In this issue:

Page 1: M. 7878  **HeidelbergCement / Schwenk / Cemex Hungary / Cemex Croatia**

The remedies proposed in this case were insufficient to clear the transaction as they concerned an uncertain business opportunity for a new competitor.

Page 5: M. 8465  **Vivendi / Telecom Italia**

This transaction consisted of the acquisition of (de facto) control by a minority shareholder over a listed company with a widely dispersed share capital. The Commission concluded that a pre-merger minority shareholding held by the buyer in a competitor of the target company could give rise to competition concerns.

Page 9: M. 8401  **J&J / Actelion**

In this case the Commission found competitive concerns due to the combination of two development programmes for insomnia drugs, currently in Phase II of clinical trials.
**Competition merger brief**

**HeidelbergCement/Schwenk/Cemex Hungary/Cemex Croatia – Cement travelling across borders**

*Silvia Modet*

**Introduction**

On 5 April 2017, the Commission prohibited the proposed takeover of Cemex’s assets in Croatia and Hungary by building materials companies HeidelbergCement and Schwenk.

Two years earlier, Mexican cement producer Cemex group had initiated a process for the sale of its subsidiaries operating in Austria, Hungary and Croatia. These divestments were undertaken in the context of the group’s further debt restructuring.

Duna-Dráva Cement, ‘DDC’, a joint venture controlled by the German companies HeidelbergCement and Schwenk, and active in Hungary, Croatia and the Western Balkans, entered into an agreement to acquire Cemex Croatia.

The Commission’s investigation pointed to strong concerns that the transaction would have significantly reduced competition in grey cement markets and increased prices in Croatia.

Cemex Croatia is currently the largest producer of cement in Croatia, whereas DDC and HeidelbergCement are the largest cement importers into the country.

To address the concerns raised, the parties submitted a remedy proposal which consisted in granting access to a cement storage facility to a potential competitor. The Commission’s investigation indicated that the proposed remedies would not have allowed a supplier to compete effectively and on a lasting basis with the merged company and, as a result, the Commission prohibited the proposed transaction.

**HeidelbergCement and Schwenk in the driving seat**

The acquisition of Cemex Croatia was implemented through DDC, a full-function joint venture. Following a consultation submitted by DDC prior to the notification of the transaction and following a detailed investigation into the circumstances of the proposed transaction, the Commission ultimately concluded that the parent companies HeidelbergCement and Schwenk were the real players behind the acquisition and thus the ‘undertakings concerned’ on the acquirer’s side. Therefore their respective turnovers were taken into account in assessing the Commission’s jurisdiction. The Commission reached this conclusion in view of HeidelbergCement and Schwenk’s significant involvement in the initiation, organisation and financing of the transaction.

On the basis of an analysis of the parties’ submissions and internal documents, the Commission made the following findings:

First, the acquisition of Cemex Croatia was initiated by HeidelbergCement and Schwenk, which identified the operation as an attractive business opportunity and decided that DDC should be the acquiring entity.

On 5 May 2015, HeidelbergCement and Cemex initiated high-level contacts and had an initial discussion. The next day, HeidelbergCement had already decided that it would submit an indicative offer and sought for and obtained Schwenk’s agreement to proceed. HeidelbergCement employees decided in the course of a meeting that a steering committee would be established and chaired by a HeidelbergCement employee.

**In a nutshell**

The acquisition of Cemex Croatia would have seen DDC transform from an expanding importer in Croatia into the largest Croatian incumbent, and customers could have no longer benefitted from the competitive pressure from those imports.

The remedies proposed were insufficient to clear the transaction as they concerned an uncertain business opportunity for a new competitor.

---

1 See also cases M.7054 – Cemex / Holcim assets and M.7009 – Holcim/Cemex West of the European Commission and case S541/13 – Spojení soutěžitelů CEMEX Czech Republic, s.r.o., a Holcim (Česko) a.s. of the Czech Competition Authority concerning asset swaps between Cemex and Holcim in Spain, the Czech Republic and Germany.

2 See paragraph 147 of the Commission Consolidated Jurisdictional Notice.

The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

The author would like to thank Birthe Panhans for valuable contribution to this article.
would include two DDC employees as members. Moreover, the project manager for the operation with overall responsibility for its planning and execution was also nominated and chosen among HeidelbergCement’s employees. Subsequently, HeidelbergCement informed DDC about the various decisions it had taken regarding the planning of the transaction.

Second, HeidelbergCement organised the acquisition, including developing the business case and the transaction structure, preparing the deal valuation and leading the final negotiations with Cemex. Schwenk was kept informed regularly about this organisation and it never sought to oppose the arrangements made. For its part, DDC strictly adhered to the decisions taken by its parent companies.

Third, HeidelbergCement and Schwenk designed the financing and related corporate structure of the transaction. HeidelbergCement decided which entity should take loans, whether a new entity should be established for these purposes, which company should be the direct acquirer, which companies’ capital should be increased and whether HeidelbergCement through its subsidiary holding DDC would need to inject more funding. Schwenk indicated its willingness to grant a unilateral loan to avoid issuing guarantees towards the banks to secure the financing by DDC. Furthermore, HeidelbergCement selected banks that should be contacted, engaged consultancy firms for the financial due diligence and took decisions on the allocation of debt levels. HeidelbergCement also agreed with Cemex on the final purchase price.

The Commission also found that Schwenk’s involvement in the transaction was not limited to the role of a shareholder exercising its mandatory rights in a joint-venture. It agreed to the transaction, sought and received updates about its progress on a weekly basis and was involved in matters of general strategic importance as well as in the details of the implementation of the operation, including membership of a steering committee for the integration of the transaction. In its assessment, the Commission considered that it was legally irrelevant whether Schwenk had been involved in the transaction to a different degree than HeidelbergCement, since two parents of a joint venture may have a significant, albeit different, involvement in a concentration.

HeidelbergCement and Schwenk did not agree with the Commission’s assessment in relation to their involvement in the transaction and are currently challenging the Commission’s jurisdiction over this case at the General Court.3

Transporting cement: geographic markets

Grey cement is a heavy and bulky but rather low-value product which limits the distances over which it can economically be transported. Accordingly, competitive conditions will change gradually for customers in different locations.

The Commission has in the past defined the markets by drawing circles around each of the suppliers’ plants of a maximum distance of 150 or 250 km from the production facility. These circles would in principle encompass all the customers for which the respective plant is a potential source of supply.

In the case at hand, the Commission considered that the appropriate radius for the circular catchment areas defining the relevant markets around Cemex’ plants in Split should be 250km geodesic distance. This conclusion is based on the data of the parties and their competing cement suppliers regarding delivery distances by rail and road in Croatia.

Additionally, the Commission considered an alternative geographic delineation aimed at reflecting the specific delivery distances to individual customers and the actual road network conditions in different parts of the catchment areas. Under that modified approach, the catchment area around Cemex’s plants in Split was defined as the area reached by travelling 359 road km and results in excluding mainly Slavonia (in north-eastern Croatia) where Cemex makes only limited sales due to the distance to be travelled.

![Figure 1 - 250km circular catchment area around Split and actual minimum driving distances to areas located on the 250km perimeter](image)

**Source:** Form CO, Google Maps, the Commission

Effects of the transaction in the markets around Split

Cemex Croatia is currently the largest cement producer in Croatia. It runs three profitable production plants in the south of the country, near Split.

---

3 HeidelbergCement and Schwenk filed actions for annulment against the Commission’s decision of 10 October 2016 opening a phase II investigation pursuant to Article 6(1)(c) of the EU Merger Regulation (cases T-902/16 HeidelbergCement v Commission and T-907/16 Schwenk v Commission). On 27 November 2017, the General Court dismissed these actions as inadmissible. The Commission’s conclusions in relation to the involvement of HeidelbergCement and Schwenk in the transaction, as well as the substantive competitive assessment, are the subject of an on-going appeal against the Commission’s decision of 5 April 2017 prohibiting the transaction pursuant to Article 8(3) of the EU Merger Regulation (case T-380/17 HeidelbergCement and Schwenk Zement v Commission).
HeidelbergCement does not have any cement production plant in Croatia. However, it is by far the largest importer of cement in the country accounting for more than 50% of the overall import volume. Its joint venture DDC imports grey cement into Croatia from its plants in Hungary and Bosnia-Herzegovina, whereas HeidelbergCement imports grey cement into Croatia from a plant in Italy.

The Commission concluded that the transaction would have significantly reduced competition and would potentially have created a dominant player in the catchment areas around Cemex Croatia's plants in Split.

First, the market investigation showed that DDC is a close competitor of Cemex Croatia. Its plant in Bosnia is geographically the closest plant to those of Cemex Croatia in Split. DDC and Cemex Croatia are also each other's closest competitors in the area south-east of Split, where domestic producer LafargeHolcim is active to a limited extent with only a few customers due to high transport costs. Moreover, DDC was aggressively targeting Cemex's customers pursuing a policy to increase sales volume and to further expand into southern Croatia.

Second, on the basis of a detailed analysis of each of the competitors, viewed individually and collectively, the Commission concluded that the remaining competitors will not sufficiently constrain the merged entity after the transaction.

Apart from the parties, the main suppliers of grey cement in the relevant catchment areas are domestic suppliers LafargeHolcim, which operates one cement plant in Koromačno (western coastal Croatia), and Nexe, a local supplier headquartered in Našice (Slavonia), and importers by land including Asamer (Lukavac, Bosnia-Herzegovina), Titan (Kosjerić, Serbia), W&P, (Anhovo, Slovenia), and Colacem (Italy and Albania).

The additional distance to reach the customers in the areas concerned entails both higher transport costs and a lower degree of security of supply of cement. This puts more remote suppliers, be it domestic suppliers or importers, at a competitive disadvantage compared to the parties, which have their production facilities located closest to each other's catchment area.

In particular, the geographically closest competitor to Cemex and DDC in Southern Croatia is LafargeHolcim whose cement terminal in Dalmatia is capacity-constrained.

The remaining competitors are currently present only to a limited extent in the markets concerned and would not have been able to or would not have had the incentives to compete effectively with the merged company after the takeover. This is because other suppliers have limited potential for sales expansion and are located further away, facing higher transport costs to reach customers in the relevant markets.

Sea-based imports were unlikely to constrain the merged entity, due to transport costs and security of supply disadvantages, and since no terminals are available on the Croatian coast for the import of bulk cement.

Other potential land-based importers, such as Turkish companies, will not be able to deliver cement in the relevant market due to the high transport costs entailed by the road distance between their production facilities and Croatia.

Third, past behaviour suggested that both Cemex Croatia and DDC have often considered and resorted to reactions to deter the threat of competitive entry by making such entry less profitable and more difficult. Such actions would involve targeting of specific customer groups of the would-be entrant as well as litigation strategies aimed in particular at importers. In relation to this, the Commission found that the incentives of actual or potential competitors to expand their presence or enter the markets concerned would be curbed by possible future actions conducted by the merged entity.

Finally, the review of internal documents submitted by the parties also revealed contemporaneous documents prepared by top management of DDC indicating that the transaction would lead to price increases for grey cement.

**Inadequate remedies: viable business vs uncertain business opportunity**

In order to address the concerns raised by the Commission, the parties submitted a remedy proposal aimed at facilitating market entry of a competitor by granting access to a cement terminal located in Metković (Southern Croatia).

A terminal is a storage facility which allows for storing and distributing cement. The Metković one is owned by the Croatian state, and is currently leased to Cemex Croatia, which makes only sporadic use of it. Pursuant to the commitments, the 5-year lease agreement would be transferred to a competitor who could start selling cement through the terminal.

The Metković terminal is located about 25km inland on the Neretva river. It is accessible by vessels of limited draft as it does not have access to a deep sea port. The terminal is accessible also by road, but it does not have a functioning railway access.

The Commission concluded that this remedy proposal was insufficient to clear the impediment to competition brought about by the acquisition of Cemex Croatia.

Not only did the commitments leave the merged entity's market position nearly unchanged – combining all of their cement production capacity –, they also entailed a high level of uncertainty, as they did not concern the divestiture of a viable business, but offered a mere opportunity to the company taking over the lease to start from scratch its own cement operations in southern Croatia.
Moreover, the potential lessees of the terminal were unlikely to grow into viable competitors able to compete effectively and on a long-term basis.

The parties presented Titan (with production plants in Serbia and Albania) and Asamer (located in Bosnia) as the best placed companies to take over the lease. The Commission’s assessment and market test showed however that these companies would be significantly less competitive than DDC.

At the outset of its assessment, the Commission considered that, in order to become a viable competitive force, a new lessee would have to be sufficiently cost-competitive when compared to DDC in serving customers in southern Croatia. It then compared the variable cost-to-market in the region of each potential lessee to that of DDC, analysing all possible means of transport to supply the Metković terminal. This included seaborne, road-based and rail-based transport (even if the rail connection was not operable at the time of the assessment).

The analysis showed that each of the potential lessees identified would be significantly less cost-competitive than DDC, regardless of the mode of transport. It also revealed that these cost disadvantages would not be offset by the improved security of supply that the new lessee could potentially propose to customers in southern Croatia.

Furthermore, the remedy appeared insufficient in scale. This is because the seasonality of demand in the area, as well as the logistical challenges in supplying cement to the terminal, limit its effective capacity. Furthermore, due to the vicinity of the Metković terminal to Bosnia and Montenegro, it is unlikely that the capacity of the terminal would have been exclusively allocated to Croatia. Finally, additional spare capacity would have been required at the Metković terminal to enable a new lessee to compete effectively.

In this regard, it is revealing that at the time of the submission of the commitments, Titan had entered into a non-binding memorandum of understanding in relation to the lease of the terminal. However, after getting access to the details of the proposition, Titan came to the conclusion that the lease of the terminal was not an attractive business opportunity and decided not to pursue the negotiation further.

Subsequently, Asamer signed a lease agreement for the Metković terminal. The Commission nonetheless concluded that Asamer would not be a suitable lessee. Besides the significant cost-to-market disadvantages and capacity issues referred to above, Asamer would have had to overcome important logistical difficulties in refilling the terminal by truck or by rail to a sufficient extent.

In its assessment, the Commission also observed that Asamer had in the past shown a lack of aggressiveness in competing with the parties in spite of the proximity of its production facilities to DDC’s core market. There were no indications to expect that Asamer would have competed more aggressively in southern Croatia following the lease agreement.

Conclusion

Remedies proposed by merging companies must fully address the Commission’s competition concerns on a lasting basis. In cases where there are competition concerns because merging companies compete on the same markets, remedies providing a structural solution, such as the divestiture of a business unit, are generally preferable to other types of remedies. This is because they immediately replace the weakened competition in the markets resulting from the merger. These types of structural solutions have been offered by parties and accepted by the Commission in past cement mergers such as Holcim’s acquisition of Lafarge and HeidelbergCement’s acquisition of Italcementi.

However, in this case, the parties did not offer to divest an existing cement business but limited their proposal to access to an asset that would offer a mere uncertain business opportunity for a competitor to start or expand its cement businesses in the markets concerned. That divestment did not eliminate the competition concerns entirely, leading the Commission to prohibit the proposed transaction.
Vivendi/Telecom Italia - jurisdictional and substantive assessment of minority shareholdings

Pierantonio D’Elia, Eleonora Ocella, Salvatore De Vita

Introduction

On 30 May 2017, the Commission conditionally cleared the acquisition of de facto sole control over Telecom Italia S.p.A. ("Telecom Italia") by Vivendi SA ("Vivendi") subject to remedies. Telecom Italia is the Italian formerly state-owned telecommunications incumbent, primarily active in Italy in the provision of mobile and fixed telecommunications services. Telecom Italia also controls Persidera S.p.A. ("Persidera")1, which holds frequencies for the transmission of digital terrestrial television ("DTT") in Italy. Vivendi is a French holding company of a group of businesses active worldwide in the music, TV, cinema, video sharing and games sector, including in Italy, via a minority stake in Mediaset S.p.A. ("Mediaset").

The transaction attracted significant media attention, especially in Italy, and it was subject to scrutiny and intervention by the Italian authorities for the protection of media plurality,2 public security,3 and prudential rules.4

The transaction also raised interesting EU merger control issues related to, in particular, (i) the assessment of (de facto) control over listed companies with a widely dispersed share capital and (ii) the substantive assessment of a pre-existing minority shareholding held by the buyer in a competitor of the target. This article focuses on these two issues.

De facto control

Under the Merger Regulation, the Commission has jurisdiction over "concentrations" with an EU dimension, which are defined as acquisitions of control by one or more person(s) or undertaking(s) over one or more other undertakings or parts of undertakings.5 On substance, the Commission concluded that a pre-merger minority shareholding held by the buyer in a competitor of the target company could give rise to competition concerns.

Control by one person or undertaking (sole control), can be acquired on a legal basis, when such a person or undertaking acquires a majority of the voting rights of a company or a (minority) shareholding with attached rights which allow it to exercise a decisive influence over the company (de jure control).6

A minority shareholder may also acquire sole control on a de facto basis. According to the Consolidated Jurisdictional Notice, this is in particular the case where the shareholder is highly likely to achieve a majority at the shareholders’ meetings, given the

In a nutshell

The Vivendi/Telecom Italia case raised interesting issues related to minority shareholdings.

1 Telecom Italia has a 70% shareholding in Persidera, the remainder being held by Gruppo Editoriale l’Espresso.
2 The Italian Communications Authority ("AGCOM") scrutinised the acquisition of shares in Telecom Italia by Vivendi since the latter also held a significant minority stake in Mediaset. On 18 April 2017, AGCOM issued a decision (No. 178/17/CONS), where it concluded that that the fact that Vivendi held, at the same time, a significant shareholding in both Telecom Italia and Mediaset violated Italian media plurality law, and it ordered the adoption of suitable measures to remedy the violation to be implemented within 12 months. Vivendi submitted a compliance plan (on 19 June, later amended on 31 July and 13 September), according to which it would ensure that its voting rights in Mediaset do not exceed 10%, and it would transfer the management of its voting rights exceeding this threshold to an independent third party. AGCOM took note of the plan on 13 September.
3 The legislative decree n. 21/2012 ("Golden Powers Decree") allows the Italian Government to exercise special powers in relation to companies which carry out activities deemed to be of strategic importance in the defence and national security sectors, and in relation to companies which hold assets deemed to be of strategic importance in the fields of energy, transport and communications. On 16 October 2017, the Italian Government adopted a decree exercising its powers under the Golden Powers Decree following the transaction, and imposing on Telecom Italia a series of measures which it considers necessary to safeguard public security.
4 On 13 September 2017, the Italian financial market authority ("CONSOB") concluded that Vivendi’s stake in Telecom Italia qualifies as a de facto controlling shareholding under Italian civil and corporate law.
5 Article 3 of the Merger Regulation.
level of its shareholding and the evidence resulting from the presence of shareholders in the shareholders’ meetings in previous years.7

Nonetheless, in certain circumstances, historic voting patterns at the shareholders’ meeting alone may not provide a sufficiently reliable basis to assess the existence of de facto control. Therefore, it may be necessary to also consider other elements in order to verify whether a minority shareholder has acquired the ability to exercise decisive influence over strategic decisions of an undertaking.

The Commission conducted this type of assessment twice in the Vivendi/Telecom Italia decision: first, with respect to the influence exerted by Vivendi over Telecom Italia, to determine whether a concentration had arisen; second, with respect to the influence exerted by Vivendi over Mediaset, for the purposes of the competitive assessment.

Telecom Italia

Starting in late 2014, Vivendi had progressively increased its stake in Telecom Italia through a series of successive acquisitions. At the time of the transaction, Vivendi held 23.93% of the voting rights in Telecom Italia’s shareholders’ meeting.

In the meantime, a series of circumstances and changes in the shareholding structure of Telecom Italia occurred. As a result of these, on the eve of the shareholders’ meeting of 4 May 2017, Vivendi was the largest shareholder of Telecom Italia, with no other shareholder holding more than 5% of the shares. Vivendi was also the only industrial shareholder in the company.

As a result, merely considering historic voting patterns at the shareholders’ meeting would have not exhaustively informed the Commission’s assessment as to whether Vivendi was able to exert decisive influence over Telecom Italia. This reflected the fact that the most recent changes in the shareholding structure of Telecom Italia deprived past attendance rates and voting patterns of their predictive value. Moreover, the specific rules governing the appointment of the 15 members of Telecom Italia’s board of directors allowed the shareholder with the highest number of votes cast to appoint the majority of these members.8

In these circumstances, despite the fact that the slate of board members presented by Vivendi did not achieve the absolute majority of the votes cast at the 2017 Telecom Italia shareholder meeting, Vivendi was able to appoint the majority of the members of Telecom Italia’s Board of Directors.9 As a result, Vivendi acquired the ability to control this corporate body, which is in charge of taking all of the company’s strategic decisions. This control will in principle last until the expiry of the mandate of the board, that is to say, until the approval of the financial statements for the year closing on 31 December 2019.

In light of these circumstances, the Commission concluded that Vivendi acquired de facto sole control over Telecom Italia at the very latest at the shareholders’ meeting of 4 May 2017. The Commission therefore considered the notified transaction as a concentration within the meaning of Article 3 of the Merger Regulation.

Mediaset

The activities of Telecom Italia either overlapped horizontally or were vertically related to the ones of Mediaset. It was therefore important for the Commission to assess whether Vivendi, by holding 28.80% of the share capital and 29.94% of the voting rights in Mediaset, had some form of control over the company. This finding was relevant for the competitive assessment, as it would have influenced the potential theories of harm to be assessed.

As it did with respect to the issue of control over Telecom Italia, the Commission considered all relevant factual circumstances to perform its assessment; however it reached the opposite conclusion: the Commission found that, at the time it reviewed the transaction, Vivendi did not jointly or solely control Mediaset.

First, another industrial shareholder (Fininvest) historically held the largest share of Mediaset’s share capital (at that time amounting to 39.53% of the ordinary share capital and 41.09% of the voting share capital), it obtained the majority of the voting rights in at least the last six shareholders’ meetings and it appointed the majority of the board in at least the last two terms (in 2012 and 2015).

Second, so far, Vivendi had not been able to appoint any members of the Board of Directors, and it did not enjoy any specific information or other rights, which materially differed from those of any other minority shareholder.

Finally, at the time of the transaction, Vivendi and Mediaset were engaged in ongoing litigation following the breakdown of the negotiations for the acquisition of Mediaset Premium by Vivendi in 2016, which thus seemed to exclude the existence of a commonality of interests between Vivendi and Mediaset’s controlling shareholder, Fininvest.

7 Consolidated Jurisdictional Notice, paragraph 59.
8 Specifically, according to Telecom Italia’s by-laws, two-thirds of the directors are chosen from the slate which obtains the (relative) majority of the votes, with the remaining directors being chosen from the other slates.
9 The slate presented by Vivendi, listing ten candidates, obtained 49.37% of the votes cast at the meeting. Only one other alternative slate was presented for the shareholders’ meeting of 4 May 2017. This was the list submitted by Assogestioni, an association representing minority shareholders. Assogestioni’s slate listed only 5 candidates, corresponding to only one third of the board members, and obtained 49.005% of the votes. Therefore, Vivendi would have in practice obtained two-thirds of the board members even if Assogestioni’s list would have obtained more votes.
The minority shareholding issue

Unlike other jurisdictions, the Commission can assess possible anticompetitive concerns arising from an acquisition of a minority shareholding only when it is related to an acquisition of control.10 In other words, the Commission can intervene only against a pre-existing minority shareholding held by one of the parties to a concentration within the meaning of the Merger Regulation.11 For example, the Commission can intervene if the undertaking in which one party has a minority stake is a competitor of the other merging undertaking.

Minority shareholdings, which do not confer the power to exercise a decisive influence, can nonetheless give rise to competition issues as they may affect a company’s incentives to compete post-merger.

Even non-controlling minority shareholdings can potentially weaken competition since a company that has a financial interest in its competitor's profits may decide to raise its own prices or reduce its output and so 'internalise' the resulting increase in its competitor's profits. This anti-competitive effect may arise also if the minority shareholding is passive (giving it has no influence over the competitor's decisions).

A similar situation was present in the Vivendi/Telecom Italia case with respect to Vivendi’s stake in Mediaset. Indeed, both Telecom Italia and Mediaset were active in the market for wholesale access to digital terrestrial networks for the broadcast of TV channels ("DTT Wholesale Access").

Telecom Italia was active on this market through its subsidiary Persidera, which held licences for five of the 20 frequencies (or multiplexes, "MUXes") allocated by AGCOM for the DTT broadcast of TV channels at national level.

Mediaset, in turn, held five national MUXes and technically managed another three (belonging to 3itronica, Cairo Network and Prima TV), through so-called full service agreements, which granted Mediaset significant control over technical and qualitative aspects of those MUXes.

The Commission, in line with the observations submitted by the Italian Competition Authority and some third parties during the review of the transaction, found that the overlap between Mediaset’s and Telecom Italia’s activities in DTT Wholesale Access was likely to give rise to anticompetitive horizontal unilateral effects. Indeed, after the transaction, Vivendi would have controlled Telecom Italia and would have had a significant participation in Mediaset, together directly holding 50% of the MUXes for DTT at national level and a much higher share if captive capacity of MUXes were not taken into account.

Those anticompetitive effects would have arisen from a change in Telecom Italia’s incentives to compete against Mediaset in the DTT Wholesale Access market. Indeed, whilst Vivendi would have not been able to influence the strategic behavior of Mediaset, its significant financial participation was such that, post-transaction, Telecom Italia could have raised its prices or offered inferior conditions to channels wishing to be broadcast over Telecom Italia’s MUXes. By worsening the conditions for access to its MUXes, it would have financially benefited Mediaset and, indirectly, its controlling shareholder, Vivendi.

Alternatives would have been limited in a market, which, according to the market review carried out by the Italian Competition Authority in November 2016,12 was already concentrated and where a few players held a considerable part of the transmission capacity. Indeed, Mediaset’s MUXes (including the three MUXes it technically manages) would be the only viable alternatives for third-party channels: of the remaining MUXes, the capacity of RAI’s MUXes was fully occupied and captive,13 one MUX (Rete Capri) was not considered to have adequate characteristics in terms of quality/coverage (and, in addition, it did not broadcast third-party channels) and the last remaining MUX (Europa Way), in addition to having inferior quality and limited coverage, was held by a company in bankruptcy proceedings. Moreover, switching to a different MUX could be a complex technical operation, discouraging channels – faced with inferior conditions – from doing so.

Finally, the Commission considered that the overall capacity would have been further limited by the reallocation of spectrum resources (the 700Mhz band) in the near future (2020-2022) to mobile telecommunications. In particular, according to the Italian Competition Authority, six MUXes would be reallocated to mobile transmission, thus reducing the available frequencies for DTT by 33%.

In light of the foregoing, the Commission considered that the transaction raised serious doubts with regard to the market for DTT Wholesale Access.

To dispel the serious doubts identified by the Commission, Vivendi offered to divest Telecom Italia’s 70% stake in Persidera.

After carrying out a market test of the proposed commitments, the Commission considered that, by divesting in full the overlap between Telecom Italia's and Mediaset’s activities in the market for DTT Wholesale Access, the remedy was capable of removing the concerns identified and therefore it cleared the transaction.

---

11 Ibidem.
12 Indagine Conoscitiva IC41, 30 November 2016.
13 With the exception of one third-party channel, TV2000.
Conclusions

The Vivendi/Telecom Italia case is an important precedent with respect to the assessment of de facto control. It provides examples of the factual elements that the Commission may assess to ascertain whether a minority shareholder exerts control over an undertaking, in the absence of legal means to exercise such control or an informative voting pattern at the shareholders’ meetings. It does so both with a positive example, where it establishes that de facto control existed (the issue of control over Telecom Italia), and a negative example, where the existence of such control could not be verified (the issue of control over Mediaset).

At the same time, the Commission’s decision in the Vivendi/Telecom Italia case provides another example of competition concerns arising from a pre-existing minority shareholding, despite the fact that it was passive and did not bring about flows of commercially sensitive information. In line with its case law, the Commission accepted a structural remedy which entirely removed the overlap between the activities of the target and the company in which the acquirer held a minority shareholding.

14 The Commission considered that, due to its shareholding, Vivendi did not enjoy any specific information or other rights, which materially differed from those of any other minority shareholder (see, decision, paragraph 49).

15 Commission decision of 13 March 2009 in case M.5406 – IPIC/MAN Ferrostaal and Commission decision of 13 June 2000 in case M.1673 – VEBA/VIAG, where the proposed commitments entailed the disposal of minority shareholdings. See also Commission decision of 13 July 2005 in case M.3653 – Siemens/VA Tech, where, under the commitments given by Siemens, Siemens’ representatives in the shareholder bodies of SMS Demag (the undertaking where it held a pre-existing minority shareholding giving rise to anticompetitive effects) would have been replaced by trustees, thus ensuring the company’s independence from Siemens. Nonetheless, this remedy was accepted in a context where Siemens had already exercised a put-option to sell its stake to SMS, the parent company of SMS Demag, but the transfer of the shares had been delayed due to a legal dispute relating to their valuation.
J&J/Actelion – falling asleep fast and deeply while staying fully awake on innovation

Rositsa Pencheva, Noa Laguna-Goya and Marion Bailly

Overview

In June 2017 the Commission cleared the acquisition of Actelion Pharmaceuticals (Actelion) by Johnson & Johnson (J&J), subject to conditions. The companies committed to ensure that clinical development of their innovative insomnia drugs would not be adversely affected by the merger.

J&J is a global company, active in the sectors of pharmaceuticals, consumer goods and medical devices. Actelion focuses on the prescription pharmaceutical sector and is specialised in the research and development of specialty prescription medicines and late-stage medicines under development related to a number of therapeutic areas (including, most notably, pulmonary arterial hypertension).

The acquisition took the form of a two-step transaction. First, Actelion demerged the majority of its medicinal product discovery operations and early-stage clinical development assets into a newly-created company, Idorsia Ltd (Idorsia) in which J&J acquired a minority interest. Second, J&J acquired a majority stake in Actelion. The Commission’s investigation focused on two areas where J&J and Actelion’s medicinal products and research programmes compete:

• treatments for insomnia, where both J&J and Actelion carry out research and development (R&D) activities; and

• treatments for multiple sclerosis, where J&J distributes Biogen’s marketed products in a number of Central and Eastern European countries, and Actelion has a treatment under development.

While the treatments for multiple sclerosis raised no concerns, the Commission found that the proposed acquisition, as initially notified, would have raised competition concerns on innovation for insomnia treatments, where both J&J and Actelion are developing medicinal products (both in ‘Phase II’ clinical trials). This case is a further example of the Commission’s careful consideration of the impact of mergers on innovation competition.

Markets at stake: insomnia drugs

Presentation

Insomnia is a disease characterised by acute or chronic sleep disturbance. It creates daytime fatigue, hyperarousal, impaired social or occupational functioning, and reduced quality of life. Originally, insomnia was regarded as a symptom, not as an illness in itself, since for the vast majority of patients insomnia coexists with psychiatric, medical, or other sleep or substance use disorders (so-called secondary insomnia). Primary insomnia is diagnosed in patients when no underlying cause can be identified. Primary insomnia is characterised by one or more of the following symptoms that last for at least a month and are accompanied by subsequent impaired daytime functioning: (i) difficulties in initiating sleep; (ii) disorders of maintaining sleep

2 Other examples in the pharmaceutical sector being M.7275 – Novartis / GlaxoSmithKline Oncology Business (“Protecting the drugs of tomorrow: competition and innovation in healthcare”, Competition Merger Brief 2/2015), M.7559 – Pfizer / Hospira (“Through the looking-glass: assessing competition by biosimilars”, etc.)
(frequent or long awakening); (iii) premature awakening; and (iv) feeling of non-restorative sleep.³

Treatments

The current standard treatments for insomnia in the European Economic Area (EEA) are based on GABAergic molecules, such as zolpidem. J&J’s and Actelion’s medicines under development are based on a novel mechanism of action (orexin-antagonists). Orexins are small proteins naturally produced in our brain in an area called the hypothalamus. They work as neurotransmitters, i.e. transmit signals between neurons in the brain. They impact arousal and sleep in such a way that a loss of the orexin-producing neurons causes sleepiness. In other words, orexins play a role in keeping people awake and alert. Orexin-antagonist drugs inhibit the effects of orexins, i.e. they block the signalling of the substance orexin in the brain by blocking the orexin receptors in the neurons. Thus, orexin-antagonist drugs have the potential to promote sleep and are considered as a novel approach for treating insomnia.

The advantages of the orexin-antagonists compared to existing treatments are related to less dependency, minimal risk of abuse and fewer central nervous system side-effects (such as drowsiness or residual effects the next day). J&J and Actelion’s pipeline products, if successfully brought to market, may thus constitute a significant improvement over the existing standards of care for insomnia. The Commission’s market investigation showed that the parties’ pipelines were very promising, and that orexin-antagonists were “likely to cause a paradigm shift in the sense that the dependency potential is low”.⁴

Currently, no orexin-antagonist medicine for insomnia is marketed in Europe. Furthermore, apart from J&J’s and Actelion’s pipelines, only a very limited number of medicines with this new mechanism of action are being developed.

The parties’ pipeline drugs

J&J is co-developing its insomnia medicine with a third party, Minerva Neurosciences Inc. (Minerva), under a co-development agreement. The product is a selective orexin-2 antagonist compound (called JNJ-7922, seltorexat) for the treatment of primary insomnia and depression.

Actelion’s product is a dual orexin receptor antagonist (DORA) for primary and secondary insomnia (compound name ACT-541468). Post-transaction, this project would be developed by the spin-off company Idorsia (see above), in which J&J would have some influence, in particular through its minority stake, certain shareholder rights and provision of financing.

Both J&J’s and Actelion’s products are in Phase II clinical trials, the stage at which therapeutic efficacy in patients is explored in a small group of patients. Phase I clinical trials typically establish initial safety and tolerability of the drug, and Phase III trials are to confirm the preliminary evidence on efficacy and safety in a larger group of patients.⁵

Competitive concerns: innovation theory of harm

The competitive landscape on the insomnia market shows, as described above, that there is no current and very limited future competition in Europe for this new class of drugs. First, based on the information available to the Commission, J&J was found to have the ability and incentive to delay, re-orient or discontinue one of the two insomnia products under development. Second, the market investigation revealed that only a very limited number of orexin-antagonists are being developed by other pharmaceutical companies. Therefore, by reducing the number of companies active in the development of orexin-antagonist drugs, the merger would have posed the risk of significantly diminishing the orexin-antagonist pipeline drugs likely to enter the insomnia market in the short to medium term.

In addition, the sector is characterised by high barriers to entry. All medicines in development must follow the three phases of clinical trials. Therefore, unless a product is already in an advanced stage of development (Phase II or III of clinical studies), there cannot be any new entrant that would be able to challenge existing development programmes and enter the market in a timeframe similar to the parties’ drugs launch in the EEA.

Therefore, the Commission concluded that insufficient competition would remain following the likely re-orientation, delay or discontinuation of one of the two research programmes of the merging parties after the merger.⁶

---

⁴ Reply of a doctor to the Commission’s market investigation.
⁵ The Phases of Clinical Development can be described as follows: Phase I starts with the initial administration of a new drug to humans - generally healthy volunteers. It typically involves one or a combination of the following aspects: estimation of initial safety and tolerability, characterisation of a drug’s absorption, distribution, metabolism, and excretion, and early measurement of drug activity. Phase II usually starts with the initiation of studies to explore therapeutic efficacy in patients. Studies in Phase II are typically conducted on a small group of patients that are closely monitored. An important goal for this phase is to determine the dose(s) and regimen for Phase III trials. Phase III usually starts with the initiation of studies to demonstrate, or confirm, therapeutic benefit. Studies in Phase III are designed to confirm the preliminary evidence accumulated in Phase II that a drug is safe and effective for use for the intended indication and in the recipient population. These studies are intended to provide an adequate basis for marketing approval. Phase IV begins after drug approval.
⁶ According to paragraph 38 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (Official Journal C 31 of 05.02.2004) (Horizontal Merger Guidelines), effective competition may be significantly impeded by a merger between two important innovators, for instance between two companies with ‘pipeline’ products related to a specific product market.
In previous cases the Commission had strongly emphasised that a concentration can affect competition between marketed pharmaceutical products as well as competition in innovation, i.e. development of new drugs or new therapeutic indications of already existing drugs. In particular, the Commission found competitive concerns due to the acquisition of pharmaceutical products at an advanced stage of development (Phase III) but also at an early stage of development for pipelines which were related to marketed products.

In J&J/Actelion, the Commission took action in relation to two products which are both at an earlier stage of the clinical trials (Phase II). While it is the first time that this type of overlap leads to remedies in a pharmaceutical case, the underlying assessment is fully coherent with the Horizontal Merger Guidelines and the Commission’s focus on innovation in situations characterised by high barriers to entry and limited prospective competition.

Remedies: tackling co-development and minority stake

The objective of the remedy offered by the parties is to ensure the continuation of the clinical trials of the two pipelines.

In view of the specificities of the case, in terms of transaction structure and the framework in which the J&J pipeline is being developed, J&J offered two complementary sets of commitments.

The remedy package included pre-and post-closing measures where J&J commits for an adequate period of time:

- to grant Minerva control over the global development of JNJ-7922 for insomnia and not to acquire any influence over the commercialisation of JNJ-7922 in the EEA, by waiving a number of its rights (casting vote and royalty rights) and by divesting its entire minority equity interest in Minerva. J&J also commits to continue to fund the pipeline development costs, and to support Minerva in its development of JNJ-7922 (“Minerva Commitments”).
- to ensure that J&J cannot acquire influence over the global development of ACT-541468 by removing some links with Idorsia, and in particular by limiting its minority shareholding and committing not to nominate any board member, nor receive any confidential information in relation to the problematic pipeline (“Idorsia Commitments”).

Based on these tailor-made commitments, which were developed taking into account the circumstances of the case and to address the precise competition concerns identified, the Commission concluded that post-transaction, J&J would not have the ability or incentives to re-orient, delay or discontinue the development of the relevant insomnia pipelines.

This case illustrates once again that, in particular in the pharmaceutical sector, complex cases involving concerns about future products can be cleared within the very short deadlines in a Phase I merger procedure if the parties offer comprehensive suitable remedies.

---

7 The Commission raised serious doubts in relation to Novartis/ GSK oncology business for pharmaceuticals in Phase III clinical trials and marketed and also for other therapeutic indications of those products that were in earlier stages of development – Phase I and Phase II. See case M.7275 – Novartis / GlaxoSmithKline Oncology Business.

8 In the agrochemical industry, in the Dow/DuPont case the Commission accepted remedies to solve competition concerns arising from the parties’ overlapping crop protection projects at the development stage (see Case M.7932 Dow/DuPont, Section B of the decision).