Mergers: Main developments between 1 September and 31 December 2007

Mary LOUGHRAN and John GATTI

The number of notifications received in the four months from September to December was, at 110, considerably lower than the record of 170 set in the previous four-month period. However, the number of decisions adopted set a new, slightly higher, record of 146. Of these, 130 were decisions under Article 6(1)(b). The Commission adopted 82 decisions (or 63% of all unconditional clearances) according to the simplified procedure during the period. The Commission also adopted 12 conditional clearances in phase I (under Article 6(2)). Three cases were cleared unconditionally under Article 8(1) after a phase II investigation. And one other was cleared subject to conditions (Article 8(2)). Finally, the Commission initiated 8 second-phase proceedings in the period (Article 6(1)(c)).

A — Summaries of decisions taken under Article 6(2)

SCA/Procter and Gamble European Tissue Business

On 6 September the Commission approved the proposed acquisition of the European tissue business of the US company Procter & Gamble by Sweden’s SCA. The Commission’s decision was subject to the fulfilment of certain commitments concerning divestment of SCA’s Softis brand handkerchief/facials business.

Both companies are major suppliers of tissue paper products. SCA is a Swedish company active in the personal care sector across Europe. In the consumer tissue sector, SCA supplies toilet paper, household towels and handkerchiefs/facials. SCA’s main brands include Edet, Softis, Velvet and Zewa. Procter & Gamble’s European tissue business (P&G ECT) is a division of Procter and Gamble plc which supplies toilet paper, household towels and handkerchiefs/facials in Europe. Its main brands are Bounty, Charmin, Tempo, Bluemia and Bess. In addition to their own brands, SCA and, to a lesser extent, P&G ECT also produce and supply tissue paper products for private labels (i.e. products marketed under the retailers’ brands).

The Commission found that the two categories of products (branded and private labels) were sourced separately by retailers, through bilateral negotiations for brands and through tenders for private labels, but were displayed next to each other on supermarket shelves. Therefore, while the Commission found that branded and private-label consumer tissue products constituted separate product markets at the supply level, the competitive interaction between branded products and private labels proved crucial for the assessment of the case at the downstream retail level.

The Commission’s market investigation indicated that private labels play an increasingly important role in the tissue sector across the whole of Europe. Compared to branded products, their share of retail sales is consistently around 50% across Europe and this share is still growing.

The main overlaps between the parties’ activities occurred on the markets for the production and supply of branded toilet paper, household towels and handkerchiefs/facials supplied to German and Austrian retailers. The Commission found that in the sector for branded toilet paper and household towels the parties were under intense competitive pressure from private labels. Consequently, despite high market shares on these markets, the Commission concluded that the new entity would not be able to exert market power or increase wholesale prices. However, the Commission came to a different conclusion regarding the production and supply of branded handkerchiefs/facials in Austria and Germany. The proposed concentration, as initially notified, would have combined the two major brands on the Austrian and German market for handkerchiefs/facials (P&G’s Tempo and SCA’s Softis), leading to extremely high market shares and less competition. As consumers are more likely to buy a particular brand of handkerchief or facial wipe as compared to toilet paper and household towels, private labels would not have exerted a sufficiently strong competitive constraint on the parties’ brands.

To remove the competitive concerns identified by the Commission, SCA agreed to divest its handkerchief/facial brand Softis in Germany and

(1) Directorate-General for Competition, units F-4 and B-3. 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.

(2) COMP/M.4533. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m90.html#m_4533.
Austria, along with production facilities, converting lines and sales and marketing personnel, at the option of the candidate purchaser. In addition, with a view to taking into account comments put forward by third parties in the framework of the market test of the remedies, SCA also committed to divest, at the option of the candidate purchaser, the Softis handkerchief/facial brand in all other countries where SCA is active.

Yara/Kemira GrowHow

On 21 September the Commission cleared the proposed acquisition of Finnish mineral fertiliser producer Kemira GrowHow by Yara of Norway, also a fertiliser company, subject to commitments (3).

Yara International ASA is active in the manufacture of mineral fertilisers as well as the production and supply of certain nitrogen-based chemicals. Until 2004 Yara belonged to Norsk Hydro. Kemira GrowHow is also active in the production and sale of mineral fertilisers as well as chemical products associated with fertiliser manufacturing.

The Commission’s examination of the proposed deal focused on the EEA markets for mineral field and water-soluble fertilisers and the distribution of these products in national markets. The decision also assessed the markets for certain chemical by-products. The investigation identified serious competition concerns relating to the fertiliser distribution markets in Denmark and Latvia, the market for liquid carbon dioxide (CO₂) in the UK, the markets for weak nitric acid, AN Solution and aqueous ammonia in north-western Europe and in the Nordic countries and the market for concentrated nitric acid in western Europe.

The commitments offered by the acquirer Yara allayed the Commission’s concerns as regards these markets as they would lead to reduced market presence and the creation of alternative sources of supply for customers. The commitments included pulling out of distribution joint ventures for mineral fertilisers, selling a CO₂ liquefaction unit in the UK, and selling certain production facilities at Kemira GrowHow’s plant in Tertre, Belgium and Yara’s plant in Köping, Sweden, as well as providing access to the necessary process chemicals to maintain and expand the output of the divested facilities.

Fortis/ABN AMRO

On 3 October the Commission cleared the proposed acquisition of certain assets of the Dutch banking group ABN AMRO by the Belgo-Dutch financial services group Fortis. The Commission’s decision was granted subject to the upfront divestiture of ABN AMRO’s Dutch factoring subsidiary and part of its commercial banking business in the Netherlands (4).

Fortis has activities in banking, insurance and related services, such as asset management, leasing and factoring. Fortis’ operations are centred, in particular, in Belgium and the Netherlands, with additional presence in other Member States, Asia and the United States. ABN AMRO is an international banking group active worldwide in four principal customer segments: personal banking, private banking, business and commercial clients and corporate and institutional clients. In the EEA, ABN AMRO is predominantly active in the Netherlands.

On 29 May, a consortium formed by RBS, Fortis and Santander announced a bid for ABN AMRO’s entire share capital. If the bid were successful, it would lead to the break-up of the ABN AMRO assets among the three banks. The consortium’s operation is considered to give rise to three different proposed concentrations. This decision refers to the merger that would result from the acquisition by Fortis of certain ABN AMRO assets. RBS’ and Santander’s proposed acquisitions of the remaining ABN assets were authorised by the Commission in its decisions of 19 September.

Under the terms of the proposed bid, Fortis would acquire ABN AMRO’s Business Unit Netherlands (except former Dutch wholesale clients), Business Unit Private Clients and Business Unit Asset Management. Fortis’ activities and the ABN AMRO assets to be acquired mainly overlap in the Netherlands in the markets of commercial banking and factoring, retail banking and payment services and to a lesser degree in leasing, asset management, financial market services, and insurance.

In commercial banking, the proposed merger would combine the first and fourth largest banks in the Dutch market, which is already concentrated. The Commission had concerns that as a result of the transaction corporate customers with a turnover of €2.5 million to €250 million would face less competition between banks.

(3) Case COMP/M.4730. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m94.html#m_4730.

(4) COMP/M.4844. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m96.html#m_4844. See also the article on this case on page 27.
To address the Commission's concerns, Fortis committed to divest a corporate banking business, consisting of Hollandsche Bank Unie N.V. (HBU), two corporate client departments, 13 ‘Advieskantoren’ and ABN AMRO’s Dutch factoring activities to a large international bank. The divested business is larger than Fortis’ corporate banking activities in the Netherlands. Fortis also agreed, under certain conditions, to give the purchaser the option to buy or lease any ‘advieskantoor’ that Fortis would have otherwise closed within a specified period. Fortis can only acquire control over ABN AMRO’s Business Unit Netherlands and Business Unit Private Clients after having closed the sale of the divestment business to a suitable purchaser.

In factoring, the Commission also had serious doubts that corporate customers would have sufficient competitive choices. However, the divestiture of ABN’s factoring subsidiary, IFN Finance BV, would remove the overlap caused by the proposed transaction.

Schering-Plough/Organon BioSciences

On 11 October the Commission cleared the proposed acquisition of Organon BS of the Netherlands, a subsidiary of Akzo Nobel active worldwide in human and animal health, by the global pharmaceutical company Schering-Plough Corporation of the US, subject to conditions (5). The Commission found that the proposed transaction as initially notified would have given rise to competition concerns in twelve product areas and more than thirty relevant national markets. To address the Commission's concerns, SP offered to divest the overlapping activities in all the markets raising serious doubts.

Schering-Plough is a global healthcare company. Organon BS is the holding company for the human and animal healthcare activities of Akzo Nobel. It consists of two operating units — Organon International BV, the human pharmaceutical business; and Intervet International BV, the animal health business.

The Commission's investigation revealed that the proposed transaction would not significantly modify the structure of the human health markets concerned and that a number of credible alternative competitors would continue to exercise competitive constraint on the merged entity.

As regards veterinary products, the Commission found that the proposed transaction, as initially notified, could raise competition concerns in a number of national markets in five vaccine areas — swine E. Coli, equine influenza and tetanus, ruminant neonatal diarrhoea, ruminant clostridia, multi-species rabies — and seven pharmaceutical areas, namely endocrines for reproductive use, insulin, antibiotics/sulphonamides, antibiotics/intra-mammary mastitis treatment, euthanasia, parasiticides and anti-inflammatories. In all the markets where the Commission identified competition concerns the transaction would lead to very high combined market shares or even a monopoly situation. In a number of instances the investigation also revealed that the products offered by the parties were the closest substitutes for each other.

To resolve these competitive concerns, Schering-Plough proposed to divest more than twenty formulations and trademarks covering the whole of the EEA. The divestitures consist of the sale of the relevant assets for the manufacture and sale of the products concerned. These assets include goods and inventory, marketing authorisations, trademarks, intellectual property rights and know-how. Following the market testing, the Commission concluded that the businesses would be viable and that their divestiture would resolve all identified competition concerns.

Egmont/Bonnier Danish books

On 15 October the Commission cleared the proposed acquisition of the Danish book publishing company Bonnier Forlagene A/S, belonging to the Swedish media group Bonnier, by Egmont of Denmark, also a media group (6). The Commission’s clearance was granted subject to the commitment by the parties to modify the proposed transaction so that Egmont would not acquire the Danish strip cartoon business of Bonnier.

Egmont is a media group active in a variety of areas, including book publishing, especially in Scandinavia. The Bonnier group is active in more than twenty countries with a particular focus on northern Europe. Its Danish subsidiary — Bonnier Forlagene A/S, comprising six publishing houses and a book club chain — is active as a book publisher in Denmark.

The Commission reviewed the competitive effects of the proposed concentration at each level of the economic chain of the book sector in Denmark, that is, the acquisition of publishing rights, the distribution of books, the sale of books to dealers and the sale of books to final consumers. It also

(5) COMP/M.4691. Documents available on http:// ec.europa.eu/competition/mergers/cases/index/m93. html#m_4691.

(6) COMP/M.4611. Documents available on http:// ec.europa.eu/competition/mergers/cases/index/m92. html#m_4611.
looked at each different book category — general literature (hardback and paperback), children’s books, factual prose (including reference works), and strip cartoons.

The Commission’s market investigation revealed that the proposed operation would significantly reduce competition in the Danish market for the sale of strip cartoon books to dealers, where Bonnier and Egmont are by far the two leading suppliers. Thus, the Commission considered that the proposed transaction, as initially notified, was likely to weaken competition and therefore raised serious doubts as to its compatibility with the single market.

With a view to removing these concerns, the parties modified the proposed transaction so that Egmont would not acquire the Danish strip cartoon business of Bonnier. The parties also agreed to exclude strip cartoons publications from the scope of the sales agreement.

After market testing these commitments, the Commission concluded that they were suitable to solve the competition concerns raised by the transaction.

Imperial Tobacco/Altadis S.A.

On 18 October the Commission cleared the proposed acquisition of the Franco-Spanish company Altadis by Imperial Tobacco of the UK (7). The Commission’s decision is conditional on the divestment of a number of tobacco brands in certain national markets for roll-your-own tobacco, pipe tobacco and cigars where the Commission identified competition concerns.

Imperial Tobacco Group plc is a manufacturer and distributor of a range of tobacco products including cigarettes, roll-your-own tobacco and cigarette papers, pipe tobacco and factory-made cigars in more than 130 countries worldwide. Its portfolio includes the cigarette brand West, the roll-your-own tobacco brands Drum, Golden Virginia and Van Nelle, and Rizla cigarette papers. Altadis S.A. is active in the manufacture and sale of tobacco products worldwide, including cigarettes and cigars. Its origins are in the former French and Spanish tobacco monopolies, Seita and Tabacalera, and its main cigarette brands include Gauloises, Fortuna, Ducados and Gitanes. In cigars, Altadis produces both factory-made and hand-made cigars. Altadis has a large market share in hand-made Cuban cigars following its acquisition in 2000 of a 50% interest in Corporación Habanos.

Altadis also provides logistic services for tobacco products and other goods in France, Italy, Morocco, Portugal and Spain. Together with the Italian company Autogrill, Altadis jointly controls Aldeasa S.A., which operates retail outlets primarily in airports.

The Commission concluded that the proposed transaction would not raise concerns in the cigarette market. The Commission’s investigation confirmed that the horizontal overlaps between the activities of Altadis and Imperial in the cigarette market are generally limited and that the new entity would continue to face competition from several strong, effective competitors such as Philip Morris International, BAT and Japan Tobacco, which acquired Gallaher earlier this year.

The Commission’s investigation did, however, find competition concerns in several markets for other tobacco products where the merged entity would have significant market shares.

These markets are for roll-your-own tobacco in France, Italy, Portugal and Spain; for pipe tobacco in Finland and France; and for cigars in Greece. In each case, Imperial offered to divest one or more brands to address the competition concerns identified by the Commission. The divestment of these brands meant that there would be no increment in market share as a result of the proposed transaction.

The Commission also examined the potential effects of the merger on other tobacco manufacturers in the light of Altadis’ very strong position in the wholesale distribution of tobacco products in France, Italy and Spain. The Commission concluded that the merged entity would have neither the ability nor the incentive to restrict its competitors’ access to its distribution channels and that the merger would have no negative impact on the final consumer as in any case distribution costs account for a small share of the final retail price of tobacco products.

The Commission also concluded that the proposed transaction would not restrict tobacco competitors’ access to Aldeasa’s retail outlets as this would not be in the interest of Autogrill, the other partner in the joint venture.

Antalis/MAP

On 24 October the Commission cleared the proposed acquisition of the Dutch paper merchant MAP, belonging to the Finnish M-Real group, by the French paper merchant Antalis. The Commis-

(7) COMP/M.4581. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m91.html#m_4581.
tion’s clearance was granted subject to the parties’ undertaking to divest the UK paper merchant Premier, currently a subsidiary of MAP (⁹).

Antalis is active in the distribution of fine paper in most EEA countries. MAP is also active in the distribution of paper in many EEA countries. The Commission reviewed the competitive effects of the proposed takeover in each European market in which both Antalis and MAP are currently active. The market investigation revealed that the proposed operation, as initially notified, would significantly reduce competition in the UK paper distribution market, where there are two major players with comparable market shares accounting for about 75% of the market.

In order to remove these concerns, the parties undertook to divest paper merchant Premier, one of MAP’s subsidiaries in the UK, which is equivalent in size to the UK operations of Antalis. The parties also undertook to offer the purchaser of Premier the possibility to enter into a logistic service contract with Antalis UK’s logistics arm, gm2, in addition to acquiring Premier’s own logistic capabilities.

After market testing these commitments the Commission concluded that they would resolve the competition concerns raised by the proposed transaction.

Owens Corning/Saint Gobain Vitrotex

On 24 October the Commission cleared the proposed acquisition of the glass-fibre reinforcements and composite fabrics businesses (Vitrotex) of the French Compagnie de Saint-Gobain (Saint Gobain) by Owens Corning of the US. Approval was granted subject to the divestment of two facilities producing certain types of glass-fibre reinforcements for which it had identified competition concerns (⁹).

Owens Corning is a company active worldwide in the production and sale of glass-fibre reinforcements, composite fabrics and building materials. Saint-Gobain, through Vitrotex, is active worldwide in the manufacture and sale of glass-fibre reinforcements and composite fabrics. Glass-fibre reinforcements are intermediate products which, combined with resins, form compounds used in the construction, automotive and electronics sectors. Composite fabrics, made of glass-fibre reinforcements, are used to produce high-strength composite applications such as shipping containers, ballistic armour and wind generator blades.

The Commission examined the competitive effects of the proposed concentration in the various markets for glass-fibre reinforcements in Europe, with special reference to direct and assembled rovings, dry-use chopped strands, wet-use chopped strands, chopped-strand mat and continuous-filament mat markets, as well as the composite fabrics market.

The Commission’s market investigation revealed that the proposed operation, as initially notified, would raise competition concerns in Europe on the markets for direct rovings and dry-use chopped strands, where the concentration would create a market leader significantly stronger than the largest competitors, and also on the continuous-filament mat market, where the transaction could lead to the creation of a monopoly.

With a view to removing these concerns, the parties offered to divest two of Owens Corning’s glass-fibre reinforcements plants located in Batzic, Belgium and in Birkeland, Norway. As a result of these divestitures, the overlap created by the proposed transaction will be removed on the markets where competition concerns had been raised. Following a market test of the proposed commitments, the Commission concluded that they would resolve the competition concerns.

Danone/Numico

On 31 October the Commission approved the proposed acquisition of the Dutch company Numico by the French group Danone. Both companies are major suppliers of baby food and baby milk products. Approval was granted subject to the divestment of Numico’s baby milk and baby drink business in France, Danone’s baby meals, baby milk, baby snacks and baby drink activities in Belgium, and Danone’s baby meal and baby snacks activities in the Netherlands (⁹⁰).

Danone is a worldwide company organised around two core activities, bottled water and fresh dairy products. Numico is a company specialised in the manufacture and distribution of baby food and clinical nutrition.

The Commission examined the competitive effects of the proposed merger in the baby food and baby milk markets. It had serious doubts as to the compatibility of the proposed transaction, as initially notified, as regards the infant formula and follow-

(⁹) COMP/M.4753. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m95.html#m_4753.

(⁹) COMP/M.4828. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m96.html#m_4828.

(⁹⁰) COMP/M.4842. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m96.html#m_4842.
on milks and baby drink markets in France, the baby meal, baby growing-up milks, baby snacks and baby drinks markets in Belgium, and on the baby meal and baby snack markets in the Netherlands.

In France, the main overlap of activities occurred on the market for infant milk, where Danone’s and Nestlé’s leading positions are disputed by Numico with its brands Nutricia and Milupa. The Commission’s market investigation suggested that Numico had played an important role in making the market competitive, in terms of both keeping prices down and introducing innovative products. A similar conclusion was reached for the baby drinks market.

As regards Belgium, the market investigation showed that Danone and Numico were face-to-face competitors on the baby meal market, and the proposed takeover as notified would have significantly weakened competition. Furthermore, Numico is a strong player on the growing-up milk and baby drink markets, and a combination of Numico and Danone would also have harmed competition on these markets. The same conclusion was reached for the market for baby snacks, where Danone’s sales (e.g. with the brand Betterfood) represent more than half of the total market.

With respect to the Netherlands, the proposed deal as notified would have removed one of the few competitors to Numico on the baby meal market, whereas its effect on the baby snack market would have been similar to that in Belgium.

To address the Commission’s serious doubts as to the compatibility of the proposed transaction with the single market, Danone committed among other things to divest the Numico baby milk business in France, consisting of the assignment and licensing of brands, an optional production facility, and the transfer of the necessary know-how and personnel. As regards the Belgian and Dutch markets for which the Commission raised serious doubts, Danone offered a package including the licensing of its brand Blédina.

The Commission analysed the undertakings submitted by Danone and, in the light of the comments made by third parties, concluded that they would remedy the serious doubts and so ensure that effective competition was not impeded as a result of the takeover.

**Deutsche Bahn/English Welsh & Scottish Railway Holdings**

On 7 November the Commission cleared the proposed acquisition of English Welsh & Scottish Railway Holdings (EWS) by Deutsche Bahn (DB). The Commission’s decision was subject to DB’s undertaking to fulfil EWS’ expansion plans and to provide non-discriminatory access to certain EWS training activities and maintenance facilities in France (11).

DB is a state-owned German-based railway company engaged, inter alia, in rail passenger and freight transport (through its subsidiary ‘Railion’) in Germany, Italy, the Netherlands and Denmark, as well as in freight forwarding (by all modes of transport), logistics and ancillary services worldwide (inter alia through its subsidiary ‘Schenker’). EWS is the successor of the freight business of the former UK national rail monopoly. EWS is active in rail freight transport and related services in the UK and recently, through its subsidiary, in France. EWS also provides rail freight transport services through the Channel Tunnel.

Despite the lack of overlap in the parties’ rail freight transport activities in any geographic market, the Commission had concerns that the proposed transaction, as initially notified, might result in France in weakening of the competitive constraint exercised by EWS, a new entrant in the French market. This concern was based on the consideration that DB may not have the same incentives to pursue the rail freight transport business in France with the same intensity as EWS would in the absence of the merger.

To address the Commission’s concerns, DB committed to fulfil EWS’ expansion plans in France in the next five years through investments in key assets (locomotives) and personnel as set out in the EWS Business Plan and to deploy these in France. As an additional guarantee of maintaining competition in this market, DB undertook to provide fair and non-discriminatory access to EWS Driver Training Schools and maintenance facilities in France for all third-party rail operators (except SNCF, the French incumbent), thereby lowering these potential barriers to entry and expansion for companies wishing to enter the French rail freight market.

**Kraft/Danone Biscuits**

On 9 November the Commission approved the proposed acquisition of the worldwide biscuits, snacks and cereals business of Danone of France by the US-based company Kraft. The Commis-

---

(11) COMP/M.4746. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m94.html#m_4746.
Kraft is active worldwide in the manufacture and sale of packaged foods and beverages, in particular snacks, beverages, cheese and dairy products, coffee, chocolate confectionary and biscuits. Danone Biscuits is the global biscuits, snacks and cereals business of the French company Danone. The proposed transaction affected only certain Member States where both parties sell biscuits and chocolate confectionary.

As regards biscuits, Danone Biscuits is active in the whole of Europe with its umbrella brand LU as well as other international brands. Kraft sells biscuits primarily in Iberia under the Fontaneda and Artiach brands. The Commission’s market investigation revealed that the proposed acquisition, as initially notified, could have significantly reduced competition as regards the Spanish market for sweet biscuits. The Commission found in particular that the merged entity would be the market leader with by far the largest portfolio of must-have brands and would become an unavoidable trading partner for retailers.

Concerning chocolate confectionary, Danone Biscuits’ products include only chocolate bars sold under national brands: Cha-cha in Belgium, Tatranky, Horalky and Fidorka in the Czech Republic and Slovakia and Balaton in Hungary. In turn, Kraft sells chocolate confectionary in various formats throughout the EEA under a range of international brands: Milka, Côte d’Or, Toblerone, Suchard and certain local brands. The original transaction would have created a market leader combining a range of strong brands from both parent companies and would have threatened to impede effective competition in the Hungarian market for chocolate bars.

To address the Commission’s serious doubts as to the compatibility of the proposed transaction with the single market, Kraft made the commitment to divest a range of Spanish biscuit brands, including Artiach, Chiquitin, Filipinos and Marbú Dorada and one of its production plants in Spain. With regard to Hungary, Kraft undertook to divest the Balaton brand. After market testing these commitments, the Commission concluded that they would be suitable to remedy the serious doubts.

B — Summaries of decisions taken under Article 8(1)

Sony/BMG

In October the Commission granted regulatory approval to the creation of Sony BMG, a joint venture combining the recorded music businesses of Sony and Bertelsmann, after concluding that it did not have sufficiently strong evidence to oppose the deal (12).

In January 2004, the Commission received a notification whereby Sony Corporation and Bertelsmann AG (BMG) would merge their recorded music businesses into a 50/50 joint venture named Sony BMG. The transaction was originally cleared after second-phase investigation in July 2004. This decision was annulled by the Court of First Instance in July 2006. Following the annulment the case was renotified in January 2007.

The transaction combined the companies’ activities in the discovery and development of artists and the recording and marketing of their music. It did not include their activities in music publishing or the manufacture and physical distribution of records.

The Commission assessed the merger carefully as it reduces the number of so-called music majors from five to four without, however, giving Sony BMG the number one spot in Europe which continues to be held by Universal. Therefore, the Commission sought to establish whether the deal could create or strengthen a collectively-held dominant position between Sony BMG, Universal, EMI and Warner Music, the other main players in the music industry.

The Commission focused its attention particularly on the markets for recorded music. Analysis of a large amount of price data and third-party submissions in the recorded music markets countries indicated relatively close price parallelism for CDs released by the five majors in some countries as well as features that could facilitate tacit collusion. On balance, however, the Commission had to conclude that the evidence found was not sufficient to satisfactorily demonstrate either that coordinated pricing behaviour had existed in the past or that a reduction from five to four major recording companies would create a collectively-held dominant position in the national markets for recorded music in the future.

(12) COMP/M.4824. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m96.html#m_4824.

(13) COMP/M.3333. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m66.html#m_3333.
The Commission also examined the merger’s impact in the emerging markets for online music licences and for online music distribution, but concluded that the operation would not lead to serious competition problems. It reached the same conclusion in relation to its examination of the vertical relationships between Sony BMG’s recorded music and Bertelsmann’s downstream TV and radio activities in Germany, France, Belgium, Luxembourg and the Netherlands.

**Syniverse/BSG**

In December the Commission decided to clear the acquisition by the US technology group Syniverse of the BSG Group’s wireless business, providing data and financial clearing services to wireless telecommunication companies around the world. The Commission’s investigation had shown that the acquisition would be unlikely to result in competition concerns in the market for the provision of GSM roaming data clearing services (14).

Syniverse is a global provider of technology services to wireless telecommunications companies. The BSG Group is a global provider of payment processing, data clearing, and financial settlement and risk management solutions for fixed-line and wireless communication service providers. The proposed transaction relates only to the acquisition of the BSG Group’s wireless business, mainly providing data and financial clearing services to mobile network operators (MNOs). The activities of Syniverse and of the BSG Group’s wireless business overlap only in the market for GSM roaming data clearing services. With these services, data clearing houses provide for the exchange of roaming data between MNOs, allowing roaming services provided to be billed to end-users.

The proposed transaction reduced the number of competitors active in Europe in the market for clearing services for roaming data from three to two. However, the Commission’s in-depth investigation revealed that Syniverse had not exerted strong competitive pressure on BSG’s prices; that switching between BSG and Syniverse had been very rare; and that both BSG and Syniverse had faced strong competition from the market leader Mach. It was therefore likely that the combined Syniverse/BSG would be in strong competition with Mach in the future.

Furthermore, other data clearing companies, not yet active in Europe, would have the possibility to provide such services to European MNOs as there were no capacity constraints and several MNOs clearly consider them as credible bidders. In addition, technological developments may give other players, in particular providers of software for the billing of roaming services, the ability and incentive to enter the market for data clearing services. The Commission’s market investigation also showed that MNOs would remain sufficiently strong to resist unilateral price increases by the merged entity, in particular by sponsoring the entry of new competitors.

The in-depth market investigation also confirmed that the reduction in the number of currently active data clearing service providers operating in Europe would be unlikely to result in the coordination of competitive behaviour between the remaining service providers. In particular, the dynamic nature of the market and the tendering process, which customers predominantly use for procuring these services, would limit the transparency of the market and thus the possibility of monitoring any coordination of prices or other market conditions. New contracts come up relatively infrequently, thus making retaliation against competitors relatively difficult. Furthermore, new entrants would most likely jeopardise the outcome of any potential coordination of competitive behaviour.

**AEE/Lentjes**

Also in December the Commission cleared the acquisition of Lentjes GmbH of Germany by Energy & Environment AG & Co KG (AEE), which is part of the Austrian A-Tec group (15). Both AEE and Lentjes are active in engineering and supplying a range of energy and fired waste-to-energy plants for incinerating municipal waste, plants based on so-called ‘fluidised bed technology’ (used for example for burning coal or sludge) and systems for the desulphurisation of the flue gases resulting from the burning process.

The Commission opened an in-depth investigation because it had serious doubts as to the compatibility of the proposed transaction with the single market in relation to grate-fired waste-to-energy plants for incinerating municipal waste. The Commission was also concerned that the merger could lead to supply problems for competitors in the market for plants based on fluidised bed technology, since Lentjes appeared to be one of the few suppliers of a flue gas desulphurisation technology specific to such plants.

After its in-depth investigation the Commission concluded that the transaction would not signifi-

---

(14) COMP/M.3555. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m71.html#m_3555.

(15) COMP/M.4647. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m92.html#m_4647.
cantly impede effective competition in the area of waste-to-energy plants. In particular, a detailed analysis of bids in Europe over the past five years showed that a number of effective competitors would remain in this market and that customers would continue to have a number of options when selecting their suppliers. The investigation also revealed that significant competitive constraint from suppliers tendering for parts of a plant (lots) would continue to exist, because a number of engineering companies are providing services to assist customers in unbundling turnkey projects into lots.

C — Summaries of decisions taken under Article 8(2)

Kronospan/Constantia

In September the Commission cleared the acquisition of part of the raw and coated particle board business of Constantia Industries AG of Austria by Kronospan Holding GmbH of Germany, a member of the Kronospan Group. Both companies are active in the manufacture and supply of wood-based products, in particular raw and coated particle board, decorative laminates and components, all of which are used in the furniture industry (16).

Raw particle board is used to make furniture, e.g. upholstered furniture, shelves or worktops. Coated particle board is raw particle board that has been coated with impregnated décor paper and is used in higher value-added applications for worktops and other furniture. Decorative laminates consist of several layers of craft and décor papers sealed together and used, for example, for shower cabins and balconies. Components (also called ‘post-forming elements’) are pieces of raw particle board which have been shaped to the required profile, for example to the form of a window sill, and to which laminate has been glued.

The Commission’s analysis of the impact of the proposed operation raised serious concerns that the transaction, as notified, would have significantly impeded effective competition in the market for raw particle board. The Commission’s market investigation indicated that customers in Austria, Hungary, Slovakia and Romania would have had limited possibilities to switch suppliers and that the main suppliers did not have significant spare capacity to increase supplies in the affected area. Expanding capacity would require considerable investment and entail a significant lead time. Although some capacity is expected to come on stream in the affected area over the next two years, notably from the new facility of Egger, a competitor, in Romania, and from a new Kronospan facility in Slovakia, this additional capacity would be barely sufficient to meet the increasing demand for raw particle board.

The Commission considered that, in the form originally notified, the transaction would have removed Constantia’s raw particle board business, in particular the Austrian company Fundermax, as an important independent competitor in the affected area. To resolve these concerns, the parties modified the proposed transaction so that Kronospan would acquire only two of the three companies originally targeted, namely the German company Sprela and the Hungarian company Falco. Fundermax would continue to be owned by Constantia. Kronospan undertook not to acquire Fundermax for a certain period of time.

The Commission considered that the modification of the transaction and the commitment given by Kronospan were sufficient to allay the serious doubts concerning the concentration’s compatibility.

D — Summaries of decisions taken under Article 21

Enel/Acciona/Endesa

The acquisition of joint control of Endesa by Enel and Acciona was notified to the Commission on 31 May and cleared on 5 July (17). Under the relevant national law, Enel and Acciona requested the Spanish energy regulator (Comisión Nacional de Energía — CNE) to approve the deal. On 4 July the CNE approved the transaction subject to a number of obligations:

(i) Endesa had to remain the parent company of the group, and it had to maintain its trade mark and its headquarters in Spain;
(ii) Endesa had to be kept adequately financed;
(iii) the committed investments in electricity and gas infrastructure had to be realised and the CNE had to be kept informed of the status of such investments;
(iv) all the regulations relating to the nuclear generation sector had to be respected; a clearly identified unit charged with management of the nuclear assets had to be maintained within Endesa; the CNE had to be kept regularly informed of the management of such assets and possible plans for developing them;

(16) COMP/M.4525. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m90.html#m_4525.
(17) COMP/M.4685. Documents available on http://ec.europa.eu/competition/mergers/cases/index/m93.html#m_4685.
(v) a specified amount of coal had to be burnt in Endesa’s coal-fired generation assets;

(vi) effective control over Endesa’s regulated assets outside mainland Spain had to be maintained within Endesa for five years from the date of acquisition;

(vii) the supply contracts concluded by Endesa had to be honoured;

(viii) the CNE had to be informed of the long- and short-term strategies of Endesa’s management in relation to Spain’s public interest and security, with special reference to the company’s regulated activities;

(ix) the CNE had to be informed of all the strategic decisions taken by Endesa’s board of directors in regulated markets. The CNE had to have the right to revoke any board decision if Enel’s vote in the board was necessary for the approval of such a decision, in order to avoid ‘the additional risks which may derive from the special powers that the Italian State still has in Enel’;

(x) the CNE had to have the right to revoke such authorisation and to prevent Enel from exercising its voting rights in Endesa, should Enel fail to respect the above conditions and in particular condition (ix);

(xi) condition (ix) was to remain in effect as long as Enel was publicly controlled.

The Commission considered these conditions to be incompatible with Community law and in particular with Articles 43 and 56 EC. It therefore sent Spain a preliminary assessment in which it expressed the view that Spain had infringed Article 21 of the Merger Regulation by adopting, without prior notification to and approval by the Commission, measures which unduly restricted a concentration of Community dimension (i.e. the Enel/Acciona/Endesa transaction) and which were not necessary for and proportionate to the protection of a legitimate interest and therefore not compatible with Community law.

Enel and Acciona lodged an appeal against some of the conditions of the CNE decision of 4 July with the Spanish Minister for Industry and Tourism. The Minister revoked some of the CNE’s conditions ((vii)-(xi)) and modified others ((ii)-(v)). Conditions (i) and (vi) were not challenged and therefore not modified by the Minister. The Commission considered that the remaining conditions as modified by the Minister were still contrary to Community law and ordered Spain by decision of 5 December to withdraw them by not later than 8 January 2008.