



# Competition *merger brief*

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# Competition *merger brief*

## ***S&P Global/IHS Markit – A benchmark in preserving fair data markets***

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### Introduction

On 22 October 2021, the Commission cleared the USD 44 billion acquisition of IHS Markit (“IHSM”, UK) by S&P Global (“S&P”, US) (the “Transaction”), subject to an extensive remedy package. Both S&P and IHSM (“the Parties”) were major providers of data and analytics to global financial markets, industries and governments.

The Parties *inter alia* operated two of the four main price reporting agencies (“PRAs”), which provide data on prices in physical and derivative commodity markets. In anticipation of possible competition concerns, and in the context of parallel reviews in other jurisdictions, the Parties publicly announced their intention to divest IHSM’s PRA already before notification. Ultimately, the Commission identified preliminary competition concerns in the market for price assessments, which were addressed by the divestment.

While the remainder of the Parties’ broad portfolios were largely complementary, the transaction gave rise to a large number of horizontally and non-horizontally affected markets related to financial data and services. Many of the overlaps involved critical data and infrastructure, and thus required a thorough assessment. The Commission’s investigation revealed further potential horizontal and vertical competition concerns in the markets for the supply of loan identifiers, leveraged loan market intelligence and leveraged loan indices, in addition to those in price assessments. To address these concerns, the Parties offered additional divestments of S&P’s businesses.

The clear-cut divestment package, which removed the relevant overlaps, led the Commission to clear the case conditionally in Phase I.

### Commodity price assessments

The Parties both operated price reporting agencies (“PRAs”). PRAs provide data on prices in physical and derivative commodity markets, which are in turn used in physical contracts and financial trades. These prices may become the market standard for a specific commodity, and thus qualify as benchmarks, such

as the Brent benchmark for crude oil. PRAs therefore play an important role in ensuring efficient and transparent trading in commodity markets.

S&P, via S&P Platts, and IHSM, via OPIS, PCW and CMM, were two of the main providers of price assessments globally in a number of commodity markets (including oil, coal, biofuels and petrochemicals). S&P was a clear leader in such markets, with IHSM normally being the third largest player, depending on the exact relevant market. The other two main PRAs were Argus and ICIS. The consolidation in these markets is in part due to their specific characteristics whereby price assessments are embedded into a large number of long-term contracts, leading to extremely high switching costs and barriers to entry. The Commission was therefore concerned that the Transaction would harm competition in these already concentrated markets.

To address these concerns, the Parties offered to divest IHSM’s OPIS (including PCW and CMM), which fully removed the problematic overlap.

The Parties signed a share purchase agreement with News Corp, a US media and publishing company, with respect to the OPIS divestment business already prior to the notification of the Transaction to the Commission. Nevertheless, the Commission’s market test and the commitments did not exclude the possibility of other purchasers. Ultimately, News Corp was found to be suitable purchaser meeting all the purchaser criteria, which on top of the standard criteria, required the purchaser to not be a financial investor, having global presence and no material

### In a nutshell

The USD 44 billion acquisition of IHSM by S&P was conditionally cleared in Phase I, subject to a remedy package across multiple markets.

While the Parties’ portfolios were largely complementary, they gave rise to overlaps in the areas of commodity and financial data. The Commission’s investigation revealed both horizontal and vertical competition issues in a number of markets. To address these, the Parties offered extensive and clear-cut divestment packages, leading to a conditional clearance decision in Phase I.

All divested businesses were ultimately acquired by strong industrial purchasers, preserving competition for

exposure to the price of underlying commodities to safeguard the divestment business' independence.

Throughout the process, the Commission cooperated closely with its counterparts in the US (DoJ) and the UK (CMA), which were reviewing the Transaction in parallel. Both the DoJ and the CMA also raised concerns in the area of commodity price assessments and ultimately approved News Corp as a suitable purchaser of the price assessment divestment.

## Loan identifiers

### The horizontal overlap

Both Parties provided loan identifiers. These are unique identifiers assigned to loans, and provide a globally standardised way for identifying loans used for the purposes of financial transactions but also analytics (e.g. market intelligence). S&P operated CUSIPs, key identifiers covering all security types, including loans ("Loan CUSIPs").<sup>1</sup> IHSM, on the other hand, operates the market-leading loan identifier LXID to track individual loans in their loan pricing and reference data products.

The Parties argued that Loan CUSIPs and LXIDs are highly differentiated products. Mainly, they are created and updated at different stages of a loan's lifecycle, and Loan CUSIPs are created on a request by a borrower or a bank, while LXIDs are only created for loans included in IHSM's loan pricing and reference data. In spite of this commercial link between LXIDs and the remainder of IHSM's loan data offering, the Commission considered LXIDs as a standalone identifier, based on usage patterns and market feedback, in competition with Loan CUSIPs.

The Commission found that LXIDs were the clear market leader and likely the dominant loan identifier, while Loan CUSIPs were the number two in this market. Despite the differences outlined above, the Commission found that the two identifiers were substitutes at least for a number of specific use cases, and that Loan CUSIPs were the closest alternative to LXIDs, and its main challenger. At the same time, none of the competing identifiers (from e.g. Bloomberg or Refinitiv) seemed to have posed any meaningful constraint on the Parties, in particular due to a lower loan coverage. In addition, as is the case for all security identifiers, these markets are prone to network effects, high switching costs and high barriers to entry, since the products are meant to be a standard way of identifying specific assets. The Commission therefore had serious doubts about the impact of the Transaction on competition in the market for loan identifiers.

### The CUSIP Commitment

To address the concern, the Parties initially offered to divest Loan CUSIPs, by way of a carve-out from S&P's CUSIP business. The initial commitment was market tested. However, the results of the market test showed that Loan CUSIPs were not considered to

be a viable and competitive business on a standalone basis, in particular due to the small size of the Loan CUSIP business, and their link with and dependence on the overall CUSIP business.

As a result of the negative market feedback, the Parties offered a significantly broader divestment of the overall CUSIP business to address the viability concerns of the Loan CUSIP carve-out identified in the market test. The standalone nature of the CUSIP business allowed the Commission to conclude that the broader commitment did not suffer from any of the issues identified during the market test of the Loan CUSIP carve-out.

As S&P operated the CUSIP business under the license of the American Bankers Association ("ABA") and required an agreement with the Loan Syndication and Trading Association ("LSTA"), the purchaser criteria included a condition that both ABA and LSTA shall have consented to the transfer of the CUSIP business to the purchaser. Ultimately, the CUSIP business was acquired by FactSet, a US financial data and software company, which the Commission found to have met all the necessary purchaser criteria.

## Leveraged loan market intelligence and leveraged loan indices

### LXIDs as an input into loan market intelligence

The Commission found that the above-mentioned LXIDs (sold together with IHSM's loan pricing and reference data) were an important input into leveraged loan market intelligence products, of which S&P was the market leader with its Loan Commentary and Data (LCD) product. The Commission identified vertical competition concerns, as it found that the Parties would have the ability and incentive to foreclose LCD's competitors, which would likely increase prices for end-customers and reduce choice and innovation.

### Leveraged loan indices

The Parties were also both active in the provision of financial indices, where their portfolios were largely complementary with S&P focusing on equity indices and IHSM on fixed income indices.

However, based on precedents and market feedback, the Commission found that there are numerous plausible segmentations of the market for financial indices. The Commission's investigation found that leveraged loan indices were a plausible product market, as fixed income indices could be distinguished by investors based on the underlying instrument type (leveraged loans, bonds or credit default swaps for instance). In leveraged loan indices, a small sub-category of fixed income indices, the Parties were the only two players. Out-of-market players were found to be insufficient to constrain the Parties in this market. In particular, companies trading leveraged loans over the counter were found not to exert a strong constraint on the Parties. IHSM is the market leader for loan pricing data which is relevant for the trading of leveraged loans that these other players also rely on. The Commission therefore

<sup>1</sup> S&P also offered LCD IDs, but these were found to be only a distant competitor to LXIDs.

found that the Transaction would create a monopoly in the market for leveraged loan indices, which would be further strengthened by IHSM being a supplier of an essential input (loan pricing data). Therefore, despite leveraged loan indices being a relatively niche category of overall financial indices, the Commission identified horizontal concerns in this market.

### The LCD Commitment

Given that S&P offered their leveraged loan indices as part of their LCD product, the Parties offered to divest S&P's LCD business including its leveraged loan index in order to address the two separate concerns outlined above. This divestiture was a clear-cut way to remove both the horizontal overlap (by removing the increment in leveraged loan indices) and the vertical relationship (by removing the merged entity's activity in loan market intelligence), and therefore addressed the Commission's preliminary concerns.

Like for the CUSIP Commitment, the purchaser criteria included the consent of the LSTA as well as other technical capabilities. Ultimately, the Commission approved Morningstar as a purchaser of the LCD business.

### Conclusion

S&P and IHSM were global leaders in commodity and financial data markets. While the large majority of their portfolios were complementary, the Commission assessed carefully a large number of markets where the Transaction could have limited customers' access to competitive and reliable data.

The remedy package consisted exclusively of structural remedies, namely divestments. The divestments were used to address both horizontal and non-horizontal concerns (e.g. LXIDs as an input into loan market intelligence), and were in some markets much larger than the overlap (e.g. all CUSIPs to address the issues in loan identifiers). The remedies ensured that competition in those markets was preserved, which is in turn essential to ensure transparency (and therefore the fairness) of physical commodity trades and all trades carried over financial markets.

# Competition *merger brief*

## *Veolia/Suez – No wasted effort*

*Daniel Coublucq, David Dubois, Simon Genevaz, Pierre Pêcheux, Camille Vardon*

### Introduction

On 14 December 2021, the Commission approved the acquisition by Veolia Environnement S.A. (“Veolia” or the “Notifying Party”, France) of Suez S.A. (“Suez”, France)<sup>1</sup> subject to substantial remedies (the “Transaction”).<sup>2</sup> The combination of Veolia and Suez creates a world leading provider of waste and water management services to local authorities and businesses. By this decision, the Commission ensured that this acquisition would not adversely affect competition in water and waste management services, sectors crucial to the European Green Deal and the circular economy.

The acquisition of Suez by Veolia was staggered over time. As a first step, Veolia acquired a minority non-controlling share of 29.9% in Suez. As a second step, Veolia launched a hostile takeover bid for the remaining shares of Suez. Following a thorough analysis of the facts of the case, the Commission considered that the Transaction (i.e. the first and second steps) formed a single concentration that could benefit from the derogation to the standstill obligation provided for by Article 7(2) of the EU Merger Regulation.<sup>3</sup>

From a substantive standpoint, the merger combined worldwide players that operate assets across the whole water treatment and waste and water management value chains. The Transaction involved hundreds of markets, most located in France. Many of these markets resulted in significant overlaps, which made it clear at very early stages of the review that competition concerns were likely. As Veolia submitted comprehensive and clear-cut remedy packages to resolve these concerns on all problematic markets in a timely fashion, the Transaction was conditionally cleared in Phase 1.

<sup>1</sup> Veolia and Suez are hereinafter referred to as the “Parties”.

<sup>2</sup> M.9969 – Veolia/Suez, decision dated 14 December 2021,

<sup>3</sup> M.9969 – Veolia/Suez (rejection of a request to act), decision dated 17 December 2020. The Commission’s decision was challenged by Suez on 25 February 2021. However, following the announcement, on 14 May 2021, that Veolia and Suez had reached an agreement, the case was removed from the General Court’s register.

This Brief analyses the Commission’s approach to the substantive issues raised by the Transaction and the remedies ultimately adopted. It also covers the specific issue raised by the Transaction’s staggered structure and the applicability of the automatic derogation to the standstill obligation provided for by the EU Merger Regulation.

### On the scope of the Article 7(2) derogation

On 30 August 2020, Veolia announced its intention to acquire control of Suez through an operation that would consist of two phases. Setting into motion the first phase, on 30 August 2020 Veolia offered to acquire a 29.9% non-controlling stake in Suez. On the same day, Veolia announced the second phase, indicating its intention to file a voluntary public bid for the remaining shares in Suez. Through these two phases, Veolia would acquire more than 50% of the shares in Suez and as such would take sole control of Suez.

On 16 October 2020, Suez formally invited the Commission, under Article 265 TFEU, to declare that, by implementing the first phase of its takeover without obtaining the Commission’s prior clearance, Veolia infringed the standstill obligation under Article

### In a nutshell

Following a constructive period of pre-notification, the Commission approved, in Phase I, the acquisition of Suez by Veolia, bringing together two leading French waste and water-management firms.

The transaction involved dozens of affected markets, and would have resulted in a near monopoly in France in the absence of remedies. It could only be approved in Phase I thanks to a very comprehensive set of commitments by Veolia, who agreed to divest almost the entirety of the overlap in France, where the companies are historical competitors.

The transaction was also notable because of the adversarial circumstances in which it took place, and of the multiple derogation requests made by Veolia (and resisted by Suez) as it proceeded with its hostile takeover.

7(1) of the EU Merger Regulation.<sup>4</sup> By a decision of 17 December 2020, the Commission rejected Suez's request to act.<sup>5</sup>

First, the Commission concluded that the first step (i.e., the acquisition of a 29.9% non-controlling stake in Suez) and the second step (i.e., the launch of a public bid for the acquisition of the remaining shares of Suez) of the Transaction constituted a single concentration within the meaning of Article 3 of the EU Merger Regulation. The Commission considered that the first and second steps were interdependent, as they had been simultaneously designed and planned by Veolia to reach the same economic goal: the acquisition of control over Suez. The Commission's assessment was based on Veolia's public declarations and internal documents indicating that it would not have sought to first acquire a non-controlling minority stake in Suez if it did not intend to acquire control over the company, thus making the initial acquisition of the minority stake a key means to achieve the takeover. Therefore, the Commission concluded that it would be artificial to consider that the acquisition of the minority stake was economically autonomous.

Second, the Commission concluded that, since the two steps of the Transaction constituted a single concentration, the derogation from the standstill obligation provided for by Article 7(2) of the EU Merger Regulation<sup>6</sup> covered the entire Transaction. The Commission considered that Article 7(2) derogations are applicable to hybrid situations where control is acquired through the combination of a transaction in securities and a public bid, as long as they constitute a single concentration.<sup>7</sup> Indeed, the

Commission considered that if two transactions constitute a single concentration, it cannot exclude the acquisition constituting the first stage of that single concentration from the scope of Article 7(2) derogations. It follows that all transactions contributing to an acquisition of control and forming part of a single concentration should be subject to the same legal regime.<sup>8</sup>

## On the competitive assessment

The Commission found that the Transaction resulted in significant overlaps between Veolia and Suez in France, where the Parties were already pre-Transaction the number 1 and number 2 players for the provision of waste and water management services.<sup>9</sup>

For most affected markets where the Commission raised serious doubts, the Transaction resulted in the creation or strengthening of a dominant position. In its assessment, the Commission considered the already large market shares of Veolia pre-transaction, the significant increment brought about by Suez, the increased concentration level resulting from the combination of the Parties' activities, the Parties' close competitive relationship and the lack of a sufficient competitive constraint from competitors. The Commission also took into account the existence of high barriers to entry and the lack of sufficient countervailing power from customers. The Commission's assessment was confirmed by overwhelmingly negative feedback and supporting data received from both customers and competitors during the market investigation.

Thus, the Commission pursued a rather classic dominance case and relied on a series of consistent structural factors pointing to highly concentrated markets, and the unlikelihood that actual or potential competitors would contest the merged entity's position. Notable aspects of the Commission's assessment include the use of bidding data, its approach to defining catchment areas, as well as the impact of customers' ability to internalize their demand on the competitive assessment.

### **The use of bidding data in the presence of high market shares**

In the presence of bidding markets, the analysis of companies' tender data can play a central role in showing the existence<sup>10</sup> or lack<sup>11</sup> of competition concerns.

<sup>4</sup> Pursuant to Article 7(1) of the EU Merger Regulation, "[a] concentration with a Community dimension as defined in Article 1, or which is to be examined by the Commission pursuant to Article 4(5), shall not be implemented either before its notification or until it has been declared compatible with the common market pursuant to a decision under Articles 6(1)(b), 8(1) or 8(2), or on the basis of a presumption according to Article 10(6)".

<sup>5</sup> Case M.9969 – Veolia/Suez (rejection of a request to act), decision dated 17 December 2020. The Commission's decision was challenged by Suez on 25 February 2021. However, following the announcement, on 14 May 2021, that Veolia and Suez had reached an agreement, the case was removed from the General Court's register.

<sup>6</sup> Article 7(2) of the EU Merger Regulation establishes that the standstill obligation provided for by Article 7(1) "shall not prevent the implementation of a public bid or of a series of transactions in securities including those convertible into other securities admitted to trading on a market such as a stock exchange, by which control within the meaning of Article 3 is acquired from various sellers, provided that:

(a) the concentration is notified to the Commission pursuant to Article 4 without delay; and

(b) the acquirer does not exercise the voting rights attached to the securities in question or does so only to maintain the full value of its investments based on a derogation granted by the Commission under paragraph 3".

<sup>7</sup> This interpretation is in line with the principles established by the EU case law. In *Marine Harvest*, the General Court clarified "that it is possible that the acquisition of a minority stake which does not confer control of the target undertaking, followed by a public bid, may form part of a single concentration which falls within the scope of Article 7(2) of Regulation No 139/2004". Judgment of 26 October 2017 in *Marine Harvest v Commission*, T-704/14, EU:T:2017:753, paragraph 191.

<sup>8</sup> Provided that the first transaction does not confer upon the acquirer any control over the target. In the *Marine Harvest* ruling (T-704/14, *Marine Harvest v Commission*), the General Court examined a situation in which a buyer first acquired a controlling stake in the target through a single transaction, and subsequently acquired the remaining shares through a public bid. The General Court considered that *Marine Harvest* had broken the standstill obligation after having acquired a controlling stake of 48.5% in the target through the first transaction, prior any clearance decision from the Commission.

<sup>9</sup> The Transaction also gave rise to horizontally affected market in Belgium, Czechia, Germany, Poland and Spain.

<sup>10</sup> See for instance Case M.9779 – Alstom/Bombardier, decision dated 31 July 2020.

In Veolia/Suez, most of the waste and water management services concerned by the Commission's competitive assessment were procured by both local authorities and businesses through tender procedures. Thus, the Commission conducted a series of statistical analyses based on bidding data to assess the intensity of competition between the Parties and the extent of the potential unilateral effects resulting from the Transaction. The Commission carried out its analyses of the bidding data both in number of tenders and in terms of the values of tenders, and eventually relied mainly on the analyses by value, more representative of the Parties' situation.<sup>12</sup>

*First*, the Commission analysed the average number of participants in each tender pre- and post-Transaction. This analysis indicated that the market structure was already concentrated pre-Transaction with only a limited number of participants in the vast majority of tenders. The Transaction would therefore only increase the level of market concentration, leaving only little choice of alternative suppliers to customers.<sup>13</sup>

In the absence of reliable market share data,<sup>14</sup> such analysis played a critical role in assessing the Parties' position on the market for the provision of mobile water services in the EEA. While the Parties argued that they held a limited position on this market in the EEA, with a low combined market share (<20%), the investigation revealed that the Parties were considered as significant players by most of their customers and competitors, facing only a limited number of credible competitors. In order to shed some light on the competitive landscape, the Commission notably relied on the Parties' tender data which showed the market for the provision of mobile water services in the EEA to be highly concentrated, with a rather limited number of operators participating in the same tenders as the Parties.<sup>15</sup>

*Second*, the Commission analysed the bidding data to determine the closeness of competition between the Parties and identify the other potential competitive constraints. More specifically, the Commission analysed how often the Parties participated against each other in tenders, relative to other suppliers (i.e., conditional participation analysis) and how often the Parties lost to each other, also relative to other bidders (i.e., conditional loss analysis). These analyses indicated that the Parties were close competitors,

often bidding against one another, and losing a high proportion of tenders to the other Party's benefit,<sup>16</sup>

*Third*, the Commission analysed the Parties' respective contract renewal rates. Indeed, while a low renewal rate indicates that customers can easily switch suppliers and is a sign of a dynamic competitive landscape, a high renewal rate is consistent with a certain inertia in the market and a limited possibility for customers to switch suppliers. A high renewal rate is thus consistent with the existence of important switching costs and high barriers to entry. Here, the Commission's analysis showed several markets to have very high renewal rates, with for instance renewal rates going up to 90-100% for Veolia and 80-90% for Suez on the markets for the provision of water management services in France.

The quantitative evidence therefore indicated that the Transaction would have led to a significant loss of competition in multiple waste and water managements markets.

By contrast, the bidding analyses carried out by the Commission on the basis of the Parties' data played a critical role in dispelling the Commission's competition concerns in some other affected markets (e.g., markets for the provision of water management services in Czechia and in Spain, the market for the incineration of hazardous waste in Spain or the market for the supply of chemical treatment of hazardous waste in Belgium). For these markets, the analysis of tender data showed that the Parties were not particularly close competitors and importantly that several credible alternatives would constrain the merged entity post-Transaction.

#### ***The approach taken when defining catchment areas***

In markets where demand is highly localised, the Commission will generally resort to defining the relevant geographic market according to catchment areas around either a customer or a supplier. This will typically be the case where a product can only be transported over short distances because of logistics and regulatory issues or because transport costs are high.

In this case, the Commission considered that the geographic scope of the markets for the treatment of hazardous waste should be based on catchments areas. This marked a departure from the Commission's previous practice which had considered these markets likely to be EU-wide due to significant cross-border flows and low regulatory barriers.<sup>17</sup> In this case, the Commission's investigation showed that the market conditions had significantly evolved and that the vast majority of hazardous waste produced in Europe was now treated within its country of

<sup>11</sup> See for instance Case M.7429 – Siemens/Dresser-Rand, decision dated 29 June 2015.

<sup>12</sup> See also case M.9829 – Aon/Willis Towers Watson, decision dated 9 July 2021 and case M.8677 –Siemens/Alstom, decision dated 6 February 2019.

<sup>13</sup> For example, post-Transaction, [70-80]% of the tenders would have been characterised by a monopoly or a duopoly in the market for the provision of water management services to local authorities in France.

<sup>14</sup> M.9969 – Veolia/Suez, decision dated 14 December 2021, recitals 345-346.

<sup>15</sup> As part of its assessment, the Commission relied on a strong body of evidence, both of qualitative (e.g. internal documents, results of the market investigation) and quantitative (e.g. tender data, partial market reconstruction collected from the main third parties) nature.

<sup>16</sup> The Commission noted as well that participation rate and loss rates between the Parties were higher in value, which indicates that the Parties were even closer competitors for high value tenders.

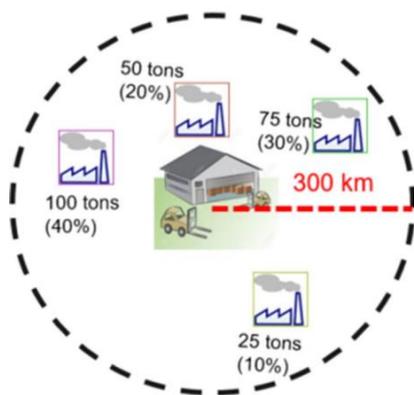
<sup>17</sup> Case M.295 – SITA-RPC/SCORI, decision dated 19 March 1993, recital 19 and case M.4576 – AVR/Van Gansewinkel, decision dated 3 April 2007, recital 18.

origin.<sup>18</sup> This change was notably due to European and national regulations which actively encourage waste to be treated as close as possible to where it is produced<sup>19</sup> and customers' preferences (customers indicated that treating waste over the shortest possible distance was very important, in order to limit both transport costs and carbon emissions<sup>20</sup>).

The Commission concluded that for the treatment of hazardous waste, the relevant geographic scope was a catchment area around each landfill or incinerator of the merging parties. In order to carry out this supplier-centric analysis, the Commission analysed data on the volumes of dangerous waste that were collected by each site of the merging Parties and their main competitors and calculated the distance travelled by 70, 80 and 90% of the waste to reach the treatment site.

This led to the Commission to define catchment areas of 300 km radius for both the landfilling and the incineration of hazardous waste. In practice, a circle of 300 km radius was drawn around each site of Parties, and market shares were calculated by taking into consideration the total volume that was treated by each site included in the catchment area (see Figure 1 below). Since data on the total volume that is treated by a site was generally available for both the Parties and their competitors, the site-centric approach was relatively straightforward to implement.

**Figure 1: illustration of market shares by site-centric catchment areas**

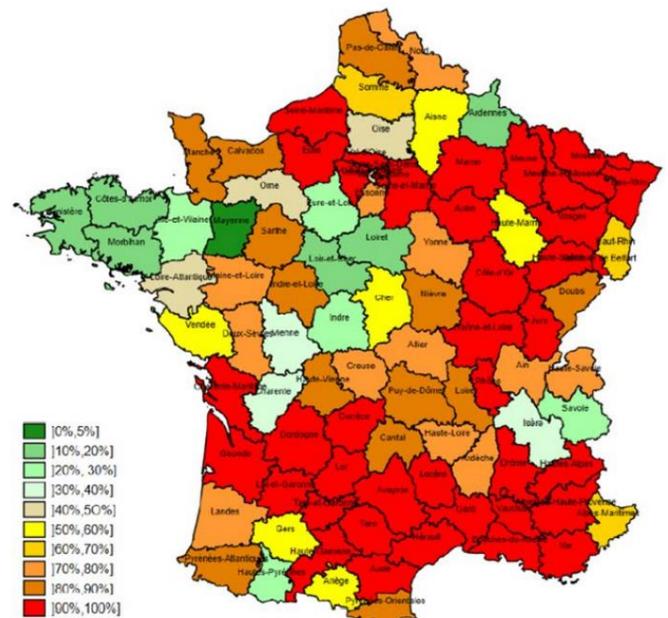


The Commission complemented the commonly used site-centric approach with a customer-centric approach. To that end, customers were grouped according to the French administrative district (“*département*”) where they were based. For each *département*, the Commission analysed which volumes were sent to each site of the Parties and their competitors for treatment, and calculated market shares accordingly, as shown in Figure 2

<sup>18</sup> More specifically, the Commission found that only 5-10% of the hazardous waste landfilled, and 10-20% of that which is incinerated, crosses a national border.  
<sup>19</sup> Directive 2008/98/CE relative to waste, article 16(3); French Environmental Code, article L. 541-1 (II - 4°).  
<sup>20</sup> M.9969 – Veolia/Suez, decision dated 14 December 2021, recital 908.

below. This approach had a number of advantages. First, it reflected the actual flows of waste sent by customers for treatment, and did not require setting a specific radius for a catchment area. Second, by allowing the Commission to more precisely identify the Parties' sites in direct competition with each other, it helped to identify the sites that would constitute the most suitable candidates for divestments to remedy competition concerns.

**Figure 2: Veolia and Suez combined market shares following a customer-centric approach for the landfilling of hazardous waste in France.**



Source: extract from the Commission's decision in Case M.9969 – Veolia/Suez

**The assessment of in-house services supplied by customers**

One key argument put forward by the Notifying Party to dismiss competition concerns on the markets for the provision of water management services was the trend towards the “remunicipalisation” of water management services by local authorities.<sup>21</sup> According to Veolia, local authorities (i.e. municipalities) that tender out water management services are also able to internalize those services and provide them in-house. As a result, Veolia claimed that municipalities exercised countervailing buyer power given the option of turning to in-house services in the event that bids by private companies for water services contracts were insufficiently competitive. According to the Notifying Party, such “return” of water services to full public management is significant and, as such, needed to be accounted for at the stages of the market definition and the competitive assessment.

<sup>21</sup> M.9969 – Veolia/Suez, decision dated 14 December 2021, recital 60.

First, Veolia argued that municipal water management services performed by French local authorities themselves (i.e., “régies”) should be part of the relevant product market because local authorities can choose to self-supply even after launching a formal tender<sup>22</sup> Moreover, Veolia claimed that there existed a growing trend for French local authorities to take back these services in-house over the last 10 years.<sup>23</sup>

The Commission dismissed this argument in relation to the French markets based on two main findings.<sup>24</sup> Firstly, the market investigation showed that French local authorities generally decide to internalise municipal water management services long before any public tender is launched. The reasons given by local authorities to internalise the management of municipal water are based on political considerations rather than competitive considerations such as price increases or the worsening of service levels. Secondly, local authorities with in-house water management services use their assets and knowledge of the sector strictly in relation to their own needs and do not participate in tenders involving other territories. Therefore, they do not exercise any competitive pressure in public tenders and cannot be considered to be active in the relevant markets.

By contrast, the market investigation carried out by the Commission showed that some public companies owned by Czech local authorities do participate in tenders organised by other local authorities and directly compete against private operators. In its decision, the Commission therefore considered that these public companies to be active in the relevant market.<sup>25</sup>

Second, Veolia submitted that the possibility for French local authorities to internalise water management services could be used as a leverage during public tender negotiation and thus exercised a competitive constraint on private operators.<sup>26</sup>

The Commission rejected the argument as its market investigation showed that the move from an external service provider to self-supply generally needed to be decided well before the launch of a call for tender. This is because the provision of water management services requires important technical skills as well as human and operational resources that many local authorities consider not to have when launching a tender. That is why the decision of a local authority to internalise water services is made long any call for tenders in France.<sup>27</sup>

By contrast, the Commission found that some Czech local authorities, when launching calls for tenders, require to enter the capital of the operation company of the selected operators, who then becomes a co-shareholder alongside the local authority.

<sup>22</sup> Idem.

<sup>23</sup> Idem.

<sup>24</sup> M.9969 – Veolia/Suez, decision dated 14 December 2021, recital 68.

<sup>25</sup> M.9969 – Veolia/Suez, decision dated 14 December 2021, recital 170.

<sup>26</sup> M.9969 – Veolia/Suez, decision dated 14 December 2021, recital 78.

<sup>27</sup> M.9969 – Veolia/Suez, decision dated 14 December 2021, recital 112.

Competitive pressure from enterprises with public and private capital seemed likely to grow in the years to come, given the strong trend in the return to public or semi-public management currently experienced by the Czech market, as indicated by a competitor.<sup>28</sup>

Finally, Veolia presented comparable arguments in relation to the market for the provision of water management services to industrial customers, considering that industrial customers may consider it economically and technically appropriate to handle these services in-house and have the ability to develop the necessary knowledge and assets to do so. Again, the Commission rejected Veolia’s arguments. First, the Commission dismissed the argument according to which services performed in-house by industrial customers were part of the relevant product market because most industrial customers interviewed as part of the market investigation lack the required capacities to handle such services in-house, and those who may have the required skills do not provide their services on the market.<sup>29</sup> Second, the results of the market investigation clearly showed that a majority of industrial customers would, post-Transaction, be locked in with the combined entity because of (i) the lack of alternative credible competitors they could turn to and (ii) the lack of expertise to internalise these services in-house. Industrial customers’ bargaining power would thus not be sufficient to counterbalance the negative effects - price increase or worsening of service levels - resulting from the transaction.<sup>30</sup>

## An industrial consolidation subject to large remedies

In the initial stages of the Transaction, Veolia indicated having identified the “*the limited antitrust issues that such a transaction would entail*” and “*anticipated remedies*” which would include Suez’s French water management services to local authorities, certain waste management assets activities in France and a limited number of activities outside of France to be acquired by a pre-identified purchaser.<sup>31</sup>

As a general rule, the Commission accepts remedies in Phase 1 when they constitute a clear-cut solution and unambiguously eliminate the competition concerns. Structural solutions removing the entire overlap normally qualify as a clear-cut solution. The divested assets also need to be a viable business that a purchaser can use to effectively compete post-transaction on a lasting basis. The Commission is prepared to examine remedy proposals at early stages of the investigation, sometimes even already during the pre-notification stage in order to make

<sup>28</sup> M.9969 – Veolia/Suez, decision dated 14 December 2021, recital 184.

<sup>29</sup> M.9969 – Veolia/Suez, decision dated 14 December 2021, recital 252.

<sup>30</sup> M.9969 – Veolia/Suez, decision dated 14 December 2021, recitals 310-320.

<sup>31</sup> Veolia’s press release dated 20 August 2020 “*Veolia is offering to acquire 29.9% of Suez from Engie, to create the French world champion of ecological transformation*”.

progress before the case is notified, given the tight merger assessment deadlines that the Commission must observe in Phase 1. However, even when companies offer substantial remedies to eliminate all competition concerns in pre-notification, the Commission must still carry out a thorough market investigation to identify competition concerns. Any remedy discussion taking place before the Commission's market investigation remains preliminary and without prejudice to the results of the formal merger review.

In the case at hand, the Commission collected a very significant amount of information from the Parties (including market share and tender data) and analysed large volumes of internal business documents. The Commission also contacted several hundreds of local authorities and businesses. The Commission's early engagement and quality of the evidence gathered made it possible to identify all plausible competition concerns raised by this case still in Phase 1.

The initial remedy package offered by the Parties included a pre-existing viable and stand-alone business that removed the concerns in the markets for the municipal water management in France, the collection and treatment of non-hazardous and regulated waste and the treatment of hazardous waste in France. During pre-notification, the Notifying Party identified a consortium associating investors GIP<sup>32</sup> and Meridiam<sup>33</sup> as potential acquirers of this package. As the identity of the acquirers was known early in the process, the Commission was in a position to test with market participants the ability of the consortium to take over the divested assets and compete effectively with Veolia going forward. In that regard, the results of the market test gave further assurances that the consortium would be suitable to operate and develop the business going forward.

In addition, the market investigation showed that the Transaction raised additional competition concerns in the markets for the treatment of hazardous waste in France, for industrial water management, also in France, and for mobile water services market in the EEA. In order to address those concerns, Veolia committed to divesting almost all of its activities in the industrial water management and mobile water services markets, as well as assets of both Veolia and Suez in hazardous waste management, going significantly beyond the assets included in the first remedy package. After some improvements offered by Veolia following the results of the market test, the Commission considered that the additional remedy proposals would remove the competitive concerns and be viable going forward.

## Conclusion

Following a constructive pre-notification, the Commission found that the proposed transaction would raise serious competition concerns on markets for the provision of waste and water management services, especially in France. Given the extensive and clear-cut remedies offered by Veolia, the Commission was able to approve the Transaction in Phase I, although the length of the decision reflects the depth of the investigation actually carried out.

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<sup>32</sup> GIP (US) is a private investment fund specialized in infrastructure in the energy, transport and water and waste facilities.

<sup>33</sup> Meridiam (France) is an investment company and an asset manager specialized in mobility, energy and environmental transition.

# Competition *merger brief*

## **Meta/Kustomer – What’s the Meta with Kustomer?**

*Liam Biser, Christian Grobecker, Sean Mernagh, Patricia Oliveira*

### Introduction

On 27 January 2022, following an in-depth investigation, the Commission cleared the acquisition of Kustomer by Meta (formerly Facebook), subject to remedies.

Kustomer offers a customer relationship management (‘CRM’) Software as a Service (SaaS) tool that aids businesses with managing their customer service. Kustomer’s CRM software supports business-to-consumer (‘B2C’) communication through various channels, notably phone, email, webchat, SMS, WhatsApp, Instagram, Messenger, and Twitter. Meta provides various websites and applications for mobile devices offering social networking, consumer communications and photo and video-sharing functionalities. These include WhatsApp, Instagram and Messenger (‘Meta’s messaging channels’).

The stated rationale of the transaction was to accelerate the shift in B2C communications from more traditional channels, such as phone and email, to app-based over-the-top (‘OTT’) messaging channels, such as Meta’s messaging channels.

Despite the approximately USD 1 billion price paid by Meta, in view of Kustomer’s low turnover, the transaction did not meet the notification thresholds under the Merger Regulation. Instead, the Commission obtained jurisdiction following a referral under Article 22 of the Merger Regulation by Austria, where the case was initially notified, and nine other EEA national competition authorities.

Although small, Kustomer was considered an innovative, and fast growing, player in the customer service CRM software market. The Commission was concerned that through its control over important B2C OTT messaging channels, WhatsApp, Instagram and Messenger, Meta would unfairly advantage Kustomer and foreclose rival CRM software providers by removing or degrading their access to Meta’s messaging channels. The Parties proposed a remedy providing for continued open and free access to Meta’s messaging channels for third party CRM providers, with appropriate safeguards to cover future improvements of those channels, on the basis of which the Commission conditionally approved the transaction.

This case is an example of an exceptional scenario where the Commission was able to conclude that an access remedy was suitable to remove non-horizontal competition concerns at issue, similar to its *Google/Fitbit* decision<sup>1</sup>. It is also the first case since *Google/Fitbit* where the Commission assessed data-related strengthening of dominance concerns in depth, although it was ultimately able to rule them out.

In this brief, we focus on some of the more interesting or novel points raised by the case, namely (1) an input foreclosure theory of harm targeted at a sub-set of competitors, (2) the factors that allowed the Commission to conclude that a non-divestiture access remedy was suitable in this case, and (3) the reasons the Commission was able to exclude concerns in relation to data accumulation.

## 1. Targeted input foreclosure

Popular OTT messaging channels, and Meta’s messaging channels in particular, are increasingly important channels through which businesses interact with their customers. Because of the specific features and uses of these channels, the Commission found that they constituted a separate market, distinct from phone or email, and that they were inputs for customer service CRM software providers, such as Kustomer and its competitors. Meta and Kustomer therefore operated in

### In a nutshell

*In **Meta/Kustomer**, the Commission was concerned that through its control over Meta’s important messaging channels, Messenger, WhatsApp and Instagram, the merged entity would unfairly advantage Kustomer and foreclose rival CRM software providers that rely on Meta’s channels, by removing or degrading their access.*

*A 10-year access commitment to continue providing free and non-discriminatory access to Meta’s messaging channels to competing third-party CRM software providers, with appropriate safeguards to cover future improvements of those channels, alleviated the Commission’s concerns.*

<sup>1</sup> [M.9660](#) – *Google/Fitbit* (2020). See [Competition Merger Brief issue 1/2021](#), *Google/Fitbit: Preserving healthy competition in digital markets*.

vertically-related markets, with access to Meta's messaging channels being granted via APIs.<sup>2</sup>

The Commission's in-depth investigation focused on whether Meta may disadvantage Kustomer's rival providers of customer service CRM software, and in particular Kustomer's close rivals and new entrants, which—similarly to Kustomer—tend to focus on small and medium business customers ('SMBs') and on the impact such a strategy might have, notably on innovation in the CRM software market.

### 1.1 The ability to block or degrade API access for targeted competitors

The Commission concluded that Meta would have the ability to engage in input foreclosure through blocking or degrading API access to its messaging channels for targeted competitors of Kustomer. This overall conclusion involved several elements.

First, the Commission found that Meta holds market power on the upstream market for OTT B2C messaging. Meta's messaging channels collectively account for over 40% of the upstream market for OTT B2C messaging channels in the EEA, as well as having high user bases in the EEA, even exceeding 90% of the population of some Member States. Such channels are an important input for the downstream CRM software market today, and are expected to become even more important in the coming years as communication shifts more and more away from traditional channels such as phone, email and SMS, to more modern OTT channels. Even today, there is a limited number of CRM software providers that do not offer integrations with Meta communication channels as part of their customer service CRM offerings.

Second, the Commission's investigation found that Meta has the ability to either restrict (i.e. cut off entirely) or degrade access to any or all of its OTT messaging channels. Degradation could involve removing certain features or functionalities for third parties and/or providing superior versions to a select few players, including Kustomer, and there was evidence that in the past Meta provided an alternate version of its Messenger API with reduced functionality or features to access seekers based in the EEA.

Third, even if Meta may not have a reason to cut off access to its channels to certain large CRM providers, such as Salesforce, which focused on large enterprise customers and therefore did not compete closely with Kustomer, which focused on small and medium-sized business customers ("SMBs"), the Commission concluded that Meta has the ability to target specific API access seekers for foreclosure, in particular close competitors of Kustomer such as CRM providers that also focus on serving e-commerce businesses and SMBs. Notably, the Commission found that Meta may have engaged in similar practices of refusing or

degrading API access to perceived competitors in the past. In addition, such a strategy would be possible not only where Meta has a direct supplier relationship with the API access seeker but also in circumstances where API access to Meta's channels is provided indirectly through third party intermediaries. This is because Meta had the contractual ability to require such intermediaries to refuse API access to a specific customer if it so wished. For that reason it would also not have been possible for a CRM provider whose direct access was cut off to regain access through other means, e.g. via a third party intermediary.

### 1.2 The incentive to foreclose and the added benefit of steering businesses into the Meta ecosystem

An input foreclosure strategy would, on the one hand, steer businesses using the foreclosed CRM providers towards Kustomer (at the downstream level), resulting in gains for the merged entity. On the other hand, input foreclosure would result in the foreclosed CRM providers switching to other B2C channels (at the upstream level), resulting in losses for the merged entity.

The Commission found that downstream gains would be numerous, diverse and significant. First, and most directly, the merged entity would gain from additional businesses using Kustomer (i.e. SaaS revenue). Second, but no less importantly, significant gains would also come from outside the direct downstream market. Meta's many different closely related products provide it with many avenues from which to benefit from foreclosure, and in particular from business customers switching to Kustomer. For example, Meta is also able to benefit from (i) additional data obtained via businesses switching to Kustomer which could be used for online ads purposes, (ii) additional click-to-message ads revenue from such businesses, and (iii) it would benefit from steering such businesses into its ecosystem of products (i.e. Meta's suite of business and personal products, including Meta's ecommerce products). In that regard, Meta's presence across multiple markets was an important element in the Commission's finding of a competition concern.

The Commission found that upstream losses would be limited to a sufficient degree by Meta targeting Kustomer's close competitors. Doing so would maximize the number of business customers switching to Kustomer (downstream gains), whilst sufficiently minimizing the number of business customers switching away from Meta (upstream losses). The Commission found that a significant proportion of the business customers of Kustomer's close competitors would switch to Kustomer in response to foreclosure, which would result in downstream gains outweighing upstream losses. However, the available evidence was not as conclusive for more distant rivals of Kustomer. As such, the Commission conservatively took the view that only a targeted input foreclosure strategy would be profitable for the merged entity, and that a market-wide input foreclosure strategy may have led to too many losses upstream.

However, whilst a targeted foreclosure strategy does increase the incentive to foreclose, since it minimises losses upstream, it also

<sup>2</sup> In essence, API, or application programming interfaces, allow software programmes and hardware, or different software programmes, to communicate with each other.

has the potential to reduce the scale of any anticompetitive effects on the downstream market, since some players in that market would remain unaffected by the foreclosure strategy. This link between the weighing of incentives and effects was an important point throughout the in-depth investigation.

The Commission also assessed the profitability of total foreclosure (i.e. blocking access outright) and partial foreclosure (i.e. degrading functionalities or features of the messaging channels) separately, as the magnitude of gains and losses may have varied depending on the exact foreclosure strategy. However, the Commission found that, whilst these different foreclosure strategies changed the magnitude of the gains and losses, they would not significantly impact the merged entity's incentive to foreclose. Indeed, the benefits remained significant relative to the limited losses similarly between total and partial foreclosure. The Commission found that, in this case, if total foreclosure is profitable then partial foreclosure would also be profitable, and vice versa. As such, it was not necessary for the Commission, for the purposes of its assessment and conclusions, to distinguish between total and partial foreclosure strategies or to determine the relative likelihood for these different foreclosure strategies.

Lastly, it is worth noting that, whilst the Commission was able to conduct a quantitative analysis of the losses and most of the gains resulting from foreclosure, some gains were difficult to quantify precisely, as acknowledged in Meta's own internal valuation modelling of Kustomer. These unquantifiable gains were often inherently forward-looking and uncertain, since they are likely to become salient only after a number of years. For example, such difficult to quantify gains included the longer-term benefits from steering businesses into the Meta 'ecosystem' of products and increasing Meta's ability to defend its position in the highly valuable B2C messaging market in the future. Therefore, it was necessary to qualitatively assess these additional longer-term gains. However, in this instance, the qualitative assessment was conservative, since the Commission did not consider there to be any qualitative losses, and in any event the Commission was able to conclude that Meta would have an incentive to foreclose even without taking into account such longer-term gains, i.e. on the basis of a quantitative assessment alone.

### 1.3 The detrimental effect of foreclosing particular drivers of innovation in the CRM market

To assess the effects of a targeted input foreclosure strategy, the Commission had to consider whether foreclosing a subset of competitors (namely smaller customer service CRM players focused on SMBs and new entrants into the CRM software market) would have detrimental effects on competition or whether post-Transaction, non-foreclosed CRM rivals (i.e., large customer service CRM providers) could potentially replace the role of the foreclosed CRM players and exert competitive pressure on Kustomer.

In this context, the Commission investigated whether potentially foreclosed firms played a sufficiently important role in the competitive process in the downstream market. The Commission found that these smaller CRM players and new entrants are particular drivers of innovation and foreclosure of such players would lead to lower quality and less innovation (especially for SMBs) in the overall CRM software market. This is because the Commission's in-depth investigation, notably input from its market investigation, outlined that disruptive technological approaches were typically adopted by newcomers to the CRM industry whose approach and agility are difficult to replicate by larger incumbents. Moreover, innovations from those players were often quickly emulated by the other companies in the market, thereby benefiting the market as a whole.

Although it can be challenging to determine what constitutes an innovation in the customer service CRM market (e.g., what constitutes an innovative feature? And, to what extent is an add-on an innovation?), the Commission considered that internal documents of the merging parties, industry reports and public information pointing to a very high number of innovative start-ups in the market, all supported that these small CRM players focusing on SMBs as well as new entrants played a disproportionate role in innovation.

The Commission therefore concluded that a targeted input foreclosure strategy would have significant negative effects on competition in the downstream CRM software market as a whole.

### 1.4. A brief note on Meta's ecosystem

As outlined in the Commission's December 2022 Policy Brief *'Merger Enforcement in Digital and Tech Markets: an Overview of the European Commission's Practice'*<sup>3</sup>, competition in digital services increasingly occurs among a few large ecosystems. Where a merger may complement, extend or reinforce an existing ecosystem that may raise specific issues relevant to a merger review. Those concerns are gaining increasing relevance in the Commission's decisional practice, for example where enlarging the ecosystem by an acquisition may lead to the creation or the strengthening of a company's dominant position in one "core" market (or more), and in turn further lock customers in or incentivise them to remain within its so-called "walled garden" of services.

In *Meta/Kustomer*, the Commission considered theories of harm related to Meta's ecosystem of products and, as outlined above, concluded that Meta would have the incentive to engage in input foreclosure, including because of the benefits from steering businesses into its ecosystem of products. In that regard, Meta's presence across multiple markets was an important element in the Commission's finding of a competition concern.

<sup>3</sup> [https://competition-policy.ec.europa.eu/document/download/dac56b61-Zada-4013-b6eb-ae1fbae41295\\_en?filename=kdak22002enn\\_competition\\_policy\\_brief\\_digital\\_mergers.pdf](https://competition-policy.ec.europa.eu/document/download/dac56b61-Zada-4013-b6eb-ae1fbae41295_en?filename=kdak22002enn_competition_policy_brief_digital_mergers.pdf)

## 2. The suitability of an API access commitment to resolve the vertical competition concerns

It is important to recall that structural remedies are systematically preferred in the Commission's decisional practice, and are the benchmark against which any other solution is assessed.<sup>4</sup> However, other remedies can be appropriate in specific cases, when such remedies constitute an effective way to solve a specific competition concern and do not require excessively onerous or indefinite monitoring.<sup>5</sup>

Meta/Kustomer was one such specific case, where a comprehensive set of access commitments with a 10-year duration were deemed sufficient to address the input foreclosure concerns.

These included a commitment to guarantee non-discriminatory access, without charge, to Meta's publicly-available APIs for its messaging channels to competing customer service CRM software providers, and new entrants. This limb of the remedy ensured that the same access that was available pre-transaction would be maintained post-transaction.

The commitment also included safeguards related to future improvements and new functionalities over the lifetime of the commitments, to prevent Meta creating superior non-public APIs that would only be made available to Kustomer and its users. To the extent any features or functionalities of Meta's messaging channels used by Kustomer's customers pre-transaction may be improved or updated after the transaction, Meta committed to also make any such improvements available to rivals of Kustomer and new entrants on an equivalent basis. This would also hold for any new features or functionalities of Meta messaging channels in the future if used by a material portion of Kustomer's customers.

Finally, to ensure the commitments would be largely self-policing, Meta committed to publish an up-to-date list of any new messaging channel functionalities used by a material portion of Kustomer's customers, and committed to a fast-track dispute resolution mechanism that API access seekers could use to quickly resolve any issues.

On balance, and having secured significant improvements of the commitments compared to the initial proposal, the Commission was able to conclude that they would be sufficient to remove the concern that Meta might revoke or degrade API access to close competitors of Kustomer and new entrants.

<sup>4</sup> See Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, (2008/C 267/01) "Commission Remedies Notice", paragraphs 10 and 17.

<sup>5</sup> Furthermore, under Council Regulation (EC) No 139/2004 (the 'Merger Regulation') and applicable case law, the Commission must clear a modified transaction that no longer significantly impedes effective competition

This was notably because the type of plausible conduct Meta could engage in to carry out a foreclosure strategy was well-identified and circumscribed, and preventable through the remedy. The fact that API access was already granted pre-merger was relevant, as pre-existing access terms could constitute a benchmark that the Commission could rely upon. Further, the overall number of access seekers was reasonable and could easily be identified at the moment of the decision, namely providers of customer service and support CRM software, which is a specific type of software application, and was clearly defined in the commitments. Another important element was that the type of access was standardised, i.e. all access seekers got the same type of access to the same APIs, and access was free of charge. Providing for tailor-made access arrangements, or introducing pricing elements may have materially complicated the commitments and the Commission, under its Remedies Notice, is only able to accept commitments where the complexity does not lead to a risk of their effectiveness from the outset.<sup>6</sup>

## 3. Clearing data accumulation

With respect to the market for the supply of online display advertising services, where the Commission had raised preliminary concerns, the Commission found that the merger was not likely to lead to a significant impediment of effective competition. While the Commission found that Meta holds at least significant market power on a market for online display advertising services (and certain segments thereof) and has data collecting capabilities that provide a significant data advantage, it concluded that any additional data that Meta may gain access to as a result of the acquisition of Kustomer would not result in a significant negative impact on competition.

Kustomer does not separately trade data that businesses store on its systems. Therefore, the Commission did not assess an input foreclosure concern. Rather, the Commission investigated the potential accumulation of data by Meta within the framework of horizontal non-coordinated effects. Specifically, the Commission assessed whether the data concerned could be considered as an important asset to Meta for its activities in online display advertising, which would make expansion or entry by rivals more costly or difficult to the detriment of competition.<sup>7</sup>

In assessing the importance of the data concerned, the Commission found that only a limited volume of data was involved as a result of Kustomer's small market size at the time

<sup>6</sup> Commission Remedies Notice, paragraphs 14 and 66. See also the Commission's December 2022 policy brief '*Merger Enforcement in Digital and Tech Markets: an Overview of the European Commission's Practice*' available at [https://competition-policy.ec.europa.eu/document/download/dac56b61-7ada-4013-b6eb-ae1fbae41295\\_en?filename=kdak22002enn\\_competition\\_policy\\_brief\\_digital\\_mergers.pdf](https://competition-policy.ec.europa.eu/document/download/dac56b61-7ada-4013-b6eb-ae1fbae41295_en?filename=kdak22002enn_competition_policy_brief_digital_mergers.pdf).

<sup>7</sup> Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03) ("Commission Horizontal Merger Guidelines"), paragraph 36.

of the transaction. Even in the future, if Kustomer were to grow significantly in the hands of Meta, the Commission considered that the volume of new data would remain relatively limited. Any market growth for Kustomer would likely result from cross-selling its services to existing customers of Meta, for which Meta already holds similar commercial data. The Commission also assessed what the value of any new categories of data would be for Meta's activities in online display advertising. The main category of new data that Meta could potentially get access to would be unstructured customer interaction data over channels not owned by Meta. This category of data is however not used for online advertising purposes today.

Beyond the importance of the data concerned, the Commission investigated whether any accumulation of data could result in increased barriers to entry or expansion for Meta's rivals. The investigation showed that rivals have and will continue to have access to similar commercial data, both through third party CRM software and other business platforms or software. For example, CRM software of other players like Salesforce and Hubspot already contain integrations for businesses to share data with Google. Not only will Meta's rivals have continued access to commercial data, but businesses have and will continue to have an interest in sharing such data with Meta and its rivals in order to measure and optimise the performance of their own ad campaigns.

Finally, the Commission concluded that CRM providers do not own the data that businesses store on their systems. As a result, for Meta to get access to any data following the transaction, they would not only require the agreement of the businesses using Kustomer's CRM software but a business would also need to obtain the consent from the end-customer in compliance with the GDPR<sup>8</sup> and the e-Privacy directive<sup>9</sup>.

## Conclusions

Meta/Kustomer, which was referred to the Commission under the 'traditional' Article 22 procedure, is an example of a case where, in spite of the small size and low turnover of the target, the merger would have led to significant competition concerns, and shows the need for the Commission to have the jurisdictional tools to review problematic cases irrespective of the size of one of the parties.

Yet following an extensive investigation and constructive cooperation from the merging parties in developing a comprehensive API access remedy that was well-received by rivals during market testing, the Commission was able to permit the merger to proceed while protecting competition and innovation in the CRM software market.

In the EEA, Germany had not joined the referral by Austria since when the Bundeskartellamt concluded that the merger was notifiable in Germany, the deadline to join the Article 22 referral had passed. Therefore, the Bundeskartellamt investigated the transaction directly, in parallel to the Commission, and cleared it unconditionally following a phase 1 review. In doing so, the Bundeskartellamt took into account *inter alia* the commitments accepted by the Commission in their assessment before concluding that competition concerns in the CRM software market could be excluded.<sup>10</sup>

In concluding, it is important to stress that access remedies remain the exception to the rule. They are only considered in a very narrow set of circumstances, such as the ones specific to the present case, but are certainly not a one-size-fits-all remedy to remove vertical input foreclosure concerns.

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<sup>8</sup> Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, OJ L 119, 4.5.2016.

<sup>9</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31.7.2002.

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<sup>10</sup> See Bundeskartellamt 'Case summary: Acquisition of Kustomer by Meta (formerly Facebook) cleared', available at: [https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberic hte/Fusionskontrolle/2022/B6-21-22.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberic hte/Fusionskontrolle/2022/B6-21-22.pdf?__blob=publicationFile&v=3)

# Competition *merger brief*

## *Cargotec/Konecranes: Heavy-lifting to protect European customers*

Jaroslav Kračún, Jean-Christophe Mauger, Andreas Sowa, Christina Von Busch

### Introduction

On 24 February 2022, following an in-depth investigation, the Commission conditionally cleared the merger between Cargotec and Konecranes (referred to below respectively as the 'Transaction' and the 'Parties'). Cargotec, based in Finland, offers equipment and services for cargo handling in ports and terminals globally, as well as for ship and road transport. Konecranes, also based in Finland, offers equipment and services for lifting and cargo handling in shipyards, ports and terminals at global level. A key overlap between the Parties is in their product offering for container handling, namely machinery used to load and stack containers by port and terminal operators, and industrial players.

In this case, the Commission was concerned that the Transaction, as initially notified, would have substantially lessened competition and likely led to higher prices in the European Economic Area (the "EEA"), with respect to a number of container and cargo handling equipment types, in particular in the areas of:

- rubber-tired gantry cranes (RTGs)
- straddle/shuttle carriers
- mobile equipment, in particular reach stackers, empty container handlers and heavy-duty lift trucks (>10 tonne capacity).

For each of these areas, the merged entity would have held very large market shares and only face competition from a very limited number of remaining players. European customers would not have effective access to new suppliers, due to significant existing barriers to entry. As a result, European terminals and industrial customers would have faced higher prices and reduced choice of container and cargo handling equipment.

In addition, the Commission's investigation found that, in light of the vertical integration of Konecranes' mobile equipment business with Cargotec's spreaders business (and the fact that spreaders are attached to mobile equipment to enable them to move containers), the Transaction would have restricted access

to a significant customer base for competing mobile equipment suppliers.

The Commission's assessment in this case was notable for its analysis of the scope of geographic markets, competition from China-based companies and customer foreclosure risks.

### Geographic market definition

The Parties considered that the markets in the container handling sector are worldwide and, if not global, should at least include the EEA together with Switzerland, Turkey, Ukraine and the UK.

As regards RTGs as well as mobile equipment, the Commission however found that the relevant market is EEA-wide in light of significant differences in the structure of supply, competitive landscape, demand characteristics and customer preferences, as well as differences in the regulatory environment and transport costs in the EEA as compared to other regions.

In particular, the Commission found that a regional sales system and regional after-sales support are of key importance for the supply of RTGs as well as in the supply of mobile equipment in the EEA. More specifically for RTGs, a successful track record in the EEA was a prerequisite to be considered as a valid supplier in the region.

Furthermore, the Commission found that the relevant market does not include Switzerland, Turkey, Ukraine or the UK due to the lack of suppliers in these countries that could supply the EEA.

### In a nutshell

On 24 February 2022, following an in-depth investigation, the Commission conditionally cleared the merger between Cargotec and Konecranes in the field of port equipment.

This case was particularly interesting as it tackled various challenges such as scope of geographic market, competition from China-based companies and risks of customer foreclosure.

Ultimately, the merger did not go through as it was blocked by the UK CMA. Differences in regional market conditions and in legal framework and standards may lead to diverging outcomes between jurisdictions. The Commission cleared the case based on two comprehensive and stand-alone packages which remedied the competition concerns the EU Commission identified.

As regards straddle/shuttle carriers, the Commission found that the market is at least EEA-wide and potentially global in scope. While the structure of supply, competitive landscape and customer preferences are fairly similar across the world, and differences in the regulatory environment and transport costs did not appear significant, the Commission nevertheless found that regional access with a specific sales system and after-sales support are also significant. In light of this, the Commission assessed those markets both at EEA-level and at global level.

### Taking into account competition from China

Competition from China-based companies in the EEA was a feature in all three product areas in which the Commission found competition concerns. The Parties claimed that competition from Chinese players exerted a significant constraint on the Parties in the EEA, and that this constraint was set to increase substantially in the future.

In assessing the importance of Chinese presence and expansion, it is important to recognise the specific circumstances in the product markets in question.

With respect to cranes, the Commission observed that while a Chinese supplier, ZPMC, has a strong presence in ship-to-shore cranes in the EEA, its European activities in rubber-tyred gantry cranes are more limited. With respect to straddle carriers, ZPMC had only recently entered Europe, commanding a very small market position. In mobile equipment, another Chinese company, Sany, has a strong global position, but a very low market share in Europe. The actual constraint exerted by Chinese players therefore differed, depending on the product market.

Taking into account the specificities of each market, three considerations proved to be particularly relevant to assess the importance of the competitive constraints exerted by Chinese players:

First, successful entry into one European product market is not necessarily indicative of success on other markets, even if these are related in terms of products, customer groups and active suppliers. While one market may favour Chinese suppliers (e.g., because large steel structures can be delivered to sea-facing ports), other markets may require a significant local presence (e.g., via an elaborate distributor network).

Second, successful entry into a European market is not necessarily indicative of likely significant future expansion in that market. A competitor based outside of the EEA (e.g., in China) may have been able to enter a segment of a European market with a price-competitive offering, but face persistent challenges in expanding to other segments of this market.

Third, even an established presence in a European market is not necessarily indicative of an ability to constrain the Parties across the entirety of the market. While a competitor from outside Europe may command a meaningful market share on the European market, it may nevertheless not be a viable alternative for certain customers in Europe – this can be the case in particular in differentiated product and/or geographic markets.

### Customer foreclosure

The transaction created a risk of customer foreclosure for an independent spreader manufacturer for mobile equipment, leading to a likely price increase for mobile equipment.

Spreaders are the mechanical devices attached to cranes and mobile equipment enabling them to grab and manipulate containers. They represent approximately 1/5 of the mobile equipment value.

Cargotec is the only mobile equipment manufacturer with an integrated spreader production facility for both cranes and mobile equipment. Other independent spreader manufacturers produce mainly crane spreaders and only one specialises in mobile equipment spreaders.

The Parties claimed that all spreader manufacturers are capable of manufacturing all types of spreaders, the latter constitutes one single market. The Parties added that post transaction, if Konecranes' demand for mobile equipment spreaders would shift to Cargotec's internal spreader manufacturing capacity (even if they submitted it was not envisaged), the remaining independent spreader players would in any event have enough opportunities to recoup the lost sales.

First, the market investigation showed that, for technical reasons, crane and mobile equipment spreaders are two distinct markets. Furthermore, while crane spreaders were available from multiple independent suppliers, only one plausible independent supplier was active for mobile equipment spreaders, and pooled demand from various mobile equipment manufacturers for optimum pricing conditions.

Secondly, the market investigation showed, that post-transaction, Cargotec would have the capacity to absorb Konecranes's demand for mobile equipment spreaders, providing it with its own comparable quality alternative.

Thirdly, Cargotec would have the incentive to internalise the supply of mobile equipment spreaders for the future merged entity in order to fully use its capacity and eliminate double margins.

Fourthly, based on the Commission's analysis, with the loss of a customer, the independent spreader manufacturer would lose its scale, which would lead to a price increase of mobile equipment spreaders on the independent market. Such price increase would create further room for the merged entity either to increase its margin on mobile equipment or to increase its sales of these benefiting from lower costs stemming from the increased internal scale and double margin elimination on mobile equipment spreaders.

Finally, the market investigation has not identified any plausible alternative strategy for the independent mobile equipment spreader manufacturer to recoup its lost scale in the near future on any of the neighbouring markets, in particular due to mature competition and the different distribution model necessary, especially for crane spreaders.

## The commitments and multijurisdictional cooperation

To address the Commission's concerns, the Parties offered a comprehensive set of commitments:

In the rubber-tyred gantry cranes, and straddle/shuttle carriers markets, Cargotec committed to divest its full business, including a manufacturing plant in Poland and a licence for use of Cargotec's Kalmar brand for the divested product categories.

In the mobile equipment markets, including for mobile equipment spreaders, Konecranes committed to divest its business for the manufacturing and commercialisation of reach stackers, full container handlers, empty container handlers, as well as forklift trucks, which include the problematic product areas. This includes manufacturing plants in Sweden and China, and contracts with distributors.

These commitments fully addressed the competition concerns identified by the Commission. Feedback received from several customers, distributors and competitors in the market test of the proposed commitments confirmed the Commission's view that the divested assets constituted viable businesses that would enable suitable buyers to effectively compete with the merged entity.

Therefore, the Commission concluded that the Transaction as modified by the commitments would no longer raise competition concerns. However, primarily in light of the UK CMA's decision to block the transaction, the Parties decided to cancel the merger.

However, the Parties run global businesses and the deal was also reviewed in other jurisdictions. On 29 March 2022, the UK CMA prohibited the merger and the Parties announced their intention to abandon the deal shortly thereafter. At that time, the US DoJ issued a statement taking note of the abandonment and indicating that it was about to challenge the deal.

As per usual practice, the Commission has engaged in close cooperation with other competition authorities in this case. As explained above, the markets are regional in scope, so different authorities had a different focus. For example, the US DOJ did not mention concerns in mobile equipment<sup>1</sup> whereas it was a key product area of concern in the EEA. Conditions of competition, and therefore scope of concerns, may also vary across jurisdictions.

The Parties tried to address these issues in all jurisdictions with the same package of divestitures. Although they did not necessarily have the same concerns due to different conditions of competition, the Commission discussed extensively the possible remedies with other jurisdictions.

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<sup>1</sup> <https://www.justice.gov/opa/pr/shipping-equipment-giants-cargotec-and-konecranes-abandon-merger-after-justice-department>

The CMA rejected the remedies as it would entail "(...) *carving out these assets from the merging businesses' existing operations, and knitting them together into a new combined business, (that) would be complex and risky (...)*".<sup>2</sup>

The Commission's policy is also hostile to mix-and-match remedies and rather requires the divestiture of stand-alone businesses. From the perspective of the Commission however, the package in this case did not consist of a 'mix-and-match' remedy, but rather two stand-alone packages to remedy two separate competition concerns. In this respect, there was no substantial evidence on file that there were commercial or operational links between the two business areas in the two packages. On the contrary, extensive market feedback enabled the Commission to conclude that customers in the market source the products from the two packages separately.<sup>3</sup> Moreover, dozens of respondents to the market test suggested that the Parties divested a structural and viable business, encompassing two self-standing remedies packages. Respondents, and in particular several European customers, were satisfied that, thanks to those remedies, there would be as many choices for European customers as before the merger. This was in line with the extensive evidence gathered by the Commission, including thousands of internal documents examined to assess the concentration. In other words, in its assessment of stand-alone structural remedies, the Commission checks on the one hand that they fulfil the criteria of adequacy and viability in view of all the evidence on file, and on the other hand that this is in line with the feedback of the numerous customers and competitors who were given a chance to provide information concerning the remedy packages.

As in many cases where the Commission deals with divestitures, there could be some implementation risks. In order to address them, the Commission took adequate safeguards, notably regarding staff and equipment unrelated to cranes and straddle carriers, that Cargotec planned to move out of the divested plant. The Commission also secured an upfront buyer requirement, meaning that the parties could not consummate the merger before the Commission had approved the purchaser for both divestment businesses. This increases the companies' incentives to swiftly find a suitable purchaser.

This was why the Commission, following a transparent process and an extensive investigation with European market participants, cleared the deal conditionally in line with its legal mandate and the Remedies Notice.

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<sup>2</sup> <https://www.gov.uk/government/news/cma-blocks-planned-cargotec-konecranes-merger>

<sup>3</sup> The fact that it is not necessary to own assets in the two business areas to compete on the markets, and that there are no strong links affecting the viability of either business, seem to be in line with Cargotec's recent decision to transfer its heavy cranes business to Chinese company RIC, and continue to operate and focus on its mobile equipment business. See <https://www.cargotec.com/en/nasdaq/stock-exchange-release-kalmar-hiab-macgregor/2022/kalmar-to-move-heavy-cranes-related-intellectual-property-to-ric-in-china>

## Conclusion

The Cargotec/Konecranes merger assessment shows that expansion of China-based companies in the EEA does not always follow a consistent and systematic pattern, even when some customers are the same. Because of the specificities of each product, the success of some companies in one product area cannot be presumed from their achievements in other (even neighbouring) product areas.

The divergences in remedies assessment between various competition authorities came down to differences in the market situations and in the competition concerns identified. Different legal frameworks and standards in each jurisdiction may lead to different outcomes. The Commission's assessment of remedies is guided by its preference for stand-alone structural remedies, whose adequacy and viability are assessed through the gathering of a robust set of quantitative and qualitative evidence, and also taking into account the feedback of customers and competitors who provide information in its market test.

# Competition *merger brief*

## **Ali/Welbilt – A Hot N Cold decision about ovens and ice machines**

*Irina Alexandru, Fabio Chiovini*

### Introduction

On 17 June 2022, the Commission approved, subject to remedies, the acquisition of the US business of Welbilt by the Italian company Ali Group. Both parties are active in the production and sale of professional kitchen equipment on a global level, with significant overlaps in the markets of speed ovens and ice making machines.

The Commission's assessment of the impact of the merger on these markets was contrasted. While speed ovens are an innovative and relatively recent product, ice machines are not. Thus, in the absence of prior decisions and of reliable data on speed ovens, the Commission undertook a sophisticated market definition exercise and conducted a detailed market reconstruction. Eventually, the Commission concluded that the transaction raised no competition concerns in this market, particularly in light of the potential entry and expansion of rival suppliers.

Conversely, the Commission's substantive analysis in the market of ice making machines was more straightforward: this mature market had already been considered in previous cases, and the concerns raised by the transaction in this area were less disputed. The Commission's investigative efforts therefore focused on the proposed remedies and the transaction was cleared subject to divestment commitments.

### Product market definition: a focus on the use case of innovative products

During the market investigation, considerable efforts were made to delineate the most appropriate market definition for the assessment of the transaction. This is a particularly important step of the Commission's review, as it sets the stage for the assessment of market shares and the competitors' relative strength.

A first challenge was the product market definition for speed ovens, an area in which, no previous decisional practice was available. Indeed the introduction of these products in continental

Europe is still in the early stages. The delimitation of the relevant product market was made more difficult by the considerable diversification of speed ovens, which come in different sizes and are used to cook a broad variety of foods relying on different combinations of technologies. Moreover, the terminology used in the market is sometimes ambiguous, with the terms 'speed', 'fast', 'accelerated' and 'rapid' ovens used to refer to the same or different products.

To correctly draw this market's demarcation lines, the Commission centred its analysis of product substitutability around the specific use case of speed ovens. Market participants explained that this specific use case is the provision of hot food to customers at the counter (as opposed to the table), particularly in fast food restaurants or cafeterias. The distinguishing feature of a speed oven is therefore its ability to cook food within the short time required for the customer to make the payment and for the server to prepare the drink and finalize the order. The market investigation showed that such a short cooking time is typically achieved through a combination of microwave technology and at least one type of convection technology (i.e., fan or impingement convection).

This led the Commission to include all products having the technological setup required to serve the specific use case in the relevant market, such as Welbilt's Eikon series, Ali Group's XpressChef and Lainox ovens, Middelby's TurboChef ovens,

### In a nutshell

The acquisition of Welbilt by Ali Group – both suppliers of professional kitchen equipment – was conditionally cleared in Phase I, subject to divestments.

The Commission's assessment focused on two main areas of overlap: speed ovens and ice making machines.

Before ruling out concerns in relation to speed ovens, the Commission focused its investigative efforts on the definition of the relevant market and the reconstruction of the suppliers' shares.

To address concerns relating to ice making machines, the parties offered the divestment of Welbilt business in this market. A purchaser was identified by the parties during pre-notification and approved by the Commission shortly after clearance.

AtollSpeed's AS series and others. The Commission instead excluded from the relevant market all multi-technology ovens without microwaves (such as Lincat's CiBo oven) or without convection (such as Electrolux's SpeeDelight), as these were not considered viable alternatives for the same use case.

While focusing its assessment on the market of speed ovens, as defined above, the Commission also took into account the (albeit limited) competitive pressure from other products with respect to specific geographic markets or customer segments (e.g., panini presses in the Italian market).

### Geographic market definition: a multifaceted sector where competition happens at different levels

A second challenge was the definition of the relevant markets' geographic scope. The market investigation confirmed that there are no significant obstacles to the international delivery of speed ovens and ice making machines and that the design and setup of these products is substantially the same across different geographic areas. However, these markets are also characterized by significant local specificities. In particular, the availability of a local branch or partner for the provision of after sale services is required to effectively compete in these markets. Customer purchasing strategies are also conducted at different levels, with large key accounts buying from producers through international supply agreements while small customers purchase from local distributors and dealers. Because of these specificities, suppliers' market shares in different EU countries can diverge significantly.

This case therefore shows that, even when the supply side of the market has a European or global dimension, demand-side specificities may require an assessment of the transaction's effects at the national level. In order to fully take these considerations into account, the Commission did not reach a conclusive definition of the geographic market and assessed the transaction's effects both at the European level and in each individual Member State.

### Assessment of market shares: the market reconstruction exercise

After delineating the markets affected by the transaction, the Commission went on to assess the competitors' market shares. This analysis is generally based on market share estimates provided by the notifying party. However, in cases where the notifying parties do not have complete visibility on their competitors' sales data and have to rely on assumptions and approximations, these estimates may not be fully accurate. If not supported by independent sources or internal intelligence developed in the ordinary course of business, market share estimates may be considered to be unreliable.

In this case, the Commission conducted a market reconstruction exercise to obtain robust share estimates in line with the market definition for speed ovens described above.<sup>1</sup> The Commission reached out to suppliers to collect actual sales data over the reference period in the different product segments. With a coverage of more than 90% of the market, the reconstruction exercise was particularly successful.

The market reconstruction showed that the parties' combined shares for speed ovens were significantly higher than the notifying party's initial estimates. Nonetheless, the Commission cleared the transaction in relation to this market because of other countervailing considerations which, even in the presence of high market shares, were sufficient to dispel competition concerns.

In particular, the market investigation showed that high market shares at the national level were often volatile and mainly due to sizeable but occasional orders from large customers or distributors. Market participants also confirmed that competing suppliers are able to easily enter national markets from neighbouring countries and can quickly gain shares through partnerships with local dealers. New entrants did so in recent years, expanding from ex-EU regions or from neighbouring product categories. Moreover, technological barriers to entry are relatively low and customers can easily switch to alternative suppliers. Finally, Welbilt's strong market position is at least in part due to first-mover advantage, while the forecasted growth of this market is expected to attract new competitors in the coming years.

### Commitments: a global remedy removing the overlap in ice making machines

As mentioned above, competition concerns were however found in the more concentrated market of ice making machines. The transaction combined two leading global producers of ice making machines, with high market shares in many EEA countries. These markets are also characterized by high barriers to entry and a small number of alternative competitors. The notifying party therefore proposed structural remedies to secure the Commission's clearance.

Both Parties were active globally and had manufacturing facilities operating for the ice making machines business throughout the Americas, Europe and Asia. To address all competitive concerns by completely removing the overlap, Ali Group proposed to divest Welbilt's global Manitowoc ice machine business. This business operates under the Manitowoc and Koolaire brands, including manufacturing facilities located in Manitowoc (USA), Monterrey (Mexico), and Hangzhou (China). The remedy package was clear-cut and created a structural change in the market, while being viable and competitive.

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<sup>1</sup> A similar exercise was not carried out for the market of ice making machines, where the parties indisputably held a particularly strong combined market position.

Given the particular importance of a strong distribution network to ensure the competitiveness of the divestment business in this particular market – and also to facilitate a smooth transition of the divestment business to the buyer – the remedy package was designed to include a robust distribution network in support of the business.

The decision therefore confirms that competition concerns relating to manufacturing activities can be successfully solved through comprehensive, and when necessary global, structural divestitures with adequate safeguards.

### Procedural aspects: a ‘hybrid’ fix-it-first remedy

After designing the remedy package, the Parties started engaging with possible buyers and identified a purchaser during the pre-notification process.

While the Commission took note of the sale agreement in its clearance decision, this was without prejudice to the full assessment of the purchaser’s suitability. In particular, the Commission decided not to approve the purchaser in the clearance decision (as it would be the case in an ordinary fix-it-first process, where the identity of the buyer is a crucial element of the remedy’s design<sup>2</sup>). Instead, the Commission adopted a separate approval decision following the complete vetting of the proposed buyer. Nonetheless, the parties’ early engagement allowed them to secure the purchaser approval decision within a short timeframe, just a couple of weeks after the clearance decision.

### Main takeaways

This case confirms that the assessment of market shares is a core element of the merger review. The Commission will not hesitate to use its investigative powers to cross-check the notifying party’s estimates, particularly when these are not sufficiently supported by independent sources or internal intelligence developed in the ordinary course of business. Nonetheless, the Commission’s approach to market shares may well lead to a clearance decision even in the presence of high combined shares, particularly when new entry or expansion of alternative competitors has occurred in the recent past or is likely to occur in the near future.

The Commission will also welcome the parties’ early engagement on remedies and may well accommodate the companies’ timeline for the completion of divestments. But it will grant no discounts on the approval requirements: a separate (but possibly shorter) purchaser approval process will still be required if the identity of the buyer is not a crucial element of the remedies’ design and the suitability of the proposed buyer cannot be conclusively assessed before the end of the merger review.

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<sup>2</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, paras. 56 f.

# Competition *merger brief*

## ***Bouygues/Equans – keeping competition “on track”***

*Julia Tew, Thorsten Schiffer, Fotios Filios-Metentzidis*

### Introduction

On 19 July 2022, the Commission conditionally approved the acquisition of Equans by Bouygues.

Both companies are based in France, providing a diversified set of multi-technical services globally, including energy and digital network infrastructure, facility management and electrical, mechanical, heating, ventilation and air-conditioning (“HVAC”) engineering.

Bouygues and Equans’ activities overlapped in a large number of markets mainly in the EEA, in most of which however several large players would remain active after the transaction. The Commission was only concerned in relation to the market for railway electrification services in Belgium, which represented a relatively small part of the Parties’ activities.

The approval was conditional on full compliance with the commitments offered by Bouygues, pertaining to the full divestment of Colas Rail Belgium, Bouygues’ subsidiary active in railway electrification services in Belgium, a standalone business and a separate legal entity. The remedy package ensured that Colas Rail Belgium will remain a credible and independent competitor to Bouygues in the relevant market.

In parallel to the Commission, the transaction was reviewed by the UK Competition and Markets Authority (“CMA”), in relation to Bouygues and Equans’ activities in the market for railway electrification services in the UK. The CMA conditionally approved the transaction in Phase I.<sup>1</sup>

### Railway electrification services

The Commission’s investigation focused on the provision of installation and maintenance services for railway contact lines. Railway contact lines are transmission systems for supplying trains with electric current.

Bouygues and Equans were primarily active in the provision of installation and maintenance services for a specific type of railway contact lines, namely systems of catenaries and

overhead contact lines. An overhead contact line is an electrical cable, which is suspended above the train and transmits electrical energy to the train, while the catenary is a stabilising cable attached to the overhead line.

Installation and maintenance services for catenaries and overhead contact lines are typically sourced through tenders by national and urban railway infrastructure operators. Differences in the technical aspects of railways between countries, as well as the need for service providers to comply with extensive national regulations, lead to markets that tend to be national in scope.

### Effective competition on course for derailment

The transaction, as notified, would have resulted in the creation of a dominant player in the market for the provision of installation and maintenance services for catenaries and overhead contact lines in Belgium, by combining two out of three leading service providers.

First, in 2021 the Parties’ combined market shares in Belgium were in the range of 60-70%. The merged entity would thus be positioned well ahead of its main competitor, whose market shares did not exceed 10-20% in 2021.

The Parties argued that their market shares were not indicative of their competitive significance, given that their shares could fluctuate significantly from year to year, based on the outcome of each tender of a new project. However, the Commission found that the combined market shares of the Parties were consistently high, with an increasing tendency in the years from 2018 to 2021.

Second, the proposed acquisition would limit the main competitors from three to two, in a market that was already

### In a nutshell

The acquisition of Equans by Bouygues would have resulted in a dominant player in the Belgian market for railway electrification. It would have reduced the nation-wide service providers from three to two, in a market with high barriers to entry.

Bouygues offered to divest its entire business in Belgium (Colas Rail Belgium), excluding its participation to one project which could have created high liability risks for the suitable purchaser.

<sup>1</sup>Full text decision of the CMA available at:

[https://assets.publishing.service.gov.uk/media/633eb569e90e0709df741cca/Bouygues\\_Equans\\_decision\\_for\\_final\\_acceptance\\_of\\_UILs.pdf](https://assets.publishing.service.gov.uk/media/633eb569e90e0709df741cca/Bouygues_Equans_decision_for_final_acceptance_of_UILs.pdf)

characterised by high degrees of concentration. After the proposed transaction, the combined entity would have faced limited competitive constraints from only one competitor with a comparable footprint.

According to the Parties, after the transaction they would be facing competition from at least another two service providers active in Belgium. The Commission's investigation, however, showed that these players were active either in the Dutch- or the French-speaking parts of Belgium, and were mainly addressing smaller railway electrification projects.

Third, barriers to entry are high in Belgium, and the possibility of short-term entry of new credible competitors in the market appeared remote. Such entry barriers consisted mainly of (i) high qualification requirements faced by potential entrants for their eligibility to participate in tenders for railway electrification projects in Belgium, (ii) technical differences in Belgium's railway network compared to its neighbouring countries, requiring special know-how and equipment, and (iii) the requirement to speak both French and Dutch, which for safety reasons the personnel would be required to understand and speak in order to operate in the relevant regions.

The Commission therefore concluded that the proposed acquisition raised competition issues in the market for the provision of installation and maintenance services for catenaries and overhead contact lines in Belgium, both on the overall railway market, as well as the potential market segments for long-distance and metropolitan rail.

### Prochain arrêt: Luxembourg

Outside of Belgium, the transaction resulted in similar degrees of concentration in Luxembourg, where the Parties were at that time two out of the three service providers. However, the Commission did not find competition concerns in this market, mainly because the barriers to entry described for the Belgian market were not present in Luxembourg.

Indeed, the market in Luxembourg is serviced by French providers, which move to Luxembourg temporarily on a project-by-project basis. This is because in Luxembourg the technical specificities of the network and the qualification requirements are identical to those in France, and the only language required for the personnel is French.

The Commission's investigation showed that a number of French companies were eligible and able to participate in tenders for projects in Luxembourg. In fact, one major French player was already on its way to addressing future projects in Luxembourg, while another was being assessed by the railway operator in Luxembourg. The Commission considered this as sufficient to maintain the competitiveness of the market at pre-transaction levels.

### Pulling the breaks with a structural remedy package

To address the Commission's concerns, Bouygues offered to divest Colas Rail Belgium, its subsidiary active in the Belgian market for railway contact lines and railway tracks. This remedy package pertained to the divestment of Colas Rail Belgium as an independent legal entity, including the necessary qualifications, assets, personnel and ongoing and future contracts with customers.

Market participants had however expressed some reservations about potential contractual liabilities (and associated financial penalties) faced by Colas Rail Belgium as a contractor in the Liège Tramway Project.

In order to ensure the viability of the business, the remedy package explicitly excluded any liability of Colas Rail Belgium connected with its participation in the Liège Tramway Project. Furthermore, in close cooperation with the Commission, Bouygues devised a "Hold-Harmless-Mechanism", a contractual warranty to indemnify the purchaser without limitation and to discharge Colas Rail Belgium of any obligation of further engagement in the Liège Tramway Project.

### Conclusion

Overall, the structural commitments offered by Bouygues fully addressed the competition concerns identified by the Commission while remaining an attractive business for the market participants. The divestment of Colas Rail Belgium would ensure the existence of a third credible competitor in the relevant market, who will actively compete with Bouygues. Feedback received during the market test of the remedy package confirmed that Colas Rail Belgium would be a viable and attractive business that would enable suitable buyers to effectively compete with the merged entity. The Hold-Harmless-Mechanism was considered to sufficiently address any potential liabilities faced by Colas Rail Belgium.

On 30 November 2022, the Commission approved EQOS as a suitable purchaser of Colas Rail Belgium. EQOS is a German-based multinational group with long experience in the railway infrastructure sector, which currently has limited presence in the Belgian market for long-distance rail. Consequently, it is in a position to maintain and develop Colas Rail Belgium as a viable and active competitor in the market.