EU merger control in 2013

A look at last year's highlights

*by **Catriona Hatton** and **David Cardwell****

The past year in EU merger control has seen the beginning of some important trends and changes. The European Commission (the Commission) issued 279 merger decisions in 2013, with two prohibitions and 11 decisions resulting in the acceptance of remedies. The failing firm defence has seen a return to prominence, with the Commission accepting a failing firm argument when it cleared two transactions that resulted in a monopoly in certain markets. In the cases where the Commission accepted remedies, at the most concentrated end of the scale, the Commission approved with substantial divestments some transactions which would have resulted in a 2-to-1 merger in certain markets.

The efficiency defence also made an appearance in several cases. While it gained some traction with the Commission, it ultimately failed to win the day, raising the question of whether arguments that merger efficiencies outweigh the anticompetitive effects of a deal will ever play a key role in gaining Commission approval.

On the policy front, the Commission has consulted on and implemented as of 1 January 2014 significant changes to the simplified procedure designed to alleviate the burden on business with regard to filings of non-complex transactions, although additional new requirements in all filings may offset some of the benefit. The treatment of transactions involving the acquisition of a minority shareholding is also subject to change after the Commission launched a consultation on proposals to extend its jurisdiction to review pure minority acquisitions which do not result in a change in control of the target company.

Mergers with remedies

Approvals subject to remedies

The Commission approved 11 mergers subject to remedies in 2013, with nine of those clearances granted in Phase I and the remaining two following Phase II in-depth investigations. This figure is slightly higher than in previous years, reflecting perhaps a gradual increase in the total number of transactions being reviewed, when compared with earlier years. While the majority of remedies cases in 2013 involved a classic divestiture solution, several of the cases have included behavioural-type solutions, whether adopted as standalone measures or as "bolt-ons" to divestiture arrangements. The impact of cross-border co-operation between the Commission and other international agencies is also evident in a number of the decisions.

In GE's acquisition of Avio, the Commission's concerns focused on two main areas, potential vertical foreclosure of GE engine manufacturer competitors Pratt & Whitney and Rolls Royce through disruption of supply of Avio engine parts, and the degree of influence that it believed GE would be able to exercise on another competitor, the Eurojet consortium, as a result of Avio's veto and information rights in the consortium. Interestingly, as regards the vertical foreclosure concern, while the parties submitted commitments to address that issue, they were ultimately deemed to be unnecessary by the Commission as the parties in the meantime concluded private agreements with Pratt & Whitney and Rolls Royce aimed at ensuring that Avio would remain a reliable source of supply of parts for these competitors. A parallel investigation by the US Federal Trade Commission (the FTC) may have influenced this outcome. The FTC also focused on this foreclosure concern as regards its potential effect on Pratt & Whitney and required an order to ensure effective compliance with the terms of the agreement. Both agencies acknowledged their close co-operation on the investigation.

As regards the Commission's concerns on GE's potential influence over the Eurojet consortium, GE committed to a series of measures. These included limiting Avio's decision-making power in the consortium to what is required to protect the economic value of its minority investment, and putting in place firewalls and other measures designed to reassure the Commission that Eurojet's strategic information would be protected, that any conflict of interest on GE's part would be eliminated, and that Eurojet would be able to continue to compete with GE.

In the two Phase II cases which were approved with remedies, Munksjö/Ahlstrom (paper industry) and Syniverse/MACH (technology services to telecoms companies), the Commission was concerned about the large combined shares of the parties in some of the markets concerned, reducing the number of players in the EU from three to two in certain markets and resulting in a monopoly or near monopoly in others. The Commission looked at the remaining competition in both cases and at customer power but concluded that these were insufficient to offset a potential price increase by the merged entity. Both deals required significant divestitures in order to win approval.

Apart from divesting assets, the parties committed to other measures to ensure the viability of the divested businesses. For example – in Munksjö/Ahlstrom – Ahlstom committed to enter into a series of ancillary agreements with the new owner of the divested paper plant to ensure the continuity of operations and to transfer power generation and water treatment facilities for the plant into a joint venture to be jointly controlled by the merged entity and the new owner of the divested plant. In Syniverse/MACH, the parties also committed to transfer to the new owner of the divested assets some of MACH's personnel, several of its top customers and a range of customer contracts covering medium-sized and smaller network operators.

At least two transactions were subject to remedies that included divestment of assets outside the EU in order to address concerns about the reduction in competition in the EU market. Thermo Fisher's acquisition of Life Technologies gave rise to concerns as a result of the overlap between the parties in a number of life sciences markets. The transaction was approved subject to a range of divestiture commitments,

** Catriona Hatton is a partner in – and David Cardwell is a senior associate with – Baker Botts LLP (Brussels)*

including divestment of a business in Colorado, related brands, staff and patent licences.

Similarly, the acquisition by Crane Co of MEI, both US companies involved in the manufacture of unattended payment systems, gave rise to concerns as a result of the high market shares of the parties and relatively weak position of the remaining competitors in certain EU markets. The Commission cleared the transaction subject to divestment of certain product lines manufactured in Germany and in Canada. The parties committed not to close the transaction subject to divestment of these product lines and related technologies to a suitable purchaser approved by the Commission.

The Thermo Fisher decision also highlights international co-operation between the EU and other agencies. In this case, the Commission co-operated with the FTC, the Australian Competition and Consumer Commission, China's Ministry of Commerce, the Japan Fair Trade Commission, the Competition Bureau of Canada and the New Zealand Commerce Commission.

Prohibitions

The Commission blocked two transactions in 2013 – Ryanair/Aer Lingus and UPS/TNT. In both cases, the parties offered substantial remedies to address the Commission's concerns. These cases are both now the subjects of appeals to the General Court.

Failing firm and efficiencies defences

In 2013, the Commission approved two mergers which resulted in a reduction of competitors from 3 to 2 in certain markets and a monopoly in others on the basis of the failing-firm defence. The Commission and the European Courts have long recognised that a merger which might otherwise be considered to result in a significant impediment to effective competition can be approved if one of the merging parties is a failing firm. In its 2004 guidelines on horizontal mergers, the Commission sets out the detailed criteria it would apply to such an assessment, with the basic requirement being that the deterioration of the competitive structure that follows the merger cannot be said to be caused by the merger. However, until this year, there have been few cases where parties successfully invoked this defence.

In the two recent decisions approving Nynas AB's acquisition of Shell Deutschland Oil GmbH's Harburg refinery assets and Aegean Airline's acquisition of Olympic Air, the Commission applied the failing firm criteria. In Nynas/Shell, Shell satisfied the Commission that it would not continue to operate its Harburg refinery as it was economically unsustainable. The Commission's investigation showed that Nynas was the only buyer interested in purchasing the Harburg assets. Therefore, the most likely alternative to the acquisition would be the closure of the Harburg refinery, significantly reducing production capacity in Europe and probably resulting in increased prices.

Similarly, in Aegean/Olympic (previously blocked by the regulator), the Commission was satisfied that Olympic was a failing firm that would go out of business soon, with no credible purchaser other than Aegean interested in acquiring Olympic or its assets. In both cases, the Commission was able to conclude, following an in-depth investigation, that a reduction in the number of competitors would occur anyway and would not be caused by the acquisitions. In Nynas/Shell, the Commission also noted that the transaction would have some positive effects on competition, as Nynas would achieve significant reductions in costs and the Commission considered that the benefits were likely to be passed on to customers.

In contrast, the efficiencies defence, although raised in the US Airways/American Airlines transaction and the UPS/TNT merger, failed to win the day. The Commission acknowledges in its 2004 guidelines on horizontal mergers that it may approve a merger if there is sufficient evidence that the efficiencies generated by a deal are likely to enhance the ability and incentive of the merged entity to act procompetitively for the benefit of consumers, thereby counteracting the adverse effects on competition which the merger might otherwise have. However, the Commission has yet to approve a merger on this basis.

In contrast to the position it took in US Airways/American Airlines where the efficiencies arguments were rejected and the transaction was cleared subject to remedies (and indeed in many previous cases), in UPS/TNT the Commission accepted that at least certain cost efficiencies would be generated by the merger and would be passed on to consumers in certain markets in the form of price reductions. However, the Commission considered that the efficiencies were not sufficient to offset the negative impact the transaction would have in the markets concerned and it ultimately blocked the transaction. Arguably, this is at least a small step forward as one of the few cases where the Commission accepted that the high threshold for demonstrating that consumers will benefit from merger efficiencies was met.

Referral of cases

The EU Merger Regulation (EUMR) allows EU member states to request the Commission to refer all or part of a case that meets EU thresholds – and is otherwise subject to the exclusive jurisdiction of the Commission – back for review at national level (see article 9 EUMR). Member states can also request the Commission to review a merger that does not meet EU thresholds (see article 22 EUMR).

In 2013, there have been few requests made by member states under these provisions. In September 2013, Germany requested the Commission to refer the planned cement industry acquisition of Cemex West by Holcim for review by the German Bundeskartellamt. The Commission rejected that request on the basis that the criteria for such a referral were not met, namely because the cement markets concerned were not national or narrower than national in geographic scope but also included territories outside Germany (including parts of Belgium, the Netherlands and north-east France). As regards requests from member states for the Commission to review transactions which do not meet EU thresholds, the Commission's review of Olympic/Aegean was based on a referral from the Greek and Cypriot national competition authorities.

Policy changes

Merger simplification

The Commission's system for merger review has been criticised over the years for being overly burdensome on business in terms of the amount of information required in filings for non-complex mergers and the length of the informal prefiling review.

In December, the Commission adopted a package of measures aimed at simplifying its procedures in connection with EU merger filings. The measures, which took effect on 1 January 2014, bring about three main changes: they extend the Commission's simplified procedure process to more transactions; they eliminate some of the current information requirements in both short-form notifications under the simplified procedure and full-length notifications; and they aim to reduce the amount of time taken by the Commission for prenotification review of draft filings.

The simplified procedure is designed for mergers that do not pose competition problems and allows parties to notify their planned merger using a short-form filing, requiring significantly less information than a full filing. The simplified procedure also allows the Commission to approve a transaction without consulting competitors, customers or suppliers. The new rules raise the market share thresholds for merging companies to qualify for the simplified procedure to 20% for horizontal overlaps (up from 15%) and to 30% for vertical overlaps (up from 25%). Furthermore, mergers resulting in a combined market share of up to 50% but where there is only a small increment in market share can qualify for the simplified procedure. Finally, there is a new "super-simplified procedure" for notifications of joint ventures which do not affect Europe.

The Commission has also reduced some of the information requirements in the filing forms and invites notifying parties to seek waivers for certain other categories of information. However, they have introduced some new requirements – in particular, parties have to identify not only the markets which they consider to be the relevant markets but also "all plausible alternative product and geographic market definitions" and provide information for those potential markets. They also require the parties to provide more internal documents with filings – for example, in full-length filings, the parties should provide (among other things) minutes of board and shareholder meetings where the transaction has been discussed and board and shareholder documents that discuss alternative acquisitions. There is some risk here that these new requirements will offset the benefits which might otherwise result from the reforms.

As regards the prenotification review of draft filings, the Commission commits to keeping the process as short as possible. It also invites parties to submit filings without engaging in prenotification discussion with the Commission where the merger does not give rise to horizontal overlaps or vertical links between the parties in Europe. Overall, the changes should result in an improvement to the system but the Commission has considerable discretion in how the rules will be applied, so much will depend on their ongoing commitment to reduce the administrative burden and cost for business.

Minority shareholdings

In June 2013, the Commission launched a consultation on proposals to introduce significant changes to the EUMR as regards the treatment of minority acquisitions. The Commission is currently restricted to reviewing transactions that involve the acquisition of "control" for purposes of the EUMR – ie in the case of acquisitions of minority shareholdings, where the stake will allow the holder to determine the strategic decisions of the target company through, for example, the exercise of a veto right over the company's budget, business plan or appointment of senior management.

Minority stakes that do not confer control ("structural links") are not subject to notification. The Commission sets out two alternative frameworks for expanding the Commission's jurisdiction to review of structural links. The first option, a mandatory system, would require prior notification of proposed structural links between companies. The second option would allow parties to proceed to close their transactions, but would allow for a Commission investigation in potentially problematic cases. The Commission proposes that this could be done either through a system of monitoring and/or based on complaints from third parties, or through the use of a system where parties file a "short" information notice informing the Commission and member states of the transaction. It is unclear whether, under this second option, parties would be permitted to submit notifications voluntarily in order to gain legal certainty in relation to their transactions.

Whether under a mandatory or voluntary system, the Commission proposes that its definition of what constitutes "structural links" could include a safe harbour for parties where their acquisition of a minority shareholding would not be subject to review if, for example, the level of shareholding fell between a certain percentage, or where certain categories of shareholder rights were not acquired.

Other potential changes to EU merger rules

The Commission's consultation considers a broad range of other possible changes, including amending the current rules so that joint ventures operating entirely outside the EU and which have no impact on competition in the EU would not have to be notified under the EUMR.

The Commission is also considering changes to the existing Form RS procedure, currently used by parties in order to request referral of a transaction for review by the Commission when it would otherwise fall to be reviewed by three or more national competition authorities.

The Commission notes that the existing requirement on parties to submit a separate form (Form RS) in addition to the eventual merger filing (Form CO) – a time-consuming process that can create significant delays – may have discouraged parties from using the referral process. The Commission proposes the elimination of the Form RS, instead permitting parties to notify the transaction directly. Member states would still be entitled to object to referral of the transaction to the Commission (although this rarely happens in practice) but the length of time they would have to register their objection would drop from 15 working days to 10 working days.

Conclusion

One of the more notable areas of change in 2014 is on the policy front: it remains to be seen whether the way in which the Commissions applies the new merger simplification rules in practice will have any tangible impact on the efficiency of proceedings in straightforward cases. The next step in the consultation on the extension of the Commission's jurisdiction in the review of minority shareholdings will be the adoption of a white paper, when a clearer picture will emerge of the changes that the Commission's would like to implement. Given the significant impact that these proposed changes could have, the white paper will be keenly anticipated.