the EC had opened an in-depth investigation into this planned transaction.[122] The EC was concerned that the proposed transaction would remove Johnson & Johnson as the best placed potential

105 *Id.*, paras. 103-107.
106 *Id.*, paras. 109-110.
107 *Id.*, paras. 111-112.
108 *Id.*, paras. 121-123.
109 *Id.*, para. 124. See Council Regulation (EEC) No 95/93 of 18 January 1993 on common rules for the allocation of slots at Community airports OJ L 14, 22.1.1993, p. 1.
110 *Id.*, paras. 126 and 137.
111 *Id.*, para. 137.
112 *Id.*, paras. 138-139.
113 *Id.*, para. 143.
114 *Id.*, paras. 149-150.
115 *Id.*, para. 199.
116 *Id.*, paras. 204-249.
117 *Id.*, paras. 223-225.
118 *Id.*, paras. 251-292.
119 *Id.*, para. 271.
120 *Id.*, paras. 279-283.
121 Withdrawal of notification of a concentration (case M.9547, *Johnson & Johnson/Tachosil*). See OJ C124/1, 17 April 2020.
122 Case M.9547, *Johnson & Johnson/Tachosil*. See IP/20/529, 25 March 2020.

entrant in the EEA/UK market for dual haemostatic patches, which are used to manage bleeding during surgery. Tachosil was dominant on the relevant EEA/UK market and the EC believed that the transaction would enable Johnson & Johnson to reinforce its leading position in the haemostats space in the EEA/UK and hinder competitors' expansion globally.

In addition, in May, the parties to the *Boeing/Embraer* transaction abandoned their transaction.[123] The EC had opened an in-depth investigation and been concerned that the transaction would remove Embraer as the third largest global competitor in the already highly concentrated commercial aircraft industry.[124]

B.1. Aurubis/Metallo Group Holding

In May, the EC unconditionally cleared the acquisition of Metallo by Aurubis.[125] Metallo was active in the processing and refining of non-ferrous metal scrap, in particular, copper scrap while Aurubis is a vertically integrated provider of non-ferrous metals and a leading player in the European copper industry.

The transaction was the third notified to the EC in the last two years in markets for copper products, following the EC's approval of KME's acquisition of MKM[126] and its prohibition of Wieland's proposed acquisition of Aurubis Rolled Products and Schwermetall.[127]

During its in-depth investigation, the EC assessed whether the transaction would create an entity with a dominant position, which could benefit from buyer power when purchasing copper scrap for refining. The EC was concerned that the merged entity could prevent price competition and harm industrial suppliers of copper scrap in the EEA who produce copper scrap as a by-product of their industrial activities. This could, in turn, have resulted in increased overall costs for these companies and increases in the prices of their end products. Furthermore, the EC assessed whether lower purchase prices paid by the merged entity could reduce the incentives for recyclers to collect and sort copper scrap. The EC also investigated whether Aurubis could use the acquisition of Metallo to control the supply of copper cathodes and wire rods.[128]

The EC found that copper scrap for refining was distinct from copper scrap for direct melt.[129] It considered that copper scrap for refining consisted of different markets, such as for relatively standardised products "*copper scrap no. 2*" and e-scrap, as well as for the more heterogenous copper scrap for smelting and refining ("*CSSR*").[130] The EC's investigation focused mainly on CSSR.

The EC concluded that the geographic market was EEA-wide since the conditions of competition within the EEA were sufficiently homogenous and different to those in other regions. The decision notes that refining charges and copper scrap prices differed between world regions and that CSSR suppliers took transport costs and regulatory barriers to export into account.[131] While its market definition was limited to the EEA, the EC took the possibility of exporting copper scrap into account in its competitive assessment and considered that this was an important alternative for some EEA scrap suppliers.[132]

The EC concluded that, despite the transaction bringing together the two market leaders in the EEA and the possibility that the merged entity would pay lower prices to suppliers, it was not likely to impede effective competition significantly on the CSSR market because:

- The parties' combined purchasing share for CSSR would remain moderate.[133]
- The parties did not compete closely before the transaction as their focus was on different groups of suppliers.[134]
- A large number of alternative purchasers of copper scrap inside and outside the EEA would continue to constrain the merged entity.[135] In addition, the decision notes that exports to non-EEA copper refiners were a viable alternative to EEA-based CSSR suppliers for many producers.[136]
- Some suppliers could also upgrade and/or re-mix CSSR material and, at least temporarily, stock scrap.[137]
- The CSSR market was characterised by its dynamic character; and barriers to entry and expansion would not prevent competitors from constraining any price increases in refining charges by the merged entity.[138]

The decision concluded that the transaction would lead to possible synergies in the refining of copper scrap,

123 See OJ C 167/13, 15 May 2020.

124 Case M.9097, *Boeing/Embraer*. See IP/19/6007, 4 October 2019.

125 Case M.9409, *Aurubis/Metallo Group Holding*. The EC's decision is available on its website. See also IP/19/6305, 19 November 2019 and IP/20/801, 4 May 2020.

126 Case M.8909, 11 December 2018.

127 Case M.8900, 5 February 2019.

128 See IP/19/6305, 19 November 2019.

129 Case M.9409, para. 165.

130 *Id.*, para. 227.

131 *Id.*, para. 332.

132 *Id.*, paras. 267, 300 and 306.

133 *Id.*, para. 460.

134 *Id.*, para. 507.

135 *Id.*, para. 616 *et seq.*

136 *Id.*, paras. 657-658.

137 *Id.*, paras. 703 and 718.

138 *Id.*, para. 770.

namely better "*valorisation*" given the complementarities between the parties' technological focus.[139]

The decision found that there would be no SIEC on the market for copper scrap no. 2 because there was a large number of alternative outlets available to suppliers.[140]

Lastly, the EC concluded that the transaction would not raise vertical concerns. In this context, it investigated the relationship between the parties especially regarding copper rods and copper shapes produced by Aurubis since Metallo was a potential input supplier for these products.[141]

B.2. PKN Orlen/Grupa Lotos

In July, the EC conditionally cleared PKN Orlen's acquisition of Grupa Lotos.[142] Both parties were large Polish integrated oil and gas companies. Both were active in Poland, where they owned refineries, and in several other Central and Eastern European and Baltic countries.

Following its in-depth investigation, the EC had concerns that the transaction, as notified, would have impeded effective competition in the markets for the wholesale and retail supply of motor fuels in Poland, the supply of jet fuel in Poland and Czechia and the supply of related products, such as different types of bitumen, in Poland.

To resolve the EC's competition concerns, PKN Orlen offered the following commitments:

- To divest a 30% stake in Lotos' refinery accompanied by strong governance rights, with the purchaser having the right to approximately half of the refinery's diesel and gasoline production, while also giving the purchaser access to critical storage and logistics infrastructure;
- To divest nine fuel storage depots to an independent logistics operator and to build a new jet fuel import terminal in the Polish city of Szczecin, which would be transferred to the independent logistics operator on completion;
- To release most of the capacity booked by Lotos at independent storage depots, including the capacity booked at Poland's biggest terminal for the import of fuels by sea;
- To divest 389 retail stations in Poland, amounting to approximately 80% of the Lotos network, and to supply these with motor fuels;
- To sell Lotos' 50% stake in the jet fuel-marketing joint venture that it had with BP, to continue to supply the joint venture and to give the joint venture access to storage at two airports in Poland;
- To make available up to 80,000 tonnes of jet fuel per year to competitors in Czechia via an annual open tender; and
- To divest two bitumen production plants in Poland and to supply the purchaser with up to 500,000 tonnes of bitumen/heavy residues annually.

The EC concluded that this package of commitments would allow the purchasers of the divested business and other competitors to compete effectively with the new entity. In particular, in the wholesale diesel and gasoline markets, the EC concluded that the purchaser of the divested Lotos refinery would be able to import significant volumes because it had greater access to infrastructure, which would enable it to exert a competitive constraint similar to that which Lotos had exercised before the transaction.

The remedies are a combination of structural and behavioural commitments. The commitment to build a new jet fuel import terminal and transfer this to an independent logistics operator on completion is noteworthy.

A third-party manufacturer of paraffin products, Polwax, has lodged an action for the annulment of the EC's decision.[143]

B.3. Peugeot/Fiat Chrysler

In December, the EC conditionally cleared the merger of Fiat Chrysler Automobiles N.V. ("*FCA*") and Peugeot S. A. ("*PSA*").[144] The EC was initially concerned that the proposed transaction would reduce competition in the market for light commercial vehicles weighing below 3.5 tonnes in 14 Member States and the UK due to the combination of the parties' high market shares and their range of brands and models, particularly smaller vans. In addition, the EC's press release noted that the relevant market is characterised by relatively high barriers to entry and expansion.

The EC concluded that the commitments offered by the parties would fully address its concerns. In particular, FCA and PSA committed:

- To expand the cooperation agreement currently in force between PSA and Toyota Motor Europe ("*Toyota*") for small light commercial vehicles. Under this agreement, PSA produces vehicles for sale by Toyota under the Toyota brand mainly in the EU. The commitments increase the available capacity for Toyota and reduce transfer prices for the vehicles and associated spare parts/accessories.

139 *Id.*, paras. 835 *et seq* and 854.

140 *Id.*, paras. 916, 935 *et seq.*

141 *Id.*, paras. 956-960 and 962-966.

142 Case M.9014, *PKN Orlen/Grupa Lotos*. The EC decision has not yet been published. See IP/20/1346, 14 July 2020 and IP/19/5149, 7 August 2019.

143 Case T-585/20, *Polwax v Commission*.

144 Case M.9730, *FCA/PSA*. The EC decision has not yet been published. See IP/20/1117, 17 June 2020 and IP/20/2506, 21 December 2020.

- To amend the "*repair and maintenance*" agreements for passenger cars and light commercial vehicles in force between the parties and their repairer networks. The EC considers that this will facilitate access for competitors. For instance, under the amended agreements, there will not be a need for brand specific reception or waiting areas or entrances for FCA/PSA light commercial vehicle clients and any existing prohibitions on repairers using the parties' tools and equipment to service competitors' vehicles will be removed.

The EC's press release states that the remedies will enable Toyota to compete effectively with the merged entity and lower entry barriers for new entrants.

B.4. Google/Fitbit

In December, the EC conditionally cleared the acquisition of Fitbit – a manufacturer and distributor of wearable devices and connected scales in the health and wellness sector – by Google.[145] The EC's main concern was that the proposed transaction would increase Google's data advantage and enable it to deliver more personalised advertising and impact the markets for the supply of online search and display advertising services and the supply of "*ad tech*" services, where Google is dominant or holds a strong market position. The EC's review also focused on the transaction's effects in the digital healthcare sector and on whether Google would have the ability and incentive to degrade the interoperability of rivals' wearables with Google's Android operating system for smartphones.

Google proposed the following commitments:

- Google Ads: Google committed not to use EEA users' health and wellness data collected from Fitbit devices (including search advertising, display advertising, and advertising intermediation products) in Google Ads. This commitment also applies to data collected via sensors (including GPS) and to data that is manually inputted. In addition, Google proposed to maintain a technical separation of the relevant Fitbit's user data, by storing this data in a separate "*data silo*". Lastly, Google agreed that EEA users will have an effective choice over whether to grant or deny other Google services (such as Google Search, Google Maps, Google Assistant and YouTube) access to the use of health and wellness data stored in their Google Account or Fitbit Account.
- Web Application Programming Interface ("*API*") Access: Google committed to maintain third parties' access to users' health and fitness data by allowing their software applications to access this data through the Fitbit Web API. This access will be without a charge and subject to user consent.
- Android APIs: Google committed to continue licensing, royalty free, to Android OEMs the public APIs covering all current core functionalities that wrist-worn devices need to interoperate with an Android smartphone (these include connecting via Bluetooth, accessing the camera and GPS). Google cannot circumvent this commitment by duplicating the core interoperability APIs outside the Android Open Source Project ("*AOSP*") as any such APIs must be maintained in open-source code. In addition, Google offered to grant competing wearable device OEMs access to all the Android APIs that it will make available to Android smartphone app developers, including those APIs that are part of Google Mobile Services. Google also committed not to degrade users' experience with third-party wearable devices through the discriminatory display of warnings, error messages or permission requests or by imposing discriminatory conditions on competing wearable device OEMs' access to the Google Play Store.

The EC concluded that these commitments addressed its concerns. The EC's press release notes that the duration of the commitments package is 10 years and that the Google Ads commitment is extendable by up to an additional ten years due to Google's dominance.

C. ONGOING PHASE II INVESTIGATIONS

> **Ongoing Phase II investigations**
> - 7 ongoing investigations on 31 December 2020
> - General delays due to COVID-19
> - But some investigations concern industries that are particularly affected by pandemic

As of 31 December 2020, there were seven ongoing phase II investigations. In addition, as noted above, the parties to the *Johnson & Johnson/Tachosil* and *Boeing/Embraer* transactions withdrew their notifications in the last 12 months.[146] A number of the ongoing investigations are taking longer than normal; no doubt, this is partially due to practical considerations resulting from the COVID-19 pandemic, but it is also of note that a number of the investigations concern sectors that are particularly affected by the pandemic, which may be complicating the EC's analysis (for example, cruise shipbuilding, air transport and retail).

145 Case M.9660, *Google/Fitbit*. The EC decision has not yet been published. See IP/20/1446, 4 August 2020 and IP/20/2484, 17 December 2020.

146 See Section B above.

C.1. Chantiers de l'Atlantique/Fincantieri

In October 2019, the EC opened an in-depth investigation into Fincantieri's proposed acquisition of Chantiers de l'Atlantique.[147] The EC's concern was that the proposed transaction would remove Chantiers de l'Atlantique as an important competitive force in the allegedly already concentrated and capacity-constrained market of cruise shipbuilding. The EC's press release also noted the market's high barriers to entry due to the complex nature of the construction and the unlikelihood of timely market entry from another credible shipbuilder. The EC believed that the proposed transaction could lead to higher prices, less choice and reduced innovation. In addition, the EC's preliminary review concluded that large customers would not have sufficient buyer power to counteract the risk of price increases. The EC suspended its review of the transaction in March.

C.2. Hyundai Heavy Industries/Daewoo Shipbuilding

In December 2019, the EC opened an in-depth investigation into Hyundai Heavy Industries Holdings' proposed acquisition of Daewoo Shipbuilding & Marine Engineering ("*Daewoo*").[148] The EC's main concern was that the proposed transaction would remove Daewoo as a significant competitive force in the following markets: (i) large containerships; (ii) oil tankers; (iii) liquefied natural gas ("*LNG*") carriers; and (iv) liquefied petroleum gas ("*LPG*") carriers. The EC considered that other shipbuilders would not be able to exert sufficient competitive restraint on the merged entity and that customers would have insufficient bargaining power to counter price increases. The EC's press release also notes high barriers to entry and that timely market entry was unlikely. The EC's review has been suspended three times; in January, March and July 2020.

C.3. EssilorLuxottica/GrandVision

In February, the EC opened a phase II investigation into EssilorLuxottica's proposed acquisition of GrandVision.[149] The EC's press release noted that the combination of EssilorLuxottica's strong market position in the wholesale supply of optical products and GrandVision's leading presence in retail distribution could lead to a reduction of competition in the retail markets for optical products. In particular, the EC's investigation focuses on vertical theories of harm, namely whether the proposed transaction could lead to increased prices or reduction of choice of optical products for final consumers through the raising of prices, the degrading of conditions of supply to competing retailers or the limiting of access of competing suppliers of lenses or eyewear to GrandVision stores. The EC's review has been suspended three times, in March, April and July 2020. In March 2018, the EC had cleared the merger between Essilor and Luxottica after a phase II investigation.[150]

C.4. Air Canada/Transat

In May, the EC opened an in-depth investigation into Air Canada's proposed acquisition of its rival airline Transat.[151] According to its press release, the EC's main concern was that the proposed transaction could significantly reduce competition on 33 origin and destination city-pairs between the EEA and Canada. The EC's preliminary review found that EEA national carriers only compete on a very small subset of routes out of their respective home hubs and did not exert sufficient competition. The EC's investigation is analysing the impact of the COVID-19 pandemic on competitors' operations in the midand long-term. The EC's review has been suspended twice, in June and in December 2020.

C.5. Refinitiv/London Stock Exchange

In June, the EC opened a phase II investigation into London Stock Exchange Group's ("*LSEG's*") proposed acquisition of Refinitiv.[152] The first phase investigation concluded that the proposed transaction could raise: (i) horizontal concerns in the market for electronic trading of European Government Bonds due to the combination of trading venues such as LSEG's MTS and Refinitiv's Tradeweb; (ii) vertical concerns in the market for trading and clearing of over-the-counter interest-rate derivatives due to barriers to entry and customers' reluctance to switch trading or clearing houses; (iii) vertical concerns in the market for consolidated real-time datafeeds and desktop solutions, as competitors could be prevented from accessing LSEG's input data; and (iv) vertical concerns in the market for index licensing,

147 Case M.9162, *Chantiers de l'Atlantique/Fincantieri*. See IP/19/6205, 20 October 2019.

148 Case M.9343, *Hyundai Heavy Industries/Daewoo Shipbuilding*. See IP/19/6792, 17 December 2019.

149 Case M.9569, *EssilorLuxottica/Grand Vision*. See IP/20/217, 6 February 2020.

150 Case M.8394, *Essilor/Luxottica*. See IP/18/1442, 1 March 2018.

151 Case M.9489, *Air Canada/Transat*. See IP/20/934, 25 May 2020.

152 Case M.9564, *LSEG/Refinitiv* Business. See IP/20/1140, 22 June 2020.

as competitors could be prevented from accessing Refinitiv's input data. The EC issued a statement of objections on 2 October 2020.[153]

C.6. Danfoss/Eaton Hydraulics

In September, the EC opened an in-depth investigation into the proposed acquisition of Eaton by Danfoss.[154] Both companies are leading global manufacturers of hydraulic components. The EC's press release notes that it is concerned that the transaction would result in reduced choice for suppliers and higher prices for certain hydraulic components for mobile applications because of the combination of the companies' high market shares in already concentrated markets.

C.7. Aon/Willis Towers Watson

In December, the EC opened an in-depth investigation into Aon's proposed acquisition of Willis Towers Watson.[155] Both companies are active in the markets for commercial risk brokerage services, re-insurance brokerage and provision of retirement and health and welfare services to commercial customers. The EC's main concern was that the proposed transaction would reduce competition in brokerage services provided to (i) large multi-national customers in certain risk classes such as Property and Casualty or Cyber and Marine and (ii) customers of all sizes for Space and Aerospace manufacturing risks as well as in a few additional risk classes in specific national markets. In addition, the EC's review also focuses on the provision of (i) reinsurance brokerage services, including the mediation of risks between insurance and reinsurance companies and (ii) consulting and administration services to companies regarding the retirement, health and welfare schemes offered to their employees.

D. OTHER DEVELOPMENTS

Other

- EC confirmed that two-step transaction can qualify for the exemption to the EUMR standstill obligation
- Amendment of three commitments in light of changed market conditions

continued on next page

- EC determination that no concentration arose (*Kaindl*)
- No formal legislative proposals but:
  * Executive Vice-President Vestager statements on encouraging referrals to the EC, in part to address "*killer acquisitions*" not caught under EUMR thresholds
  * Formal consultation on 1997 Market Definition Notice

D.1. Veolia/Suez

In December, the EC issued a decision rejecting Suez' claim that Veolia had infringed the standstill obligation, under Article 7(1) EUMR, in its acquisition of a minority stake in Suez.[156]

Veolia had announced in August that it intended to acquire sole control of Suez in a two-step transaction. Veolia would first acquire a 29.9% non-controlling minority interest in Suez from Engie and it would then launch a public offer for the remaining shares. The first step was completed in October 2020.

A few days later, Suez formally requested the EC, under Article 265 TFEU, to declare that Veolia had infringed the standstill obligation by acquiring the 29.9% non-controlling minority interest. In addition, Suez also asked the EC to impose interim measures against Veolia's acquisition of the 29.9% minority interest, under Article 8(5)(a), and to initiate proceedings against Veolia with a view to imposing a fine under Article 14(2) EUMR.

The EC, despite noting that it was not legally bound to rule on Suez' request, decided to issue this decision in the interest of providing clarity.[157]

First, the EC concluded that Veolia designed and planned the two steps of the transaction simultaneously to achieve its objective of acquiring control of Suez. In particular, the EC noted that, even in the event that the second step (i.e., the takeover bid) were to fail, the first step (i.e., the acquisition of 29.9% of Suez' shares) significantly increased the chances of this bid succeeding. As a result, the EC concluded that the two steps were interdependent within the meaning of paragraph 43 of the Consolidated Jurisdictional notice and the *Cementbouw* judgment[158] and therefore constituted a single concentration.[159]

153 See MLex report, 16 October 2020.

154 Case M.9820, *Danfoss/Eaton Hydraulics*. See IP/20/1715, 21 September 2020.

155 Case M.9829, *Aon/Willis Towers Watson*. See IP/20/2512, 21 December 2020.

156 Case M.9969, *Veolia/Suez*. The EC's decision is available on its website.

157 *Id.*, para. 5.

158 Case T-282/02, *Cementbouw Handel & Industrie v Commission*, Judgment of 23 February 2006, ECLI:EU:T:2006:64.

159 *Id.*, paras. 11-13.

Second, the EC concluded that, since the two steps of the transaction formed a single concentration, the transaction as a whole qualified for the exemption to the standstill obligation under Article 7(2) EUMR.[160]

In this regard, the EC noted that the Article 7(2) exemption applies to situations, such as in this case, where control is acquired from various sellers both through a private transaction and through acquiring the remaining shares in a subsequent takeover bid resulting in an acquisition of control from several sellers.[161]

Furthermore, the EC highlighted the GC's statement in *Marine Harvest* that it is possible that the acquisition of a minority stake, which does not confer control, over the target undertaking, followed by a public bid, may form part of a single concentration which falls within the scope of the exemption to the standstill obligation.[162]

The EC considered that there was no evidence that Veolia did not act promptly in notifying the transaction. The EC recalled, in this regard, that notifying parties are encouraged to engage promptly in pre-notification discussions with the EC and that the EC is subject to a duty of confidentiality regarding these contacts.[163]

Consequently, the EC concluded that the two-step transaction constituted a single concentration and that each step benefitted from the exemption to the standstill obligation under Article 7(2) EUMR.[164] The EC thus rejected Suez' claim that Veolia had infringed the standstill obligation.[165]

D.2. Amendment of a commitment: *Takeda/Shire*

In May, the EC waived the commitments made by Takeda to obtain clearance for its acquisition of Shire, a global biopharmaceutical company.[166] In November 2018, the EC had conditionally approved Takeda's acquisition subject to the divestment of a biologic drug, under development by Shire, to treat inflammatory bowel diseases, namely SHP 647. The divestment would have removed the overlap between Takeda's and Shire's activities on the relevant market.[167]

Following Takeda's reasoned request to waive the commitments in their entirety, the EC found that several permanent, significant and unforeseeable developments had occurred. These included the emergence of promising new drugs, negative results of studies on SHP 647 and difficulties in recruiting patients for the clinical trials of SHP 647 (this was partly because of the COVID-19 pandemic). These developments negatively affected the development and potential competitiveness of Shire's pipeline drug. As a result, the EC concluded that the divestment of SHP 647 was no longer necessary.

D.3. Amendment of a commitment: *Nidec/Embraco*

In May, the EC also partially waived a commitment made by Nidec when it acquired Embraco (Whirlpool's refrigeration compressor business).[168] Under the clearance decision, Nidec committed to divest its refrigeration compressor business and the decision prohibited reacquisition. Nidec requested that the EC waive the non-reacquisition clause relating to the fixed speed household compressor manufacturing line. The EC's investigation determined that the structure of the relevant markets had changed materially and that the non-reacquisition clause was no longer necessary.

D.4. Amendment of a commitment: *Gaz de France/Suez*

In October, the EC partially waived a commitment made by Gaz de France in connection with its acquisition of Suez (the combined entity is now known as Engie).[169] In 2006, the EC had cleared this transaction subject to conditions. Among the remedies, Engie had committed to build new gas storage capacity in France and offer this new capacity to the market through a transparent and non-discriminatory auction mechanism. No end date was foreseen with regard to these commitments and Engie requested that the EC waive them in light of changing market conditions. The EC's review revealed that the structure of the relevant markets and the applicable legislation had changed. As a result, the EC found that these commitments were no longer necessary.

D.5. No concentration: *I. Kaindl/P. Kaindl/M. Kaindl*

In September, the EC decided that the acquisition of joint control over M. Kaindl OG a wood processing and manufacturing joint venture company by Ms, Ines

160 *Id.*, para. 24.

161 *Id.*, paras. 25-30.

162 Case T-704/14, *Marine Harvest ASA v Commission,* Judgment of 26 October 2017, ECLI:EU:T:2017:753, para. 191.

163 *Id.*, para. 34.

164 *Id.*, para. 35.

165 *Id.*, para. 36.

166 Case M.8955, *Takeda/Shire*. The decision on the waiver of the commitments is available on the EC's website. See also IP/ 20/967, 28 May 2020.

167 Case M.8955, *Takeda/Shire*. The EC's decision is available on its website. See also IP/ 18/6497, 20 November 2018.

168 Case M.8947, *Nidec/Embraco*. The decision on the waiver of the commitments is available on the EC's website. See also MEX/20/892, 15 May 2020.

169 Case M.4180, *Gaz de France/Suez*. See MEX/20/1993, 27 October 2020.

Kaindl did not amount to a concentration under the EUMR.[170] The EC considered that Ms, Kaindl did not control any undertaking with economic activity within the meaning of the EUMR at the relevant moment for establishing the EC's jurisdiction in a case of acquisition of joint control through succession.

D.6. Legislative proposals

There were no formal legislative proposals in the mergers area. However, in a recent speech marking the EUMR's 30[th] anniversary, Executive Vice-President Vestager outlined some preliminary conclusions regarding procedural and jurisdictional aspects of EU merger control.[171] In particular, Executive Vice-President Vestager highlighted three areas that she thought could be improved.

First, the EC is considering how specific transactions, potentially characterisable as "*killer acquisitions*", could be reviewed notwithstanding that they would not satisfy the EUMR's revenue-based thresholds. This concern was also mentioned in the EC's "*Competition policy for the digital era*" report,[172] which noted that the current revenue-based threshold system may not always reflect a company's competitive potential. Executive Vice-President Vestager seems to have ruled out the possibility of introducing an additional value-based threshold as being disproportionate. Instead, her speech indicated that the EC may "*start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level whether or not those authorities had the power to review the case themselves*".[173]

Second, Executive Vice-President Vestager indicated that the EC will review the rules concerning the application of the simplified procedure and aim at reducing the amount of information required to be submitted and the extent of pre-notification discussions.

Third, Executive Vice-President Vestager said that the EC will launch a review of its substantive assessment of merger cases. This will analyse its past practice and developments such as digitalisation and ongoing concentration of markets.

In addition, in June, the EC launched a public consultation on the 1997 Market Definition Notice.[174] The consultation seeks to gather views on how increases in global trade, including with major emerging markets, the progressive elimination of national barriers to commerce within the single market, digitisation and the rise of new players in some sectors have affected the definition of relevant product and geographic markets. The EC aims at publishing the results of this consultation in 2021.

170 Case M.9741, *I. Kaindl/P. Kaindl/M. Kaindl*. See MEX/20/1745, 25 September 2020.

171 *The future of EU merger control*, the International Bar Association Annual Conference, 11September 2020, available at https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en.

172 European Commission, *Competition policy for the digital era Final report*, available at https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf.

173 In the last 12 months, the EC accepted a referral request from the Austrian, Danish, Finnish, Norwegian, Swedish and the UK national competition authorities asking the EC to assess Mastercard's proposed acquisition of Nets A/S account-to-account payment business; see EC's Daily News, 6 April 2020. In November, the EC decided, at the UK's CMA's request, to refer Liberty Global and Telefónica's plan to create a JV in the UK to the CMA. The CMA's referral request noted that the transaction *threatens to affect significantly competition in a market within the UK, which presents all the characteristics of a distinct market*" and that referral was even more justified given the then forthcoming end of the Transition Period under the EU/UK's Withdrawal Agreement see https://assets.publishing.service.gov.uk/media/5f84629b8fa8f5045d715757/M-9871_-_Liberty_Global_plc_-_Telefonica_SA_-_JV_-_CMA_Article_9_Request__WEB.pdf. See IP/20/2164, 19 November 2020.

174 IP/20/1187, 26 June 2020.