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By

Andreas Weitbrecht


Reprinted from **European Competition Law Review**
Issue 7, 2010

Sweet & Maxwell
100 Avenue Road
Swiss Cottage
London
NW3 3PF
(Law Publishers)

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Andreas Weitbrecht*

 Competition policy; Economic conditions; EU law; Merger control; Remedies

The economic crisis that was triggered by the collapse of the market for sub-prime mortgages in the United States and the subsequent insolvency of US-based investment bank Lehman Bros in September 2008 has significantly affected the European Commission's merger control practice during 2008 and 2009: the number of merger notifications in 2009 was down by 35 per cent compared to the bumper year 2007. Much of this fall-off was due to the decline in transactions involving private-equity firms. Apart from sheer numbers, the crisis has also affected the kind of transactions that came before the Commission: transactions in the banking sector required speedy clearance in order to keep systemically relevant banks from going under. And in other industries, such as air transport, the crisis accelerated the consolidation in the industry. However, the Commission also reviewed many mergers in industries that were far less affected by the crisis, such as the energy, pharmaceutical or high-tech sectors.

This article will focus on the most relevant developments: it first looks at developments in the field of jurisdiction and procedure, including statistical data. Secondly, it will analyse how mergers triggered by the economic crisis in the financial services industry have been handled by the Commission. Thirdly, it will look at horizontal mergers in established industries, most notably in the pharmaceutical and aviation fields. The next section will describe mergers in the IT and high-tech industries which in 2008/2009 have presented a

* Dr Andreas Weitbrecht is a partner at the Brussels and Frankfurt offices of Latham & Watkins LLP and teaches competition law at the Universities of Trier and Osnabrück. He thanks Laura Baudenbacher, Jan Komossa and Annegret Struck for invaluable contributions in the drafting and finalizing of this article. All views are personal. Overviews of developments in EU merger control in 2004, 2005, 2006 and 2007 have been published at [2005] E.C.L.R. 67, [2006] E.C.L.R. 43, [2007] E.C.L.R. 125 and [2008] E.C.L.R. 341 respectively.

mix of horizontal and, in particular, vertical issues. The following section will be devoted to the new Remedies Notice issued by the Commission in 2008; and a further section will describe the most important judgments from the Community courts, such as the landmark judgment by the ECJ in *Sony/BMG* relating to collective dominance. The article will conclude with some thoughts on emerging trends in EC merger control and an outlook for 2010/2011.

Commission jurisdiction and procedure

Statistics

After the year 2007 had brought a new record with 402 mergers notified, the number of notifications dropped to 347 in 2008 and to 259 in 2009.¹

As in previous years, the Commission in 2008 and 2009 cleared approximately 90 per cent of mergers in phase I without remedies; of these 60 per cent were treated under the simplified procedure, a percentage that has been steadily increasing ever since the simplified procedure was introduced in 2000. In 2008, 19 phase-I clearances included commitments, whereas that number fell to 13 in 2009.

Especially noteworthy is the number of phase-II clearance decisions the Commission adopted in 2008 and 2009: in 2008, such decisions without remedies (nine)² outnumbered clearance decisions with remedies (five),³ a very high number of phase-II

1 All statistics according to the Commission's website <http://ec.europa.eu/competition/mergers/statistics.pdf> [Accessed March 23, 2010].

2 Decision of 23 January 2008 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.4781-*Norddeutsche Affinerie/Cumerio*); Decision of 30 January 2008 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.4734-*Ineos/Kerling*); Decision of 5 March 2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (COMP/M.4747-*IBM/Telelogic*); Decision of 11 March 2008 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.4731-*Google/DoubleClick*); Decision of 14 May 2008 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.4854-*TomTom/Tele Atlas*); Decision of 5 May 2008 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.4956-*STX/Aker Yards*); Decision of 2 July 2008 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (COMP/M.4942-*Nokia/NAVTEQ*); Decision of 4 August 2008 declaring a concentration to be compatible with the common market and the EEA Agreement (COMP/M.4874-*Itama Holding/Barcovision Division*); Decision of 17 December 2008 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.5141-*KLM/Martinair*).

3 Decision of 19 February 2008 declaring a concentration to be compatible with the common market and the functioning

decisions by historical standards⁴ and a high number of unconditional clearances. On the other hand, in 2009, there were only three⁵ phase-II decisions in total, all with remedies, equalling the record low of phase-II decisions of 1993. Again there was no prohibition decision; thus between 2002 and 2009 only two mergers were prohibited.⁶

Commission report on the functioning of the ECMR

In June 2009, little more than five years after the entry into force of Regulation 139/2004 of January 20, 2004 on the control of concentrations between undertakings (the EC Merger Regulation; “ECMR”),⁷ the Commission issued its report to the Council on the application of the Regulation.⁸ The preceding public consultation and the report focused in particular on the referral mechanisms, which had been expanded with the 2004 Merger Regulation. Not surprisingly, the report considers that the referral mechanisms have worked well, noting that between 2004 and 2008, referrals pursuant to art.4(5) ECMR resulted in 150 notifications to the Commission; substituting for approximately 1,000 notifications to national competition authorities. Referrals in the other direction—i.e. from the Commission to national

competition authorities on the basis of art.4(4) ECMR—remained scarce, with approximately 40 such cases between 2004 and 2008.

The report also makes reference to the two-thirds rule, which has kept some controversial cases with NCAs over which the Commission would have preferred to exercise jurisdiction. Finally, the public consultation suggested that multiple filings, as a result of differences in standard of review between Member States, still may lead to contradictory results.⁹

€20 million fine against Electrabel for failure to notify a merger

Article 7(1) ECMR prohibits parties from implementing a merger that falls under the ECMR before having received clearance from the Commission. This prohibition is often referred to as the standstill obligation, the exact delineation of which is not always clear.¹⁰

Parties violating the standstill obligation, according to art.14(2) of the ECMR, can be fined up to 10 per cent of their annual turnover. This provision, which has remained unchanged since the coming into force of the first Merger Regulation 4064/89 [1989] OJ L395/1, has rarely been used and prior to 2009 there were only two cases where the Commission had assessed fines against companies on this basis; the fines were in the low six-digit euro range.¹¹

In a marked departure from its previous practice, the Commission in June 2009 assessed a fine of €20 million against Electrabel France for failing to notify and for putting into effect without clearance the acquisition of de facto control over Compagnie Nationale du Rhône (CNR).¹² According to the undisputed facts, in December 2003, Electrabel, part of the Suez group, acquired slightly less than 50 per cent of CNR’s shares. CNR has the task of developing the Rhône valley

of the EEA Agreement (COMP/M.4726-*Thomson Corporation/Reuters Group*); Decision declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.4513-*Arjowiggins/M-Real Zanders Reflex*); Decision of 23 September 2008 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.4980-*ABF/GBI Business*); Decision of 21 October 2008 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.4919-*Statoilhydro/Conocophillips*); Decision of 17 December 2008 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.5046-*Friesland/Campina*).

⁴ Only 2000 and 2001 brought a higher number of phase-II decisions with 17 and 19 respectively.

⁵ Decision of 9 January 2009 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.5153-*Arsenal/DSP*); Decision of 22 June 2009 declaring a concentration compatible with the common market and EEA Agreement (COMP/M.5335-*Lufthansa/SN Airholding*); Decision of 28 August 2009 declaring a concentration compatible with the common market and EEA Agreement (COMP/M.5440-*Lufthansa/Austrian Airlines*). But see also the unconditional clearance in Decision of 21 January 2010 declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement (COMP/M.5529-*Oracle/Sun Microsystems*) (unconditional clearance), also discussed below.

⁶ Decision of 9 December 2004 declaring a concentration incompatible with the common market pursuant to Article 8(3) of the ECMR (COMP/M.3440-*ENI/EDP/GDP*) [2005] OJ L302/69; Decision of 27 June 2007 declaring a concentration to be incompatible with the common market and the EEA Agreement (COMP/M.4439-*Ryanair/Aer Lingus*).

⁷ [2004] OJ L24/1.

⁸ *Report on the Functioning of Regulation No 139/2004 COM(2009) 281 (final)*.

⁹ See, e.g. the prohibition by the German Federal Cartel Office in *Cargotec*, where on the basis of a Europe-wide market, the merger was cleared in Spain and in Austria and prohibited by Germany: *Cargotec/CVS Ferrari* (B5-51/07) August 24, 2007, available on the homepage of the Federal Cartel office at: <http://www.bundeskartellamt.de/wDeutsch/download/pdf/Fusion/Fusion07/B5-51-07.pdf> [Accessed March 23, 2010].

¹⁰ See Order of the President of the Court of First Instance in *Aer Lingus Group Plc v Commission of the European Communities* (T-411/07 R) [2008] E.C.R. II-411; [2008] 5 C.M.L.R. 7, where the President takes the position that a partial implementation of a merger does not violate the standstill obligation.

¹¹ Decision 1999/594 imposing fines for failing to notify and for putting into effect a concentration in breach of Article 4(1) and Article 7(1) of Regulation 4064/89 (IV/M.920-*Samsung/AST*) [1999] OJ L225/12 and Decision 1999/459 imposing fines for failing to notify and for putting into effect three concentrations in breach of Articles 4 and 7(1) of Regulation 4064/89 (IV/M.969-*A.P. Møller*) [1999] OJ L183/29.

¹² Decision of 10 June 2009 imposing a fine for implementing a concentration in breach of Article 7(1) of Regulation 4064/89 and Article 57 of the EEA Agreement (COMP/M.4994-*Electrabel/Compagnie Nationale du Rhône*).

under a concession granted by the French state. The remaining shares of CNR are widely dispersed among approximately 200 French regions and municipalities and the Caisse des Dépôts et Consignations (CDC). As a result, Electrabel enjoyed a comfortable majority at the annual shareholder meetings of CNR.

In 2007, Electrabel, on its own motion, approached the Commission to discuss the issue of whether Electrabel was exercising control over CNR. The transaction was finally notified in March 2008 and cleared in phase I without remedies.¹³ The Commission assessed the high fine apparently for the purpose of attracting attention to the issue and the seriousness with which it now views such infringements; nevertheless, the fine seems disproportionate given that CNR is a semi-public company fulfilling an infrastructure task, that Electrabel itself had brought the matter to the attention of the Commission and that the case was a straightforward phase-I clearance. Electrabel has appealed.

Commission power to issue “stop-the-clock” information requests

Article 11(1) ECMR empowers the Commission to request from companies information that it considers necessary for the evaluation of a merger; art.11(3) ECMR empowers the Commission to compel companies to provide such information by formal decision, which according to art.10(4) ECMR will suspend the running of relevant time periods within which the Commission must take its decision. In many cases, the issuance of such a “stop-the-clock” information request is agreed between the Commission and the notifying parties.

In the case of the acquisition by the Swiss company Omya of certain assets of US-based J.M. Huber relating to the production of precipitated calcium carbonate, primarily used by the paper industry, the Commission in 2006 during the phase-II investigation issued two such requests to Omya pursuant to art.11(3) ECMR. The information requested was very copious and was designed to form the factual basis for an econometric study relating to market definition and market power. On the basis of the responses to the first request, the Commission had prepared a draft unconditional clearance decision, which however was met with criticism in the Advisory Committee and from competitors. This criticism pointed inter alia to certain inaccuracies in the data submitted pursuant to the first request and led the Commission to issue the second of these requests. The merger was ultimately cleared subject to conditions.¹⁴

¹³ Decision of 29 April 2008 declaring a concentration to be compatible with the common market (COMP/M.4994-*Electrabel/Compagnie Nationale du Rhône*).

¹⁴ Decision of 19 July 2006 declaring a concentration compatible with the common market and the functioning of

The second formal information request has been challenged by Omya before the CFI. Omya’s principal argument was that the request was not necessary since the information already in the hands of the Commission was materially correct and that it was disproportionate in that it caused the clearance to be delayed by another three months. The CFI rejected these claims, holding that the Commission was entitled to require the information to be produced as the Commission must have a factually correct basis for its decision under the ECMR and as the question of what is necessary to establish this factual basis must be answered on an ex ante basis.¹⁵

Mergers in an economic crisis—the banking industry

The European banking industry was, of course, in particular focus during the economic crisis when governments rescued systematically relevant banks. Since it was Member State governments acting, this process raised serious state aid issues which are beyond the scope of this report.

As regards the Merger Regulation, many transactions escaped review by the Commission: where the bank was saved by the injection of money by the national government, the governmental aid in most cases did not mean that the recipient bank was run as a state-owned enterprise and thus there was no change of control. As a result, the Commission ended up reviewing only one such transaction, the takeover by the German state-controlled holding SoFFin of Hypo Real Estate.¹⁶

Where banks were saved by a stronger competitor, rather than national governments, many mergers did not have a community dimension by virtue of the two-thirds rule, since many banks still achieve more than two-thirds of their Community-wide turnover within their home state.¹⁷ Where the Commission did have jurisdiction, it was faced with mergers that normally would have required a phase-II inquiry or extensive pre-notification discussions, for which (under the circumstances) there was no time.

Rather than bending its substantive standard of review, the Commission was able to speed up its procedure and give clearances, even where complex remedies were required, in the first phase. In one case of particular urgency, the Commission reportedly granted a derogation from the standstill obligation within 24

the EEA Agreement (COMP/M.3796-*Omya/Huber PCC*) [2007] OJ L72/24.

¹⁵ *Omya AG v Commission of the European Communities* (T-145/06) [2009] E.C.R. II-145.

¹⁶ Decision of 14 May 2009 declaring a concentration to be compatible with the common market (COMP/M.5508-*SoFFin/Hypo Real Estate*).

¹⁷ See, e.g. the mergers *Lloyd/HBOS* or *Commerzbank/Dresdner Bank*.

hours.¹⁸ In none of the cases was it necessary to apply the failing company doctrine, since banking markets are still not very concentrated and tend to run along lines of national borders, making a cross-border takeover such as *BNP Paribas/Fortis* (where France's largest bank acquired the Belgian and Luxembourg subsidiaries of Fortis) in principle unproblematic.¹⁹

Consolidation of established industries—horizontal issues

A number of industries have held up extremely well during the economic crisis and the process of consolidation in these industries has continued; in other industries, the crisis has accelerated the consolidation. Regardless of the reason, such consolidation leads to competition issues of horizontal nature and representative cases are discussed below.²⁰

Pharmaceutical industry

The pharmaceutical industry continues to produce blockbuster mergers at about the same rate as blockbuster drugs are going out of patent protection. Major mergers have happened in this industry which were cleared in phase I without any remedies being required²¹ and no merger has so far been prohibited, since pharmaceutical companies are active in a large

number of relevant markets, of which usually only a very limited number pose problems. In this vein, the US \$68 billion acquisition of Wyeth by Pfizer ultimately raised no issues in the area of human medicines and was cleared in phase I, subject to the divestment of various sorts of animal health vaccines, animal health pharmaceuticals and medicinal feed additives. The transaction, which was announced in January 2009, was notified in May and cleared in July 2009.²²

Similarly, the American pharmaceutical giant Merck, when acquiring Schering-Plough, made its own “fix-it-first” move and divested its participation in a 50/50 joint venture with Sanofi-Aventis in animal health products prior to notifying the larger merger, allowing the Commission to unconditionally approve the transaction in phase I.²³ Sanofi-Aventis and Merck have now notified the reacquisition of the 50 per cent share originally held by Merck—a merger that is expected to be subject to careful scrutiny.

Aviation

During 2008/2009, the Commission reviewed five airline mergers against the background of necessary consolidation in the European air transport industry. Three of these cases concerned acquisitions by the German flag carrier Lufthansa. Of these, the acquisition of BMI (British Midland), where Lufthansa had previously already held a stake, was cleared unconditionally since there were no overlapping routes between the two companies.²⁴

The acquisitions of Brussels Airlines (the successor to the former Belgian flag carrier Sabena)²⁵ and of Austrian Airlines²⁶ both required phase-II inquiries and extensive remedies. The Commission also approved subject to remedies the acquisition by Iberia of the two Spanish local airlines Vueling and Clickair.²⁷ This case was cleared in phase I, following intensive pre-notification discussions.²⁸

18 Decision of 17 December 2008 declaring a concentration to be compatible with the common market (COMP/M.5363-*Santander/Bradford & Bingley Assets*).

19 Decision of 3 December 2008 declaring a concentration to be compatible with the common market (COMP/M.5384-*BNP Paribas/Fortis*). In order to eliminate the Commission's concerns about the merged entity's strong market-position on the market for the issuing of credit cards in Belgium and Luxembourg, BNP offered to divest its own credit-card issuing operation in those countries, thereby eliminating the increase in market share.

20 Another industry that has been largely unaffected by the economic crisis is the energy sector where a process not so much of consolidation but of re-shuffling of large assets, triggered, inter alia, by the Commission's liberalisation of energy markets, continues unabated. See for instance Decision of 31 October 2008 declaring a concentration to be compatible with the common market (COMP/M.5005-*Galp Energie/ExxonMobil Iberia*); Decision of 22 December 2008 declaring a concentration to be compatible with the common market (COMP/M.5224-*EDF/British Energy*); Decision of 22 June 2009 declaring a concentration to be compatible with the common market (COMP/M.5496-*Vattenfall/Nuon*); Decision of 23 June 2009 declaring a concentration to be compatible with the common market (COMP/M.5467-*RWE/Essent*); Decision of 13 October 2009 declaring a concentration to be compatible with the common market (COMP/M.5519-*E.ON/Electrabel Acquired Assets*); Decision of 16 October 2009 declaring a concentration to be compatible with the common market (COMP/M.5512-*Electrabel/E.ON*); Decision of 12 November 2009 declaring a concentration to be compatible with the common market (COMP/M.5549-*E.DF/Segebel*).

21 See, e.g. Decision of 24 May 2006 declaring a concentration to be compatible with the common market (COMP/M.4198-*Bayer/Schering*).

22 Decision of 17 July 2009 declaring a concentration to be compatible with the common market (COMP/M.5476-*Pfizer/Wyeth*).

23 Decision of 22 October 2009 declaring a concentration to be compatible with the common market (COMP/M.5502-*Merck/Schering-Plough*); see also Decision of 19 December 2008 declaring a concentration to be compatible with the common market (COMP/M.5295-*Teva/Barr*) and Decision of 4 February 2009 declaring a concentration to be compatible with the common market (COMP/M.5253-*Sanofi-Aventis/Zentiva*).

24 Decision of 14 May 2009 declaring a concentration to be compatible with the common market (COMP/M.5403-*Lufthansa/BMI*).

25 COMP/M.5335-*Lufthansa/SN Airholding*.

26 COMP/M.5440-*Lufthansa/Austrian Airlines*.

27 Decision of 9 January 2009 declaring a concentration to be compatible with the common market (COMP/M.5364-*Iberia/Vueling/Clickair*).

28 See also the unconditional clearance decision in COMP/M.5141-*KLM/Martinair*; this is one of the few decisions where the Commission came close to applying the failing company defence.

Where the Commission required remedies, the remedies package often went beyond the traditional slot divestitures, which had proved ineffective in the past: slots freed for specific routes at slot-constrained hub airports of the merging parties in order to allow competitors to start a new service were seldom a sufficiently attractive inducement for competitors to enter that market dominated by the merging parties. Other instruments such as frequency freezes or capacity reductions, also employed previously, are essentially anti-competitive in that they reduce output without ensuring the entry or expansion of capacity by competitors.

In recent cases, the Commission therefore has further fine-tuned the slot remedies by giving new entrants grandfather rights on the slots, allowing the new entrant to use the slot for other routes after having used it on the problematic route for a certain number of flight plan periods. In addition, for instance in the *Lufthansa/SN Brussels* clearance, the Commission added behavioural remedies such as participation of a new entrant in Lufthansa's frequent flyer program, code-sharing and preferential pro-rate agreements. Whether the totality of these measures will be sufficient to induce competitors to enter monopoly routes that go into the hubs of the merging airlines remains to be seen.

The Commission recognises that there is a need for further consolidation in the European airline industry, which is the principal reason that it allows these mergers to go forward, even if the remedies package relies on behavioural remedies that would otherwise seem to be unacceptable under the Remedies Notice.²⁹ The Commission is ultimately the prisoner of its own market definition, defining product markets as city pairs, which is correct from a demand-side point of view, but not from the supply-side point of view of a flight planner at an airline.

Co-ordinated effects reinvigorated—Spanish and Portuguese yeast

With the *Airtours* judgment of the CFI in 2002³⁰ appearing to have raised the bar for a finding of collective dominance and with the SIEC-test introduced in 2004 allowing the Commission to intervene in concentrated markets based on unilateral effects without having to show the existence of single or joint dominance, the Commission had for a number of years not decided any case on the basis of co-ordinated effects (collective dominance).

However, shortly following the judgment of the ECJ in *Sony/BMG*,³¹ the Commission intervened on this basis

29 [2008] OJ C267/1.

30 *Airtours Plc v Commission of the European Communities* (T-342/99) [2002] E.C.R. II-2585; [2002] 5 C.M.L.R. 7.

31 *Bertelsmann AG v Independent Music Publishers & Labels Association (Impala)* (C-413/06 P) [2008] E.C.R. I-4951; [2008]

in the case of *ABF/GBI*, where ABF acquired the yeast business in continental Europe of GBI. Yeast, which is mostly sold to bakeries, is not a huge business and the transaction did not meet the turnover thresholds of the ECMR. However, Spain, Portugal and France referred the case to the Commission pursuant to art.22(3) ECMR.³² The Commission found that a merged entity's market share would reach 70–80 per cent on the Portuguese and of 40–50 per cent on the Spanish market for compressed yeast, which at least in the case of Portugal would have allowed for a finding of a single firm dominance and in Spain for a finding of a significant impediment to effective competition.

However, the Commission assessed the market structure as one where co-ordinated effects existed, leading to a finding that the merger, which would reduce the number of players from three to two on these markets, would create or strengthen a position of collective dominance. The transaction was cleared subject to appropriate commitments concerning the Portuguese and Spanish markets.

The most interesting aspect of this case is the question—over which commentators are divided—whether on a given market unilateral effects and co-ordinated effects are mutually exclusive or whether the Commission has the choice of intervening on the basis of unilateral effects even where arguably co-ordinated effects exist.

Mergers in the IT and high-tech industries—horizontal and vertical mix

The high-tech industries produced a considerable number of important merger decisions. These mergers are characterised by a mix of horizontal and vertical or exclusively vertical issues. Many of these cases concerned markets in IT and high-tech industries that had never previously come before the Commission and some represent extremely complex patterns of interaction among market participants.

Oracle/Sun Microsystems

On January 24, 2010, the Commission cleared the proposed acquisition of Sun Microsystems by Oracle without any conditions.³³ Oracle is the world's largest

5 C.M.L.R. 17, overturning *Independent Music Publishers & Labels Association (Impala) v Commission of the European Communities* (T-464/04) [2006] E.C.R. II-2289; [2006] 5 C.M.L.R. 19, discussed further below.

32 COMP/M.4980-*ABF/GBI Business; Bertelsmann v Impala* [2008] E.C.R. I-4951. See also Amelio et al., "ABF/GBI Business: coordinated effects baked again", forthcoming in (2009) 1 *Competition Policy Newsletter*.

33 COMP/M.5529-*Oracle/Sun Microsystems*.

supplier of business software and the world's largest supplier of database software. Sun's product range includes computer systems (hardware), software, storage and services and also the open source database MySQL.

In an extended phase-II inquiry, the Commission's statement of objections identified the open source database MySQL as the remaining issue which might impede the clearance of the transaction, which had been unconditionally cleared in the United States.³⁴ In its defence to the statement of objections and at the oral hearing, Oracle was able to dispel to a large extent the Commission's concerns, which upon further review considered that other open source databases and so-called "forks" (independent branches of the MySQL code base), which are legally possible due to MySQL's open source nature, might also develop in future to exercise a competitive constraint on Oracle.

The Commission also attached significant weight to Oracle's public announcement of December 14, 2009³⁵ pledging to customers, users and developers of MySQL the continued release of future versions of MySQL under the GPL (General Public Licence) open source licence.³⁶ The Commission did not insist that this pledge be cast in the form of a formal remedy, relying instead on Oracle's statement to the public as a fact which was part of the record.

TomTom/Tele Atlas and Nokia/NAVTEQ—duopoly in digital maps

Within a period of a few months and largely in parallel, the Commission analysed the acquisition of the two leaders in digital maps, Tele Atlas and NAVTEQ, by

TomTom³⁷ and Nokia³⁸ respectively. TomTom is the market leader in many national markets for personal navigation devices (PNDs) while Nokia is the leader in mobile telephone sets. Digital maps—for which there are currently no other viable providers than Tele Atlas and NAVTEQ—constitute important input for PNDs and, as regards mobile telephone sets, facilitate the addition of navigation functionalities.

The case allowed the Commission for the first time to apply its Non-Horizontal Guidelines which had been published on the website at the end of 2007³⁹ (they were officially published in the *Official Journal* only at the end of 2008⁴⁰). The principal feature of these Guidelines is the three-step analysis whereby the Commission first analyses whether the merged entity would have the possibility to foreclose competitors from input or output; secondly asks whether there is an economic incentive to engage in such foreclosing practices; and finally, if both questions are answered in the affirmative, analyses the effects of such foreclosure strategies in light of the overall market conditions.

In these two cases, and assuming an ability to foreclose, the Commission found that neither TomTom nor Nokia would have an incentive to foreclose—as under a foreclosure strategy the merged entities would only capture very limited additional sales downstream (of PNDs or mobile telephones) which would not be sufficient to offset the loss of revenue due to the decrease in sales of map databases. As a result, both mergers were cleared without remedies.

Google/DoubleClick

The acquisition of DoubleClick by Google⁴¹ concerned another nascent market where business and technology are evolving at a fast pace, where market definitions are elusive and reliable market share data difficult to obtain, volatile or both. Google primarily offers internet search capabilities for end users which are delivered free of charge (where it enjoys an extremely high share) and it reaps revenues from selling online advertising space on its own websites and on partner websites through its intermediation network "AdSense". DoubleClick

34 Following the issuance of the statement of objections, the US Department of Justice, which had cleared the merger unconditionally, took the unusual step of issuing a press release expressing its surprise and confirming that it had seen absolutely no competitive issues. See http://www.justice.gov/atr/public_press_releases/2009/251782.htm [Accessed March 23, 2010]. This threatened to create a scenario along the lines of the famous *GE/Honeywell* case, where a transaction that had been cleared in the US ultimately was prohibited by the European Union. The international conflict over *GE/Honeywell* between the US and the EU in 2001 was mitigated only by the fact that, at the time of the prohibition (Decision 2004/134 declaring a concentration to be incompatible with the common market and the EEA Agreement (COMP/M.2220-*General Electric/Honeywell*) [2004] OJ L48/1, later confirmed by the CFI in *General Electric Co v Commission of the European Communities* (T-210/01) [2005] E.C.R. II-5575; [2006] 4 C.M.L.R. 15), GE had lost interest in acquiring Honeywell.

35 This public announcement is available on Oracle's homepage at <http://www.oracle.com/us/corporate/press/042364> [Accessed March 23, 2010].

36 See Commission press release of December 14, 2009, "Mergers: Commission welcomes Oracle's MySQL announcement", MEMO/09/551, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/551> [Accessed March 26, 2010].

37 Decision of 14 May 2008 declaring a concentration to be compatible with the common market and the EEA Agreement (COMP/M.4854-*TomTom/Tele Atlas*).

38 COMP/M.4942-*Nokia/NAVTEQ*. For both mergers see Esteva Mosso et al., "Digital maps go vertical: TomTom/Tele Atlas and Nokia/NAVTEQ" (2008) 3 *Competition Policy Newsletter* 70.

39 For a summary, see Weitbrecht, [2008] E.C.L.R. 341, 345.

40 Non-Horizontal Guidelines [2008] OJ C265/6.

41 Decision of 11 March 2008 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (COMP/M.4731-*Google/DoubleClick*). See also Brockhoff et al., "Google/DoubleClick: The first test for the Commission's non horizontal merger guidelines" (2008) 2 *Competition Policy Newsletter* 53.

develops and sells ad serving, management and reporting software to publishers of websites and advertisers and agencies.

Without needing to define markets in detail, the Commission found that as far as horizontal elements are concerned, Google and DoubleClick were not exerting significant competitive constraints on each other and therefore could not be regarded as actual competitors.

The vast majority of the Commission's decision is devoted to non-horizontal relationships and refuting the various theories of harm brought before the Commission by third parties during the market investigation. The Commission examined in detail foreclosure effects based on DoubleClick's market position in ad serving, foreclosure effects based on Google's market position in the provision of search advertising space and ad intermediation services and foreclosure effects based on the combination of Google's and DoubleClick's assets. However, the Commission concluded in each case that concerns were largely speculative and that the presence of competitors in the relevant or adjacent markets, combined with the financial resources of such competitors as Yahoo, Microsoft, AOL/Time Warner, Axel Springer and WPP (the ad agency) were sufficient to ensure competition in all of these markets in the future.

Thomson/Reuters

On February 18, 2008, the Commission cleared the proposed acquisition of Reuters by Thomson, subject to complicated and innovative conditions and obligations.⁴² Both Thomson and Reuters are leading providers of financial information which source, aggregate and disseminate both historical and real-time market data and other types of financial information. Customers are companies and individuals active in the financial services industry, such as traders, financial analysts, fund managers and banks. Thomson is also active in legal, fiscal, accounting and scientific research, whereas Reuters is best known as one of the largest international news agencies.⁴³

The Commission's market investigation showed that competition concerns would be limited to the supply of and access to certain types of financial information, in particular broker reports, earning estimates and fundamental financial data of enterprises. In the view of the Commission, the proposed transaction would have eliminated the rivalry between the two closest competitors for the supply of such products, leaving customers with reduced choice and a severe risk

of discontinuation of overlapping products and of increasing prices.

It was not feasible to divest distinct business units that produce these databases since the same business units produce a number of other databases where no competition concerns existed. In this situation, the Commission agreed that the merging parties would divest databases containing the content sets of such financial information products, together with the relevant assets, personnel and customer base as appropriate, which would allow third party purchasers of such assets to quickly establish a credible competitive force in the marketplace and to compete with the merged entity.

Revised Remedies Notice

Following several years of extensive work, the Commission, on October 22, 2008, adopted a new Notice on Remedies⁴⁴ together with an Amendment to the Implementing Regulation.⁴⁵ The new Notice, which replaces the Remedies Notice of 2001, is not only a codification of the Commission practice as it has evolved since 2001, but also introduces, via the amendment to the Implementing Regulation, a new form RS which parties must fill out when submitting remedies.

As a substantive matter, the new Notice seeks to describe more precisely the requirements for the sufficient scope of the divestiture and for the suitability of purchasers. The new Notice also identifies situations where fix-it-first solutions or at least upfront buyers are required. Finally, the Remedies Notice stresses again that non-divestiture remedies are only acceptable where they are equivalent in their effect to a divestiture; commitments to provide access to infrastructure will only be acceptable if there is a sufficient likelihood that they will actually be used by competitors in practice. Difficulties in monitoring and risks of effectiveness of remedies may lead to a rejection of non-divestiture remedies.

Overall, when looking at some of the more innovative remedies the Commission has accepted over the past few years and continues to accept, there appears to be a trend that the tough language of the Remedies Notice is, in individual cases, tempered by reasonableness and the willingness to avoid prohibition decisions by accepting innovative remedies, where no other solution exists. While the Commission's flexibility is to be welcomed as far as the individual case goes, the sheer extent of

42 COMP/M.4726-*Thomson Corp/Reuters Group*. See also Baccaro, "The Thomson/Reuters merger investigation: a search for the relevant markets in the world of financial data" (2008) 2 *Competition Policy Newsletter* 61. This journal is also published by Thomson Reuters.

43 These areas, however, did not raise any competition concerns.

44 Notice on remedies acceptable under the Regulation 139/2004 and under Regulation 802/2004 (the "Merger Implementation Regulation") [2008] OJ C267/1.

45 Regulation 1033/2008 amending Regulation 802/2004 implementing Regulation 139/2004 on the control of concentrations between undertakings [2008] OJ L279/3.

the Commission's discretion involved in making these decisions is definitely problematic from the point of view of legal certainty.

Judicial review

The years 2008 and 2009 produced four judgments by the Community courts in the area of merger control, two of which relate to the compensation that the Community owes to companies whose merger has been unlawfully prohibited by the Commission. A third judgment relates to the Commission's power to issue stop-the-clock decisions pursuant to art.11(3) ECMR⁴⁶; this case has been discussed in the section dealing with procedure. By far the most important ruling is the judgment by the ECJ in *Sony/BMG*:

Sony/BMG

On July 10, 2008, the Court of Justice reversed the controversial CFI ruling of 2006 which had annulled the Commission's Clearance Decision concerning the joint venture between the recorded music divisions of Sony and Bertelsmann. The CFI judgment annulling the Commission's decision had been based on a number of procedural and substantive grounds.⁴⁷

The judgment provides a number of clarifications concerning procedure and substance. First, it makes clear that the Commission carries the same burden of proof whether it arrives at a clearance or a prohibition decision. This argument is based on the symmetry of paras 2 and 3 of art.2 ECMR and as such the outcome appears quite compelling.

Secondly, the judgment makes clear that the Commission, in a phase-II proceeding and after a statement of objections, is not bound by the provisional findings made in the statement of objections and is permitted to reach a different conclusion than in the statement of objections based upon new evidence and/or arguments put forward by the merging parties.

Thirdly, and most importantly, the judgment clarifies the standard for collective dominance, which also had been cast into doubt by the judgment of the CFI. In essence, the ECJ reaffirms the standard enunciated by the CFI in *Airtours*: (i) market conditions must be sufficiently transparent and products sufficiently homogenous in the market in order to allow each member of the oligopoly to monitor each other's behaviour; (ii) there must be a credible retaliation mechanism, based upon quick detection of deviations from the tacitly collusive policy and leading to such

deviations being punished, to the detriment of all members of the oligopoly; and (iii) market participants outside the oligopoly must not be able to seriously jeopardise the market position of those that tacitly collude.

Compensation for damages suffered as a result of unlawful prohibition decisions?

When the Commission issues a prohibition decision which later is annulled by the courts, it is clear that there was an unlawful act of an EU organ—possibly triggering the European Union's non-contractual, i.e. tortious liability pursuant to art.340 TFEU. Accordingly, two of the three prohibition decisions that were annulled by the CFI in 2002 have led to litigation over the issue whether the European Union owes the company any damages.⁴⁸

In September 2008, the CFI dismissed the claim by MyTravel for damages resulting from the Commission's 1999 decision prohibiting the merger between Airtours (since renamed MyTravel) and FirstChoice.⁴⁹ In its judgment, the CFI confirmed that the mere annulment of a Commission decision prohibiting a merger is not, without more, sufficient to trigger the non-contractual liability of the European Union. Rather, the unlawful act must rise to the level of a "sufficiently serious breach of a rule of law intended to confer rights on individuals".⁵⁰

In particular, the CFI stressed that—despite the fact that the original CFI judgment had found manifest and grave defects with respect to the Commission's economic analysis—the application of competition law involves complex and difficult assessments, notably in the field of merger control, which are made even more difficult by the time constraints under which the Commission operates and the prospective nature of the Commission's analysis. The CFI took also account of the discretion enjoyed by the Commission in making such assessments. As a result, the CFI concluded that the errors of assessment established by the CFI in its 2002 judgment, while sufficient to annul the Commission decision, were not of such magnitude as to give rise to the non-contractual liability of the Community.

In *Schneider v Commission*, the Commission had appealed against the judgment from the CFI that had awarded to Schneider considerable damages as a result of the Commission's unlawful prohibition of its merger with Legrand. While confirming the principle that the European Union is required to compensate victims of unlawful acts, the ECJ held that the CFI misapplied the law as there was no sufficient causal connection between

46 *Omya v Commission* [2009] E.C.R. II-145.

47 *Bertelsmann v Impala* [2008] E.C.R. I-4951, overturning *Impala v Commission* [2006] E.C.R. II-2289.

48 The third merger thus affected, *Tetra Laval/Sidel*, was cleared by the Commission upon remand and subsequently implemented.

49 *MyTravel Group Plc v Commission of the European Communities* (T-212/03) [2008] E.C.R. II-2027; [2008] 3 C.M.L.R. 49.

50 *MyTravel v Commission* [2008] E.C.R. II-2027 at [37].

the damages suffered (and to be compensated according to the CFI) and the unlawful act: the losses resulting from the reduced purchase price that Schneider received at the fire sale of Legrand during the second Commission investigation were not caused by the Commission's disregard for the rights of defence and the illegality of the prohibition decision; rather this financial loss resulted from Schneider's decision not to wait until the Commission had completed its second investigation of the merger following the CFI judgment before disposing of its shares in Legrand. As a result, the Commission needs to reimburse Schneider only for the costs of taking part in the resumed merger investigation.⁵¹

Over the past couple of years, the issue of compensation for companies whose merger had been unlawfully prohibited has received an amount of attention that is disproportionate to the practical relevance of the problem. And indeed the two judgments make it amply clear that the European Union's non-contractual liability is extremely limited: There are many problems for the parties claiming damages in this situation, including the fact that not every misapplication of the law constitutes a sufficiently serious breach to give a right to damages. The most fundamental problem, however, lies in the fact that a judgment from the CFI (or even the ECJ) annulling a prohibition decision does not allow the conclusion that the merger should have been cleared; instead the case goes back to the Commission for a fresh assessment. Therefore, companies whose merger has been unlawfully prohibited cannot simply be made whole on the basis that with a lawful Commission decision the merger would have been cleared and completed.

Emerging trends and outlook for 2010/2011

In conclusion, one may note the following emerging trends and outlook for the future:

Clearing complex cases in phase I

The tendency to deal with complex cases in the first phase, which has been apparent for some time, seems to have become even more prevalent in 2008/2009. Where the timetable for the transaction allows for this and where there is sufficient transparency of the market either based on preceding Commission decisions or based on market surveys such as exist for retail consumer goods and pharmaceuticals, the Commission's investigation can go a long way before the notification has officially been filed.⁵²

⁵¹ *Commission of the European Communities v Schneider Electric SA* (C-440/07 P) [2009] 5 C.M.L.R. 16.

⁵² See COMP/M.5476-Pfizer/Wyeth, see fn.22, which was cleared in phase I with a 170-page decision, including commitments.

This trend is likely to stay: it is usually preferable to deal with the Commission in the pre-notification phase rather than in a second phase when, by definition, the Commission will already have identified serious doubts about the transaction. In fact, some Commission case teams will more or less insist that the official notification not be filed before they see a clear path to clearance, subject only to what the market test may bring.

Expansion of the Commission's margin of discretion

A number of developments seem to work in the direction of the Commission rather systematically expanding the area in which it enjoys a considerable margin discretion and where its actions will only to a very limited extent be subject to review by the European courts: the increasing use of econometric models and economic analysis makes it extremely difficult for the courts to decide between two competing economic studies and experts. Similarly, the Commission's treatment of remedies, which usually is based on an evaluation of the results of a market test of the remedies, will be very difficult to challenge successfully in Luxembourg. Finally, in such cases as the €20 million fine against Electrabel, there are simply no guidelines on record on the basis of which to evaluate the legality of the fine, unless the Community courts are willing to develop their own guidelines which so far they have refused to do. This troubling trend is obviously something that one will need to keep an eye on in future.

Harmonisation of standards of merger review in the European Union

The new Competition Commissioner Almunia, in his first policy statement, has voiced sympathy for a deepening of the exchange between the Commission and national competition authorities; not only with respect to the exchange of know-how, but also with respect to the coherence and convergence of legal standards of merger control. In the Commissioner's view, such harmonisation would contribute to the elimination of obstacles that still exist in the internal market.⁵³

Two solutions appear possible here: one in parallel to the one that was chosen in Regulation 1/2003 [2003] OJ L1/1, where by virtue of a Community instrument national competition authorities apply European law; the other one involves national law being harmonised by Member States themselves and brought in line with EU standards. It will be interesting to watch over the coming years which of these two solutions will ultimately prevail.

⁵³ Speech given by Commissioner Almunia on February 15, 2010 in Paris, original French, reproduced on the Commission's website.