Merger: main developments between 1 January and 30 April 2010

John Gatti (1)

1. Introduction

During the period from 1 January to 30 April 2010 the number of notifications received fell to 81 from 109, 26% less than in the previous period. However this represented a rise from the 75 cases notified in the corresponding period of 2009. The Commission adopted a total of 84 first phase decisions of which 74 were unconditional clearances. Decisions adopted under the simplified procedure accounted for 43 of the first phase total or 53%. Seven first phase decisions were cleared conditionally and one case was cleared after an in-depth second phase investigation. Four decisions were taken under Article 4(4) to refer cases with a Union dimension back to Member States. Member States accepted 7 requests from parties for cases to be referred to the Commission and refused one under Article 4(5). The Commission also accepted the request of five Member States under Article 22 to examine a case with no Community dimension (2). The Commission refused the request of a sixth Member State. Finally the Commission referred two cases to Member States following requests made under Article 9.

2. Summaries of decisions taken in the period

2.1. Summaries of decisions taken under Article 6(2)

Kraft / Cadbury

The European Commission cleared, on January, the proposed acquisition of Cadbury PLC of the UK by Kraft Foods Inc. of the US. The decision is conditional upon the divestment of Cadbury’s Polish and Romanian chocolate confectionary businesses.

Kraft is a worldwide food and beverage company active in more than 150 countries. Cadbury is a worldwide producer and seller of chocolate and sugar confectionery products in over 60 countries.

Both Kraft and Cadbury are strong players in the chocolate confectionary business in the EEA. With its main chocolate brands Milka, Côte d’Or and Toblerone, Kraft has a very strong presence in most Member States, with the exception of the UK and Ireland where customers’ preferences remain strong for traditional British chocolate. Cadbury is the market leader in the UK and Ireland, in particular with its Dairy Milk brand. In continental Europe Cadbury is mainly active in France, Poland, Romania and Portugal, with local brands.

Cadbury has very significant market shares in the UK and Ireland, however, the penetration of Kraft’s brands in these markets remains low. In addition, Kraft’s and Cadbury’s brands are not close competitors, given the strong preference of UK and Irish customers for traditional ‘British’ chocolate as opposed to ‘continental’ chocolate. Therefore, the Commission found no competition concerns in the UK and Irish markets.

However, the Commission identified competition concerns within chocolate confectionery in Poland and Romania, where the combined market share of Kraft/Cadbury is particularly high and their brands compete closely, in particular in the chocolate tablets markets.

To remedy these concerns, Kraft committed to divest Cadbury’s Polish confectionery business marketed under the Wedel brand and Cadbury’s domestic chocolate confectionery business in Romania.

After market testing the proposed commitments, the Commission considered that they would remove the identified competition concerns and therefore concluded that the proposed transaction, as modified by the commitments, would not raise competition concerns.

Agilent / Varian

On 21 January the Commission cleared the proposed acquisition of Varian Inc by Agilent Technologies Inc, both of the US. The decision is conditional upon the divestment of Agilent’s entire micro/portable gas chromatography instrument business and Varian’s entire laboratory gas chromatography, triple quadruple gas chromatography-mass spectrometry and inductively coupled plasma-mass spectrometry instrument businesses.

Both Agilent and Varian are active in the design, development, manufacture and sale of bio-analytical measurement products, including analytical and life
science instruments and the associated services, consumables and software.

The activities of the parties overlap in relation to a number of sectors within the analytical instrumentation and consumables in the EEA. The Commission identified competition concerns in relation to each of the Laboratory Gas Chromatography (Lab GC), micro/portable Gas chromatography, triple quadrupole Gas Chromatography-Mass Spectrometry instruments (triple quad GC-MS) and Inductively Coupled Plasma-mass Spectrometry (ICP-MS) instrument markets in the EEA. These instruments are used to detect and quantify molecular and atomic components in a given sample.

The proposed transaction would bring together close competitors in the EEA Lab GC, micro/portable GC and ICP-MS instrument markets where the combined entity would have significant market shares.

As regards the EEA triple quad GC-MS instrument market, the proposed transaction would result in the elimination of an important competitive force in the market. Varian already has a large market share on this market and, although a recent entrant, Agilent competes closely with Varian on this market and had rapidly established a significant presence.

To remedy the concerns raised by the Commission in relation to each of these markets, Agilent and Varian have committed to divest Agilent’s entire global micro/portable GC instrument business and Varian’s entire global Lab GC, triple quad GC-MS and ICP-MS instrument businesses.

After market testing the proposed commitments, the Commission concluded that they would remove the competition concerns identified and ensure that effective competition would not be impeded as a result of the proposed transaction.

### TLP / Ermewa

The Commission has cleared the proposed acquisition of the Swiss company Financière Ermewa (Ermewa) by Transport et Logistique Partenaires SA (TLP) owned by the French railway company SNCF on 22 January. This clearance is conditional upon the divestment of Ermewa’s European activities involving axial hopper wagon hire for cereal transportation and its involvement in the organisation of cereal transport by rail. This transaction results in a change of control for the Ermewa Group from joint control (TLP and Citerne Invest) to sole control by TLP.

TLP is fully owned by SNCF Participations, a subsidiary of the SNCF. TLP holds the group’s shareholdings in the freight wagon hire and transport organisation sector (particularly for cereals) and in combined transport. The SNCF group provides passenger rail transport services on the national rail network together with other rail transport services.

Ermewa is involved in freight wagon hire and the organisation of transport (of cereals in particular), and in tank container hire, in several EU Member States.

After the transaction the parties’ activities will overlap in the wagon hire, transport commissioning, and freight wagon repair and maintenance markets. The operation will also result in the creation or reinforcement of certain vertical links, in particular between rail traction and rail transport commissioning, and between rail transport commissioning and tank container hire.

It emerged from the Commission’s market investigation that the planned transaction was likely to raise competition concerns on markets linked to the transportation of cereals by rail, in particular the market for the hire of axial hopper wagon, and on the cereal rail transport commissioning market in France, Benelux, Italy and the part of Germany where such wagons are used. The planned transaction would have had the effect of bringing together the two main operators in this field, leading to the creation of an unavoidable partner for cereal shippers in the areas in question.

To address these concerns, TLP offered to divest all its commissioning activities for the transportation of cereals by rail and a fleet of cereal hopper wagons. After market testing the proposed remedies the Commission considered that they would address the competition concerns identified in its market investigation and, therefore, concluded that the planned transaction, as modified by the commitments, would not raise competition concerns.

### Abbott / Solvay Pharmaceuticals

On 11 February the Commission approved the proposed acquisition of Solvay Pharma (Belgium) by Abbott Laboratories (USA). The decision is conditional upon the divestment of the Cystic Fibrosis testing business of Solvay Pharma’s subsidiary Innogenetics in the European Economic Area (EEA).

Abbott is a global company active in pharmaceutical and nutritional products, medical devices and diagnostics products. Solvay Pharma is the pharmaceutical division of Solvay S.A. It is active in the in-vitro diagnostic (‘IVD’) sector following its acquisition in 2008 of Innogenetics N.V., a Belgian biotechnological company active in this field. IVD systems comprise dedicated items of equipment and reagents that allow tests for various diseases to be carried out (e.g. from samples of tissue or blood).
The Commission’s investigation found that competition concerns could be excluded in the pharmaceutical markets, due to the limited horizontal overlaps between the parties’ activities and low combined market shares.

The Commission also investigated the potential effects of the proposed transaction on IVD markets where competition concerns could be excluded in most of these markets due to small increments and the presence of a sufficient number of credible competitors.

However, the Commission found that the proposed operation would raise competition concerns in relation to cystic fibrosis testing on an EEA-wide level as well as in a number of individual Member States. In these markets, the parties’ combined market shares would have been very high. The Commission was concerned that customers would face increased prices and reduced choice.

To address the Commission’s concerns, Abbott offered to divest the Cystic Fibrosis testing business of Innogenetics in all EEA countries. In view of these commitments, and following a market test, the Commission concluded that the transaction would no longer raise competition concerns.

**Otto / Primondo Assets**

The Commission cleared, on 16 February, the proposed acquisition of certain assets of the insolvent Primondo by Otto, both Germany-based home-shopping companies. Otto acquires trademarks, including the Quelle brand, trademark applications, internet domains and the right to use the Quelle customer data base for Germany. The decision is conditional upon the divestiture of certain trademarks and the trademark purchasers having the right to use the Quelle customer data base under the same conditions as Otto.

Otto is a trading and service company, which is internationally active through its subsidiaries in various retail channels (including home-shopping), financial and other services. Home-shopping comprises sales to consumers by catalogue, e-commerce and other means of distance selling. Quelle was active in the retail business and focussed on home-shopping. Quelle belonged to the insolvent Primondo group and went into insolvency proceedings on 1 September 2009. Otto is the market leader in the German home-shopping market where, prior to its insolvency Quelle was Otto’s strongest competitor.

The transaction raised competition concerns in eight different product categories of the German home-shopping market, for example women’s clothes and sport textiles. The Commission’s investigation showed that through the acquisition of the Quelle trademark and the use of the Quelle customer data, Otto would be able to take over a significant part of the Quelle business.

To address these competition concerns, Otto offered to divest certain trademarks including, Webschatz, Universum or Casamaxx. In addition, the purchaser of the trademarks would be given the right to use the Quelle customer data to the same extent and under the same conditions as Otto. Following a market test, the Commission concluded that the commitments offered by Otto remedy the competition concerns.

The Commission’s clearance decision also covers the acquisition of Quelle Russia by Otto which is part of the same concentration and which did not raise any competition concerns.

**Orange / T-Mobile**

The Commission cleared, 1 March, the proposed merger of Orange UK and T-Mobile UK, respectively France Télécom’s (FT) and Deutsche Telekom’s (DT) UK subsidiaries. The decision is conditional, firstly upon the amendment of an existing network sharing agreement with Hutchison 3G UK (3UK), to ensure that sufficient competitors remain in the market, and secondly the divestiture of a quarter of the merging parties’ combined spectrum in the 1800 MHz band, which is one of three frequency bands currently used for mobile communications in the UK.

Orange UK is a wholly-owned subsidiary of the French incumbent telecommunications operator France Telecom. It provides mobile telephony services in the UK and, to a lesser extent, broadband internet access services on a fixed network. T-Mobile UK is a wholly-owned subsidiary of the German incumbent telecommunications operator Deutsche Telekom. It provides mobile telephony services in the UK.

In the course of the investigation, the Commission identified no direct concerns in relation to the market for the provision of mobile telecommunications services to end-consumers, the wholesale market for access and call origination on public mobile telephones and the wholesale market for international roaming and related markets.

However, the Commission investigation showed that the transaction might endanger the future of T-Mobile’s Radio Access Network sharing agreement with 3UK (the Radio Access Network being one of the main infrastructure elements of a mobile network). 3UK is the smallest mobile network operator (MNO) in the UK and is owned by Hutchison Whampoa. This could threaten 3UK’s viability and
possibly lead to the elimination a competitor. With the merger of the subsidiaries of FT and DT there will be only four players in the UK, hence the concerns about the fate of 3UK.

Second, the investigation also revealed that the contiguous spectrum held by the combined entity at the 1800 MHz level (60 MHz) would be significantly larger than that of their competitors. This could result in the new entity being the only MNO in the UK able to offer next-generation mobile data services medium term through Long Term Evolution (LTE) technology at the best possible speeds.

In order to address the competition concerns identified by the Commission, the parties concluded a revised agreement with 3UK which will secure its position as a competitive force on the market, and offered to divest 15 MHz of spectrum at the 1800 MHz level. The Commission concluded that the commitments offered by the parties remedy the identified competition concerns.

The Commission cooperated closely with both the OFT and the UK’s telecommunications regulator OFCOM throughout the investigation. On 2 February 2010, the OFT submitted a request to the Commission to refer to it the examination of the proposed transaction pursuant to Article 9 (2) (a) of the EU Merger Regulation. However, in light of the commitments offered by the parties, the OFT withdrew its referral request on 1 March 2010.

Cisco / Tandberg

On 29 March the Commission approved under the EU Merger Regulation the proposed acquisition of Tandberg, a vendor of videoconferencing products with dual headquarters in Norway and in the US, by Cisco of the US. The approval is conditional upon the divestment of a protocol developed by Cisco for its videoconference solutions, called ‘TIP’, to ensure the interoperability of the merged entity’s products with those of its competitors.

Cisco Systems is active globally in the development and sale of networking products. In particular it designs, manufactures, and sells Internet Protocol (IP)-based networking products related to the communications and information technology industries, and, specifically, to video communications solutions systems. Tandberg is also a vendor of a broad range of video communications solutions systems. In addition, Tandberg produces Multipoint Control Units (‘MCUs’) which are devices needed for communications that are not simply ‘point-to-point’ connections between compatible videoconferencing formats.

The proposed transaction would result in horizontal overlaps in the markets for video conferencing solutions. The concentration would also give rise to vertical and conglomerate effects, as Tandberg is active in the upstream MCUs market and Cisco in the neighbouring markets for networking products. The Commission’s market investigation confirmed that there were no significant concerns with regard to the markets for multipurpose room and desktop solutions, or in relation to the vertical and conglomerate effects of the proposed transaction.

In the course of its investigation, the Commission identified serious competitive concerns in relation to the market for high-end video conferencing products video conferencing solutions (dedicated-room solutions) often referred to as ‘telepresence’, where the combined entity would have high market shares.

In order to address these concerns, Cisco committed, inter alia, to divest the rights attached to its proprietary protocol TIP to an independent industry body, in order to ensure interoperability with Cisco’s solutions and to allow competitors to participate in the development and in the updates of the protocol. Following a market test, the Commission concluded that the commitments were suitable to remove the competition concerns.

This structural remedy facilitates market entry or expansion irrespective of where the competitor or its target customers are located. Moreover, the remedy is designed to ensure that an independent industry body will develop an industry-based proposal for a standard protocol; this proposal will then be submitted to a standard setting organization.

2.2. Summaries of decisions taken under Article 8

Oracle / Sun Microsystems

The Commission approved, on 20 January, the proposed acquisition of US hardware and software vendor Sun Microsystems Inc. by Oracle Corporation, a US enterprise software company. After an in-depth examination the Commission concluded that the transaction would not significantly impede effective competition in the European Economic Area (EEA) or any substantial part of it.

Oracle is a supplier of business software, including middleware (i.e. software that connects software components applications), database software, enterprise application software and related services.

Sun provides network computing infrastructure solutions that include computer systems, software, storage and services. In 2008, Sun acquired the open source database, MySQL.

The Commission’s second phase investigation assessed whether the acquisition of the world’s
leading open source database MySQL by Oracle, the leading proprietary database vendor, would lead to a significant impediment of effective competition within the EEA. The database market is highly concentrated with the three main proprietary database vendors – Oracle, IBM and Microsoft – accounting for approximately 85% of the market in terms of revenue.

Sun’s share of the database market in terms of revenue is low because MySQL is open source users can download and use the database for free. The Commission’s investigation therefore focussed on the nature and extent of the competitive constraint that MySQL currently exerts on Oracle and whether this would be affected by the proposed transaction.

The Commission’s investigation showed that although MySQL and Oracle compete in certain parts of the database market, they are not close competitors in others, such as the high-end segment.

Given that MySQL is an open source product, the Commission also assessed Oracle’s ability and incentive to remove the constraint exerted by MySQL after the merger and the extent to which this constraint could, if necessary, be replaced by other actors on the database market. The Commission’s investigation showed that another open source database, PostgreSQL, is considered by many database users to be a credible alternative to MySQL and could be expected to replace to some extent the competitive force currently exerted by MySQL on the database market. In addition, the Commission found that ‘forks’ (branches of the MySQL code base), which are legally possible given MySQL’s open source nature, might also develop in future to exercise a competitive constraint on Oracle in a sufficient and timely manner. Given the specificities of the open source software industry, the Commission also took into account Oracle’s public announcement of 14 December 2009 of a number of pledges to customers, users and developers of MySQL concerning issues such as the continued release of future versions of MySQL under the GPL (General Public Licence) open source licence. Oracle has already taken action to implement some of its pledges by making binding offers to third parties who currently have a licensing contract for MySQL with Sun to amend their contracts. This is likely to allow third parties to continue to develop storage engines to be integrated with MySQL and to extend the functionality of MySQL.

The Commission examined the potential impact of Oracle’s acquisition of the intellectual property (IP) rights connected to the Java development platform in the context of the proposed transaction. It found that Oracle’s ability to deny its competitors access to important IP rights would be limited by the functioning of the Java Community Process (JCP) which is a participative process for developing and revising Java technology specifications involving numerous other players in the IT industry, including Oracle’s competitors.

The Commission also found that Oracle would not have the incentives to restrict its competitors’ access to the Java IP rights as this would jeopardise the gains derived from broad adoption of the Java platform and therefore the proposed transaction would raise no competition concerns in respect of the licensing of IP rights connected with Java.

Finally the Commission looked at the potential effects on the market for middleware and in the ‘IT stack’, where the merger would strengthen Oracle’s presence. It concluded that no competition concerns would arise in these areas in the light of the merged entity’s market shares and prevailing competition in the markets.

2.3. Summaries of cases taken under Article 9

Schuitema / Super de Boer Assets

On 25 January the Commission referred the acquisition by Schuitema of the Super de Boer assets (SBA) to the Dutch competition authority the Nederlandse Mededingingsautoriteit (NMa).

Schuitema is engaged in the procurement, wholesale and retail supermarket business in the Netherlands. It is primarily a wholesale organization, which supplies goods and services to approximately 330 stores operated by franchisees (under Schuitema’s store formula C1000). Schuitema also operates 39 of its own stores.

The SBA consist of 21 owned supermarkets and 59 franchised supermarkets, currently operating in The Netherlands under the Super de Boer franchise formula.

In December 2009 the NMA made a request under Article 9(2)(b) of the EC Merger Regulation seeking the referral of the whole of the notified concentration on the basis that the concentration in question affected competition in a number of markets within The Netherlands, which present all the characteristics of distinct markets and which do not constitute a substantial part of the common market. Alternatively, the NMa requested a referral under Article 9(2)(a).

After examination the European Commission concluded that the proposed transaction met the criteria for referral under both Article 9(2)(a) and 9(2)(b). It further concluded that as the effects of the operation would be felt only the Netherlands and because
the NMa had recent experience of the markets concerned that the NMa was the best placed competition authority to examine the impact of the operation. Consequently the European Commission referred the entire case to the Dutch authorities.

**Motor Oil (Hellas) Corinth Refineries / Shell Overseas Holdings**

The Commission has referred to the Hellenic Competition Authority the examination of the proposed acquisition of Shell’s oil sector activities in Greece by Motor Oil of Greece, on 15 March. The transaction includes the creation of a joint venture with Shell Overseas Holdings Limited (SOHL) of the UK for the supply of aviation fuel at Greek airports.

In January, the European Commission received a notification whereby Motor Oil would acquire sole control of the Greek-based companies, Shell Gas Commercial and Industrial and of Shell Hellas, from the Royal Dutch Shell Group. Simultaneously, Motor Oil and Shell Overseas Holdings Limited (SOHL, UK), a subsidiary of Royal Dutch Shell, would create a joint venture which would be active in the supply of aviation fuel at Greek airports.

In February 2010 the Hellenic Competition Commission (HCC) asked that the case be referred to Greece, pointing out that the planned operation would threaten to significantly affect competition because it would result in high market shares in various retail markets for fuels in Greece as well as in various non retail markets for fuels and bitumen. The HCC argued that various affected markets were local in nature and it was better placed to appreciate the competitive impact of the operations.

The Commission found that the HCC’s request met the criteria of Article 9 of the Merger Regulation. It further found that the Greek competition authority would be best placed to assess the impact of the proposed transaction as only the Greek markets for fuels and bitumen would be affected. Consequently, it referred the case to Greece to be assessed under the Greek merger control law.