European Commission

Competition *merger brief*

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Foreword by Margrethe Vestager

Preserving the benefits of competition between firms is essential for a healthy business climate, and contributes to the growth and competitiveness of our economies. Competition drives innovation, keeps prices reasonable and encourages firms to be more efficient and to deliver better products. And competition policy plays a central role in keeping EU markets open and competitive.

The vast majority of mergers do not pose threats to the competitive process, and the Commission clears them swiftly. Some mergers can, however, be harmful to competition, for instance when they remove vibrant competitors from the market or create companies with excessive market power. In such cases the Commission must intervene in order to keep markets competitive. This is to the direct benefit of millions of European consumers and of industrial clients who can continue to purchase products and services at competitive prices.

I am greatly looking forward to taking up my new role as commissioner in charge of competition policy, and to helping protect competition for the benefit of people and companies all over Europe.

In this role I believe it is very important to be as transparent as possible about the rationale behind decisions and policy measures in the competition field. This is why I warmly welcome DG Competition's initiative to publish *Competition Merger Briefs*, a publication detailing the ins and outs of recent merger cases. *Merger Briefs* complement the regular *Competition Policy Briefs* about policy initiatives, as well as *Briefs* on important decisions in the areas of antitrust and State aid. This inaugural edition of *Competition Merger Briefs* covers important recent decisions in diverse sectors such as fisheries, steel and telecoms. Many more will follow.

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Competition *merger brief*

Harvesting salmon, jumping guns: the *Marine Harvest* early implementation case

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In July 2014 the Commission fined Marine Harvest €20 million for violating the standstill obligation and failing to properly notify the Commission of a merger.

With this decision, the Commission reaffirmed that a violation of the standstill obligation is a serious infringement, which undermines the effectiveness of the Merger Regulation[1].

The case also contained new elements.

Unlike previous transgressions such as *Electrabel* [2], the Commission found competition concerns in the merger as originally notified, which needed to be resolved by remedies. This especially affected the size of the fine.

In the *Marine Harvest* case, the Commission also made its position clear on the standstill obligation in public bids and creeping takeovers.

Marine Harvest ASA (Marine Harvest) is a Norwegian company with a leading position in salmon farming in the EEA. On 9 August 2013 it notified under the Merger Regulation the acquisition of its rival Morpol ASA (Morpol), the largest salmon processor in the EEA.

On 30 September 2013, the Commission declared the transaction compatible with the internal market. This clearance was conditional upon the divestment of approximately three quarters of Morpol's salmon farming activities in Scotland. The Commission had concerns that the transaction, as originally notified, would have significantly reduced competition in the market for farming and primary processing of Scottish salmon[3].

In the clearance decision, the Commission noted that the acquisition by Marine Harvest of a 48.5% stake in Morpol on 18 December 2012, i.e. several months before the Clearance Decision, had already conferred upon Marine Harvest *de facto* sole control over Morpol[4]. This made it possible that an infringement of Article 4(1) (notification requirement) and Article 7(1) (standstill obligation) of the Merger Regulation had occurred.

Ten months later, the Commission concluded proceedings under Article 14 of the Merger Regulation. In its decision of 23 July 2014, the Commission found that Marine Harvest had indeed breached Articles 4(1) and 7(1) of the Merger Regulation, and imposed a fine of €20 million on Marine Harvest.

With this decision, the Commission follows previous practice. Just three days before the Commission fined Marine Harvest, the Court of Justice confirmed a €20 million Commission fine imposed on Electrabel, for violating the standstill obligation.

In a nutshell

In July 2014, the Commission fined Marine Harvest €20 million for breaching the standstill obligation and failing to meet notification requirements.

For the first time covering a case that also involved serious competition concerns, the Marine Harvest case is a milestone in the Commission's pursuit of gun jumping and procedural infringements.

1 Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings OJ L 24, 29.1.2004, p. 1 (the Merger Regulation).

2 Commission Decision in Case M.4994 *Electrabel/CNR* of 10 June 2009.

3 See press release available at http://europa.eu/rapid/press-release_IP-13-896_en.htm.

4 Decision of 30 September 2013 in Case M.6850 – *Marine Harvest / Morpol*.

The authors would like to thank Stefan Siebert for his valuable contribution to this article.

1. Legal framework: notification requirement and standstill obligation

The notification requirement is laid down in Article 4(1) of the Merger Regulation, which states that a concentration with a Union dimension must be notified prior to its implementation. It is complemented by the standstill obligation in Article 7(1) of the Merger Regulation, which prevents companies from implementing a concentration with a Union dimension until it has been declared compatible with the internal market by a Commission decision, or in the absence of a decision, by expiry of the legal deadline.

The notification requirement and the standstill obligation are cornerstones of the EU merger control system, as they enable the Commission to carry out *ex ante* control of all concentrations with a Union dimension. This prior scrutiny is a key safeguard that protects the structure of competition and ultimately consumers from any permanent and irreparable damage to effective competition that could emerge from an anti-competitive transaction. The importance of these provisions is confirmed by the fact that the Commission can impose a significant fine (up to 10% of the turnover of the undertakings concerned) in the event of an infringement of the notification requirement or the standstill obligation[5]. A violation of the standstill obligation through early implementation of a transaction is also known as 'gun jumping'.

This is the fourth time that the Commission has imposed fines for breaches of Article 4(1) and Article 7(1) of the Merger Regulation. The sizes of the fines were relatively low in the first two infringements, *Samsung/AST* in 1998[6] and *AP Moller* in 1999[7] (€33,000 and €229,000 respectively), as these two cases were the first in which the Commission found infringements of Articles 4(1) and 7(1). Under the legal framework of the 2004 Merger Regulation, however, the Commission set a substantially higher fine in the 2009 *Electrabel* case, namely €20 million for the infringement of the standstill obligation alone[8]. Both the General Court[9] and the Court of Justice[10] upheld the Commission's decision.

2. Factual background

On 14 December 2012, Marine Harvest entered into an agreement with companies owned by Mr Jerzy Malek, founder and former Chief Executive Officer (CEO) of Morpol, to purchase shareholdings in Morpol representing approximately 48.5% of Morpol's share capital. The closing of this acquisition took place on 18 December 2012.

Marine Harvest then took further steps to purchase the whole of Morpol's capital. On 15 January 2013, Marine Harvest submitted a mandatory public offer for the remaining shares in Morpol. After the completion of the offer in March 2013, Marine Harvest owned 87.1 of Morpol's capital. The remaining shares were acquired in November 2013.

On 21 December 2012, three days after closing the December 2012 acquisition, Marine Harvest sent a case team allocation request to the Commission to investigate the acquisition of sole control over Morpol[11]. In this request, Marine Harvest informed the Commission that the acquisition of 48.5% of the capital of Morpol had already been closed, and that Marine Harvest would not exert its voting rights pending the decision of the Commission pursuant to Article 7(2) of the Merger Regulation.

On 9 August 2013, Marine Harvest formally notified the transaction to the Commission. After a thorough market investigation, the Commission informed the parties of its concerns about a possible negative impact of the transaction on competition in the farming of Scottish salmon. In order to eliminate these serious doubts, Marine Harvest submitted a first remedy package on 9 September 2013. Following a market test and certain modifications, the company submitted a final set of remedies on 25 September 2013. Marine Harvest committed to divesting approximately three-quarters of the overlap between the Scottish salmon farming capacity of the merging companies, dispelling the serious doubts identified by the Commission.

On 30 September 2013, the Commission adopted the clearance decision, which approved the concentration subject to the parties' full compliance with their commitments.

Although there were no objections to the substance of the merger as modified by the commitments, the Commission further investigated Marine Harvest for violation of the procedural requirements of the Merger Regulation. To that end, the Commission issued a statement of objections on 31 March 2014[12], which was followed by a decision imposing fines pursuant to Article 14 of the Merger Regulation on 23 July 2014[13].

3. Legal assessment: *De facto* control and Article 7(2) of the Merger Regulation

In its decision of 23 July 2014, the Commission carried out its legal assessment of Marine Harvest's infringements in two steps.

First of all, the Commission had to establish whether the acquisition by Marine Harvest of a stake in Morpol in December 2012 was in itself a concentration that Marine Harvest should have notified to the Commission before implementation.

5 Articles 14-2(a) and 14-2(b) of the Merger Regulation.

6 Commission Decision in Case M.920 *Samsung/AST* of 26 May 1997.

7 Commission Decision in Case M.969 *AP Moller* of 10 February 1999

8 The infringement of the notification requirement in Article 4(1) was in that case time-barred.

9 Judgment of the General Court of 12 December 2012 in Case T-332/09 *Electrabel* v *Commission* (not yet reported).

10 Judgment of the Court of Justice of 3 July 2014 in Case C-84/13 P *Electrabel* v *Commission* (not yet reported).

11 The case team allocation request is filed by the notifying party to request the Commission to engage in the pre-notification stage.

12 See press release available at http://europa.eu/rapid/press-release_IP-14-350_en.htm.

13 Commission Decision in Case M.7184 – *Marine Harvest / Morpol (Art. 14(2) proc.)* of 23 July 2014 (the Decision).

To this end, the Commission examined whether the December 2012 purchase of Mr Malek's 48.5% share granted Marine Harvest sole control over Morpol. The 48.5% stake enjoyed by Mr Malek in Morpol at the time of the acquisition did not account for a majority of voting rights and as such did not give Mr Malek *de jure* control over Morpol. However, a minority shareholder may be deemed to have sole control on a *de facto* basis, particularly where it is highly likely to achieve a majority at the shareholders' meetings, taking account of its shareholding percentage and the attendance of other shareholders at previous years' meetings[14].

Because of the wide dispersion of the remainder of the capital in Morpol, Mr Malek always accounted for a clear majority of votes cast at shareholders' meetings. On this basis the Commission concluded that Mr Malek had sole *de facto* control over Morpol. By acquiring Mr Malek's stake in Morpol with all related rights, Marine Harvest acquired sole *de facto* control over Morpol.

The Commission considered it irrelevant that Marine Harvest had not exercised any voting rights in Morpol between acquiring the 48.5% interest and the Commission's clearance of the merger. The purchase of a 48.5% shareholding in Morpol made it possible for Marine Harvest to obtain a clear majority at Morpol's general shareholders' meeting, and allowed it to exercise decisive influence on Morpol. This possibility is sufficient to establish control within the meaning of Article 3(2) of the Merger Regulation. As this acquisition was closed in December 2012, Marine Harvest had implemented a concentration of Union dimension *before* its notification to the Commission, and *before* clearance under the Merger Regulation.

Having proved this, the Commission embarked on the second step of its legal assessment, and examined whether the exemption contained in Article 7(2) of the Merger Regulation applied to the case. Article 7(2) contains a conditional exemption for certain transactions on the prohibition of early implementation. Some transactions can be implemented prior to notification and clearance, providing they are notified to the Commission without delay and the buyer does not exercise the voting rights attached to the relevant securities. In particular, Article 7(2) applies in the following two cases: (a) public bids, with a view to preserving the liquidity of the stock markets; and (b) a series of transactions in securities admitted on a stock exchange, in which control is acquired from various sellers (so-called 'creeping bids'). In this case, Article 7(2) is intended to provide a sufficient degree of legal certainty, protecting acquirers from unintended and unforeseen breaches of the standstill obligation in situations where it can be challenging to determine which particular shares or block of shares acquired from various shareholders will give the buyer control over the target company.

According to the Commission, the acquisition by Marine Harvest of 48.5% in Morpol did not fall under (a), because it took place before the launch of a public bid. The acquisition also did not fall under (b), because Marine Harvest did not acquire control from 'various sellers', but from only one seller who previously enjoyed control over the target. In these cases, it is normally straightforward to establish the acquisition of control and therefore the application of the derogation in Article 7(2) would not be justified.[15] On these grounds, therefore, the Commission concluded that Article 7(2) did not apply to this case.

4. Level of fines

There are no formal guidelines for setting the level of fines in the case of procedural infringements of the Merger Regulation. The Merger Regulation, however, does explicitly mention some of the criteria to be followed. These include the nature, gravity and duration of the infringement[16]. In addition, in previous cases the Commission took into account potential mitigating and aggravating circumstances. The Commission applied these criteria also in the *Marine Harvest* case.

First, the Commission concluded that Marine Harvest's infringement had not been intentional. In particular, Marine Harvest had received legal advice from its external counsel according to which the acquisition of Mr Malek's stake by Morpol would have been exempt from *ex ante* notification pursuant to Article 7(2) of the Merger Regulation. The existence of this advice allowed the Commission to conclude that, in this specific case, Marine Harvest had not intentionally infringed the procedural provisions of the Merger Regulation. The Commission did conclude, however, that Marine Harvest's conduct had been negligent, and that the infringement followed from this negligence. This was because the legal advice had been provided very late, that is on the date the transaction was closed.

Moreover, according to the Commission, Marine Harvest's substantial previous experience with national and European merger control should have induced the company to pay particular attention to the procedural requirements of European merger control. In addition, Marine Harvest had already been fined by the French Competition Authority for infringing the notification obligation at national level when it purchased Fjord Seafood[17]. According to the Commission, this prior infringement should have further prompted Marine Harvest to ensure compliance with merger control rules.

The Commission considered the infringement particularly serious, because of the serious doubts raised about the compatibility with the internal market of the proposed merger, which was cleared only after the submission of remedies.

[14] See paragraph 59 of the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("Jurisdictional Notice"), OJ C 95, 16.4.2008, p.1.

[15] See also Commission Decision in Case M.4730 – *Yara / Kemira GrowHow* of 21 September 2007.

[16] See Article 14(3) of the Merger Regulation.

[17] See C2006-103 / Lettre de sanction du ministre de l'économie, des finances et de l'industrie du 8 décembre 2007, à Monsieur le Président de la société Pan Fish, relative à une concentration dans le secteur du saumon.

As stated above, the standstill obligation is a pillar of the Merger Regulation, and anti-competitive effects are not required to find an infringement. With potentially problematic mergers it is even more important to ensure that transactions are not implemented before scrutiny, because they will in all likelihood result in irreparable damage to the competitive structure of the market.[18].

The Commission also noted that actual competitive harm could have occurred in this case, despite Marine Harvest's abstention from exercising its voting rights. This could have happened, for instance, because of Morpol's CEO Mr Malek's resignation, which was a condition of the share purchase agreement signed between Marine Harvest and Mr Morpol. The Commission also noted that the transaction as originally notified could have given Marine Harvest access to sensitive information, and diminished Marine Harvest's incentives to compete with Morpol because of the internalisation of the latter's profits.

In setting the fine, the Commission also took the duration of the infringement into account. As an infringement of the notification requirement is instantaneous, it is by nature without duration. Regarding the duration of the breach of the standstill obligation, the Commission exercised its discretion and took into account the period from implementation of the concentration to clearance of the transaction (i.e. nine months and twelve days), because the transaction raised competition concerns, and a fine should achieve an adequate deterrent effect.

Lastly, the Commission considered it a mitigating circumstance that Marine Harvest had not exercised its voting rights in Morpol, and had kept Morpol ring-fenced from Marine Harvest. The Commission also saw the fact that Marine Harvest started pre-notification discussions only a few days after closing the transaction as a mitigating circumstance.

[18] See paragraph 155 of the Decision.

5. Conclusion

Marine Harvest is not the first case in which the Commission has imposed fines for breaching the notification requirement and the standstill obligation. Even so, the case is an important milestone when it comes to pursuing procedural infringements.

This is the first time the Commission has imposed fines on a company for failing to notify a deal which raised competition issues. In all other previous cases of early implementation, the Commission cleared the (belatedly notified) transactions unconditionally, as there were no overlaps or very limited overlaps between the parties. This means that the higher fine this time, amounting to approximately 1% of the turnover of the notifying party, should come as no surprise. The fine is still modest compared to the maximum fine possible [19] thanks to mitigating factors such as the prompt start of pre-notification and Marine Harvest's abstention from exercising its votes in Morpol. Without these mitigating circumstances, the fine imposed by the Commission would probably have been higher.

Second, the case clarifies the Commission's approach to public bids. It confirms the view already stated in *Yara Kemira/ GrowHow* that exemptions under Article 7(2) of the Merger Regulation do not apply to purchases from single shareholders,

Third, the Commission was not impressed by Marine Harvest's argument that its conduct has been caused by legal advice given by its external counsel. The Commission is usually ready to give guidance through the consultation process when it comes to interpreting provisions.

More in general, the case shows the Commission's readiness to pursue procedural infringements, and its willingness to act promptly and impose a deterrent, but proportionate fine.[20]

The Commission decision in *Marine Harvest* has been appealed before the General Court and at the time of writing the case is still pending[21].

[19] Pursuant to Article 14(2) of the Merger Regulation, the Commission can impose fines up to 10% of the turnover of the undertaking concerned for the infringement of Article 4(1) and fines up to 10% of the turnover of the undertaking concerned for the infringement of Article 7(1).

[20] Even so, the Commission always carefully looks at the arguments and information submitted by the parties subject to the investigation. In the *Munksjö/Ahlstrom* procedural infringement case, for example, the Commission closed the proceedings against Munksjö and Ahlstrom concerning the provision of potentially misleading information after having reviewed information submitted by the parties in the course of the proceedings (see press release available at http://europa.eu/rapid/press-release_IP-13-461_en.htm).

[21] Case T-704/14 - *Marine Harvest v Commission*.

Competition *merger brief*

Viking Steel: the SSAB / Rautaruukki merger

Joachim Bokobza, Massimiliano Kadar and Jani Ringborg

In a nutshell

The SSAB / Rautaruukki case gives insight into the Commission's approach to market definition in merger cases. The case confirms that the Commission's approach is case-specific, and driven by the issues at stake in a given case rather than a mechanical transposition of its precedents.

The case also features an access remedy, confirming that the Commission seeks remedies that target the actual concern identified in its investigation.

Introduction

On 14 July 2014, the Commission cleared the acquisition by the Swedish steelmaker SSAB of its Finnish rival Rautaruukki (Ruukki), subject to the divestment of five businesses in Finland, Sweden and Norway. The merging firms were both producing and supplying steel products, with a particular focus on specialty carbon steel (high-strength and wear-resistant carbon steel) and a geographic focus on the Nordic region. In particular, SSAB and Ruukki were the only two remaining carbon steel producers with production assets in the Nordic region, where they also controlled a pervasive distribution network for carbon and stainless steel products. The transaction therefore essentially created a Nordic carbon steel champion.

Effective competition at the levels of supply and distribution of steel is of paramount importance to the competitiveness of a range of export-oriented companies in the automotive, mining and construction sectors, for example, for which carbon steel is an essential input. While the transaction could enable the merged entity to compete better against its larger rivals on a European and global scale, the Commission's phase I investigation identified serious risks of negative effects for steel customers in the Nordic countries, where SSAB and Ruukki both operated strong businesses in close competition. The Commission therefore insisted on a remedy designed to facilitate the entry or expansion of other carbon steel competitors in the Nordic countries on the basis of established distribution networks and local processing capacity[1].

The transaction, notified on 22 May 2014, is the most recent merger case approved pursuant to remedies in the carbon steel industry. It posed interesting questions, notably with regard to the definition of the relevant geographic markets for carbon steel products, and the remedy with which the transaction was cleared in these markets. This article focuses on these two issues.

Commission's precedents on carbon steel

While carbon steel markets were often the subject of merger cases during the first 17 years of the Merger Regulation's application, the *SSAB/Rautaruukki* transaction was the first major European carbon steel transaction since the 2006 *Mittal/Arcelor*[2] case. Carbon steel, i.e. carbon-based steel with little or no alloy content, has long been held as belonging to markets separate from the more expensive stainless, specialty or electrical steels. A shape-based distinction between long products (such as wire rod) and flat products (such as coils or plate) is also enshrined in two decades of Commission practice. Throughout an industry consolidation that culminated with the creation of ArcelorMittal in 2006, the Commission only distinguished flat carbon steel according to its various finishing stages, from steel-making to coating. Importantly, in previous Commission decisions flat carbon steel product markets were considered as EU/EEA-wide or at least EEA-wide in scope, although the issue of a separate geographic market for the Nordic Region did not arise.

Steel as a (somewhat) fast-moving industry: High-Strength and Wear-Resistant steel

European steel producers face significant overcapacity at both European and global levels and have, especially in the aftermath of the crisis, struggled to maintain their profitability at acceptable levels. In response, some carbon steel producers have striven to differentiate their product portfolios to achieve higher margins in

[1] In addition, the remedies offered by SSAB addressed the Commission's concerns in the distribution of stainless steel and the supply of profiled steel construction sheets in Finland.

[2] COMP/M.4137 – *Mittal/Arcelor*.

The authors wish to thank Thomas Deisenhofer for the valuable comments on previous drafts of this article, and Gabor Koltay for his work on this case as a member of the Commission case team.

value-added niches. Interestingly, both SSAB and Ruukki have chosen to focus their offering on high-strength (HS) steel, used for instance in cranes, and wear-resistant (WR) steel, designed for parts used in abrasive environments such as shredders or mining equipment.

In its decision, the Commission concluded that HS and WR steel products are likely to belong to product markets separate from standard carbon steel products. In reaching this conclusion, the Commission placed significant emphasis on the fact that more costly equipment and machinery – namely quenching lines, tempering furnaces and/or thermo-mechanical rolling equipment – are needed to produce HS and WR steel compared to standard grades[3]. Other supply-side barriers were identified: the importance of know-how; the effect of the design and setup of the overall steel mill on the ability to produce (or start producing) HS and WR steel; and the limited number of producers of HS and WR steel.

Also interesting was the finding that the role of brands is another significant differentiator between standard steel and HS and WR steel. The use of specialty steels by equipment manufacturers typically requires more involvement by the steel producer than is the case for standard steel, leading to HS and WR steel brands adding value further down the supply chain.

The Commission's analysis of the *SSAB/Rautaruukki* transaction suggests that new markets may be created over time even in mature, basic industries when technological innovation designed to address and create new customer uses results in significant alterations of competitive dynamics. Interestingly, the dynamism and innovation at play in the potential HS and WR markets were also reasons why the Commission ultimately did not raise serious doubts in their respect[4].

A Nordic market for carbon steel flat products?

The merging firms were the only two Nordic producers of most flat carbon steel products[5], and portrayed themselves in investor presentations and marketing material as Nordic players with a strong "home market" focus. This meant that the competitive impact of the merger would be magnified by potential geographic differentiation across Europe. This was particularly the case for the three carbon steel flat products where both SSAB and Ruukki had strong offerings and market positions in the Nordic countries (Finland, Sweden and Norway), namely hot-rolled (HR), cold-rolled (CR) and organic-coated (OC) products.

As noted above, in older cases the Commission had defined HR, CR and OC markets as EU/EEA-wide, though there was no need at the time to assess the existence of a Nordic cluster.

However, the distribution of market shares showed that the merging firms achieved very high combined market shares in the Nordic countries, but only modest shares (below 10%) in the rest of the EEA. In addition, initial market feedback suggested that price differences between the Nordic countries and the rest of the EEA could be substantial[6]. The Commission, in line with the Notice on the definition of the relevant market[7], used those two factors as broad initial indications and conducted a more extensive economic analysis on the basis of the working hypothesis of a Nordic market.

To assess the extent and understand the causes of the price and market share discrepancies, the Commission analysed the magnitude and evolution of trade flows. The investigation showed that, despite large production overcapacity in Northern Europe (i.e. Germany, the UK and the Benelux countries; larger than overall consumption in the Nordic region) the penetration of EEA imports into the Nordic countries was limited and at best stagnating in recent years for the three products at stake, but not for other flat steel products where SSAB and/or Ruukki had limited product offerings. Moreover, there were indications that European competitors considered the Nordic countries as an export market of lower strategic importance than continental Europe. This strategic disinterest had consequences in terms of the consistency with which Nordic customers could expect competitive offers from SSAB and Ruukki's European-based competitors.

One of the more obvious explanations for the discrepancy between steel producers' market shares in the Nordic countries and in the rest of the EEA was the role of transport costs as a barrier for imports. The Commission found that, for the products at stake, transport costs from continental Europe to the Nordic countries represented up to about 10% of final prices. The relative transport cost advantage for SSAB and Ruukki thus amounted to a significant barrier to imports from the European continent.

The Commission found that European competitors of SSAB and Ruukki also faced other, non-price barriers to expansion in the Nordic countries, such as the access to efficient distribution networks and logistic routes, which only SSAB and Ruukki had, providing them with high supply chain reliability and delivery accuracy. The lack of access to efficient local supply chains also amplified the effect of transport cost differentials, thereby further raising the minimum efficient scale of ex-mill orders that could be accommodated by European producers for their Nordic customers.

[3] This approach was consistent with paragraph 23 of the Notice on the definition or relevant market (OJ C 372, 09.12.1997) regarding supply side substitutability as well as with the assessment framework used in *Outokumpu/Inoxum*, where the Commission also investigated whether commodities and specialties belonged to the same – stainless steel – markets. See decision in case COMP/M.6471 – *Outokupu/Inoxum*, recitals 163 to 173.

[4] Decision, paragraphs 171 and 176.

[5] NLMK, through its Dansteel mill in Denmark, did not produce any of the coil-based "strip" products.

[6] See decision, paragraph 64.

[7] See Notice on the definition of the relevant market, paragraph 28.

The Commission also quantitatively assessed price data. A descriptive analysis of price series showed widening gaps between continental and Nordic prices of HR and CR, which contrasted with the close alignment of prices for products where SSAB and Ruukki had less strong positions. Beyond this first result, the Commission assessed a set of price correlation analyses submitted by SSAB and Ruukki with a view to establishing that Nordic customers arbitraged between locally produced steel and continental European imports.

In its quantitative assessment in the *SSAB/Rautaruukki* case, the Commission further developed its approach as regards the use of price correlation analysis in a market definition context, building on its experience in recent cases such as *Ryanair/Aer Lingus III* and *Marine Harvest/Morpol*[8]. From the outset, the Commission noted that price correlation analysis only provides indirect evidence for market definition, and so is mainly useful as a complement to other pieces of quantitative and qualitative evidence. In this assessment in this case, the Commission dismissed correlation analysis based on price levels[9] and price differences, as well as price co-integration analysis, as uninformative in light of potential biases introduced by common cost and demand factors[10].

While underlining the limits of conditional correlation analysis[11], the Commission found that the data provided some support for a separate Nordic market for HR and CR by using another carbon steel flat product – quarto plate – as a benchmark in terms of correlation levels[12]. Finally, the Commission carried out a correlation analysis by controlling for time-fixed factors across the different price series. This analysis showed a degree of geographic clustering for HR and CR in the Nordic countries, while no clear geographic clustering could be established for quarto plate.

The economic evidence reviewed by the Commission ultimately indicated, if anything, a strong degree of geographic differentiation in the Nordic countries, with price dynamics in Norway, Sweden and Finland comparatively more homogeneous than between the Nordic countries and the rest of the EEA. The Commission therefore considered that there was at least a serious possibility that the markets for HR, CR and OC were not wider than the three Nordic countries.

The Commission's analysis in this case suggests overall that the usefulness of price correlation analysis and its refinements to support the view that several products or regions belong to the same market is subject to serious reservations. The indirect nature of these methods and the practical limitations to controlling for common factors tend to restrict the usefulness of these quantitative tools to a one-sided test supporting the existence of separate markets where prices are not (or only weakly) correlated.

Substantive assessment of carbon steel markets in the Nordics

The Commission reconstructed the overall market size and market shares on carbon steel flat product markets in the Nordic countries (Norway, Sweden and Finland) and found that SSAB and Ruukki achieved combined market shares above 50% for HR, CR and OC. A large number of customers expressed concerns about the transaction during the market investigation. In addition, the Commission's investigation showed that the merging firms were each other's closest competitors, and exercised a strong competitive constraint on each other for the supply of HR, CR and OC in the Nordics, as confirmed by the parties' internal documents.

One of the distinctive features of the *SSAB/Rautaruukki* case is that, as noted above, the merging firms were the only two producers of HR, CR and OC in the Nordic countries. By stating that there was 'at least a serious possibility' that the markets at stake were not wider than the Nordic countries, the Commission had therefore already taken a stance on one of the most crucial questions of the substantive assessment: the Commission considered as doubtful – in the context of a phase I assessment – that absent a remedy European imports would be sufficient to defeat a price increase by the merged entity.

In its substantive assessment, the Commission focussed first on the competitive pressure of Russian and Asian steel producers, concluding that these suppliers were less credible alternatives than SSAB, Ruukki and their European competitors due to a narrower product range, lower quality and perceived quality levels, as well as longer lead times as regards Asian suppliers.

The Commission also further explored the reasons for the lack of penetration by European importers in the Nordic countries, especially since the available production capacities of European steel mills could in theory serve Nordic demand several times over.

In this respect, the Commission noted that the merging firms were heavily integrated downstream into steel distribution,

[8] See decision in case COMP/M.6663 – *Ryanair/Aer Lingus III*, Annex I, and decision in case COMP/M.6850 – *Marine Harvest/Morpol*, paragraphs 47–57.

[9] The Commission further noted that since price series for the products at stake were not stationary, the correlation of price levels was uninformative on the existence of price arbitrage between the products/regions at stake. See decision, footnote 83.

[10] In such frameworks, high correlations or statistical results that support the existence of co-integration may be either due to actual price arbitrage by customers, or be the result of common costs or demand trends which are not accounted for.

[11] Conditional correlation analysis does not, as a rule, account for common demand trends. In addition, it is in practice difficult to adequately control for potential common cost elements. In the case at stake, the Commission noted that common energy costs had not been accounted for. See decision, paragraph 97 and footnote 84.

[12] The Commission also emphasized the importance of choosing appropriate benchmarks in a conditional correlation analysis setup, clarifying that benchmarks in similar markets should be preferred. In particular, correlation levels observed in different industries – in this case the airline industry – and/or using different methods (e.g. different common costs) should not be used as cut-off levels. See decision, footnote 85.

through which they supplied large captive distribution volumes. The pervasiveness of these distribution networks across the Nordic countries constituted a competitive advantage in itself by ensuring better reliability of supplies and allowing more accurate just-in-time deliveries. This advantage was enlarged by the particular demand structure of the Nordic countries, characterized by smaller customers and a stronger connection between ex-mill demand and demand served by distributors.

Perhaps most crucially, the parties' hold over steel distribution was a barrier for European importers seeking to enter Nordic markets by depriving them of a crucial route to market through which to reach small and mid-size customers, as confirmed by a number of the parties' competitors and customers. Finally, also on the basis of a review of the parties' internal documents, the Commission considered there was a risk that the role of these captive distribution channels in stemming the flow of imports from outside the Nordic countries would increase after the transaction.

The Commission therefore concluded that the reaction of the parties' competitors was unlikely to prevent an anti-competitive outcome such as a unilateral increase of prices in HR, CR and OC markets, and considered that the transaction raised serious doubts as to its compatibility with the single market.

Remedies

SSAB sought to address the Commission's doubts on HR, CR and OC in the Nordic region by offering a set of divestments as commitments. The commitments consisted of the divestment of major steel service centres (SSCs) in Finland (Naantali) and Sweden (Halmstad), as well as the divestment of SSAB's shares in two distribution joint ventures in Norway[13].

As stated above, the Commission concluded that a number of European rivals of the merged entity would have more than sufficient capacity to serve the Nordic market but lacked a suitable route to the market. In order for the commitments to remove the competition concerns, therefore, these commitments had to act as a route to market and adequately increase the ability and incentive of rivals to penetrate the Nordic region's markets for HR, CR and OC.

In its assessment, the Commission also concluded, on the basis of comments received in the course of the market test, that by purchasing the divestment business and entering the market at the distribution level, a rival would be capable of entering the market in question and increasing its presence not only at distribution level but also at the level of ex-mill sales, given that (i) in the Nordic countries, the same customers were often purchasing both at the distribution and ex-mill levels, (ii) local presence at the distribution level makes it easier to develop an effective logistic chain, (iii) ex-mill deliveries and deliveries to SSCs to the Nordic countries could be combined, which would proportionally decrease transport costs, and (iv) having processing facilities in the Nordic region would further decrease transport costs, as shipping unprocessed material is cheaper than shipping processed material.

In terms of scope, the commitments offered by SSAB covered some of the parties' main distribution assets in the Nordic countries. The package was further strengthened by the inclusion of sales personnel experienced in ex-mill sales, and a set of ex-mill contracts. As a result of these measures, the combined volumes divested were equivalent to eliminating the overlap between the parties in Norway as well as eliminating more than the overlap in Sweden and Finland.

As regards purchaser requirements, SSAB committed to ensuring that the divestment business would be at least partially owned by a carbon steel producer. This was an important element in the Commission's assessment, as full or partial ownership of the distribution assets by a carbon steel producer would considerably increase its incentives to develop the assets and to use them as a route to market, including its ex-mill sales.

In light of the above, and taking into account positive market feedback during the market test, the Commission concluded that the commitments offered would remove the serious doubts raised by SSAB's acquisition of Ruukki.

While the remedy accepted by the Commission was a clear-cut divestiture of (distribution) businesses, it did not include the divestiture of production capacity, but was designed to facilitate market access for rival carbon steel producers into the Nordic region. The remedy thus reflects the fact that the competition concern in the case was not related to lack of competing production capacity[14] – there is plenty of high quality carbon steel available relatively close to the Nordic region in Germany, the Netherlands, Belgium and the UK – but the finding that the competing carbon steel lacked an adequate route to market due to the parties' strong hold on the distribution assets.

The remedy accepted thus served a similar function to the Willich distribution assets included as an accessory part in the remedy package in the *Outokumpu/Inoxum* case. In that case, the divested distribution assets provided a new route to market to facilitate entry and expansion of the divested production asset Acciai Speciale Terni in the Germany/Benelux region, where it had previously not had its own distribution assets.

[13] The divestment also included further assets in Finland, namely further distribution assets as well as SSAB's steel roofing business, Plannja. Those divestments were nonetheless aimed at addressing other competition concerns in the areas of distribution of stainless steel and profiled construction sheets.

[14] In *Outokumpu/Inoxum*, the Commission required for such a capacity-related concern the divestment of a production facility.

Conclusion

The SSAB/Rautaruukki case is an interesting example of the Commission's approach to geographic market definition in steel markets. The Commission has built, in more than 20 years of merger control, a remarkable amount of precedents in a wide variety of markets. But it would be an overly simplistic approach for the parties to a given transaction to rely mechanically on previous Commission decisions in a given sector while ignoring the specificities of the case at stake. The remedy accepted in *SSAB/Rautaruukki* also shows that the Commission seeks to obtain remedies which target the actual competition concern identified. The types of remedies the Commission is willing to accept thus need to reflect the type of competition problem they are meant to address: while capacity problems call for production remedies, access problems can sometimes be solved with access remedies.

Ultimately, the Commission's decision in this case allows for the creation of a stronger carbon steel producer, able to compete better on European and global markets for specialty carbon steels, while at the same time ensuring that local downstream customers are not unduly harmed by the transaction.

Competition *merger brief*

No magic number to dial - The Commission's review of mobile telecoms mergers

Simon Vande Walle and Julia Wambach

In a nutshell

A wave of consolidation in Europe's telecoms sector has led the Commission to review several mergers between telecoms operators.

This article reviews the three most recent mergers between mobile network operators in Austria, Ireland and Germany. It also tries to identify some general lessons on how the Commission deals with mobile telecoms cases.

The Commission has reviewed several mergers in the mobile telecommunications sector in recent years. Three recent mergers in Austria [1], Ireland [2] and Germany [3] triggered in-depth investigations and were ultimately cleared with remedies. Earlier decisions had dealt with mergers in the United Kingdom[4], the Netherlands[5], Greece[6] and Austria[7], where a 5-to-4 merger in 2006 preceded the recent 4-to-3 merger that took place in 2012.

This article takes stock of these cases, with a particular focus on the three recent decisions relating to Austria, Ireland and Germany. Based on an analysis of these cases, the article also tries to identify some general lessons on how the Commission deals with mobile telecoms cases.

The mergers reviewed by the Commission are part of a broader wave of consolidation in the mobile telecoms sector. While consumer advocates consider this a dangerous trend that will lead to higher prices and less innovation, the industry argues that consolidation will allow mobile operators to achieve scale and invest in new technologies. When exercising its merger review powers, the Commission does not take a position on this broader debate, but has to examine each specific case on its merits.

This case-by-case analysis implies that there is no "magic number" of mobile network operators up to which consolidation is unproblematic or beyond which consolidation is problematic. Thus, the Commission cleared the 4-to-3 mergers in Austria, Ireland and Germany subject to remedies, but unconditionally cleared 4-to-3 mergers involving the acquisition of operators that were struggling to compete in the Netherlands and Greece. At the same time, it required remedies for 5-to-4 mergers in Austria and the United Kingdom.

[1] Case M.6497, Hutchison 3G Austria / Orange Austria, 12 December 2012.
[2] Case M.6992, Hutchison 3G UK / Telefónica Ireland, 28 May 2014.
[3] Case M.7018, Telefónica Deutschland / E-Plus, 2 July 2014.
[4] Case M.5650, T-Mobile / Orange, 1 March 2010.
[5] Case M.4748, T-Mobile / Orange Netherlands, 20 August 2007.
[6] Case M.4036, TPG IV / APAX / Q-Telecommunications, 13 January 2006.
[7] Case M.3916, T-Mobile Austria / Tele.ring, 26 April 2006.

1. Product market definition

Mobile telecoms services come in a variety of forms. Consumers can choose between a post-paid plan, under which they typically receive an invoice each month, or purchase pre-paid services, meaning they buy credit in advance without any long-term commitment. Differences also exist between the services offered to private customers and those offered to businesses. Moreover, mobile operators provide not only voice services but also data services, either in combination with voice services or separately, for instance to connect a tablet or laptop to the internet. In spite of this variety, the Commission has found that all of these services form part of a single product market, namely the overall retail market for mobile telecommunications services. The main reason underlying this wide definition is the relative ease of supply-side substitution, meaning mobile operators can easily switch from offering one service to offering another[8].

On the demand side, however, substitution is less easy. Private customers, for instance, cannot easily switch to a mobile plan for businesses and vice versa. Likewise, pre-paid customers may hesitate to move from occasional purchases of pre-paid credit to a post-paid contract. Because demand-side substitution is limited, the different types of services can easily be distinguished as specific segments. Mobile operators often analyse the market on the basis of these segments. Segments also play an important role in the Commission's analysis of mobile mergers. Market

[8] See Commission Notice on the definition of relevant market for the purposes of Community competition law, OJ C 372, 9.12.1997, paragraph 20.

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shares, for instance, are normally calculated not only on the overall market but also for specific segments. In the Austrian, Irish and German cases, this allowed the Commission to identify the segments in which the merger was particularly likely to cause harm. Since these segments constituted a substantial or growing part of the overall market, the findings of anti-competitive effects in these segments were also an important element for finding anti-competitive effects on the overall market. Segment-level data is also useful to assess whether the two merging entities are close competitors and to ensure that any remedies remove the competitive harm in the segment where it will be felt most acutely.

Mobile operators sometimes argue that the relevant product market should be defined as including not only mobile telecommunications services but also fixed broadband services. Consumers can access these fixed broadband services with their smartphone or tablet via Wi-Fi spots in public places or at home. In the Austrian and German cases, the Commission assessed this argument explicitly and concluded that, at present, fixed broadband is not an alternative for mobile telecommunications services. Mobile users may be using Wi-Fi spots frequently, but they also want their mobile device to function when they have no access to Wi-Fi spots. Hence, Wi-Fi acts as a complement, not as a substitute, to mobile telecommunications services.

2. Geographic market definition

The Commission has consistently defined the retail mobile telecommunications market along national borders. This geographic market definition is based on market reality. Consumers in, say, Germany, cannot realistically rely on a mobile operator in, say, Austria, to make their calls. This is because the coverage of mobile networks traces national borders and so German consumers have to rely on an operator with a network in Germany[9]. Of course, these German operators may be multinational companies that also own networks in other European countries, but that does not negate the fact that for German consumers, a mobile contract with an Austrian operator is not a substitute for a contract with a German operator. Such a contract would expose the German consumer to substantial roaming fees. It may also simply be impossible for a consumer to enter into such a cross-border contract, as many mobile operators require a customer to have a local address for billing purposes.

One of the main reasons why mobile markets are fragmented along national borders is the way in which spectrum is allocated. The spectrum needed to operate mobile telecoms networks is licensed at national level and for national territories. Different EU countries use different spectrum frequencies, and these frequencies are licensed at different points in time and for different time periods. All of this results in mobile networks that are national and, as a result, the geographic market on which mobile operators compete for customers is also national.

The Commission is keen to create a truly European market for mobile telecoms and, in 2013, it proposed legislation aimed at achieving this[10]. Creating such a single European telecoms market is also a top priority of the Juncker Commission[11]. A truly single market would allow consumers to choose comparable tariffs from any mobile operator in the EU. This is a process that is likely to take several years and until then, the geographic market on which mobile operators compete for customers will not be EU-wide.

The existence of national markets means that cross-border mergers between telecom companies are far less likely to raise problems than in-country consolidation. Operators in different countries do not compete with each other, so mergers between them are unlikely to lead to a loss of competition. By contrast, in-country consolidation is more likely to harm competition.

3. Key elements in the competitive analysis

In all the mobile telecoms cases discussed so far, the Commission’s finding of a significant impediment to effective competition was based neither on dominance nor on coordinated effects, although the latter were not excluded in the Irish and the two Austrian cases. This makes these cases so-called “gap” cases. That term refers to the perceived gap in coverage of the original Merger Regulation of 1989[12], in which the substantive test was focused on dominance, either by a single company (single dominance) or by several companies coordinating their conduct (collective dominance)[13]. This substantive test was changed in 2004, when the current Merger Regulation[14] was enacted. Under the current test, mergers must be prohibited if they would significantly impede effective competition[15]. The revised Merger Regulation makes it clear that, in oligopolistic markets, mergers can lead to a significant impediment to effective competition even when they do not lead to dominance or coordinated effects[16]. The legal test for these gap cases is whether the merger involves "the elimination of important competitive constraints that the merging parties had exerted upon each other,

[9] The operator will either own the network or, in the case of a mobile virtual network operator (MVNO), purchase wholesale access to the network of a mobile network operator and then use that access to offer services to its own customers at retail level.

[10] This proposed legislation is commonly referred to as the "Connected Continent legislative package". It consists, among other things, of a Proposal for a regulation of the European Parliament and of the Council laying down measures concerning the European single market for electronic communications and to achieve a Connected Continent - COM(2013) 627.

[11] Jean-Claude Juncker, A New Start for Europe: My Agenda for Jobs, Growth, Fairness and Democratic Change (Opening Statement in the European Parliament Plenary Session), 15 July 2014.

[12] Council Regulation (EEC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p. 1-12.

[13] *Id.*, art. 2(3).

[14] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.01.2004, p. 1-22 ("Merger Regulation").

[15] Merger Regulation, art. 2(3).

[16] Merger Regulation, recital 25.

as well as a reduction of competitive pressure on the remaining competitors"[17]. The Commission's three recent mobile telecoms cases shed light on the elements that the Commission takes into account to assess whether this is the case in mergers involving mobile operators.

First, the closer the merging parties are as competitors, the more likely it is that the merger will lead to anti-competitive effects[18]. Mobile services are relatively differentiated products and if consumers see the products of the two merging companies as close substitutes, this makes it more likely that the merged entity will raise prices. Diversion ratios are one of the tools used to assess closeness of competition. These ratios measure the number of customers switching from one operator to another. Complete data on all customers who are switching is normally not available but the Commission has used data from mobile number portability systems as a proxy.

In the Austrian and German cases, the Commission found that the merging parties were close competitors and this was one of the factors that made a significant impediment to effective competition likely. Closeness of competition is not, however, a prerequisite for finding a significant impediment to effective competition[19]. Thus, in the Irish case, the Commission made no finding of closeness but nonetheless concluded that the merger would lead to a significant impediment to effective competition based on other factors. In short, closeness of competition is an element that makes a significant impediment to effective competition more likely, but it is not decisive one way or the other.

Second, the Commission is particularly attentive to whether the merger would remove an important competitive force from the market[20]. Mobile markets usually feature operators with very different profiles and incentives, ranging from incumbent players with an established customer base to recent entrants trying to gain market share. Some operators exert more of an influence on competition than their market share suggests, and their removal from the market may change the competitive dynamics in a significant, anti-competitive way. The mergers in Austria, Ireland and Germany all involved such an important competitive force. They involved challenger companies that were offering particularly attractive prices and innovative products. In Ireland and Austria, for instance, one of the merging parties had offered particularly cheap and innovative data packages, while in Germany, one of the merging parties had been a pioneer in offering aggressively priced "all-net flat" tariffs, which allowed consumers to make unlimited calls and SMS to any network at a fixed price.

Third, the Commission also analyses the merged entity's incentives to compete. The most direct effect of a merger is the loss of competition between the merging firms. The removal of this competitive constraint may give the merged entity the incentive to raise prices.

The merged entity's incentives to compete may also be diminished because of its larger customer base. An operator with more customers has fewer incentives to engage in aggressive price competition because the low prices it offers to new customers ultimately have to be offered to all of its customers, reducing the revenue from existing customers. This reduction may be offset by the increase in revenue from the new customers, but the larger the customer base, the less likely this will be the case. In all three cases, the merger greatly increased the customer base of the acquiring operator and the Commission concluded that this would reduce that operator's incentives to compete.

Fourth, the Commission assesses how competitors would compete after the merger by examining both their incentives and ability to compete. As regards competing mobile network operators, one way in which a merger may affect their ability to compete is through an existing network sharing agreement. For instance, the merger may give the merged entity the incentive to terminate such an agreement and this could, in turn, reduce the network sharing partner's ability to compete. The Commission found that this was a likely scenario in the Irish case, where the merged entity could frustrate or terminate a network sharing agreement with one of remaining mobile network operators, thereby impairing its ability to compete effectively in the market.

In past cases, competing mobile network operators have argued that a merger may lead to a situation in which competing mobile network operators are unable to compete because of the merged entity's increased spectrum holdings. The Commission assessed such spectrum-related complaints in all three cases but ultimately concluded that the change in spectrum distribution caused by the merger would not lead to anti-competitive effects[21]. In assessing such complaints, the Commission is mindful that a merger does not reduce the spectrum held by competitors. So, if competitors have sufficient spectrum to compete before the merger and these spectrum holdings allow them to compete effectively after the merger, then the mere fact that the merger increases the merged entity's spectrum is not likely to give rise to competition concerns[22].

[17] Merger Regulation, recital 25.

[18] Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ C 31, 5.2.2004, p. 5-18 ("Horizontal Merger Guidelines"), paragraph 28.

[19] Case M.5529, Oracle / Sun Microsystems, 21 January 2010, recital 164.

[20] Horizontal Merger Guidelines, paragraph 37.

[21] Case M.6497, Hutchison 3G Austria / Orange Austria, 12 December 2012, recitals 476-484; Case M.6992, Hutchison 3G UK / Telefónica Ireland, 28 May 2014, recitals 685-697; Case M.7018, Telefónica Deutschland / E-Plus, 2 July 2014, recitals 502-524.

[22] In a case relating to a joint venture between two mobile network operators in the UK, the Commission concluded that the concentration of spectrum could leave other mobile network operators unable to compete effectively because the joint venture would be the only mobile network operators with a full-speed national 4G network in the short to medium term (Case M.5650, T-Mobile / Orange, recitals 111-139, 227).

The Commission's analysis of rivals' incentives is aimed at assessing how they would react to a price increase by the merged entity. Economic theory suggests that, in oligopolistic markets with differentiated products, a price increase by the merged entity will generate an incentive for the remaining competitors to raise prices as well. In each case, the Commission assesses whether this prediction finds support in the available evidence. This usually entails analysing the characteristics of the remaining competitors and reviewing internal documents from the merging parties, which often contain predictions on likely price evolutions after the merger. In all three cases, the evidence suggested that competitors would likely react to the merged entity's price increases by increasing their own prices as well. The Commission also estimated these price increases as part of its quantitative assessment, which is discussed in the next section.

4. Quantitative assessment – another (increasingly refined) element of the competitive analysis

In complex merger cases, the Commission frequently quantifies the merger's horizontal non-coordinated effects as part of its competitive assessment. Paragraph 24 of the Horizontal Merger Guidelines explains that the loss of competition between the merging firms is the most direct effect of a merger. This loss gives the merged entity an incentive to raise price because some of the demand that would have been lost following a price increase pre-merger will be recaptured by the merged entity post-merger. Price increases by the merged entity may, in turn, move some demand to rival firms' products, allowing them to also raise their prices. Together, these two effects could lead to significant price increases in the market overall.

Different tools are available to measure the impact of the loss of competition between the merging firms. These include upward pricing pressure (UPP) analyses, indicative price rise (IPR) analyses, and merger simulation models based on calibrations or demand estimation. The Commission relied upon these tools, albeit to different extents, in the Austrian, Irish and German cases. In all three cases, the Commission found that the respective transactions would likely lead to significantly higher prices.

In the Austrian case the Commission carried out a UPP/IPR analysis. That means it evaluated the diversion of sales between the respective products of the two merging firms without taking into account rivals' likely reactions. As this diversion between the merging firms is internalised post-merger, it will affect the incentives of the merging firms to increase prices. If there is little diversion, that is to say little competition between the respective products of the merging firms, the merged entity's incentives to increase prices as a result of the loss of this limited competitive constraint are expected to be low. If, however, diversion is high and, as a result, the competitive constraint eliminated is larger, the incentives of the merged entity to increase prices post-merger are likely to be higher. The IPR analysis in the Austrian case yielded predicted price increases of 10 to 20% in the post-paid private segment[23].

While the standard UPP/IPR analysis gives an indication of the price developments relative to the pre-merger situation and has, therefore, a probative value in the framework of the Commission's competitive analysis, it does not capture the likely reaction of competitors. In the Irish and the German case the quantitative assessment was therefore taken two steps further. First, the UPP/IPR analysis was broadened to take into account the impact of the loss of competition between the merging parties on rivals. This exercise amounted to a merger simulation based on observed margins and diversion ratios at the segment level. Second, in both cases, the Commission undertook a merger simulation based on an econometric estimation of demand.

A merger simulation not only takes into account the unilateral incentives of the merging parties to raise prices, but also rivals' reactions to these price increases. The results obtained therefore show the likely overall price increases in the relevant market and in the segments analysed. Calibrating this technique based on observed margins and diversion ratios at the segment level, the Commission found that the loss of competition between the merging parties would likely lead to significant overall price increases in both the Irish and German cases.

The merger simulation based on an estimation of demand was aimed at predicting how operators in Germany and Ireland, including the merged entities, would price their tariffs post-merger taking into account substitution patterns among tariffs. To this end, the Commission analysed data on tariffs of the largest operators in Germany and Ireland to assess the relationship between, on the one hand, the number of subscribers to a given tariff that is contestable[24] and, on the other hand, changes in price of this tariff.

In the Irish case the results of the demand estimation did not yield plausible predictions on pre-merger margins. In light of this, the Commission did not take the results into consideration in its competitive assessment and only based its quantitative assessment on the results of the calibration-based analysis at the segment level. In the German case, on the other hand, the demand estimation based merger simulation yielded reliable results that were in line with those of the analysis at the segment level. Hence, the Commission was able to base itself on

[23] In its decision in that case the Commission underlined that "[u]pward pricing pressure is to be understood relative to the direction which prices would have taken in the absence of the merger. To the extent that decreasing prices would be expected in the absence of the merger, upward pricing pressure does not necessarily mean that prices would increase as a result of the merger in absolute terms. [...] In the Commission's analysis, upward pricing pressure is taken to encompass all mechanisms by which the merged entity could increase its margins relative to the pre-merger situation." (Case M.6497, Hutchison 3G Austria / Orange Austria, 12 December 2012, recital 316).

[24] A subscriber is contestable if he or she could in principle decide to switch provider at any point in time.

both approaches when concluding on the likely anti-competitive effects of the merger.

The quantification of the likely horizontal effects of a merger is merely one, but nevertheless an important, element of the Commission's competitive assessment of complex mergers. The two recent decisions regarding the Irish and the German market show that the Commission has refined its economic analysis to better capture the main features of competition. They also show that the scope and reliability of any economic analysis depend on the type and quality of the data available, as well as the complexity of the case. These limiting factors will continue to affect the actual form of economic analysis in future cases of similar complexity.

5. Efficiencies – some insights on network sharing and fixed cost savings

A merger between two firms can result in efficiencies that may, under certain circumstances, outweigh its anti-competitive effects.

There are different types of efficiencies imaginable in the context of mergers between mobile network operators. First, efficiencies could relate to the merged entity's network. Its coverage and speed could be better than that of the two networks in the absence of the merger. Or, the roll-out of a new technology, such as 4G, could be completed faster and cover a greater part of the population than would have been the case absent the merger. Second, the merged entity could save costs by only investing in the roll-out of one new network as opposed to financing the roll-out of two separate networks.

In order for the Commission to take into account any of these potential efficiencies as a factor offsetting competitive harm, they have to fulfil the criteria set out in the Horizontal Merger Guidelines. First, the claimed efficiencies must be verifiable, that is to say, where reasonably possible the efficiencies and the resulting benefit to consumers should be quantified in a way that allows the Commission to be reasonably certain that the efficiencies are likely to materialise and that they are sufficiently substantial to counteract the merger's potential harm to consumers[25]. Second, the efficiencies must be merger-specific. The criterion of merger specificity is not fulfilled if the efficiencies in question could also be achieved to a similar extent by less anti-competitive alternatives that are realistic and attainable[26]. Finally, the claimed efficiencies must ultimately benefit consumers. They should be substantial and timely, and should, in principle, benefit consumers in those relevant markets where otherwise competitive harm would occur[27]. The burden of proof for the efficiencies claimed lies with the parties to the merger[28].

In the three recent cases relating to Austria, Ireland and Germany, the respective parties put forward various efficiency claims similar to those described above. However, to a very large extent these efficiency claims did not fulfil one or more of the three cumulative criteria of verifiability, merger specificity and benefit to consumers. For example, in the Austrian, Irish and German cases, the Commission considered that network sharing[29] could be a less anti-competitive alternative to the proposed merger that is realistic and attainable and could yield similar efficiencies. Also, in particular in the Irish and German cases, the Commission considered it unlikely that savings in fixed costs would be passed on to consumers[30]. As a result, only in the Irish case a fraction of the efficiency claims raised by the parties was accepted by the Commission and this fraction was insufficient to counteract the adverse effects on competition that otherwise resulted from the merger.

Generally, as these efficiency claims are very complex, substantial resources are needed to scrutinize them. In order to accomplish this within the tight schedule of the Merger Regulation, it is crucial to start this assessment as early as possible in the process. As the burden of proof lies with the notifying party, it is in its interest to submit relevant information on potential efficiencies as early as possible.

6. Remedies

In the three recent decisions regarding Austria, Ireland and Germany the Commission found that, absent remedies, the mergers would lead to a significant impediment to effective competition. In order to address the Commission's concerns, the parties in each of these cases submitted remedies. After questioning the market on the suitability of the respective remedies, the Commission concluded in each case that, subject to full compliance with the remedies, the proposed merger would no longer raise any competition concerns.

[25] Horizontal Merger Guidelines, paragraph 86.
[26] Horizontal Merger Guidelines, paragraph 85.
[27] Horizontal Merger Guidelines, paragraph 79.

[28] Horizontal Merger Guidelines, paragraph 87.
[29] Network sharing is an agreement between mobile network operators to share certain parts of their networks. Depending on the extent of the agreement it allows the operators concerned to increase their coverage while at the same time saving costs. There are different forms of network sharing. The two most common ones are active and passive network sharing. Operators can agree to only share the passive elements of their networks, that is to say, the mast, the site where the mast is located, power supply and the transmission network (so-called passive network sharing). Operators can also decide to share their active network equipment, that is to say the radio access network ("RAN") equipment which is responsible for the sending of data through frequencies and for controlling the network cells (so-called active network sharing). Network operators could, however, also decide to share their spectrum.
[30] Despite the evidence submitted in both cases, the Commission concluded that there were no grounds to depart from the general principle set out in paragraph 80 of the Horizontal Merger Guidelines that "reductions in variable or marginal costs are more likely to be relevant to the assessment of efficiencies than reductions in fixed costs".

A close look at each of the remedy packages shows that there is no blueprint remedy for mergers in the mobile telecoms sector. Market characteristics vary from country to country and, as a consequence, so do the specific factual circumstances considered by the Commission in each case when deciding on whether a given remedy is appropriate. It is, however, possible to identify a number of structural and behavioural elements that have been accepted in different circumstances by the Commission as part of remedy packages in the past. First, the most obvious way to remedy the loss of a competitor is to enable a new mobile network operator to enter the market. This can be accomplished by making spectrum available to the new entrant together with other elements, such as network assets (e.g. the sites needed by operators to put antennas on) or a commitment to enter into a network sharing agreement. Second, a remedy can aim at increasing the competitive pressure from players that do not own their own mobile network, such as mobile virtual network operators (MVNOs). This entails offering them access to a mobile network under predefined conditions. Access to MVNOs can be granted either by an upfront divestment of network capacity or by a reference offer specifying the price at which voice, SMS and data components are provided. Third, a remedy can aim at strengthening competition from the remaining mobile network operators by a commitment to extend existing network sharing arrangements to the merged entity's network. Finally, in markets with a robust presence of operators that do not own a mobile network, the loss of competition resulting from a merger may partly be compensated by ensuring that these players can continue to compete with the same level of intensity as they did before the merger, for instance by prolonging their contract or by offering them access to new technologies such as 4G.

Here we explain how these different elements were combined in the Austrian, Irish and German cases.

The Austrian remedy package included an element geared toward the entry of a mobile network operator and one aimed at increasing competition from MVNOs. Hutchison committed to provide certain assets, including spectrum, to an interested new entrant in the Austrian mobile telephony market. Additional spectrum was reserved by the Austrian regulator for this potential new entrant. Hutchison also committed to providing wholesale access to its network for up to 30% of its capacity to up to 16 MVNOs for a period of 10 years. The commercial terms of this wholesale access are set out in a reference offer published on Hutchison's website[31]. Hutchison also had to ensure that at least one of these wholesale access agreements would be concluded prior to the merger closing.

Although the Commission would have welcomed the entry of a new mobile network operator in Austria, the spectrum and assets offered by Hutchison, as well as the spectrum reserved by the Austrian regulator, were not picked up. Hutchison did enter into a wholesale access agreement prior to closing of the merger, namely with UPC, a subsidiary of Liberty Global. UPC has, however, not yet launched its activities as an MVNO. The fact that, following conclusion of the wholesale access agreement, a timely market entry by the MVNO did not take place in Austria was taken into consideration when the Commission assessed the suitability of the remedies offered in the Irish and German cases.

In Ireland, entry by a mobile network operator appeared to be unlikely at the time of the decision. Moreover, as in Austria, MVNOs play a very limited role. Therefore, the remedy package was geared toward compensating for the loss of one of only four mobile network operators on the Irish market by enabling two new MVNOs to enter the market on the basis of a capacity-based wholesale access agreement. In essence, Hutchison committed to divest up to 30% of its network capacity to these two MVNOs. It also committed to concluding at least one of the agreements prior to the merger closing. Unlike in Austria, the commercial conditions are not defined through a reference offer. Rather, the new MVNOs purchase the capacity upfront and so have an incentive to launch their services quickly. In addition, because they are paying a fixed annual fee for a fixed amount of capacity with no variable cost of using the capacity, they have an incentive to attract consumers with competitive offers to get a return on their investment. The commitments also contain an option for one of the MVNOs to acquire spectrum from Hutchison in order to become a mobile network operator at a later stage.

Meanwhile, Hutchison concluded the two MVNO agreements, with Liberty Global's UPC and Carphone Warehouse. UPC is already active on the Irish television, internet and telephony markets and provides mobile telecommunication services in other EU countries. Carphone Warehouse is active in Ireland as a mobile phone retailer. It recently merged with consumer electronics retailer Dixons[32].

The remedy package in the Irish case also takes into account the fact that Telefónica Ireland had previously entered into an active network sharing agreement with Eircom. Eircom does not have nationwide network coverage and relies on this network sharing agreement to reach customers in the whole of Ireland. Hutchison therefore offered to extend the network sharing agreement between Telefónica Ireland and Eircom so that Eircom could access the merged entity's network.

The core component of the remedy in the German case is also aimed at ensuring the entry or the strengthening of an MVNO based on a capacity agreement. Telefónica Deutschland committed to sell up to 30% of its capacity to up to three MVNOs. One of these deals had to be concluded prior to the merger closing. As in the Irish case, the motivation to opt for this capacity-based remedy rather than an Austrian-type reference offer was to ensure that the MVNOs would, after having purchased the capacity upfront, have low variable costs, giving them an incentive to compete on the market with attractive offers. Telefónica Deutschland decided to sell the committed

[31] https://www.drei.at/portal/media/bottomnavi/ueber_3/wholesale/2012h3greferenceoffer.pdf

[32] Case M.7259, *Carphone Warehouse / Dixons*, 25 June 2014.

amount of capacity to only one player, Drillisch. Drillisch is already active on the German market as a service provider[33].

The remedy package in the German case also contains an element that is designed to protect and improve the competitive position of the numerous MVNOs and service providers that are active on the German retail market and seek wholesale access from the three remaining mobile network operators. Unlike in Ireland and Austria, these players serve a considerable share of German retail customers. The key features of this part of the remedy are the extension of existing wholesale agreements and the offer of wholesale access for 4G services to all interested players in the future. In addition, Telefónica Deutschland commits to improving its wholesale partners' ability to switch their customers from one mobile network operator to another.

Finally, the remedy package contains an element that, in light of the upcoming spectrum auction, is geared toward facilitating entry of a new mobile network operator. In particular, Telefónica Deutschland commits to offering spectrum in the 2100 and 2600 MHz bands together with other assets, either to a new mobile network operator or to Drillisch, should it decide to become a mobile network operator.

The variations in the remedies in these three cases show that the specific facts of each case warrant a tailor-made combination of different elements. In line with previous practice and applicable laws and guidance, the Commission continues to have a strong preference for structural remedies. In the mobile telecoms sector this translates into a preference for entry of new mobile network operators. Indeed, the entry of a new mobile network operator would compensate for the loss of competition in the most clear-cut way. However, other remedies can be considered if they are equally effective. This is why the remedies in the Austrian, Irish and German cases are centered around an MVNO element, while at the same time they keep the door open to the entry of a mobile network operator or, as is the case in Ireland and Germany, a transformation from MVNO to mobile network operator.

7. Conclusion

Three mobile telecoms mergers have taken place in quick succession in Austria, Ireland and Germany. The in-depth review of these three cases over a short period of time has allowed the Commission to gain significant experience with this type of merger. The tools applied in these cases to analyse competition are likely to be useful in future cases as well.

Several lessons can be drawn from these cases. First, the product market definition that the Commission applied in earlier cases is still relevant today and was also applied in the three recent cases. This means the relevant product market at retail level is the market for mobile telecommunications services. Second, mobile markets are still national. Efforts are underway to create a single European telecoms market but it is likely to take some time before consumers can truly choose their mobile operator from any country in the EU. Third, markets can be usefully analysed by zooming in on different segments. Fourth, in oligopolistic markets such as those for mobile telecoms services, the Commission is particularly attentive to the competitive pressure exerted by the merging parties on each other. Relevant factors in this regard are the closeness of competition and the fact that some mobile operators – such as recent entrants keen on gaining market share – are particularly important for competition. Although each case is reviewed based on its specific facts, these are recurring issues that are likely to arise in the context of any future mobile telecoms merger.

[33] A service provider obtains access to the network of a mobile network operator at the wholesale level and sells mobile telecommunications services to consumers at the retail level in its own name and on its own account. However, in contrast to MVNOs, service providers do not own any network infrastructure at all.