Merger control: Main developments between 1 September and 31 December 2004

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Recent cases — Introductory remarks

In the four months to December, the Commission received 72 notifications, some 23% fewer than in the previous period. As regards final decisions the trend was also downwards with 75 final decisions being adopted as compared to 84 between May and August. Of these final decisions over 50% were adopted under the simplified procedure.

However, there was a significant increase in the number of decisions adopted after an in-depth investigation as well as an increase in the number of decisions adopted in Phase I with conditions. One prohibition decision was adopted during the period pursuant to Art. 8 (3) and one case was cleared unconditionally pursuant to Art. 8 (2). Three other conditional clearance decisions pursuant to Article 8 (2) were also adopted in the period. The Commission also referred one case to the national authorities pursuant to Article 9.

A – Summaries of decisions taken under Article 8 of the Merger Regulation

AREVA / Urenco / ETC JV

AREVA, the French nuclear group, and Urenco, a company set up by the governments of the UK, the Netherlands and Germany are the main European providers of uranium enrichment services which are needed to produce fuel for nuclear power plants. As a result of this transaction, AREVA acquired joint control over Enrichment Technology Company (ETC), Urenco’s subsidiary active in the development and manufacturing of the centrifuges used to enrich uranium. Centrifuge technology offers significant advantages over the older gas diffusion technology currently used by AREVA. ETC is to supply both its parents and third parties with centrifuge equipment.

The operation was jointly referred to the Commission by France, Sweden and Germany in April 2004. The Commission’s investigation identified competition problems in the downstream market for enriched uranium. The Commission was concerned that the concentration could lead to the creation of a joint dominant position in this market in the European Union. In particular, the Commission considered that ETC could be used by AREVA and Urenco to co-ordinate, through the exercise of their respective veto rights, their capacity developments.

The case was also of interest in view of the efficiency claims made by the parties. These related to the substantial cost savings that AREVA would achieve by being able to adopt the modern centrifuge technology of Urenco. The Commission was, however, not sufficiently convinced of the merger-specificity of these claims, in particular with regard to the more restrictive aspects of the joint venture.

In order to eliminate the Commission’s concerns at an early stage in Phase 2, AREVA and Urenco undertook to remove their respective veto rights in relation to future capacity expansions. Secondly, the flow of commercially sensitive information between ETC and its parents will be blocked by a series of measures which will be closely monitored. Finally, the parties have undertaken to provide the European Supply Agency ("ESA") with additional information, which will enable ESA to monitor the provision and pricing of enriched uranium more closely and to respond, if necessary.

Sonoco / Ahlstrom / JV

In May 2004, the Commission received a notification of a proposed concentration by which two major players of the coreboard and cores industry, Sonoco (USA) and Ahlstrom (Finland), intended to create a joint venture combining their European activities.

Cores are tubes produced from coreboard, which is itself produced mainly from recycled paper. Cores are used as the base around which various products, such as paper, film and yarn are wound. Among cores, high-end paper mill cores are high quality products used by the printing industry to roll magazine paper. Low value cores are standard products used in many industries.
The Commission's in-depth investigation identified concerns in the markets for high-end paper-mill cores in the whole Scandinavia and for low-value cores in Norway and Sweden, where the joint venture would have high market shares and where the significant competitive pressure exerted by Sonoco on the market leader Ahlstrom would be lost. To remedy these concerns, the parties proposed to divest Ahlstrom's only Norwegian core manufacturing facility in Sveberg. They also offered not to implement the merger before a buyer is found.

The European Commission approved the concentration on this basis, since it considered that this divestiture will allow for the entry of a new supplier in Scandinavia and will also remove the main part of the parties' overlap in the affected Scandinavian countries. Indeed, in late October, the Commission approved the acquisition of Sveberg by Abzac, a French core manufacturer which has significant activities in Continental Europe, but which was absent from the Scandinavian markets.

**Continental/Phoenix**

The acquisition of Phoenix AG (Hamburg) by the German undertaking Continental AG involved two rubber companies which mainly serve the automotive industry. The transaction was approved subject to divestiture commitments which removed the competition problems arising from the parties' dominant position in the markets for air springs for commercial vehicles and for heavy steel cord conveyor belts. The proposed transaction involved the acquisition of sole control of Phoenix AG, a company which is also active in the production of technical rubber products (e.g. suspension systems, anti-vibration systems, hoses and conveyor belts) by Continental, a producer of tyres, brake systems and technical rubber products. Phoenix jointly controls Vibracoustic GmbH & Co KG, Germany, through which it distributes air springs for trucks and cars.

The acquisition would have led to significant overlaps in various technical rubber markets, in particular the markets for air springs and for steel cord conveyor belts. Air springs are used as suspension components in commercial vehicles, cars and rail vehicles. Heavy steel cord conveyor belts are used for the transport of heavy goods over long distances, in particular in the field of lignite mining.

In its first phase investigation the Commission identified potential competition concerns in the markets for air springs for commercial vehicles, cars and rail vehicles as well as for heavy steel cord conveyor belts and for filter belts. The Commission's extensive market investigation confirmed its concerns in the markets for air springs for commercial vehicles (sold to original equipment manufacturers and suppliers — 'OEM/OES') and for heavy steel cord conveyor belts. Indeed, the acquisition combines the two leading players in these two markets and would lead to a combined market share in both markets of well above 60%, with only a few small competitors remaining. Furthermore, the Commission found evidence that there are significant barriers to enter both markets. This is mainly because the production and distribution of air springs and conveyor belts involves specific production and customer know-how. Accordingly, new suppliers have to undergo a lengthy qualification procedure before they can be considered as potential suppliers.

In order to eliminate the Commission's competition concerns, Continental undertook to divest Phoenix' 50% co-controlling stake in the joint venture Vibracoustic to the only other shareholder, Freudenberg (Germany). In addition, Continental will cause Phoenix to completely divest its production of air springs for commercial vehicles (OEM/OES), located in a plant in Hungary. These two commitments remove entirely the overlap of the parties' activities in the field of air springs for commercial vehicles (OEM/OES).

Continental also committed to sell a production line for wide steel cord conveyor belts to its competitor, Sempertrans. This divesture will enable Sempertrans to compete over the full range of steel cord conveyor belts with the merged entity, thereby eliminating the competition concerns in the field of steel cord conveyor belts.

**Oracle/PeopleSoft**

The Commission approved Oracle Corp's acquisition of PeopleSoft Inc. The two companies are rival makers of software applications for businesses. After a detailed investigation, the Commission concluded that there was insufficient evidence of competitive harm. Especially as the large and complex companies (often multinationals) that use the software to automate their financial management systems and their human resource processes have other suppliers to serve their needs in addition to the merging parties.

In June 2003 Oracle, the world's second largest software company launched a hostile bid for its software rival, PeopleSoft. The transaction was...
notified in Europe in October 2003 under the Merger Regulation, whilst also being subject to scrutiny by the US Department of Justice.

Enterprise application software allows corporations to automate and manage some critical business functions such as financial planning and reporting (FMS), human resources processes (HR), relationships with customers and supply chain management. FMS and HR applications are critical to large multinational corporations.

The Commission’s detailed investigation established that there are separate markets for ‘high-function’ HR and FMS software purchased by such enterprises which require high standards of performance and support. This market is known in the industry as ‘enterprise software’ or ‘tier-one software’ and is different from so-called ‘mid-market’ software. The Commission also established that the markets are world-wide in scope.

The Commission concluded that even though the proposed merger reduced the number of big players from three to two, with SAP remaining the largest player in the sector and the relevant markets, the markets would remain competitive. Typically customers invite various vendors to bid for "enterprise software" projects (both FMS and HR) and evidence shows that other vendors such as Lawson, IFS, Intentia and QAD have won bids to supply systems to large and complex enterprises in competition with Oracle, PeopleSoft and SAP. Also Microsoft, a recent entrant into business application software and still perceived mainly as a mid-market player, managed occasionally to win bids in the ‘enterprise software’ market and appears to pose a competition constraint in this market.

The Commission reached this conclusion after analysing hundreds of HR and FMS bids launched by large enterprises in recent years. The Commission also carried out various econometric tests with this data which revealed that Oracle's bidding behaviour was not particularly affected by the specific identity of the rival bidders in the final rounds of a given bidding contest, i.e. the presence of PeopleSoft or SAP as rival did not necessarily give rise to more aggressive discounting compared to Oracle's behaviour vis-à-vis other bidders.

The heterogeneity of the products, the asymmetries in the market shares of the different players and the lack of price transparency also rendered coordinated effects implausible in the industry.

The Commission conducted its investigation in close cooperation with the antitrust division of the US Department of Justice. It also took into account evidence that became available during the US trial in the US District Court of Northern California.

### B – Summaries of decisions taken under Article 6

#### Owens-Illinois / BSN Glasspack

In October the Commission unconditionally approved the acquisition of the French glass container manufacturer BSN Glasspack S.A. by its US-based competitor Owens-Illinois Inc. The glass containers produced by the merging firms are used to package products such as soft drinks, wine, mineral water, olive oil, ketchup and other food products.

Owens-Illinois is an international manufacturer of glass containers, machinery for manufacturing glass containers, and plastic containers and associated equipment. In the European Union it has glass manufacturing operations in Finland, Italy, Spain and the United Kingdom. BSN manufactures and sells glass containers for beverages and food and has production facilities in France, Belgium, Germany, the Netherlands and Spain. The two companies European plant networks were in fact largely complementary. However, Owens-Illinois and BSN Glasspack are direct competitors in two regional markets comprising, North-Eastern Spain/South-Western France and South-Eastern France/Northern-Italy. Glass containers are bulky products which are typically delivered within a range of 300-400km from the production plant. The delivery area of a plant can thus encompass regions on both sides of a national frontier.

The transaction, as originally notified, would have led to high market shares in the regions concerned and would have removed an important competitor in what are already highly-concentrated markets. Besides the merging partners, the only other major player in these regions is French company St. Gobain, the other competitors in the affected regions being rather small. Therefore, in these areas, the effect would have been to reduce the number of significant suppliers from three to two.

In order to remove the Commission’s concerns, Owens-Illinois offered to divest a production plant to an independent and viable competitor in each of the two affected regions, in Milan and Barcelona.

The deal did not raise concerns in the rest of the EEA as the two partners' business activities either
do not overlap or, where they do, the merged entity will face competition from a number of large competitors, including St. Gobain, Rexam, Ardagh, Weigand and Allied Glass.

**Syngenta CP / Advanta (1) and Fox Paine/Advanta (2)**

The Commission authorised, subject to conditions, the proposed acquisition of Dutch-based seed producer Advanta B.V. by Swiss-based Syngenta Crop Protection AG. Syngenta Crop Protection AG is a subsidiary of Syngenta AG which, like Advanta B.V., is active in the breeding, production, processing and sale of various kinds of seeds.

The Commission’s market investigation pointed to serious competition concerns in a number of national seed markets within the EU. These were sugar beet seeds in Belgium, Finland, France, the Netherlands, Portugal, Spain, Austria, Ireland and Italy, maize seeds in Denmark, the Netherlands and the United Kingdom, sunflower seeds in Hungary and Spain as well as the French market for spring barley seeds and the UK market for vining pea seeds (a type of pea seeds).

The operation would have created a very strong market leader, often twice or more the size of its nearest competitor. In the market for sugar beet seeds, the proposed operation would also have brought together two of the three major European sugar beet seed breeders, which are also the main suppliers of sugar beet seeds in Europe.

In order to remove the Commission's concerns, Syngenta offered to divest Advanta's whole European seed business to an independent purchaser, thereby removing entirely the overlap of the parties' operations on all relevant markets within the European Union. Based on this commitment, the Commission was able to clear the operation.

A few days later, the Commission approved the proposed acquisition by Fox Paine, a US manager of investment funds, of Advanta's worldwide activities in seeds for sugar beet, oilseed rape, sorghum, sunflower, grasses as well as the maize and cereals businesses outside North America. The commitments given by Syngenta in the Syngenta/Advanta concentration will be fulfilled through the implementation of this transaction.

The Commission's review of the Fox Paine/Advanta transaction showed that Fox Paine has interests in several sectors, including a majority holding in US seed-producer Seminis, which develops, grows and sells fruit and vegetable seeds including in Europe. The activities of Seminis and Advanta overlapped in the markets for vining pea seeds and onion seeds, but the market investigation did not reveal any particular competition concern as the parties would continue to face competition from other important players.

**Total/Gaz de France**

La Commission européenne a autorisé le projet d'acquisition par Total auprès de Gaz de France (GDF) de plusieurs actifs gaziers dans le Sud-Ouest et le Centre de la France, dont certains étaient déjà co-détenu par Total avec GDF. Le feu vert a été possible après que Total s'est engagé à mettre en œuvre diverses mesures visant à garantir un accès adéquat et équitable des tiers à son réseau de transport et à ses installations de stockage de gaz naturel dans le Sud-Ouest.

La Commission a reçu une notification par laquelle Total acquiert auprès de GDF le contrôle exclusif d’un ensemble d'actifs gaziers situés dans le Sud-Ouest et le Centre de la France. Dans le Sud-Ouest, les actifs en question consistent essentiellement en la société Gaz du Sud Ouest («GSO»), plusieurs canalisations de transport de gaz naturel et les installations de stockage de gaz naturel situées à Izaute (département des Pyrénées-Atlantiques). Dans le Centre de la France, Total acquiert auprès de la Compagnie Française du Méthane («CFM», société filiale de GDF) un portefeuille de clients éligibles ainsi que le personnel commercial afférent à ces clients.

Total est un groupe français actif principalement dans les secteurs pétroliers et gaziers. Les actifs gaziers de Total en France résultent essentiellement des positions historiques dont bénéficiait Elf Aquitaine avant son acquisition par Total en février 2002.

GSO est une société française active dans le transport et la fourniture de gaz naturel aux clients éligibles uniquement dans le Sud-Ouest de la France.

La présente opération s’inscrit dans le cadre du dénouement des participations croisées de Total et GDF, l’opérateur historique sur le marché du gaz en France, dans les sociétés GSO et CFM.

En ce qui concerne le Sud-Ouest de la France, l'enquête de la Commission a révélé que l'opéra-

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tion notifiée soulevait des problèmes de concurrence verticaux dans la mesure où elle conduisait à conférer à Total, via GSO, une position forte sur le marché de la fourniture de gaz aux clients éligibles ainsi qu'une situation de monopole sur l'ensemble des infrastructures de transport et de stockage de gaz naturel. Compte tenu des capacités limitées de transport et de stockage de gaz naturel disponibles dans cette région, la Commission a estimé que l'opération aurait pour effet de renforcer les incitations et la capacité de Total à restreindre l'accès des tiers à ses infrastructures gazières afin de protéger et de renforcer sa position sur le marché aval de la fourniture de gaz aux clients éligibles.

Afin de résoudre les problèmes de concurrence et éviter, ainsi, une enquête approfondie, Total a proposé de mettre en œuvre diverses mesures destinées à faciliter et à garantir un accès adéquat et équitable des tiers à son réseau de transport et à ses installations de stockage de gaz naturel dans la zone GSO. En particulier, les engagements prévoient, en cas de changement de fournisseur par un client donné, le transfert au bénéfice du nouveau fournisseur des capacités de transport et de stockage nécessaires à l'approvisionnement de ce client dont bénéficiait l'ancien fournisseur.

**BayerHealthcare/Roche (OTC Business)**

In November the Commission decided to authorise the acquisition of the worldwide Roche OTC (1) business by Bayer in a deal which creates the largest European OTC consumer health company.

The operation raised serious competition concerns in the OTC segments of the non- narcotic analgesics (N2B) market in Austria and of the topical antifungals (D1A) market in Ireland. In examining pharmaceutical markets the Commission uses as a starting point the Anatomical Therapeutic Chemical classification (ATC) system, which subdivides medicines into different therapeutic classes. The ATC system is hierarchical and has 16 categories (A, B, C, D, etc.) each with up to four levels. The first level (ATC 1) is the most general and the fourth level (ATC 4) the most detailed.

In the Austrian market nonnarcotic analgesics for the OTC sales Bayer and Roche market the well known brands Aspirin and Aspro respectively. The parties would have a combined market share of more than 50%. The Commission market investigation revealed that Aspirin and Aspro are direct competitors, that there exist entry barriers to the OTC market for these products in the form of the high level of advertising/marketing costs and that there is a substantial level of brand loyalty to existing OTC brands.

In the market for topical antifungals sold as OTC in Ireland, the new entity would have attained a very strong market position with a significant increment of market share. The operation would have brought the number one and two market operators together, while the remaining competitors would have been very small. As a result, the Commission considered that the transaction would give rise to serious doubts.

In order to remove the competition concerns, the parties offered the following commitments:

— as regards non narcotic analgesics : to divest the Aspro and Aspro C products in Austria

— as regards topical antifungals: to divest the marketing authorisation and trademarks for the existing formulations of Caldesene and Desenex, which are the two Roche products in Ireland.

**Cytec/UCB Surface Specialities**

The Commission cleared the proposed acquisition of UCB's Surface Specialties (Surface Specialties) business by Cytec Industries Inc. (Cytec) of the US. The Commission's review highlighted serious concerns in two amino resins markets, but Cytec was able to address these concerns by offering to divest Surface Specialties' Fechenheim plant (Germany), which accounts for almost all of Surface Specialties European production. This divestment eliminates the competition concerns resulting from the transaction.

Cytec produces specialty chemicals and materials, including mining and water treatment chemicals, coating chemicals, adhesives and composite materials and building block chemicals. Surface Specialties, part of the Belgian chemicals and pharmaceutical company UCB, produces coating chemicals, adhesives and chemicals used for graphic arts applications.

The Commission's market investigation identified serious competition concerns resulting from the combination of the merging parties' activities in the markets for amino resins used as crosslinkers in industrial liquid coatings and for use as adhesion promoters for reinforced rubber. The Commission

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(1) OTC: over the counter.
has also verified whether the combination of Cytec as an important supplier for acrylamide with Surface Specialties buying acrylamide as an input for the production of adhesives and resin additives could foreclose acrylamide supplies for third parties. The market investigation has not confirmed these concerns, since Cytec faces credible competitors for the supply of acrylamide and Surface Specialties' total needs appear to account for only a marginal part of Cytec's output.