



Competition *merger brief*

Issue 2/2018 - December

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KD-AL-18-002-EN-N
doi 10.2763/512788
ISBN 978-92-79-90180-5
ISSN 2363-2534

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Competition *merger brief*

Jurisdictional test(s) applicable to acquisitions of joint control / joint ventures in light of the ECJ's *Austria Asphalt* judgment

Josep Maria Carpi Badia, Julia Brockhoff, Marta Andres Vaquero, Marc Zedler

Introduction

On 7 September 2017, the Court of Justice rendered its first judgment on a reference for a preliminary ruling on the interpretation of the EU Merger Regulation (“EUMR”)¹ in the *Austria Asphalt* case.²

The case at the origin of the dispute in the main proceedings before the referring judge concerned a change of control over an existing asphalt mixing plant (the “Target”). The latter was at the time solely controlled by Teerag Asdag (“TA”), part of the PORR-Group and sold the majority of its output within this group. Post-transaction, both Austria Asphalt, part of the STRABAG-Group, and TA would jointly control the Target. To this end, TA and Austria Asphalt would create a new joint venture company, jointly controlled by both parents, to which TA would contribute the Target.

In order to establish whether this transaction fell within the scope of application of the EUMR (and thus the competence of the European Commission) or the Austrian merger regime (and hence the jurisdiction of the Austrian authorities) it was necessary to determine whether the EUMR required, for it to be applicable, that the Target would constitute a “full function joint venture” post transaction (namely that it would perform on a lasting basis all the functions of an autonomous economic entity). It was undisputed that the Target would not meet this criterion.

In its judgment in *Austria Asphalt*, the Court ultimately clarified the jurisdictional test applicable to transactions consisting of the joint acquisition of control over an undertaking where the previously controlling owner remains as a co-controlling parent

¹ [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).

² Judgment of the European Court of Justice of 7/9/2017 in Case C-248/16 *Austria Asphalt vs Bundeskartellamt*.

In a nutshell

The establishment of jurisdiction under the EU Merger Regulation requires the application of bright line tests.

In its judgment in *Austria Asphalt*, a request for a preliminary ruling from the Supreme Court of Austria, the European Court of Justice has clarified which is the relevant jurisdictional criterion for transactions consisting in a change from sole to joint control where the previously controlling owner remains as a parent. According to the ruling, these cases only constitute a concentration for the purposes of the EU Merger Regulation if the resulting joint venture is full-function post-transaction.

(also known as “sole to joint control cases”). More generally, the judgment also casts some light on the relevant test(s) determining jurisdiction over other categories of cases involving acquisitions of joint control and operations concerning joint ventures.

The Legal Framework

Overall, cases of acquisitions of joint control and operations involving joint ventures (of which sole to joint control cases –like the *Austria Asphalt* scenario– are but one type)³ constitute a particularly prevalent form of concentration under the EUMR and represent a very significant share of all transactions notified to

³ Sole to joint control cases constitute one of the three main categories (in terms of number of notifications) of joint control/joint venture transactions, together with operations of creation of a new joint venture (either greenfield or with contribution of assets from a parent) and acquisitions of joint control from third parties: in 2017, each of these three main types represented roughly between 20% and 35% of all notified joint control/joint venture cases. Other categories involve the replacement or addition of a co-controlling parent in an existing joint venture and the transformation of a non-full function joint venture into a full function one.

the Commission in any given year.⁴ While the large majority of these cases involve unproblematic transactions,⁵ sometimes they do raise competition concerns.⁶

When it comes to the jurisdiction under the EUMR over these operations, the cornerstone principle of the Regulation is that the concept of concentration must be defined in such a manner “as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market” (cf. Recital 20).

More precisely, the EUMR contains two jurisdictional provisions of relevance here. First, Article 3(1)(b) indicates that “[a] concentration shall be deemed to arise where a change of control on a lasting basis results from: [...] the acquisition, by one or more persons already controlling at least one undertaking, or by one or more undertakings, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings.” Second, Article 3(4) establishes that “[t]he creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a concentration within the meaning of paragraph 1(b).”

The EUMR does not contain any specific explanation or clarification of the interplay between these two provisions.⁷ Arguably, many transactions could fall under either rule, as Article 3(1)(b) refers to acquisitions of joint control over an undertaking, while Article 3(4) deals with the creation of a joint venture, which, by definition, is jointly controlled by more than one parent.

⁴ For instance, these cases represented over 45% of notifications in 2017.

⁵ Many of these cases are treated under the simplified procedure. The Simplified Notice contains one category specifically dedicated to joint ventures with no or negligible activities in the EEA (known as “5(a) cases”): cf. [Commission Notice of 5 December 2013 on a simplified procedure for treatment of certain concentrations under Council Regulation \(EC\) No 139/2004](#) (JO C 366, 14.12.2013, p. 5). In 2017, the Commission received 86 notifications of 5(a) cases.

⁶ Thus, in 2018, Case M.8547 – CELANESE/BLACKSTONE / JV was abandoned in phase II, after the Commission had raised preliminary objections. In 2017, Case M.7878 – HEIDELBERGCEMENT/SCHWENK/CEMEX HUNGARY/CEMEX CROATIA was prohibited and Case M.8059 – INVESTINDUSTRIAL/BLACK DIAMOND/POLYNT/REICHHOLD was approved conditionally in phase I. In 2016, Cases M.7978 – VODAFONE/LIBERTY GLOBAL/DUTCH JV and M.7758 – 3G ITALY/WIND/JV were conditionally approved, respectively in phase I and phase II.

⁷ Over the years, notably after the modification of the original provisions of the EUMR and the abandonment of the previous distinction between “cooperative” and “concentrative” joint ventures, commentators had frequently discussed whether Article 3(4) restricted, expanded or complemented the rule in Article 3(1)(b), with diverging views and conclusions. Regarding the modification of the initial regime of the EUMR, see [Council Regulation \(EC\) No 1310/97](#) of 30 June 1997 amending Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (OJ L 180, 09.07.1997, p. 1).

The Jurisdictional Notice (“CJN”)⁸ provides some guidance however. Three provisions are particularly relevant in this context.

Paragraph 24 of the CJN defines an undertaking, for the purposes of the application of Article 3(1)(b) EUMR, as a “business with a market presence, to which a market turnover can be clearly attributed”.⁹

Paragraph 92 of the CJN, in turn, re-states the rule and clarifies the scope of application of Article 3(4) EUMR, indicating that the full-functionality criterion applies to joint ventures irrespective of whether they are created as a greenfield operation or whether the parents contribute pre-existing assets which they previously owned individually.

Paragraph 91 of the CJN, finally, indicates that, under Article 3(1)(b) EUMR, a concentration arises in cases of acquisitions of joint control over the whole or parts of another undertaking from third parties (i.e. cases where the previously controlling owner does not remain as a controlling parent), “without it being necessary to consider the full-functionality criterion”. This provision explains that this type of acquisitions leads to a structural change in the market, “even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction (e.g. because it will sell exclusively to the parent undertakings in future)”.¹⁰

Against this background, two different jurisdictional tests appear as potentially relevant when assessing whether acquisitions of joint control and operations involving joint ventures fall within the scope of application of the EUMR. These tests are respectively based on whether the target (that is, the entity or assets to be acquired): (1) constitutes an undertaking (i.e. a business with a market presence to which turnover can be clearly attributed)¹¹ or (2) will constitute a full function joint venture (i.e. a joint venture performing on a lasting basis all the functions of an autonomous economic entity).¹² While these two tests in practice generally yield the same results, this is not always necessarily the case.¹³

⁸ [Commission Consolidated Jurisdictional Notice under Council Regulation \(EC\) No 139/2004 on the control of concentrations between undertakings](#) (OJ C95 of 16.04.2008, page 1).

⁹ « The [EUMR] provides in Article 3(1)(b), that the object of control can be one or more, or also parts of, undertakings which constitute legal entities, or the assets of such entities, or only some of these assets. The acquisition of control over assets can only be considered a concentration if those assets constitute the whole or a part of an undertaking, i.e. a business with a market presence, to which a market turnover can be clearly attributed. ».

¹⁰ As explained in paragraph 91 of the CJN, this impact on the market would be the same if the target undertaking had been acquired solely by only one of the acquiring undertakings.

¹¹ Cf. Article 3(1)(b) EUMR and paragraphs 24 and 91 of the CJN.

¹² Cf. Article 3(4) EUMR and paragraph 92 of the CJN.

¹³ In particular, a joint venture which sells its production (almost) exclusively to its parent companies may constitute an undertaking but not a full function joint venture in the sense of the respective aforementioned provisions.

The Austria Asphalt Judgment

In the case at the origin of the preliminary ruling, Austria Asphalt, after informally consulting the services of DG Competition, notified the Transaction to the *Bundeswettbewerbsbehörde* (Austrian Federal Competition Authority) in August 2015, under the national merger regime,¹⁴ pursuant to which non-full-function joint ventures may constitute a notifiable concentration. In October 2015, the *Bundeskartellanwalt* (Federal Cartel Prosecutor) applied for review to the *Oberlandesgericht Wien* (Higher Regional Court, Vienna) acting as *Kartellgericht* (Competition Court). However, the *Oberlandesgericht Wien* considered that the transaction fulfilled the criteria of Article 3(1)(b) EUMR as it consisted of an acquisition of joint control over an existing business with a market presence and therefore constituted a concentration notifiable to the European Commission, without it being necessary to further assess the question of full-functionality under Article 3(4) EUMR. It therefore concluded that it did not have jurisdiction to assess the Transaction.

Austria Asphalt brought an appeal against the *Oberlandesgericht Wien's* ruling before the *Oberster Gerichtshof* (Supreme Court, Austria). Considering that the relationship between Article 3(1)(b) and Article 3(4) EUMR was not entirely clear and that there were doubts as to how to interpret the notion of "creation" of a joint venture under the latter, the *Oberster Gerichtshof* decided to stay the proceedings and refer the matter to the Court of Justice for a preliminary ruling.¹⁵

In the ensuing judgment, the Court of Justice observes, at the outset, that the wording alone of Articles 3(1)(b) and Article 3(4) EUMR does not provide a clear answer as to which provision applies to a situation in which sole control of an existing undertaking becomes joint control by its previous parent company and new shareholder(s).¹⁶ Hence, textual interpretation of these rules does not suffice here to precisely delineate their respective scope of application.

The Court therefore turns to the purpose and general structure of the EUMR.

Regarding, firstly, its objectives, the Court observes that the EUMR seeks to ensure that the process of reorganisation of

undertakings does not result in lasting damage to competition and should apply to significant structural changes the impact of which on the market goes beyond the national borders of any one Member State.¹⁷ Accordingly, Recital 20 EUMR states that the concept of concentrations must be defined in a manner as to cover operations bringing about a lasting change in the control of the undertakings concerned and therefore in the structure of the market. Thus, as regards joint ventures, these must be included within the ambit of the EUMR if they perform on a lasting basis all the functions of an autonomous economic entity.

The Court rejects then the argument, raised during the proceedings, that acquisitions of joint control over an entity which already constitutes an undertaking would fall under Article 3(1)(b) EUMR, while Article 3(4) would extend the scope of the latter provision to other cases, for which full functionality would be required.¹⁸ The Court concludes that Article 3(4) must be interpreted as referring to the creation of a joint venture, that is to say to a transaction as a result of which an undertaking controlled jointly by at least two other undertakings emerges in the market, regardless of whether that undertaking, now jointly controlled, existed before the transaction in question.¹⁹

As to, secondly, the general scheme of the EUMR, the Court appears particularly wary of interpreting Articles 3(1)(b) and 3(4) in a manner which could effectively extend the scope of the preventive control laid down in the EUMR to transactions which are not capable of having an effect on the structure of the market in question and would moreover limit the scope of Regulation No 1/2003,²⁰ which would then no longer be applicable to such transactions.²¹

On the basis of these considerations, the Court concludes that "Article 3 [EUMR] must be interpreted as meaning that a concentration is deemed to arise upon a change in the form of control of an existing undertaking which, previously exclusive,

¹⁴ The Austrian Kartellgesetz 2005 (2005 Law on cartels).

¹⁵ In particular, the referring Court formulated the following question: « Must Article 3(1)(b) and (4) [EUMR] be interpreted as meaning that a move from sole control to joint control of an existing undertaking, in circumstances where the undertaking previously having sole control becomes an undertaking exercising joint control, constitutes a concentration only where the undertaking [the control of which has changed] has on a lasting basis all the functions of an autonomous economic entity? ».

¹⁶ As indicated, such scenario can be considered to constitute the creation of a joint venture within the meaning of Article 3(4), according to which the transaction will only be considered a concentration if the target company will be full-function following the transaction. Arguably, the same transaction structure may be captured by Article 3(1)(b) EUMR to the extent that it constitutes an acquisition of joint control over an existing undertaking. *Austria Asphalt*, paras 18 to 20.

¹⁷ Recitals 5 and 6 EUMR. According to these, EU law must include provisions governing those concentrations that may significantly impede effective competition in the internal market or in a substantial part of it and permitting effective control of all concentrations in terms of their effect on the structure of competition in the EU.

¹⁸ *Austria Asphalt*, paras 23 and 24 (see also Advocate General Kokott's Opinion, para 28). The Court observes that the EUMR does not draw any such distinction, which "is entirely justified due to the fact that, although the creation of a joint venture must be assessed by the Commission as regards its effects on the structure of the market, the realisation of such effects depends on the actual emergence of a joint venture into the market, that is to say, of an undertaking performing on a lasting basis all the functions of an autonomous economic entity".

¹⁹ *Austria Asphalt*, para 28.

²⁰ [Council Regulation \(EC\) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty](#) (OJ L 1, p.1).

²¹ *Austria Asphalt*, paras 29 to 34. The Court underlines that, while the EUMR's preventative control concerns concentrations having an effect on the structure of competition in the European Union, it does not follow that any action of undertakings not producing such effects escapes the control of the Commission or that of the competent national competition authorities. The Court refers, in particular, to Article 21(1) EUMR, as well as to Regulation (EC) No 1/2003 and Articles 101 and 102 TFEU.

becomes joint, only if the joint venture created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity".²²

Relevant jurisdictional test(s) in light of the Austria Asphalt judgment

In *Austria Asphalt*, thus, the Court has unambiguously set the relevant jurisdictional test for transactions consisting of a change from sole to joint control where the previously controlling owner remains as a parent: these cases only constitute a concentration for the purposes of the EUMR if the resulting joint venture is full-function post-transaction.

This clarification is certainly to be welcomed.

In light of the reasoning of the Court in *Austria Asphalt*, it can also be concluded that the requirement of full functionality applies as well, more generally, to cases of creation of a joint venture *ex* paragraph 92 CJN. This was never in doubt for the creation of greenfield joint ventures, which arguably constitutes the "purest" form of the *cas de figure* set out in Article 3(4) EUMR. After *Austria Asphalt*, it is also clear that, in cases of creation of a joint venture with contribution of assets by one or more of the parent companies, the full functionality criterion also applies, irrespective of whether or not the said assets constitute an undertaking (in the sense of paragraph 24 of the CJN).

Further, a similar reasoning can be applied to transactions consisting of the replacement or addition of a jointly controlling shareholder in an existing joint venture (i.e. cases where at least one of the previously co-controlling parents remains). In order for these cases to constitute a notifiable concentration, the joint venture over which a new shareholder (either replacing a previous one or as an additional controlling entity) acquires joint control needs to be full-function post-transaction.²³

One main additional scenario remains: transactions in which two or more parties acquire joint control over an undertaking or undertakings from third parties, described in paragraph 91 of the CJN.

This typology is not explicitly discussed in the Court's judgment in *Austria Asphalt*. Arguably, the language used in the judgment

²² Advocate General Kokott, who delivered her Opinion in this case on 27 April 2017, had proposed the Court to conclude along substantially identical lines: « [t]he transfer of an existing undertaking or part of an undertaking from sole control by one company to joint control by the self-same company and another company unrelated to it constitutes a concentration within the meaning of Article 3 [EUMR] only where the joint venture resulting from that transaction performs on a lasting basis all of the functions of an autonomous economic entity ».

²³ Since the creation of a joint venture is only covered by the EUMR if the resulting target is full-function, it would appear that the cases of subsequent addition or replacement of a parent are also necessarily subject to the full-functionality criterion (for as long as at least one of the pre-existing parents remains as a co-controlling owner).

when referring to transactions involving joint ventures could seem sufficiently broad to capture these acquisitions as well, and thus be understood as subjecting them to the requirement of full functionality. We consider, however, that *Austria Asphalt* does not necessarily impose such a conclusion or mandate such inference.

As set out in paragraph 91 of the CJN, these acquisitions of joint control over the whole or parts of another undertaking from third parties (i.e. cases where the previously controlling owner does not remain as a controlling parent)²⁴ lead to a structural change in the market, even if, according to the plans of the acquiring undertakings, the acquired undertaking would no longer be considered full-function after the transaction.²⁵ As paragraph 91 of the CJN explains, the impact on the market of these types of transactions is equivalent to that of cases where the target undertaking had been acquired solely by one buyer. Therefore, in our opinion, these transactions should not be subject to the full-functionality requirement to fall under the scope of application of the EUMR.

This position, we believe, is in line with the Court's reasoning in *Austria Asphalt*, as well as with the objectives and the general scheme of the EUMR,²⁶ on which the Court bases its conclusion in the said judgment. Notably, the need, repeatedly emphasised by the Court, of ensuring that the EUMR encompasses those transactions that bring about structural changes on the market.²⁷ It is also in line with the specific provisions of the Consolidated Jurisdictional Notice and the Commission's well established practice.

²⁴ In that sense, these cases are arguably fundamentally different to the other types described above, where at least one of the previous owner(s) always remain as a co-controlling parent (setting aside, that is, the case of the creation of a greenfield joint venture, where this consideration is obviously not relevant). In cases of acquisition of joint control (or sole control, for that matter) from third parties, the previous owner does no longer have decisive influence over the target, which is controlled by a set of new un-related owners with potentially very different sets of incentives and capabilities.

²⁵ Indeed, let's imagine a case where a fully operational undertaking with a clear presence on a market is jointly acquired by two unrelated third parties which decide to turn it into a non-full-function joint venture by deciding that it will sell only to them. In such a case the change in the structure on the market is obvious, as a market player is withdrawn from the market to sell exclusively to its newly controlling shareholders.

²⁶ In effect, a joint acquisition of control over an undertaking from third parties can be equated to the acquisition of sole control over an undertaking (which, by definition, is also necessarily from third parties). It is therefore consistent that both scenarios are subject to the same test.

²⁷ Cf. paras 21, 22, 25 and 34.

Conclusions

The establishment of jurisdiction under the EUMR requires, whenever possible, the application of bright line tests, capable of providing legal certainty to all parties involved in a transaction.²⁸

Following the Court's judgment in *Austria Asphalt*, and on the basis of the foregoing considerations, we consider that the full-functionality criterion enshrined in Article 3(4) EUMR applies to the following main types of acquisitions of joint control/transactions involving joint ventures in order to assess whether they result in a notifiable concentration:

- creation of a greenfield joint venture,
- creation of a joint venture to which (one or several of) the parents contribute assets that they previously controlled individually,²⁹
- acquisition of joint control over an undertaking which was previously solely controlled by an undertaking, which remains as a controlling shareholder,³⁰
- addition to or replacement of a controlling shareholder in a joint control scenario.³¹

Conversely, it is arguably not necessary to assess whether the jointly controlled undertaking will be full-function post-transaction in a situation of acquisition of joint control from a third party (or third parties).³² These transactions would constitute a concentration pursuant to Article 3(1)(b) EUMR, in so far as the target constitutes an undertaking, that is, a business with a market presence to which turnover can be clearly attributed.³³

²⁸ As Advocate General Kokott points out, there is need for a «*pragmatic approach to interpreting and applying Article 3 [EUMR]*» (Opinion, point 23).

²⁹ Both situations are described in paragraph 92 of the CJN.

³⁰ I.e. the *Austria Asphalt* scenario.

³¹ For as long as at least one of the previously co-controlling parents remains as a jointly controlling parent.

³² As indicated in paragraph 91 of the CJN.

³³ In the sense, thus, of paragraph 24 of the CJN.

Competition *merger brief*

Bayer/Monsanto - protecting innovation and product competition in seeds, traits and pesticides

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Introduction

On 21 March 2018, the Commission approved, subject to conditions, the acquisition of Monsanto by Bayer.¹

This is the most recent of three large concentrations that have taken place in the seeds and pesticides industries in just over two years, and follows the merger between Dow and DuPont² and ChemChina's acquisition of Syngenta.³ In line with its case practice, the Commission assesses transactions taking place in the same industry according to the so-called "priority rule" - first come, first served. The merger between Bayer and Monsanto was therefore assessed based on the market situation following the Dow/DuPont merger and the ChemChina/Syngenta merger, taking the remedies in both cases into account.

Bayer is a German company, active in pharmaceuticals, consumer health, agriculture (through its Bayer Crop Science division) and animal health. Monsanto was a US agriculture company headquartered in St. Louis, Missouri that produced seeds for broad acre crops, fruits and vegetables. It also produced plant biotechnology traits and supplied pesticides. Monsanto was perhaps most known for its glyphosate herbicide, sold under the "Roundup" brand, and the development of genetically modified (GM) crops.

There is a degree of complementarity between the Bayer and the Monsanto businesses. Bayer is a leading player in crop protection, particularly in Europe. Monsanto was the leading seed supplier worldwide, with its main markets in the Americas. The acquisition of Monsanto by Bayer created the biggest integrated agrochemical, trait and seed player worldwide and was viewed by

¹ Decision in Case M.8084 – Bayer/Monsanto (2018).

² Decision in Case M.7932 – Dow/DuPont (2017).

³ Decision in Case M.7962 – ChemChina/Syngenta (2017).

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.

some commentators and interested observers as transformative for the industry.

The transaction was notified to the Commission on 30 June 2017. The Commission opened an in-depth investigation on 22 August 2017. The number and complexity of competition issues raised had an impact on the breadth and scope of the investigation. Bayer and Monsanto submitted to the Commission over 2.7 million internal documents. The Commission addressed approximately 160 requests for information to Bayer and Monsanto and more than 2 000 to market participants and third parties.

The Commission also received a large number of spontaneous submissions by competitors, individual citizens and civil society representatives.

At the end of its investigation the Commission raised concerns in relation to the loss of actual and potential competition on prices and innovation for various vegetable and broad acre crop seeds, GM and non-GM traits, herbicides and herbicide systems, nematicidal seed treatment and digital agriculture (i.e. fungicides' spraying recommendations).

The Commission also investigated the vertical and conglomerate effects of the transaction as well as effects on innovation in foliar insecticides, foliar fungicides, biologicals and bee health. However, in those areas and following an in-depth review, it did not find a "significant impediment to effective competition" within the meaning of the Merger Regulation.

The remedies offered by Bayer to obtain a conditional clearance entailed the divestiture of a number of important businesses and significant assets, which were purchased by BASF. The divestiture

In a nutshell

The Commission investigated the effects of the Bayer/Monsanto merger in significant depth and identified likely harmful effects on product and innovation competition in several seeds, traits, pesticides and digital agriculture markets.

Bayer submitted an extensive divestiture package comprising its entire seeds and traits business, its glufosinate business and its digital agriculture efforts, which addresses all competition concerns including those related to innovation.

The Commission cooperated closely with other competition authorities around the world.

transaction was itself a very sizeable transaction, which was also reviewed by the Commission.⁴ The remedies ensured that the merger did not reduce the number of global players actively competing and innovating in seeds and traits as well as specific areas of crop protection.

The seeds and pesticides industries

The seeds and pesticides industries have witnessed several waves of consolidation in the last two decades that have reduced the number of active global players from over fifty to fewer than ten.

In the seeds industry, from the mid-1980s through the late 2000s, some of today's leading players were established or became the companies we know today. For instance Syngenta was created through the merger of AstraZeneca's and Novartis' seed businesses, Bayer entered the seed business through its acquisition of Aventis Crop Science, and BASF and DuPont acquired American Cyanamid and Pioneer, respectively.

Like the seeds industry, the crop protection industry experienced several waves of consolidation during the past 30 years⁵ that led to the creation of five global crop protection players with a fully-fledged R&D organisation across herbicides, insecticides and fungicides: ChemChina-Syngenta, Bayer, DowDuPont (now Corteva Agriscience), BASF, and FMC. Monsanto was, before the merger, one of the largest pesticides players, but its sales in crop protection were mainly driven by glyphosate, an off-patent herbicide, and by mixtures of older herbicides with glyphosate. In addition, Monsanto had only limited discovery activities in crop protection, having shifted over the years the most important part of its R&D efforts to seeds and traits.

The seeds and pesticides industries today are therefore characterised by high concentration levels, with few global integrated players active in R&D remaining on the market. Moreover, barriers to entry and expansion are high:

- Substantial R&D costs must be incurred over many years before the first sales and profits are achieved.
- Global testing, breeding and marketing capabilities need to be established and maintained to be able to operate effectively and compete on a worldwide scale.
- Global regulatory know-how and capabilities are required to overcome the strict regulatory barriers for seeds, traits and crop protection.
- Intellectual property rights and patents favour the more established players.

Industry players estimate that a new trait takes approximately 10 years from early discovery to getting regulatory approval and marketing commercial varieties incorporating the trait, at a total

cost of approximately USD 100-200 million. Likewise, it takes approximately 10 years and requires an investment of around USD 200-250 million to bring a new crop protection molecule to the market.

Another feature of these industries is the number of links between the global players. These links stem from R&D co-operations which are common in the industry; significant common shareholders that have invested in several or all of the integrated players; and a number of licensing and cross-licensing agreements.

In what follows, this article will describe the Commission's assessment of the effects of the Bayer/Monsanto merger on product and innovation competition in: (i) seeds, (ii) traits, (iii) non-selective herbicides, (iv) other pesticides, and (v) digital agriculture. It will also discuss (vi) the Commission's approach regarding non-competition concerns, (vii) remedies and (viii) international cooperation.

Seeds

Pre-transaction, both Bayer and Monsanto were active in the breeding and commercialisation of seeds and competed in a large number of vegetable seeds and parts of the broad acre crop⁶ seed markets.

Vegetable seeds

The vegetable seeds industry can be described as a two-stage industry encompassing, first, the development of new vegetable varieties via breeding and second, the commercialisation of those vegetable seeds.

The Commission's investigation showed that the relevant product market encompasses both licensing and commercialisation of vegetable seeds for each vegetable crop (e.g. tomatoes, cucumber). Further, while each vegetable crop constitutes a separate product market, it actually consists of highly differentiated segments (e.g. cherry tomatoes for glasshouses), which must be assessed individually. The geographic scope of the vegetable seed markets is national due to the national nature of registration and distribution as well as persistent price differences between Member States which are not arbitrated away.

In the EU, the parties' activities overlapped in 16 vegetable crops (such as tomatoes and cucumbers) and in a very large number of segments (such as cherry tomatoes for glasshouses). The Commission identified around 1 800 segment/country combinations to be assessed.

⁴ Decision in Case M.8851 – BASF/Bayer Divestment Business (2018).

⁵ Commission Decision in Case M.7932 – Dow/DuPont (2017), recitals 237 to 240.

⁶ Broad acre crop farming is a term used to describe farms or industries engaged in the production of crops requiring the use of extensive parcels of land. Broad acre crops include grains, oilseeds and other crops, such as maize, soy, wheat, rice, barley, peas, sorghum, hemp and sunflower.

The approach adopted by the Commission for the competitive assessment for each segment/country combination was based on structural and qualitative factors such as market shares, Herfindahl Hirschman Indices (HHIs), the relative size of the merged entity and its competitors, ongoing breeding programmes and investments in specific segments and/or Member States.

On this basis, the Commission found that the transaction would have significantly impeded effective competition due to non-coordinated effects and/or the creation or strengthening of a dominant position in a number of vegetable seed markets across the EU, corresponding to approximately 200 segment/country combinations. These segment/country combinations amounted to a significant part of Bayer's vegetable seeds activities.

Broad acre crop seeds

The Commission's investigation confirmed the market definitions for broad acre crops' seeds retained in the Dow/DuPont decision.⁷ Each broad acre crop represents a distinct product market and a further distinction can be drawn between the licensing of varieties on the one side, and the commercialisation of seeds on the other side. Licensing markets are EU-wide in scope while the markets for the commercialisation of seed varieties are national.

In the EU, Bayer and Monsanto overlapped in the commercialisation of oilseed rape (OSR) seeds and in the licensing of cotton seeds.

Pre-transaction Monsanto was the EU market leader for the commercialisation of OSR seeds, while Bayer was the global leading player in OSR. The Commission's investigation showed that Bayer had credible plans and strong capabilities to become a leading OSR player in the EU and that such plans were already showing some positive results at the time of the assessment.

The Commission concluded that the transaction would have significantly impeded effective competition in relation to the commercialisation of OSR seeds in France, Ireland, Estonia and the UK, because it likely would have removed an important competitive constraint on Monsanto and resulted in non-coordinated effects on product and price competition.

The overlap in the parties' activities in the cotton seed business in the EU arose in the (upstream) market for the licensing of cotton seeds for commercialisation. The Commission considered that the transaction would bring together the two most important competitors in the EU market for the licensing of cotton varieties.

The Commission concluded that the transaction would have significantly impeded effective competition in relation to the licensing of cotton varieties for production and sale in the EU because it would likely have strengthened or created a dominant position, due to horizontal non-coordinated effects.

⁷ Commission Decision in Case M.7932 – Dow/DuPont (2017).

Traits

Introduction

Historically, 'traits' referred to plant characteristics – such as size, resistance to certain pests, resilience to drought – achieved through natural breeding. Biotechnologies have allowed the development of such traits in laboratories and these traits can later be introgressed into plant varieties. Traits may have significant commercial value and can be sold to farmers as additional seed features. Some commercially successful traits (e.g. Monsanto's "Roundup Ready" or Bayer's "LibertyLink") are reproduced across different crops and varieties.

Regarding the go-to-market strategy, seed companies that also develop traits (mainly Monsanto, Bayer, ChemChina-Syngenta and DowDuPont) usually seek to license their traits to a number of other seed companies, in addition to the captive use in their own commercial seeds.

The Commission found that the licensing of traits represents a market upstream of seed breeding and commercialisation, and defined the relevant product markets by functionalities and crops for single traits (for example: herbicide tolerance traits for soybean) and for stacks (or combinations) of traits (for example: a stack of two traits for cotton, one providing tolerance to a certain herbicide and one providing resistance to a certain class of insects). The markets for the licensing of traits and trait stacks were found to be global in scope.

Jurisdiction

While most traits currently licensed globally are the result of genetic modification ('GM traits') and while there are only few instances of the sale of seeds with GM traits in the EEA (see below), the Commission found that it had jurisdiction to assess the effects of the merger between Bayer and Monsanto on the global markets for the licensing and the development of traits essentially on three grounds.

First, the investigation indicated that, on the global licensing market for traits and trait stacks, European companies are affected by the merger both as competitors and customers of the parties. Indeed, the transaction would have directly affected, on the licensor side, important European trait discovery and development companies such as Bayer, ChemChina-Syngenta and partially BASF and, on the licensee side, European seed companies such as Bayer, ChemChina-Syngenta, KWS or Limagrain, which in-license Bayer's and/or Monsanto's traits.

Second, while GM crops are not widely grown in the EEA, imports of such crops, in particular soy and corn produced in the Americas, are very significant, amounting to several billion euros, and the costs of the GM traits are an important part of the input costs for these imports.

Third, one GM crop is authorised for cultivation in the EU, and is grown in Spain, the Czech Republic and Slovakia, and others are currently being assessed in the EU's authorisation procedure.

Moreover, not all traits licensed and used in the EEA are GM traits. Some non-GM traits are commercially available today, and both Bayer and Monsanto were innovators in non-GM traits and considered the EU as an important target market.

Product competition

The Commission established that, pre-transaction, Monsanto held a dominant position in herbicide tolerance traits and insect resistance traits for a number of crops, and that Bayer was one of the few market players challenging that dominant position.

The Commission concluded that the transaction would have significantly impeded effective competition in existing and forthcoming trait products, because it would likely have strengthened Monsanto's dominant position in a number of markets and created a dominant position in herbicide tolerance traits for OSR.

Innovation competition

The Commission assessed innovation competition between Bayer and Monsanto in a number of innovation spaces for traits, consisting of groupings of crop/functionality combinations.

The market investigation revealed in particular that:

1. Rivalry in the industry is a key driver of innovation activities in GM and non-GM traits, as firms invest to capture market share and to defend their market share from rivals. Also, already pre-merger the firms competing on innovation in traits could appropriate to a great extent the gains of their innovation, thanks to strong IP rights coupled with commercial strategies. Moreover, cannibalisation between alternative innovation efforts targeting the same innovation space is also an element that influences a company's decisions regarding orientation, delay or discontinuation of innovation efforts. Therefore, post-merger, the loss of one rival, on the one hand, and increased cannibalisation, on the other hand, in the context of already strong appropriability, would have reduced (all else being equal) the incentives to innovate for the merged entity.
2. Trait R&D is characterised by high barriers to entry and expansion, as only a handful of companies possess the financial resources, know-how and assets to conduct R&D in this area.
3. The parties are leading innovators in traits and are close competitors in a number of innovation spaces, as set out below.

First, in order to assess the importance of Bayer and Monsanto as innovators in traits, the Commission carried out a quantitative analysis of patent data related to traits.⁸ Using all biotech patents published during the period 2007-2016, the Commission calculated for all main players the share of quality-adjusted patents ("patent share"), where patent quality was measured by the number of citations received from subsequent patents. This

⁸ This analysis was similar to the one performed in Case M.7932 – Dow/DuPont (2017).

patent share analysis was performed at the level of individual crop and technology combinations (e.g. cotton weed control), which are closely related to the innovation spaces identified.

The Commission's analysis showed that Bayer and Monsanto had a significant combined patent share in several innovation spaces which would have been significantly concentrated post-transaction and in which the transaction would have significantly increased concentration.

Second, a closeness analysis was carried out through a review of internal documents by looking at: (i) the recent research targets of the merging parties; and (ii) the characteristics of their pipelines at the discovery stage. In the innovation spaces where the parties' pipelines overlapped, the Commission also checked the research targets and pipelines of other competitors before forming a view on the number of existing research efforts alternative to the merging parties.

Overall, based on the quantitative and qualitative evidence, the Commission raised innovation concerns in the following trait innovation spaces: canola weed control, cotton weed control, cotton insect control, soybean weed control, non-GM wheat weed control, cross-crop weed control and cross-crop insect control.

Risks of foreclosure of other trait competitors

Due to Monsanto's dominant position in a number of trait markets and to the strength of Bayer in a number of crops and trait functionalities, the Commission's investigation also indicated a likely increased risk of foreclosure of other trait competitors.

Non-selective herbicides ('NSH') and herbicide tolerance systems

Both Bayer (with glufosinate ammonium sold mainly under the "Liberty" and "Basta" brands) and Monsanto (with glyphosate sold mainly under the "Roundup" brand) were active in the development and commercialisation of NSH, which are very broad spectrum herbicides.

NSH played a prominent part in the merger in view of the overlap between the parties, which are the two leading NSH players globally and in the EEA. Indeed, Monsanto's glyphosate is the single best-selling pesticide globally, with annual sales of about EUR 6 billion.

Further to the market investigation, regarding uses in agriculture, the Commission confirmed its precedents that NSH are separate from selective herbicides, and that the relevant product market for NSH should be defined at the level of crop groupings (namely perennial crops and non-perennial crops). Finally, the Commission confirmed its precedents that crop protection product markets are national in geographic scope.

Regarding non-agricultural uses, the Commission defined the relevant product market as products for industrial vegetation management and on the basis of the timing of application.

In addition, the investigation confirmed the existence of a market for weed management systems, which combine herbicides (typically NSH) with traits conferring tolerance on these herbicides.

The Commission found that the transaction would likely have significantly impeded effective competition between currently available products in the EEA in light of high combined market shares both in agricultural uses and non-agricultural uses. In particular, while the parties' products were differentiated, they competed head-to-head for a significant number of needs and were close competitors, if only because they were the two closest of at most three NSH available in the EEA.

The Commission also concluded that the parties were important and close competitors in the NSH innovation space and that their incentives to independently pursue their R&D efforts would be reduced post-transaction. The Commission's investigation also found that the constraint that would be exercised post-transaction by the remaining competitors would be insufficient. For these reasons, the Commission considered that the transaction would significantly impede effective competition in relation to NSH innovation, because it would likely eliminate an important and close competitive constraint leading to potential harm to innovation competition in NSH, by combining the parties' respective innovation capabilities and product portfolios in NSH.

Similarly, the Commission considered that the transaction would significantly impede effective competition in relation to innovation in weed management systems because it would likely have eliminated Bayer as a key innovator to challenge Monsanto's dominant position.

Other pesticides products

Besides NSH, Bayer and – to a lesser extent – Monsanto were also active in the development and commercialisation of other pesticides, including fungicides, insecticides and nematicides.

Further to the market investigation, the Commission confirmed, as the starting point for the market definition in crop protection products, a distinction between seed treatment products and other pesticides (foliar, soil) as well as a segmentation for fungicides at crop/disease level, and for insecticides at crop/pest level. As for the corresponding innovation spaces in crop protection, the Commission confirmed its precedent in Dow/DuPont and based its assessment on a segmentation of fungicides for different crop/diseases or groups of diseases and of insecticides for pests.

In addition, on the basis of the market investigation, the Commission concluded that nematicidal seed treatment constitutes an additional segment, since nematode⁹ control is targeted separately from other insects. Furthermore, the

⁹ Nematodes are microscopic roundworms that live in many habitats and often exceed a million individuals per square metre.

nematicidal seed treatment product market includes both biological and chemical products.

Seed treatment products

As concerns seed treatment, while Bayer is an important player, Monsanto was no longer active in the EEA.

However, the market investigation showed a horizontal overlap in the emerging market of nematicidal seed treatment. At present, there are no nematicidal seed treatments being sold in the EEA, but the parties were both planning to launch nematicidal seed treatments in the EEA in the near future. Evidence also showed that the parties' competitors are considerably smaller and lack the capabilities as well as scale and scope of the larger players. On this basis, the Commission raised concerns that the transaction would significantly impede effective competition in relation to nematicidal seed treatment for certain crops.

Further, the transaction gave rise to vertical links between Bayer's activity in seed treatment and Monsanto's activities on the downstream markets for seeds¹⁰, in particular in relation to insecticidal seed treatment for corn in several EEA markets.

Bayer has a strong position in seed treatment on several of these markets. The Commission came, however, to the conclusion that Bayer would not have market power, as it is not likely to preserve its position due to the evolving regulatory situation and the likely imminent entrance of new players on the market. On the other hand, on the corresponding downstream seed markets Monsanto did not have a strong position.

Overall, the evidence supported the conclusion that post-transaction the parties would likely have neither the ability nor the incentive to engage in an input or customer foreclosure strategy to the detriment of other players.

Foliar fungicides, insecticides, microbials

The Commission did not raise competition concerns regarding foliar fungicides and foliar insecticides, finding that while Bayer was a strong player in these markets, Monsanto was not currently active. Further, the market investigation indicated very limited overlaps in innovation competition, and a sufficient number of competitors were active in the innovation spaces where the parties' activities overlapped. For similar reasons, the Commission did not raise innovation competition concerns in microbials.

Bee health

Finally, both parties are also active in the development of bee health products targeting varroa mite infestations of bee colonies, which was found to be a separate product market and innovation space. The market investigation showed that the parties overlapped in innovation, but the evidence showed that the parties would not likely discontinue their innovation activities

¹⁰ In the decision, it is left open whether the downstream market is seeds or treated seeds.

further to the transaction and a sufficient number of competitors were active in these innovation spaces.

Digital agriculture: digitally-enabled spraying prescriptions

Digital agriculture is an emerging area meant to increase farm productivity to face the challenges derived from a rapidly increasing population and a stagnant farming acreage. Within digital agriculture, digitally-enabled prescriptions refer to recommendations or advice on the selection and application of agronomic inputs (e.g. fungicides). This advice is provided at a geographically increasingly granular level (e.g. field, field-zone or narrower) for a farmer to implement, and it is generated by an analytic agronomic engine based on large sets of public and proprietary data.

The market investigation supported a relevant product market defined as digitally-enabled spraying prescriptions, which should be further segmented by agronomic input and by crop groupings. The relevant geographic market was considered national.

Monsanto was the worldwide leader in digital agriculture, mainly active in the U.S. but with presence in the EEA and about to launch its key digital agriculture product, Climate FieldView, in the EEA. Monsanto was already offering digitally-enabled prescriptions of seeds.

Bayer is a leading digital agriculture player in the EEA and it started commercialising its digitally-enabled prescriptions of crop protection products, in particular fungicides, in the 2018 growing season.

The evidence showed that Bayer and Monsanto were potential competitors in the markets for digitally-enabled spraying prescriptions for pesticides. Moreover, only a limited number of integrated players had capabilities (e.g. comprehensive agronomic proprietary data) comparable to those of the parties to provide these digitally-enabled services.

The Commission concluded that the transaction would likely have led to the elimination of important potential competition in the relevant market, given that Bayer and Monsanto were potential competitors. Absent the transaction, Bayer and Monsanto were likely to impose an important competitive constraint on each other and on other competitors, and post-transaction the limited number of comparable competitors were unlikely to exercise a sufficient degree of competitive pressure, which would likely have been further limited by Bayer's first mover advantage. Moreover, following the transaction, Bayer's development and innovation efforts were likely to be in whole or in part discontinued, which would have increased the harm further.

Non-competition concerns

Some members of national parliaments, members of the European Parliament and representatives of civil society organisations expressed concerns about the transaction's effects on the protection of the environment, public health, food safety and other public interest considerations. A petition to the Commission expressing similar concerns was signed by more than one million citizens. A number of non governmental organisations intervened in the proceedings as interested third parties.

The Commission explained in its decision that while the appraisal of mergers takes place within the framework of the general objectives of the Treaty¹¹, the Commission has not been empowered by Union law to intervene against a merger on grounds other than the protection of competition¹². The Commission also pointed out that those non-competition concerns are protected by other EU or national rules and procedures.

Remedies

To address the Commission's concerns, Bayer committed to divest several fully-fledged businesses as well as certain assets. These divestitures removed the entire horizontal overlap between Bayer and Monsanto in all areas where the Commission had concerns. Together, the divested businesses and assets were worth more than EUR 7 billion, resulting in one of the largest divestitures in the history of EU merger control.

The divestitures included Bayer's global vegetable seed business and its global broad acre crop seed and trait business, subject to limited reverse carve-outs. Both divestitures included the R&D centres of the respective businesses. To ensure the businesses remained competitive and viable, Bayer also included its seed activities in areas where there were no competition concerns, such as in wheat and soybean.

To address the competition concerns relating to pesticides, Bayer committed to divest its global glufosinate business, its assets relating to current and pipeline glyphosate products in the EEA, three NSH lines of research and initially Monsanto's nematicidal seed treatment assets. The concerns on digital agriculture were initially removed by Bayer's commitment to grant a worldwide licence for the entirety of Bayer's digital farming products and pipeline projects.

After the clearance decision, at the initiative of the parties and in order to align the remedies with remedies offered in the US, parts of the remedy were modified. The commitment to license was replaced with a commitment to divest Bayer's digital farming

¹¹ See Art. 7, in connection with Art 9, 11 and 12 TFEU and recital 23 of the Merger Regulation.

¹² See Art. 7 (principle of conferral of powers), in connection with Art 103 and 352 TFEU, Art 2(1) of the Merger Regulation, recitals 2-7 and 24 of the Merger Regulation.

products and pipeline projects, with a limited licence-back to Bayer. At the same time, the divestiture of Monsanto's nematocidal seed treatment assets was replaced by the divestiture of Bayer's nematocidal seed treatment assets. The Commission accepted these changes to the initial commitments because the revised remedies were at least as effective as the initial remedies.

During the Commission's investigation, Bayer had already identified BASF as a possible purchaser of the divestitures, except for the vegetable seed business. However, the Commission did not approve Bayer as purchaser in its clearance decision, since several issues regarding BASF's suitability as a buyer required further investigation and, in any event, the agreements between Bayer and BASF had not yet been finalised. To ensure that any risks relating to BASF as the buyer remained with Bayer, the commitments contained an upfront purchaser clause, meaning Bayer was not allowed to close its acquisition of Monsanto until the Commission had approved BASF as the buyer. Ultimately, the Commission approved BASF as the purchaser on 29 May 2018.

International cooperation

Due to the global scale of the transaction, the case investigation also involved active cooperation with many national competition authorities in North America, the Pacific and Asia.

The Commission was in contact with many competition agencies internationally. It engaged more actively with nine different competition authorities, including the US Department of Justice, the Canadian Competition Bureau, the Australian Consumer and Competition Authority and the Brazilian Competition Authority CADE. Cooperation with the US Department of Justice was particularly close.

Cooperation with these authorities took the form of regular calls, exchanges of information including document exchanges, and face-to-face meetings.

This cooperation was instrumental for the case investigation as it ensured consistency in substance, process and timing as well as, importantly, consistency in the remedy process and remedy implementation on an international level. Through the international cooperation in this case, the Commission achieved, together with its peer agencies, a coordinated outcome in a multi-jurisdictional merger case that also ensured legal certainty for the private stakeholders.

Concluding remarks

The Bayer/Monsanto merger was the third in possibly the last round of consolidation in an already concentrated industry. The application of the "first come, first served" priority rule ensured an orderly sequential assessment of the three transactions.

Given the relatively high degree of industry concentration pre-merger, the relatively high barriers to entry, and the importance of the industries concerned for global food supply, the Commission "left no stone unturned" and investigated in the three cases not just the effects on price competition, but also the impact on innovation competition including on GM and non-GM traits.

While the businesses of Bayer and Monsanto were to some extent complementary and the horizontal overlaps directly affecting Europe were relatively limited, the Commission's in-depth investigation revealed likely harmful effects on product and innovation competition in several important seeds, traits and pesticides markets and innovation spaces.

The comprehensive remedy package submitted by Bayer addressed all those concerns. The divestiture of Bayer's full seeds and traits business subject to limited carve-outs ensures that in these areas where Monsanto was particularly strong pre-merger, the acquirer BASF will be able to compete as actively and effectively as Bayer before the merger.

From an innovation competition point of view, the remedies ensured that the transaction did not reduce the number of global integrated R&D players in the seeds and traits industry. In the seeds sector, six global players remain: the combined Bayer-Monsanto, DowDuPont, ChemChina-Syngenta, KWS, Limagrain and the newcomer BASF. Likewise, in the field of traits, four global players remain: the combined Bayer-Monsanto, DowDuPont, ChemChina-Syngenta and the newcomer BASF.

As, for some observers, the merger also raised a number of important public interest concerns going beyond competition, the Commission communicated on various occasions on what it can and cannot do in the framework of a merger control procedure under the competition rules. It also recalled the rules and procedures which protect these other important public interest concerns.

Given the complexity of the case and the number of jurisdictions affected, the Commission actively cooperated with a large number of competition authorities from around the world. This cooperation contributed to the fact that there were ultimately mutually compatible outcomes, and that the timing of the different approvals did not significantly diverge.

Competition *merger brief*

UTC/Rockwell Collins – UTC in the sky with diamonds

Alexandra Amaro, Reka Bernat, Jean-Christophe Mauger, Marek Zila

Introduction and Overview

On 4 May 2018, the Commission conditionally cleared UTC's acquisition of Rockwell Collins during Phase I proceedings. The USD 30 billion transaction was the largest acquisition in the aerospace industry so far, and followed Safran's recent acquisition of Zodiac Aerospace (Case M.8425 cleared unconditionally on 21 December 2017).

Both UTC and Rockwell Collins are major players in manufacturing and distributing aircraft components to aircraft manufacturers (also referred to as 'airframers') and airlines. The merged entity will be the largest tier-1 provider of aircraft components by far.

Notwithstanding UTC's and Rockwell Collins' size, their product portfolios are for the most part complementary. In general, UTC focuses on aircraft engines, landing gear and electrical systems while Rockwell Collins is present mainly in avionics and cabin interior products such as seating and lighting. In fact, a large percentage of Rockwell Collins' commercial business does not lead to any horizontal overlaps with UTC's activities.

Therefore, the Commission investigated and analysed some horizontal overlaps, but also focused on vertical links as well as conglomerate effects. The case was, in particular, the first time since GE/Honeywell in 2001 that the Commission assessed conglomerate effects linked to the combination of a major supplier of aircraft engines (UTC) and a major supplier of avionics components (Rockwell Collins).

As a result of the Phase I investigation, the merger gave rise to serious doubts as regards existing or potential horizontal overlaps in several components, namely

- Trimmable horizontal stabiliser actuators ("THSA"),
- Certain pilot controls (the rudder brake pedal system ("RBPS"), and the throttle quadrant assembly ("TQA")),
- Pneumatic ice protection products on aircraft wings and stabilizers, and
- Oxygen systems.

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.

In the Commission's view and following an extensive investigation, the transaction did not raise serious doubts as regards vertical or conglomerate links.

UTC and Rockwell Collins submitted commitments to render the transaction compatible with the internal market which the Commission found to be adequate to eliminate its concerns.

The transaction had to be notified to several jurisdictions world-wide. Therefore, the Commission held regular calls with the US Department of Justice and the Canadian Competition Bureau to coordinate investigations and to share findings. Furthermore, the Commission had contacts with the CADE of Brazil and exchanged views with MOFCOM in China.

The aircraft component industry

A broad distinction can be made between four types of aircraft: (i) commercial aircraft, (ii) military aircraft, (iii) helicopters and (iv) general aviation aircraft. Within commercial aircraft, a further distinction can be made between large commercial aircraft, regional aircraft and business/corporate aircraft.

In the field of commercial aircraft, which was the main focus of this merger review, airframers procure most of the aircraft components or systems, the so-called "supplier-furnished-equipment" (SFE). Some components, however, are procured by the final customer, i.e. typically the airlines, the so-called "buyer-furnished-equipment" (BFE).

In a nutshell

The USD 30 billion acquisition of Rockwell Collins by UTC leads to the creation of the largest global supplier of aircraft components.

In spite of its size, the transaction was to a great extent complementary and raised horizontal competitive concerns in a limited number of markets.

All horizontal concerns were resolved by the parties' commitments to divest the entire activities of one of the parties in the markets concerned. The Commission has in the meantime also approved the purchasers for each of the divestments.

The Commission investigated carefully vertical and conglomerate aspects of the transaction but did not identify any competition concerns in this respect.

The customer base of the Tier-1 suppliers is highly concentrated, since Boeing and Airbus account for most of the demand for SFE. The procurement process itself is regularly carried out through competitive tenders and the component of the chosen supplier will mostly be used for the whole duration of the aircraft programme. For the most critical components, such as engines, the final customer, i.e. the airline, may select between two pre-approved suppliers for one platform.

Current sales market shares of a Tier-1 supplier do not necessarily reflect that supplier's competitive strength in the future. Due to the lifespan of an aircraft platform and the time required to develop a new aircraft platform, current sales' market shares reflect the success of suppliers in past tenders, in some cases more than 10 years ago. To assess the market position of suppliers in the years to come, the Commission has therefore also evaluated the competitors' success in recent tenders for aircraft programs that have just started, or that have not yet started to generate revenues.

The review of the transaction

In its assessment and in relation to each affected product market, the Commission considered that competition takes place at the global level.¹ The market investigation demonstrated that: (i) the procurement of aircraft equipment and its manufacturing was taking place on a worldwide scale, (ii) suppliers were active across countries; and (iii) international trade flows were significant.

1. Horizontal overlaps

The Commission concluded that the transaction raised serious doubts as regards its compatibility with the common market in the following markets:

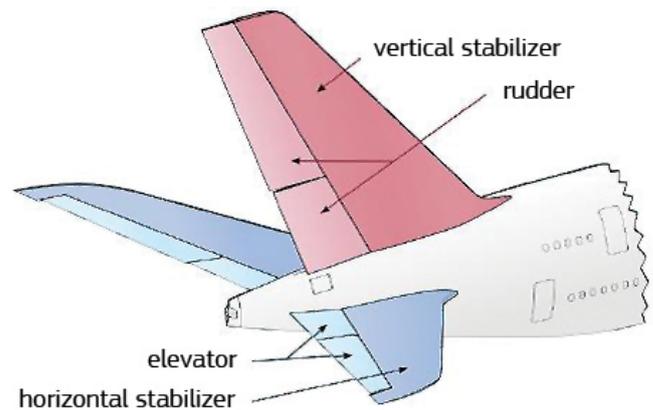
a) THSA

THSAs are actuators (components that physically move flight control surfaces on a plane) which move the horizontal stabiliser that controls the pitch of the aircraft.

Figure 1: THSA (example)



Figure 2: Vertical and horizontal stabilizer units



The Commission considered that THSAs fall into a separate market from other actuators, as there is no demand side substitution and supply side substitution is limited, as not all suppliers of actuators can supply THSAs.

The Commission came to the conclusion that the merger raised serious doubts in the THSA market on the following grounds. First, the parties are the two main suppliers of THSA and two of the three independent suppliers for large commercial aircraft (the other suppliers are some of the airframers themselves which manufacture in-house). Second, the combined market shares of the parties were very significant. Third, the bidding data highlighted that the parties were close competitors as they competed against each other for several recent platforms.

These findings were further corroborated by the feedback from customers and competitors, who raised concerns about an increase of the parties' bargaining power and the reduction of choice post-merger. In addition some market respondents also raised concerns regarding the possibility to bundle THSA and other actuators.

b) Pilot Controls

Pilot controls are equipment directly accessible to the pilot in the cockpit providing the man-machine interface for piloting functions (speed-up, brake, land, etc.). UTC's and Rockwell Collins' activities overlapped in the manufacturing of RBPS, TQA and pilot control sticks. Whereas the latter's overlap was found to be non-critical from a competition point of view, this was different as regards RBPS and TQA.

¹ This finding is in line with the Commission's previous decisions, such as in Case M.8425 – Safran/Zodiac Aerospace, Case M.6410 – UTC/Goodrich or Case M.4241 – Boeing/Aviall.

Figure 3: Pilot control stick (yoke), RBPS and TQA

i. RBPS

The rubber brake pedal system is located on the floor in front of the pilot. It controls the rudder as well as the brakes on the wheels while the aircraft is touching the ground. The Commission took the view that RBPS constitute a separate product market.

The Commission acknowledged the moderate combined market shares of the parties. However, the market shares underestimated the strength of the parties as became evident through analysing the bidding data: UTC and Rockwell Collins participated successfully in recent tenders in particular. On this basis the Commission concluded that the market share data did not fully reflect the parties' strength and that the merger would combine two (already) strong suppliers in RBPS. On top of that, respondents to the Commission's questionnaires indicated both the closeness of UTC and Rockwell Collins in RBPS, and that a new entry into this market can hardly be expected.

ii. TQA

The throttle quadrant assembly is normally located on the centre console, between the pilot and first officer. It allows the pilot to control the fuel flow in an aircraft and thus is comparable with the accelerator pedal of a car. The Commission considered that TQA constitute a separate product market.

The combined market share indicated a strong market position of the parties, and an analysis of the bidding data showed that this position is very likely to persist during the next years. Furthermore, the respondents to the Commission's investigation indicated that UTC and Rockwell Collins are also close competitors for TQA and are among the strongest suppliers of TQA.

c) Pneumatic ice protection

Ice protection systems prevent the accretion of ice on aircraft surfaces or remove accreted ice, in particular on propellers and the leading edges of aircraft wings. Ice protection products for the same application on aircraft may use different kinds of technologies.

The Commission focused on ice protection systems for wings (including vertical and horizontal stabilizers) as well as propellers for general aviation aircraft. The latter, however, proved not to raise serious doubts.

Contrary to the parties' submission, the Commission concluded that different technologies (such as pneumatic, thermal-pneumatic, electro-thermal, chemical, electro-mechanical expulsion), each form a separate product market.

The Commission concluded that the merger gave rise to serious doubts in the market for pneumatic ice protection products mainly on the grounds that the merger would lead to a duopoly of the merged entity and Zodiac Aerospace. Moreover the market investigation had also shown a particular strength of the parties on the aftermarket, which accounts for the majority of the sales in wing ice protection.

i. Oxygen systems

Oxygen systems provide supplemental oxygen to passengers and crew members for specific situations, or for the provision of emergency oxygen in the event of smoke, fire, fumes, or loss of cabin pressure.

The Commission found that oxygen systems constitute a separate market, in particular from passenger service units, in which oxygen systems may often be incorporated.

Whilst Rockwell Collins provides oxygen systems for all kinds of aircraft and commands a material market share in the oxygen systems market, UTC pursued a research programme for its own oxygen systems and was, therefore, a potential competitor of Rockwell Collins.

Particular conditions had to be fulfilled to establish anti-competitive effects: (i) significant likelihood that UTC would grow into an effective competitive force, and (ii) lack of a sufficient number of (other) potential competitors, which would maintain competitive pressure after the merger.

After a thorough evaluation of the competitive situation prevailing on the market where Rockwell Collins holds a strong position, as well as the likelihood of success of UTC's oxygen research programme, the Commission considered that the transaction raised serious doubts as regards its compatibility with the internal market as regards oxygen systems.

2. Vertical and conglomerate effects

As regard non-horizontal effects of the transaction, the Commission examined a significant number of vertical and conglomerate links, including in reaction to complaints received in the course of the merger investigation. Noteworthy are those related to the transmission of data from the aircraft and the possibility of the merged entity to bundle or to tie different systems of the aircraft, in particular engines and avionics.

a) Data transmission

Rockwell Collins offers datalink network services and information technology solutions that enable air-to-ground and ground-to-ground secure communications. Rockwell Collins' datalink services are generally referred to as ARINC, the acronym of Aeronautical Radio Incorporated, a company which Rockwell Collins acquired in December 2013. These services are typically purchased by airlines and function as a virtual "pipe" through which data is transmitted from the aircraft to the ground, including to an airline's operation centre, to air traffic control, to border control and to airline partners (including component manufacturers that receive data to monitor components' performance).

The ARINC network consists of Very High Frequency (VHF) and High Frequency (HF) radio signals that are sent and received by a global network of land-based radio stations and satellites. Satellite communications are purchased from satellite providers to supplement the (in-house) VHF and HF networks of datalink providers. Data transmitted over the ARINC network uses the ACARS protocol², which sets a limit on the size of each individual message, making it possible to transmit only short low-volume messages. For this reason, the ARINC network is only able to transmit the so-called "first generation performance data" from the different systems on the aircraft, in particular engines. Larger sets of data regarding the performance and monitoring of the different equipment and systems on aircraft – the so-called "second generation performance data" – are currently offloaded when the aircraft is on the ground through commercial cellular and Wi-Fi networks, or manually (through the use of USB sticks or PCMCIA cards).

UTC does not provide any kind of data transmission services. However, UTC supplies two types of components, the aircraft interface device (AID) and Pratt & Whitney's eFast unit that transmit data over several communication networks: Wi-Fi, satellite communication, cellular, and VHF/satellite networks. Neither of these components communicates directly with the VHF/Satellite networks. Furthermore, UTC sells aircraft components that may generate data that aircraft operators transmit to data processors.

The Commission investigated in particular whether the merged entity would be able to price discriminate in ARINC's network services, either: (i) by charging competitors in maintenance and repair higher prices for ARINC transmission, (ii) by offering discounts to the ARINC transmission of data pertaining to its own components, and/or, (iii) by bundling the sale of ARINC data transmission services with any data system or component that generates data required for the provision of health management services³, or maintenance & repair & overhaul ("MRO") services.

² ACARS stands for Aircraft Communications Addressing and Reporting System

³ Aircraft health management services provide diagnostics of aircraft systems, maintenance requirement prognostics and component design

The Commission considered that the merged entity would not have the ability to leverage its position in the ARINC network business to improve its position in the aircraft health management services market (and therefore indirectly in the sale of aircraft components) or in the MRO services, for three main reasons. First, ARINC's VHF/satellite network is not an important input for the transmission of performance data: it does not have the bandwidth required, there are several alternatives to off-load data from the aircraft, and even for short real-time messages that can be transmitted in ARINC's VHF/ Satellite network there is an alternative supplier, SITA. Second, airframers select the hardware and software that gather and transmit data within the aircraft and off the aircraft. The merged entity therefore would not control how much performance data is generated and how that data is transmitted within the aircraft and off the aircraft. Third, airlines (neither the airframers, nor the parties) choose the transmission data provider and authorise the transmission of data to third parties. Fourth, the possibilities that the merged entity would have to offer a bundle to airlines would be limited to retrofit equipment (which unlike the ARINC subscription does not necessarily cover the entire fleet) and buyer furnished equipment (where Rockwell Collins was already present and there was no indication of having offered such a bundle in the past). All other equipment, that is to say linefit and SFE equipment, is not sold to airlines and therefore not to the same customer base as the ARINC transmission services.

In addition, the Commission concluded that the merged entity would not have the incentives to leverage its position in the provision of network services to harm competition in the supply of other data related equipment or services such as health management services and MRO services. Any discrimination in the provision of VHF/Satellite services would jeopardise ARINC's reputation as an open network and lead to customers switching to other alternatives.

b) Bundling and tying of engines and avionics

The Commission examined two hypothetical practices of bundling or tying of engines and avionics, as UTC is present on the engine market with its subsidiary Pratt&Whitney, whilst Rockwell Collins has a significant presence in avionics.

First, the Commission assessed whether offering engines and avionics products in a commercial bundle together with a limited discount on the engine (by far the largest cost item on the plane) could incentivise the customers to choose the merged entity's bundle.

Second, the Commission assessed whether the merged entity could develop an integrated solution of engines and avionics, based on data exchange between the two components, that, on

improvements. These services rely on performance data generated by various sensors installed on aircraft systems. Such sensors generate large volumes of high-frequency data, such as vibration levels, speed, temperature, pressure, etc.

the one hand, would allow the merged entity to improve the performance of the engine but, on the other hand, may allow the merged entity to degrade the compatibility between UTC engines and competitors' avionics products. The underlying hypothesis being that more data shared between the systems will improve the fuel efficiency, operating cost and maintenance requirement of the engine.

The hypothesis assessed was whether, ultimately, each of these practices could reduce the ability or incentives of alternative avionics suppliers to compete, or even drive them out of the market. As bids for avionics on new platforms are rather rare, even losing some bids could potentially lead to a perceivable impact.

The Commission assessed the issues as follows:

In the first place, the Commission concluded that UTC does not hold a sufficient degree of market power in aircraft engines to enable the merged entity to engage in practices leveraging its position in engines to foreclose rivals in avionics. Within the sub-segment of large commercial aircraft, UTC has a limited position of less than 20% or 30% market share depending on methodologies used, and faces several strong competitors, notably GE (either by itself or through its 50/50 joint venture with Safran CFMI) and Rolls-Royce. In the sub-segment of regional and business jets, UTC's market position is higher than in large commercial aircraft, in particular when considering turboprop engines. However, several other aspects are to be taken into account: avionics products are not different from other regional jets when the engine is a turboprop engine or turbofan. Therefore, even a strong position in turboprop engines would not confer sufficient market power on the merged entity to be able to foreclose competitors on the (wider) segment of regional and business jets avionics. Moreover, there are no major bidding opportunities to be expected in the future in the sub-segment of regional and business jets. Therefore, even assuming that the merged entity could leverage its market position in the engines, there will be no actual opportunity to do so for many years. Finally, competitors are likely to provide alternatives to the combination of the merged entity.

In the second place, commercial bundling is not a regular feature of the industry and the customers, mainly the airframers, control the procurement process in order to maintain a sufficient level of competition. The customer's level of control goes to the point of sometimes breaking up bundled offers, after they have been proposed. Finally, the Commission has not identified any examples of commercial bundling of engines avionics in the past years, in particular for regional and business jets.

In the third place, the investigation has not revealed specific evidence that the aerospace industry is moving towards tighter integration between engines and avionics, as this would involve a high amount of investment and technical changes.

Moreover, customers of the merged entity are likely to oppose the introduction of proprietary communication protocols (as opposed to today open protocols) between engines and avionics. Currently, aircraft components communicate between each other through industry-standard communication protocols, and it can be expected that customers would not select an engine/avionics provider which does not adhere to the industry standards.

Remedies

To meet the Commission's serious doubts relating to certain horizontal overlaps, UTC and Rockwell Collins submitted three packages of commitments, namely the divestments of:

- the THSA and pilot controls business of Rockwell Collins (including certain special products),
- the ice protection business of Rockwell Collins, and
- the oxygen systems research program of UTC.

The Commission market tested all three commitment packages and concluded that the commitments were sufficient to eliminate the serious doubts as to the compatibility of the transaction with the internal market.

As regards the oxygen systems in particular, the Commission's assessment was facilitated by the parties agreeing to an upfront buyer clause regarding the oxygen systems, which the Commission deemed necessary, considering that the divestment related to research activities requiring support and previous knowledge of the purchaser.

The Commission approved the separate purchasers of the divestments on 10 August, 6 September and 28 September 2018, respectively.

Conclusion

The UTC/Rockwell Collins transaction brings together activities which are to a large extent complementary. That complementarity and the absence of concerns from a vertical and conglomerate perspective enabled the Commission to clear this significant merger in Phase I with commitments in a handful of aircraft components. The conglomerate assessment focused, as in GE/Honeywell, on the risk that UTC would leverage its market position in aircraft engines (the most expensive component in an aircraft) to favour its new avionics offering. Such practice was in this case considered unlikely to succeed because of a lack of market power of UTC in the engines market, and the current tendency of airframers to procure systems individually rather than in bundles, which would be unlikely to change after the transaction.

Competition *merger brief*

Focus on Flat Carbon Steel: Acquisition of *Ilva* by *ArcelorMittal*

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Introduction

On 7 May 2018, following an in-depth investigation, the Commission cleared the acquisition by Europe's leading flat carbon steel manufacturer ArcelorMittal, of the main production assets of its Italian rival Ilva. The clearance is subject to commitments and obligations, which include an extensive divestment package consisting of integrated steelworks and finishing lines in five different EEA countries (Italy, Romania, the Czech Republic, Belgium and Luxembourg).

Effective competition in the production and supply of flat carbon steel is of paramount importance to a range of downstream industries, spanning from construction to globally competing automotive and high-end machinery manufacturers.

Prior to the transaction, ArcelorMittal was already the largest producer and supplier of various finished flat carbon steel products in the EEA. Ilva operated the integrated Taranto steelworks, the largest of its kind in the EEA. Apart from certain complementarities in the Parties' product portfolios, the Commission found that the Parties produced and supplied similar commodity steel products and that they were close competitors on a number of attributes. While there were imports of commodity steel products into the EEA, the Commission found that the competitive pressure from imports was not enough to counterbalance the loss of competition resulting from the transaction. During its investigation, the Commission found serious competition concerns in the markets for hot rolled, cold rolled and galvanised flat carbon steel products.

In its assessment, the Commission took note of the fact that the Parties were integrated steel suppliers, active in the entire carbon steel value chain, from liquid hot metal to finished flat carbon steel products. This is reflected in the remedies accepted in the case, that include integrated steel production capacity.

The case raised important issues related to market share methodology, the role of imports, as well as failing firm defence

and counterfactual. This article will summarise the Commission's main considerations on these topics.

First, we look at the Commission's assessment of the market share methodologies. The Commission applied three complementary market share measures against the background of the flat carbon steel production and supply in the EEA being largely in the hands of integrated suppliers – such as ArcelorMittal and Ilva – that are active at various levels of the value chain, from crude steel production to hot rolled coils and further downstream finished products. In the flat carbon steel industry, the value of the upstream product is typically the most important cost component in the production of finished downstream products. The extensive captive use of upstream products by integrated companies is also characteristic of the industry in Europe.

Second, we summarise the Commission's assessment of imports. While the Commission concluded that the markets for flat carbon steel products are not wider than the EEA¹, it fully took the competitive constraints from imports into account in its

In a nutshell

ArcelorMittal, the largest producer of flat carbon steel in Europe and worldwide, was allowed to acquire Italian Ilva, which operates Europe's largest single-site integrated flat carbon steel plant, subject to significant steel asset divestments.

The case provides insights into the Commission's approach to market share methodology in a process industry characterised by a largely integrated value chain. It also examines the role of imports in the flat carbon steel markets, and discusses the failing firm defence and counterfactual in a situation where the target is in financial difficulty and is being sold via a competitive tender.

¹ The Commission concluded that the markets for flat carbon steel are not wider than the EEA on the basis that conditions of competition do not appear homogeneous within and outside the EEA, in particular as market structures largely differ across different geographic regions, sourcing occurring to a very large extent at a regional level and imports not being able to fully substitute EEA supplies. Furthermore, domestic pricing appears to be affected both by global developments in raw material and global demand/supply balances, and significantly by domestic factors.

assessment. The role of imports in flat carbon steel is examined, looking at factors such as the supply and demand side of imports and the role of trade defence measures.

Third, we discuss the application of failing firm defence and the determination of the counterfactual in the case. The case notably called on the Commission to investigate what would have happened absent the transaction, in a scenario where the target was in financial difficulty and was being sold through a competitive tender.

Integrated industry and market share methodology

Carbon steel production consists of two main stages: (i) the production of crude steel and semi-finished products and (ii) the production of finished products.

The first stage involves the production of liquid crude steel that is eventually cast into semi-finished products, typically slabs in the case of flat steel production. The second stage, the production of finished flat carbon steel, starts with rolling the slabs in a hot rolling mill into quarto plates or hot rolled coils. Hot rolled coils may then be processed through cold rolling and coating, such as galvanising, into further downstream products.

It is commonplace in the EEA flat carbon steel industry that the suppliers are integrated throughout the value chain, from the production of crude steel down to a whole range of finished downstream products, including cold rolled and coated ones. Consequently, significant volumes of hot rolled and cold rolled products are used captively to produce further downstream products.

Competition in the flat carbon steel industry is largely driven by primary steelmaking capabilities, which can be approximated to hot rolled capacity. In particular, the Commission found that the largest investment required for a hypothetical greenfield integrated flat carbon steel plant, and hence the highest barrier to entry, relates to primary steel production assets. The downstream assets are generally calibrated based on the crude steel production capability of the plant, and recourse to the merchant market is limited for integrated producers. Hence, primary steel production represents a binding constraint on the overall production of flat carbon steel producers in the EEA.

It is established Commission practice that market shares and concentration levels provide useful first indications of the market structure and of the competitive importance of the merging parties and their competitors. Market shares are usually calculated based on sales; however, the choice of which market share measures are relevant depends on the circumstances of the specific industry in question. In cases where the structural effects of the transaction are better captured by other structural measures, such as capacity, the Commission has also employed

them.² In the ArcelorMittal/Ilva case, the Commission considers three complementary market share measures: (i) sales, or merchant, market shares on the basis of sales to third parties; (ii) shares of production capacities at the relevant level of the value chain; and (iii) consumption shares which include third party sales and, in addition, internal consumption of the product by integrated producers.

Sales shares are useful to assess the competitive interaction, also in different and differentiated parts of the relevant market, by also taking into account constraints from outside. In contrast to capacity and production, which is usually concentrated in relatively few locations, the patterns of merchant sales are more widespread. Merchant sales shares in a specific geographic region can therefore provide useful information on the ability, readiness and incentive to serve specific geographic areas. Sales shares also reflect the role of imports.

Because of the integrated nature of the flat carbon steel industry, and the importance of the primary steelmaking capabilities, the Commission held that capacity shares provide a direct indication of production capabilities at the EEA level and the Commission considers capacity shares as the most appropriate and informative starting point to assess market power in the flat carbon steel industry in this case.

In the ArcelorMittal/Ilva case, the Commission also calculated consumption shares as a further indicator of market power in hot rolled and cold rolled flat carbon steel. The consumption shares approximate to the share of overall demand of a given flat carbon steel product that is served by a given entity, for both EEA and non-EEA suppliers, where consumption encompasses both the merchant market demand, as well as the captive demand of a given product by flat carbon steel producers. This metric thus reflects merchant market sales, captive use and imports. Given the way the consumption shares are computed, the Commission concluded that they can further provide a geographically differentiated picture that does not require a potentially (somewhat) arbitrary allocation of capacity to a specific use or geographic area.

Imports

The ArcelorMittal/Ilva case takes place at a time when the steel sector, in general, is characterised by global overcapacity. Moreover, the conditions on the European steel market have been distorted in recent years by the dumping practices of non-EEA producers importing steel products into Europe as well as by subsidised imports. In order to ensure a level playing field for the EU steel industry, the EU has taken action in the form of imposition of trade defence measures, such as anti-dumping and anti-subsidy duties, on imports of various steel products from some of the main steel exporting countries.

² For instance M.7155 – *SSAB/Rautaruukki* and M.6471 – *Outokumpu/Inoxum*.

Therefore, the Commission in ArcelorMittal/Ilva needed to carefully scrutinise the role of imports of the relevant products (i.e. hot rolled, cold rolled and galvanised flat carbon steel) from non-EEA countries. The relevant question in the case was whether imports would exert a sufficient constraint to eliminate the incentives for the merged entity to raise prices post-transaction.

While the Commission found that imports can play a significant role on the European steel market for commodity hot rolled steel – and to a lesser extent in case of higher value products such cold rolled and galvanised steel, the Commission concluded that imports are not a sufficiently strong and stable alternative to fully offset the likely negative effects on price due to the loss of competition between Ilva and ArcelorMittal. A number of considerations led the Commission to this conclusion.

First, the Commission's market reconstruction showed that in particular with regard to commodity hot rolled flat carbon steel, imports may be required to balance the supply and demand in the EEA. There is limited spare capacity readily available in the EEA. Moreover, some EEA steel producers prioritise the production of higher-grade products rather than commodity steel grades. The imported steel grades are, on the other hand, mostly commodity steel grades, and most of these volumes land in Southern Europe.

Second, while the term 'imports' is widely used to collectively refer to steel imported into the EEA from third countries, the Commission importantly observed that "imports" in fact represent a multitude of players from different countries and with different commercial strategies, prices, and available divertible capacities. These non-EEA producers were found to prioritise their respective domestic markets. This means that they export steel products only after their domestic supply is satisfied. Moreover, as price takers, non-EEA producers export to markets where they can achieve the highest margins. They behave opportunistically and are thus a less reliable and stable source for customers in Europe than are European producers.

Third, customers' feedback received during the Commission's market investigation showed that from a demand-side perspective, customers' sourcing from imports has certain limitations, even concerning commodity grades. Setting price aside, customers named several factors that influence their purchasing decisions and pose limits on how much hot rolled, cold rolled or galvanised steel they can buy from imports, including commodity grades. Such factors included longer lead times, need for warehousing, unreliable deliveries, difficulties with post-delivery service or complaints, commercial terms, payment terms as well as requirements for orders of larger sizes due to transport arrangements (e.g. size of the vessel). These factors often put customers into challenging situations, which may put their business at risk or cause difficulties. Customers of hot rolled, cold rolled and galvanised steel are often processing the materials further, and therefore unreliable steel supplies may affect their own production, business operations or customer relationships. Therefore, while EEA customers do source flat

carbon steel product from both EEA suppliers as well as imports, the investigation in this case showed that imports cannot be put on an equal footing with domestic EEA players that have structural presence (i.e. steel production plants) in the EEA.

Moreover, while the import flows of flat carbon steel products, in particular hot rolled coils, have been quite significant in the recent past, the vast majority of these volumes were imported into the EU at dumping prices, i.e. prices lower than the normal value of the products. Following several investigations into these practices by the Commission's DG Trade, the EU has imposed anti-dumping and anti-subsidy duties on steel products from major steel producing countries, including China, Russia, Iran, Brazil and Ukraine. Following the imposition of these trade defence measures, the prices of imported steel have increased. Some customers that participated in the Commission's investigation of the ArcelorMittal/Ilva case even reported a shortage of steel available from imports. Moreover, customers also observed that the pressure, including on price, from imports following the imposition of trade defence measures has decreased.

Thus, based on the findings of its in-depth investigation, the Commission found that the presence of significant volumes of imported products did not necessarily mean that imports were also able to exert sufficient competitive pressure to offset the likely negative effects on price resulting from an acquisition.

Failing firm defence / counterfactual

In merger investigations, the Commission assesses a transaction's competitive effects against the competitive conditions that would have prevailed in the absence of the merger. The relevant counterfactual may be different from the pre-merger situation if one can reasonably predict changes that are likely to occur independently of the transaction. The potential exit of a firm from the market is an extreme form of such a change.

Over the past years, Ilva has faced several events leading to a reduction in its production volumes. In 2008 and 2013, laws were imposed on its industrial emissions. Production facilities were closed and as a result, the up-stream production had been running below its technical capacity. Furthermore, Ilva's former management was replaced by a government-appointed Extraordinary Commissioner, who designed an environmental plan to prevent further pollution and upgrade the Taranto plant in compliance with its environmental permit.

As a result of these events, Ilva had been loss-making for several years. The lower production level had been unable to support the necessary environmental investments and the fixed costs. In 2015, Ilva entered into insolvency proceedings, and as part of those proceedings, a competitive tender was launched to sell its assets. The ArcelorMittal/Ilva case therefore afforded the Commission the opportunity to clarify how the criteria for the failing firm defence are applied.

Failing firm defence

Even in the face of competition concerns, the Commission may declare a transaction compatible with the internal market if one of the merging parties is a failing firm. The basic requirement is that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. This requirement is met when the competitive structure of the market would deteriorate to at least the same extent in the absence of the merger³.

However, for the Commission to accept a failing firm defence in its assessment, three criteria have to be met. First, the allegedly failing firm would be forced out of the market in the near future because of financial difficulties if not taken over by another undertaking. Second, there is no less anti-competitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market.

As regards the second criterion, the Commission noted in ArcelorMittal/Ilva that there was another consortium that participated in the tender for Ilva's assets, and had submitted a binding offer. The Notifying Party submitted that due to the delays incurred and the degradation of Ilva's assets in the meantime, it would be unlikely that the alternative bidder would still be in a position of acquiring Ilva. The Commission however considered that in the assessment of the failing firm defence in the context of a bid, it should be determined whether the relevant criteria were fulfilled at the time of the bidding. The assessment cannot be made contingent on a deterioration of the prospects of alternative transactions that happens after, or even because, the notified transaction has been chosen.

From a broader perspective, the forward looking counterfactual against which the Commission has to evaluate a transaction can only encompass changes in market circumstances that are unrelated to the transaction. Changes in market conditions that are causally linked to the transaction, even if not contingent on its completion, cannot form part of that counterfactual. For example, when the choice of a specific transaction by the parties leads in itself to a deterioration of the market structure because it prevents another buyer from a timely take-over and turnaround of the target business, the consequences of such a choice cannot be used as a *fait accompli* that becomes part of the counterfactual. Concluding otherwise would deprive the very assessment the Commission is bound to carry out under the Merger Regulation of its purpose.

Furthermore, the Commission deemed in ArcelorMittal/Ilva that it was not required to run a detailed assessment of this alternative bid for as long as this was deemed a suitable alternative at the time of the adjudication.

In a similar fashion, the Commission considered that the third criterion, on whether the assets would leave the market in absence of the transaction, was not met at the time of the tender award. The Commission took the view that this criterion is to be assessed on the basis of objective elements such as the considerable value of the assets as reflected in the asset valuation of Ilva's assets in the bidding process.

Counterfactual

In the ArcelorMittal/Ilva case, the Commission discussed whether, rather than applying the criteria for a failing firm defence, it should accept the exit of Ilva as the relevant counterfactual in the assessment of the transaction. However, the consequences of accepting such a counterfactual would essentially be the same as those of accepting a failing firm defence.

Therefore, the Commission concluded that the same three criteria of the failing firm defence had to be applied when assessing a counterfactual where the target would have exited the market. In other words, the Commission clarified that a market exit as the counterfactual does not provide a disguised failing firm defence with lowered evidentiary requirements but that the standard failing firm evidentiary requirements apply. Accepting a claim that one of the merging parties would exit, absent the transaction, would amount to a radical departure from the pre-merger situation as the relevant counterfactual. Such a radical departure justifies a high evidentiary standard; and the failing firm defence – which caters for precisely this case – sets out this standard.

Even when the counterfactual scenario of market exit had been rejected, the competitive conditions in the absence of the merger, against which the competitive effects of the transaction should be assessed, remained to be examined. In this context, the Commission assessed whether or not Ilva's full capacity would have to be taken into account. For instance, even an alternative purchaser would have been obliged to perform the required environmental investments, which are required to lift the limitations on Ilva's production output levels. Nonetheless, the Commission based its counterfactual assessment on a conservative approach that only takes into account the capacity and production of the assets as currently operated.

³ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (the 'Horizontal Merger Guidelines')