Issue 1/2021

Competition merger brief

In this issue:

Page 1: M.9409  
**Aurubis / Metallo**
Following an in-depth investigation, the Commission unconditionally cleared the acquisition of Metallo by Aurubis. The Parties are the two largest European copper scrap refiners.

Page 5: M.9660  
**Google / Fitbit**
Following an in-depth investigation, the Commission approved the acquisition of Fitbit by Google, subject to commitments. This is the first case that the Commission has accepted a so-called "data silo" commitment.

Page 9: M.9569  
**EssilorLuxottica / GrandVision**
Following an in-depth investigation, the Commission conditionally cleared the acquisition of GrandVision by EssilorLuxottica. The transaction constituted a further step in the progressive consolidation of the optical industry.

Page 13: M.10047  
**Schwarz Group / Suez Waste Management Companie**
Following an in-depth investigation, the Commission approved, with conditions, the acquisition by Schwarz Group ("Schwarz") of several waste management companies from Suez located in Germany, Luxembourg, the Netherlands and Poland.

More briefs:  
http://ec.europa.eu/competition/publications/cpn/

More publications:  
http://ec.europa.eu/competition/publications  
http://bookshop.europa.eu

Competition merger briefs are written by the staff of the Competition Directorate-General and provide background to policy discussions. They represent the authors' view on the matter and do not bind the Commission in any way.

© European Union, 2021. Reproduction is authorised provided the source is acknowledged.

KD-AL-21-001-EN-N  
doi 10.2763/800584  
ISSN 2363-2534
**Aurubis/Metallo and the assessment of buyer power in EU merger control**

Roberto Bove, Liliane Karlinger, Andreas Sowa, Marek Zila

**Introduction**

On 4 May 2020, following an in-depth investigation, the Commission cleared unconditionally the acquisition of Metallo by Aurubis (referred to below respectively as the ‘Transaction’ and the ‘Parties’). Metallo, based in Belgium, is active in the recycling, processing and trading of non-ferrous metals. In particular, Metallo refines copper scrap to produce copper anodes, copper cathodes but also tin, lead and other by-products of the refining process. Aurubis, based in Germany, is a supplier of non-ferrous metals and the largest integrated European copper producer. Aurubis notably processes copper concentrates and copper scrap and produces copper cathodes and by-products of the copper refining process.

The Parties’ activities mainly overlapped in the refining of copper scrap. Copper scrap refiners such as the Parties recover copper from copper scrap, which is then used for downstream production of copper-containing products. Some copper refiners are also able to recover other metals (such as tin) that are contained in some copper scrap batches. Aurubis and Metallo are the two largest European copper scrap refiners, and Metallo, the target, is technologically advanced and focused on the recovery of copper and tin from complex scrap that contains many impurities.

The in-depth investigation in this case sought to establish whether, as a consequence of the Transaction, the merged entity would have increased its buyer power and been able to impose lower prices for copper scrap purchases (in particular via an increase in the so-called ‘refining charges’, as explained below). Such lower prices could potentially harm industrial suppliers of copper scrap in the EEA when selling scrap as a by-product of their production process. In such cases, being paid less for the scrap that is unavoidably being created through the production process is equivalent to facing higher marginal production costs. This, in turn, can potentially lead to the final products becoming more expensive. Moreover, the incentives and ability of collectors of copper scrap to invest and collect could be reduced if they were faced with lower offtake prices.

The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.
With respect to the process required for recycling scrap, a distinction can be made between scrap that can be directly recycled by melting it (referred to as ‘direct melt scrap’), and scrap that requires refining prior to melting.

**Definition of the relevant markets**

The Commission found that, within scrap requiring refining, three separate relevant product markets can be distinguished, namely: (i) so-called ‘Standard Copper scrap no.2,’ which has a high copper content, is widely traded and does not require assaying; (ii) so-called ‘electronic scrap’ (‘e-scrap’), which requires special refining equipment, is widely traded and requires somewhat limited assaying compared to other types of scrap; and (iii) the heterogeneous category of all remaining non-standard scrap (value-added) they provide.

In practice, copper refiners such as the Parties purchase batches of CSSR that are highly differentiated in their copper content, but also in multiple other dimensions – for example, one batch may contain both tin and fragments of hazardous material (including liquid), while another may contain nickel and be dusty. Different types of CSSR may require specific treatment (and therefore investment in equipment) and/or assaying for determining the composition of the scrap, and the economic margins that the Parties or their competitors can earn also varies accordingly.

With respect to the geographic scope, while CSSR is exported globally, several types of CSSR face significant regulatory and economic barriers to export. These barriers include, for example, hazardous waste regulations, economic risks linked to assaying, and transport costs. In addition, the Commission found that there is no functioning price arbitrage between the EEA and other parts of the world with respect to CSSR, even for the more standardized and traded Standard Copper scrap no 2. Hence, the Commission found that the relevant markets were likely EEA-wide in scope.

---

As the content of copper and of other materials might vary significantly, depending on the origin of the scrap and on the process to recover it, purchasers of copper scrap like the Parties undertake the assaying (i.e. testing in a laboratory) of copper scrap batches to determine their composition.

---

**The key economic features of the CSSR market**

Refiners such as the Parties typically purchase CSSR at a price that reflects the copper content (e.g., for Europe, the so-called ‘LME price of copper’) minus a fee reflecting the costs associated with refining (‘refining charges’). While refiners do not have any influence on the London Metal Exchange (‘LME’) price of copper, they have a certain leeway in setting the refining charges, which represent the compensation that refiners receive for the service (value-added) they provide.

CSSR is not a conventional industrial ‘product’ but a ‘waste’, as it is not purposefully produced but rather generated as a by-product of industrial production, or ‘re-appears’ as end-of-life scrap. As a ‘waste’, its generation is only partially affected by the price ultimately paid for the copper scrap.

The supply of end-of-life scrap is somewhat elastic to the copper LME price (as reflected in variations in the recycling rate of certain scrap that would otherwise be uneconomical to recover). The supply of scrap from industrial processes is largely inelastic to any price changes (LME or refiners’ refining charges) and even end-of-life scrap supply is likely largely inelastic in relation to copper refiners’ refining charges (i.e., the part of the price that would be affected by the transaction).

The supply side for the procurement of copper scrap is very fragmented with hundreds of possible sources of supply. However, these suppliers have often made investments in the treatment of specific types of copper scrap and therefore cannot easily switch between supplying different scrap types. Industrial suppliers in any case cannot switch the type of scrap they are supplying. Concentration on the demand side by contrast is significantly higher than on the supply side.

**Legal framework and theory of harm**

**Legal framework for the assessment of buyer power**

It is well-established case law and practice that the Merger Regulation applies indiscriminately to all concentrations regardless of whether they affect the selling or the buying side of the market. Paragraph B of the Horizontal Merger Guidelines\(^2\) acknowledges for instance that ‘both suppliers and buyers can have market power’.

In relation to possible anti-competitive effects of horizontal mergers, paragraph 61 of the Horizontal Merger Guidelines explains that concentrations creating or strengthening buyer power in upstream markets may significantly impede competition, in particular by creating or strengthening a dominant position. Paragraph 61 also lists ways in which such

---

\(^2\) Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings

OJ C 31, 5.2.2004, p. 5–18
The theory of harm

Based on the legal framework and taking into account the economic aspects relevant to the assessment of buyer power, the theory of harm against which the Commission assessed the facts of the case can be summarised as follows:

- The Transaction may lead to the elimination of important competitive constraints between the Parties in the EEA market for the purchase of CSSR, which in turn may result in a significant increase in the buyer power of the combined entity on the EEA CSSR market. Since the supply of copper scrap for refining tends to be largely inelastic, such increase in buyer power may lead to significant price effects harming suppliers of CSSR whereas the supply may be reduced only moderately.

- While the reduction in revenues (or profitability) of suppliers may not be sufficient to give rise to a significant impediment to effective competition, copper scrap suppliers, in particular collectors and pre-processors, could be faced in the medium term with reduced incentives to collect copper scrap and invest in the equipment or innovation required for the collection, preparation and/or sorting of scrap. This may ultimately harm the European copper scrap collection system.

- In addition, an increase in buyer power could have direct marginal cost increasing effects in particular for industrial suppliers that pay refining charges to refiners for the law-compliant disposal of their by-products, and thus eventually harm their customers, analogously to the mechanism at play in a case of seller power. Because the copper scrap output of industrial players is proportionally fixed to the output of their final products, a post-merger increase in refining charges (resulting in a decreased selling price of copper scraps to the Parties) would effectively increase (1-for-1) the marginal costs of production of the copper-containing products. Refining charges can be seen as a production cost like any other. As in seller power cases, an increase in such a marginal cost can be expected to translate into an increase in the output price of companies generating copper scrap as a by-product. These price increases would likely be spread out over a large variety of different industries and thereby ultimately over a variety of final consumers downstream of copper using manufacturing companies.

- Finally, the concentration is unlikely to lead to more output or consumer benefits downstream. While the exercise of buyer power can sometimes lead to positive effects for the customers of the merging parties, in this case the merged entity would be unlikely to pass on the benefits of lower input prices to its downstream customers, i.e., purchasers of copper cathodes or commodity tin products. The reason is that the markets for copper cathodes and commodity tin are worldwide commodity markets where large volumes of copper cathodes from both primary and secondary production are exchanged. It would be unlikely that the combined entity would materially increase its volume of output because the Parties already operate at full capacity before the merger. The lack of prospect of increased sales would not incentivise the combined entity to lower the prices of its downstream copper products. Moreover, even if it were to sell slightly more copper (quod non), prices in the worldwide commodity market would not be materially affected.

Outcome of the assessment

The Commission’s preliminary view, as set out in a Statement of Objections, was that the Transaction would risk significantly impeding effective competition in the market for the purchase of CSSR in the EEA due to the removal of an important competitor and the creation of a dominant position. In particular, the Commission preliminarily concluded that the Transaction would have led to a high degree of concentration with the combined entity holding large purchasing, refining and capacity shares of CSSR in the EEA. Further, the Parties were considered to compete closely in the EEA purchasing market for CSSR. Therefore, the Commission was concerned that the Transaction would significantly increase the merged entity’s upstream buyer power.

---

3 Refining shares refer to the purchases of CSSR made by EEA refineries and therefore, contrary to purchasing shares, do not include exports outside of the EEA.
However, upon further investigations in particular on the role of exports, the Commission concluded that the Transaction would only lead to a moderate combined purchasing share for CSSR in the EEA of 20-30%. In turn, while the Transaction would lead to large combined refining (60-70%) and capacity shares (50-60%) in the EEA, these could not be considered in themselves to be indicative of market power in this particular case, notably because suppliers of CSSR in the EEA can and do export significant amounts of CSSR to purchasers outside the EEA. Furthermore, while the Parties appeared to compete closely in certain segments of the purchasing market for CSSR in the EEA, further assessment carried out by the Commission revealed a greater degree of complementarity in the Parties’ activities in these segments. In particular, the Commission found that there are significant differences in the Parties’ supplier bases and metal recovery capabilities.

As a result, the Commission ultimately concluded that the Transaction would not likely lead to a significant increase in buyer power and, therefore, that it was unlikely that price effects (in particular an increase in refining charges) were to materialize to a significant extent.

Moreover, the Commission found that such price effects could possibly be compensated by positive technological synergies associated with the Transaction (in particular improved metal extraction capabilities of the merged entity, the benefits of which may in part be passed on to CSSR suppliers). On balance, the Commission therefore considered that the Transaction would not result in a significant impediment to effective competition on the market for the purchase of CSSR in the EEA.

**Conclusion**

The **Aurubis/Metallo** case sheds light on a number of issues that may be relevant for future buyer power and recycling cases.

One important aspect is the legal framework for the assessment of buyer power cases: the Horizontal Merger Guidelines do not advocate a symmetrical application of seller power rules, but require a case-by-case approach balancing the positive and negative effects that might occur on upstream and/or downstream markets.

The Horizontal Merger Guidelines explicitly mention the potential for increased buyer power to generate consumer benefits to the extent that the lower input prices enjoyed by the combined entity as a result of its increased buyer power are passed on to consumers. In carrying out the balancing exercise envisaged in the Horizontal Merger Guidelines, it is therefore necessary to establish why such pass-on cannot be expected (as was the case in **Aurubis/Metallo**) or, if such positive downstream effects are instead likely, to take them into account in the balancing exercise.

Where no such consumer benefits or lack of consumer harm can be expected, it is still possible to establish a SIEC. The assessment of upstream harm can be done by applying by analogy the principles for non-coordinated effects in seller cases (elimination of important competitive constraints between the parties based on market shares, closeness, alternatives, reaction of competitors, fragmentation of the supply side, etc.). However, it is not sufficient to show that the concentration merely leads to rent shifting towards the merging parties, at the expense of their suppliers: it must be established that beyond the mere revenue loss for suppliers there is a genuine welfare harm, for example through a reduction of incentives to innovate and invest.

Another important aspect of the **Aurubis/Metallo** case is its contribution to the assessment of circular economy/waste treatment/recycling cases. Such cases have received renewed attention in the ongoing debate about the ‘greening of competition policy’. The **Aurubis/Metallo** case shows that recycling and waste treatment cases may present service elements: depending on the features of the recycling industry in question, such cases may therefore be best analysed as markets for the provision of recycling services with recyclers on the supply side of the market.

Another peculiarity of circular economy cases is that the boundaries between ‘upstream’ and ‘downstream’ players is blurred: as the example of industrial suppliers of copper scrap in the **Aurubis/Metallo** case demonstrates, some players may be both downstream customers of the combined entity and upstream suppliers of an input that they wish or need to dispose of. In such a situation, increased buyer power can lead to an increase in marginal costs for the industrial suppliers of the waste in question that will harm consumers when this marginal cost increase is passed on through higher prices of the end-product(s) containing the recycled material.

Finally, concentrations increasing buyer power may create efficiencies that need to be taken into account in the assessment under the rules on the treatment of efficiencies in the Horizontal Merger Guidelines, also applied by analogy to standard seller power cases.
Google/Fitbit: Preserving healthy competition in digital markets
Leonie Hass, Benedikt Herz, Fabio Polverino, João Vareda

Introduction
On 17 December 2020, following an in-depth investigation, the Commission conditionally approved the acquisition of Fitbit by Google. Fitbit is active in the development, manufacturing and distribution of wrist-worn wearable devices (smartwatches and fitness trackers, referred to as “wearable devices” in this article), connected scales as well as related software and services. Google is globally active in a wide range of product areas including online advertising technology, internet search, cloud computing, software, and hardware. Notably, Google develops licensable operating systems (“OS”) for smartphones and smartwatches, as well as applications, including health and fitness applications. The company also offers IT and information/research services for the healthcare industry. Google derives most of its revenues from online advertising via its internet search engine.

Google/Fitbit is the most recent case where the Commission has performed a comprehensive assessment of data-related issues in the analysis of a merger, and the first one where the Commission accepted a so-called “data silo” commitment. The case also raised important questions in relation to the assessment of interoperability issues.

It is important to note, at the outset, that this transaction does not constitute a so-called killer acquisition. Fitbit was a pioneer in wearable devices and launched its first fitness tracker model already in 2009, while Google was not active in this market with its own devices before the transaction. Moreover, in recent years, Fitbit’s market share declined significantly, both globally and in the EEA. Fitbit’s position is particularly small in the growing smartwatches segment.

Concerns related to data

The importance of Fitbit’s data
Fitbit collects a wide variety of data types from its users, ranging from relatively basic information such as the user’s weight, number of steps taken in a day or calories burnt to information on heart rate, sleep, or blood oxygen saturation. Fitbit collects this data through various sources. Some data, such as height, is manually inputted by users in the Fitbit apps. Other, such as the heart rate or the number of steps taken in a day is collected by the Fitbit device’s sensors. Finally, some data is produced by ‘inference’, that is, it is generated from the user’s interaction with Fitbit’s services and/or calculated from other types of data. Fitbit also routinely collects geolocation data, based on GPS signals, Wi-Fi access points, and IDs of cell towers received by the Fitbit device or the tethered smartphone.

A crucial question in the Commission's investigation was whether the data collected by Fitbit constituted an important increment to Google’s existing data. To assess this, following its approach in the Apple/Shazam decision, the Commission analysed the data based on its volume, variety, velocity and value, a metric combination that is usually referred to as the “4Vs”.

The Commission found that Fitbit holds a database that covers a significant number of monthly active users in the EEA and contains a large diversity of data types. Moreover, Fitbit data is collected with a high frequency and it is valuable for both online advertising and the provision of health-related services.

However, to understand the competitive advantage this data would bring to Google, it was key to comprehend how unique Fitbit’s data was. The Commission therefore sent a data request to competing wearable OEMs to assess the richness of their databases also based on the “4Vs” metric. The results of this exercise confirmed that several other wearable OEMs also collect a significant amount of data, and those with a market share higher than that of Fitbit collect even more data. These wearable OEMs also collect data with a similar variety and frequency as Fitbit.

In a nutshell

Google/Fitbit constitutes the most recent case where the Commission performed a comprehensive assessment of data-related concerns in the analysis of a merger. It is also the first case where the Commission accepted a so-called “data silo” commitment.

The Commission also assessed potential effects of the transaction on the interoperability of Android OS with third-party wearable devices. These concerns were addressed by a far-reaching “interoperability” commitment.

The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.

1 A “killer acquisition” is the acquisition by an incumbent of a competitor that threatens to launch a product that would undermine its own products, with a view to shutting it down.
The Commission therefore concluded that the Fitbit data, although being valuable, in particular for online advertising services, is not "unique" when compared to the databases of other players.

**Raising barriers to entry in online advertising markets**

Since Google is a dominant player in different online advertising markets in almost all European Member States, the Commission first assessed whether Google could combine its vast database with Fitbit’s health and location data in order to entrench its dominant position further in these markets.

A first challenge was that -- while such a concern is certainly intuitive -- it is not explicitly captured by the Commission’s merger guidelines. It does not constitute a classical “vertical” concern, since Fitbit’s data was not traded and could therefore not be regarded as an input for a firm active in online advertising. Moreover, Fitbit was not active on any online advertising market, and thus the transaction did not present a traditional “horizontal” concern. However, according to paragraph 36 in the Horizontal Merger Guidelines¹, a merger can significantly impede effective competition if the merged entity gains such a degree of control over an asset that expansion or entry by rival firms may be more difficult. This was the case here: The acquisition of Fitbit by Google would allow it to combine its already very prominent datasets with those of Fitbit, thus strengthening its ability to supply services in online advertising markets and foreclose competitors’ entry and ability to expand in such markets.

In the context of the “4Vs” assessment, the Commission also analysed the relative value of Fitbit’s data for different segments of the online advertising market. Fitbit’s data is relevant for online search advertising, where Google holds a quasi-monopolistic position. While the ads shown to users are mostly selected based on a user's specific search query, user profile information (e.g., concerning health, lifestyle and location) can help to further refine the targeting of ads, in particular in the context of health-related services and products. For example, a company advertising high-performance triathlon clothing that is bidding on key words such as “triathlon” and “gear” could further tailor its ads by only having ads shown to users who seem to be triathletes based on their Fitbit’s data. The relevance of Fitbit’s data for ads targeting is higher for online display advertising. Online display advertising consists in graphic advertising on Internet websites, apps or social media. In online display advertising, no search query is available, and thus the selection of ads shown to the user is mostly based on profile information. This could be enhanced using Fitbit’s data. However, Google’s market power in online display advertising, and display advertising intermediation, is lower than in online search advertising.

A relevant element for the Commission’s assessment was the weight of the contribution of Fitbit’s data to Google’s total advertising revenues. Although Fitbit’s database is sizeable, the overlap between the number of Fitbit’s users and Google’s online advertising users, on which Google could enhance its profiling, is not particularly significant. On top of that, only a limited share of Google’s advertising revenues are related to health or wellness services and products. Nevertheless, it could not be excluded that Google could make inferences about profiling for advertising purposes for groups of individuals larger than the number of users for which Fitbit today, and Google post-transaction, collect data. This implies that the impact on Google of the increment in data and data collection capabilities brought by the acquisition of Fitbit would go beyond the mere number of Fitbit’s active users. Google’s acquisition of Fitbit’s data and data collection capabilities thus created the possibility of raising barriers to entry or expansion for competitors. This is because, thanks to the data increment, Google would be able to marginalise even further its fringe competitors in online search advertising. In fact, despite Fitbit’s data not being unique or particularly valuable as compared with other datasets, Fitbit’s rivals do not make this data available for advertising providers. In relation to online display advertising markets and the supply of intermediation services, despite Google’s market shares being lower, the Commission could not exclude that the transaction would reduce the ability of rivals to compete with Google.

Finally, it is important to note that, while the quality of Google’s services could increase in the short-term because of better ads targeting, this would be accompanied by an increase in barriers to entry and expansion. In the long-term, given the lack of contestability in these markets, Google would likely raise its prices to both advertisers and publishers and reduce its innovation efforts. This would have a detrimental effect on advertisers and publishers, which would likely more than compensate the short-term gains of better ads targeting.

**A different story in health-related markets**

The Commission also assessed whether Google could use Fitbit’s data to strengthen its market position in the digital healthcare sector.

In this case, and contrary to online advertising markets, the Commission concluded that the combination of Fitbit’s database and data collection capabilities with those already held by Google would not lead to any risk to competition.

Two main reasons justified the different conclusion. First, Google’s position in digital healthcare markets is much smaller than in online advertising. In addition, firms with expertise in health markets as well as large technology players, some of which also have access to large user health and wellness databases, are currently entering digital healthcare markets and launching a plethora of new services. These developments contributed to dispel concerns as to the possible restriction on potential competition based on the control of user health data.

Second, health data, including Fitbit’s data, although not currently traded, can be accessed by other players in the digital health sector as a consequence of the users’ decisions to actively share that data with third parties (apps and websites) that offer value added services to them. In addition, there are alternative data providers available: (i) health data is collected by other smartphone providers and can be shared with and accessed via health and fitness apps; (ii) “aggregation services” use platforms to connect multiple individuals to mine and collect their health data; (iii) health data can be collected through corporate wellness programmes (data from health risk assessment, exercise data, lifestyle data, etc.); and (iv) electronic health records are aggregated and used to provide analytics services.

---

¹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings OJ C 31, 05.02.2004, p. 5-18
The market investigation also revealed that access to Fitbit’s data, through a Web API, allows a number of players active in digital healthcare to provide services to Fitbit’s users and obtain their data in return. The Commission found that, following the transaction, Google might restrict competitors’ access to Fitbit’s Web API. Such a strategy would particularly harm start-ups in the nascent European digital healthcare space. Therefore, the Commission accepted a specific commitment from Google to preserve such data access, subject to users’ consent, after Fitbit’s acquisition.

The interplay between privacy and competition

The announcement of Google’s plans to acquire Fitbit ignited a debate on the interplay between data protection rules and competition rules. Concerns were raised about Google’s use (and exploitation) of Fitbit’s data. Another concern related to Google’s incentives to adopt practices that could degrade users’ privacy and the possibility of Google obtaining consent to data usage more easily.

In its assessment, the Commission took into account the functioning of the General Data Protection Regulation (“GDPR”), which entered into force on 25 May 2018. The GDPR provides the regulatory framework for the processing of personal data and is designed to enhance transparency over data processing, accountability by data controllers and, ultimately, users’ control over their data. Any potential privacy-related competition between Google, Fitbit, and their competitors may therefore only take place within the boundaries set forth by the GDPR.

In past cases, such as Microsoft/LinkedIn and Apple/Shazam, the Commission already investigated concerns that the transaction could degrade the level of privacy protection enjoyed by users (for example, through the marginalisation of players offering higher privacy standards).

In Google/Fitbit, there was no evidence that users consider privacy a quality aspect of wearable devices. It would therefore be difficult to argue that consumers would be harmed as a consequence of a reduction of data protection standards, even if such a degradation would be permissible under the GDPR. Moreover, since there are many alternatives to Fitbit’s devices to which users could switch to, it is very unlikely that Google would engage in any such degradation in the first place. In addition, Google was not active in the market for wearable devices before the transaction. Therefore, even considering privacy as a parameter of competition, the transaction did not lead to the elimination of an actual competitor in that respect.

In it assessment, which was conducted in close cooperation throughout the procedure with the European Data Protection Board, the regulatory body gathering all EU national data protection authorities, the Commission made clear that a data protection aspect of a merger case can only trigger the Commission’s intervention if it has a clear impact on competition and relate to a concern pertinent to the transaction.

Data silo commitments

An important aspect of this case relates to the structure of the commitment submitted by Google to address the concerns related to online advertising. Although, strictly speaking, it does not correspond to a structural divestiture, it has inherent structural elements. Google committed to maintain the health data collected from wearable devices and other Fitbit devices in a “data silo” which will be technically separated from any other Google data that is used for online advertising. This guarantees that that data is not used in any ads-related business, including online search advertising, online display advertising, and advertising intermediation products. Any access to this “data silo” is subject to an access permissioning system which applies to both individuals and Google services, and that will be monitored by a trustee with the support of a technical expert on cybersecurity, data governance and IT systems. This commitment, despite being limited in time, may extend to a duration of up to 20 years. This is particularly extensive in the context of the fast-evolving nature of the markets involved.

Interoperability with Android OS

The case also raised conglomerate concerns. Google and Fitbit are active in the closely related markets for licensable OS for smart mobile devices and for wearable devices. Wearable devices typically connect to smartphones to interact with the apps installed on the paired smartphone (for example, to display calls and SMS notifications), to download apps and to transfer data from the wearable device to health and wellness apps on the smartphone.

In this context, the Commission investigated whether Google could impede the interoperability between the Android OS for smartphones and rival wearable devices by degrading the relevant application programming interfaces (APIs) that enable the Android OS to interact with wearable devices or by degrading its technical support for rival wearable OEMs.

This concern was raised by several market participants who also pointed, as a representative example of their concern, to Apple’s current approach to make access to Bluetooth or other relevant APIs conditional on devices being certified by Apple while refusing such certification to competing wearable devices.

The Commission analysed Google’s ability to engage in a foreclosure strategy with regard to the Android OS. It considered that Google would have such ability for the following reasons. First, there is a large pool of common customers of Android smartphones and Android-compatible wearable devices. Second, Google controls Android and has a dominant market position in the supply of licensable OS for smart mobile devices. Third, while a degradation does not seem possible under the current Android business model, Google controls Android and could freely change its business model. Fourth, Google has the technical ability to degrade interoperability with Android by degrading the relevant APIs that enable the Android OS to interact with wearable devices. Fifth, Google could prevent attempts of Android smartphone OEMs to circumvent such a degradation.

The Commission also assessed Google’s incentives to engage in such foreclosure strategy. One the one hand, the Commission was faced with a number of qualitative arguments that seemed to support Google’s claim

---

5 M.8124 – Microsoft/LinkedIn (2016).

---

6 This refers also to data collected via sensors (including GPS) as well as manually inserted data.
7 This could be achieved by Google either by keeping the relevant APIs proprietary for use by Fitbit and only providing a degraded version as part of Android Open Source Project (AOSP) releases, or by continuing to include current functionalities in AOSP while, however, withholding any future developments from AOSP.
that it would not have an incentive to degrade interoperability, such as its continued reliance on the cooperation with Android smartphone OEMs. On the other hand, several factors indicated that Google may have an incentive to degrade interoperability of rival wearable devices with the Android OS. First, Google would not necessarily incur reputational damage as a result of a degradation strategy: any subtle degradation to interoperability, implemented over time, would not be directly detectable by users or even rival wearable OEMs. Second, the quantification submitted by Google, based on a standard vertical arithmetic framework, did not convincingly show that a degradation strategy would be unprofitable for Google.

Finally, the implementation of a degradation strategy by Google could have significant effects on competition by reducing the sales prospects of Fitbit’s wearable competitors and leading to a reduction in their ability to compete. In fact, the investigation showed that a smooth connection between the respective OSs of the smartphone and the wearable device is essential for wearable devices’ proper functioning as well as for a positive user experience.

**Interoperability commitment**

The Commission received a comprehensive interoperability commitment to address these concerns. For a duration of 10 years, Google will continue to offer a royalty-free license to Android OEMs with respect to those public APIs covering all current core functionalities that wearable devices need to interoperate with an Android smartphone. To avoid circumvention, Google also committed to keep the functionalities provided by the core interoperability APIs, including any improvements, in open-source code in the future. To ensure that wearable device OEMs also have access to future functionalities, Google will grant these OEMs access to all Android APIs that it will make available to Android smartphone app developers. This includes those APIs that are part of Google Mobile Services, a collection of proprietary Google apps that is not a part of the AOSP. Other provisions of the commitment also exclude circumvention via the use of error messages or discriminatory access to the Google Play Store.

Importantly, Google’s commitment covers all core functionalities that wearable devices may use to interoperate with a smartphone. Such core functionalities include connecting via Bluetooth to an Android smartphone and accessing the smartphone’s camera or its GPS. To ensure that this commitment is future-proof, any improvements of those functionalities and relevant updates are also covered. Beyond these core functionalities, it is not important to cover each and every functionality in order to leave some space for differentiation between devices – what counts are the main functionalities which drive user experience.

**Conclusion**

The Google/Fitbit case demonstrates the Commission’s intense scrutiny of mergers between companies with exhaustive data collection capabilities. The case makes clear that, because control over data might make expansion or entry by rival firms more difficult, in such cases competition concerns can arise, even if the respective companies are neither competing in the same market nor in markets which are vertically related.

Following its approach in Apple/Shazam, the Commission assessed the extent of the data collection by Fitbit and its rivals based on the “4Vs” metrics. The Commission’s finding that Google’s acquisition of Fitbit’s data was a concern for online advertising markets but not for digital healthcare service reflects Google’s very different positions in these markets.

Ultimately, the commitments undertaken by Google are very long lasting, which, in the context of the fast-evolving nature of the markets involved, gives them a quasi-structural aspect. As a result, the Commission’s intervention in this case provided long term guarantees that the competition concerns at the core of the merger would not materialize.
In a nutshell

The acquisition of optical retail giant GrandVision by leading eyewear and lenses maker EssilorLuxottica is one of the largest retail mergers ever reviewed by the European Commission. The unparalleled brand portfolio of EssilorLuxottica and its importance for retailers gave it significant market power in several countries and led to the finding of input foreclosure concerns. The complex vertical and horizontal links in this case meant that an integrated approach to assessing the impact on competition was necessary – i.e., not just looking at its vertical and horizontal impact in isolation, but also considering their mutually reinforcing effects.

Competition merger brief

EssilorLuxottica/GrandVision – keeping a close eye on vertical integration in the optical industry

Guillaume Débarbat, Karolina Gutowska, David Kova, Enrico Lorenzon, Jean-Christophe Mauger, Zsolt Vertessy – with thanks to Daniele Calisti and Hans Zenger

Introduction

On 23 March 2021, the European Commission conditionally cleared the acquisition of GrandVision by EssilorLuxottica. The transaction constituted a further step in the progressive consolidation of the optical industry. It followed the prior merger between Essilor, the leading optical lens manufacturer, and Luxottica, the leading frames manufacturer, which had been approved by the Commission in 2018.

EssilorLuxottica is the worldwide leader in the supply of optical products. Thanks to the aforementioned merger, the company is active in every phase of the development of ophthalmic lenses (from design to manufacture to wholesale) as well as the design, manufacture and distribution of eyewear, i.e. optical frames and sunglasses. In addition, EssilorLuxottica also sells optical products at retail level, via its global network of approximately 11,000 stores (including franchisees) in 2019.1

GrandVision is the largest optical retailer in the European Economic Area (“EEA”). It sells a full range of optical products, e.g. prescription glasses (including frames and lenses), sunglasses and contact lenses, and provides eye care services such as eye tests. GrandVision operates over 7,000 stores in more than 40 different countries across Europe, North and Latin America and Asia.

The acquisition of GrandVision by EssilorLuxottica was one of the largest retail acquisitions ever reviewed by the European Commission as, typically, acquisitions in the retail sector are rather assessed by National Competition Authorities in the affected Member States. In part, this is because retail mergers are more common at national level than EU-wide; but it is also due to the fact that retail mergers often involve sub-national markets in one (or a couple of) Member State(s) so that it may be appropriate for a referral to be made to the relevant Member State(s). In the present case, however, the pan-European nature of the parties’ activities resulted in a vast number of relevant markets to analyse across Member States, which meant that the Commission was ultimately best placed to review the deal.

This case was also marked by the unprecedented circumstances of the COVID-19 outbreak. As a result, optical shops were closed for several weeks. Moreover, during the merger review, EssilorLuxottica initiated litigation against the takeover target relating to its handling of its business during the pandemic. GrandVision reacted by launching parallel arbitration proceedings. Finally, challenges in obtaining necessary information during the pandemic meant that the Commission’s assessment of the transaction was suspended on three separate occasions following the parties’ failure to respond to requests for information.

This Brief explains how the Commission evaluated EssilorLuxottica’s upstream market power. It then describes how an assessment of the impact on retail markets at national level was most appropriate despite indications that markets have considerable local features. Finally, the note explains the importance of an integrated evaluation of the horizontal and vertical effects of this transaction to grasp the full extent of its competitive impact, and describes the key tools that were used to assess it.

---


The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.
The power of brands: EssilorLuxottica’s unparalleled portfolio

What sets this case aside from previous transactions in the optical industry involving vertical integration between a manufacturer and a retailer is EssilorLuxottica’s brand portfolio. While many manufacturers can and do produce frames and sunglasses, only EssilorLuxottica offers Ray-Ban, the strongest eyewear consumer brand in Europe. Most consumers view eyewear not merely as a medical device but also as a fashion item. The Commission’s assessment therefore centred on EssilorLuxottica’s unparalleled brand portfolio. Access to this portfolio is important for retailers to be able to appeal to consumers’ tastes and requirements, i.e. to compete. EssilorLuxottica’s unique upstream position was particularly important for the competitive assessment given that it was acquiring the largest European optical retailer.

The Commission had previously assessed EssilorLuxottica’s broad portfolio when reviewing the Essilor/Luxottica merger. The context of that case was different, however, as it concerned the potential leverage of market power between closely related markets (or “conglomerate effects”). The ability of a company to foreclose its rivals should be assessed in light of the specific strategy that may potentially arise from a given merger. When reviewing the Essilor/Luxottica merger, the Commission focused on the effects on competition of combining Essilor’s lenses with Luxottica’s frames. Specifically, the Commission assessed whether the merged entity would have the ability and incentive to force opticians that buy its frames to also buy its lenses, with a view to foreclosing rival lens manufacturers. In EssilorLuxottica/GrandVision, the question instead stemmed from the vertical relationship arising from the merger, that is whether the merged entity would have the ability and incentive to disadvantage rival opticians (who are customers for eyewear and lenses but post-merger also competitors at retail level) to benefit the merger partner GrandVision.

The investigation showed that EssilorLuxottica would have had the ability to foreclose rivals in several Member States, even though its market shares were moderate in some cases. Market shares alone, however, strongly understated EssilorLuxottica’s market power. Crucially, both the markets for frames and sunglasses are strongly differentiated markets, with brands being the key driver of pricing power. EssilorLuxottica was consistently seen by market participants as the most important eyewear supplier because it had the widest selection of leading brands and the strongest brand portfolio. In particular, the Ray-Ban brand is unrivalled in terms of customers’ brand awareness. It also has a high penetration rate in a number of countries, i.e. Ray-Ban products were present in a large proportion of stores (indeed, in a higher proportion of stores than EssilorLuxottica’s market shares alone would suggest). Retailers indicated that EssilorLuxottica’s portfolio, in particular Ray-Ban, was important to attract consumers into their store. These elements suggested that, as a supplier, EssilorLuxottica’s market power was far more significant than its market shares implied.

As explained in more detail below, the Commission went on to find that the merged entity would likely have an incentive to use this market power post-merger to raise rival retailers’ costs by increasing wholesale prices or advantaging GrandVision stores in terms of product supplies. In particular, the Commission found that the “diversion ratio” between GrandVision and competing retailers was significant. As a result, partial foreclosure – e.g., a wholesale price increase targeted at rival retailers – would likely have led to a considerable number of customers switching to GrandVision, which would have appreciably increased the merged entity’s profits.

Assessing retail-level competition: can’t see the forest for the trees

In terms of market definition, EssilorLuxottica/GrandVision illustrates the importance of looking at the bigger picture when assessing foreclosure risks and the transaction’s impact on competition. The market investigation indicated that the relevant market for the retail sale of optical products in optical stores would be local in scope as consumers do not generally travel great distances to buy eyewear or lenses. As a result, from a demand-side perspective, optical stores compete with their rivals within a local catchment area to win customers. Even so, from a supply-side perspective, the specific characteristics of the parties implied that a purely local analysis would risk missing the broader impact of the acquisition, as regards horizontal and vertical effects.

GrandVision operates several retail chains within different Member States, as does EssilorLuxottica in Italy and the UK. The Commission found that there was significant differentiation between such large optical retail chains and independent stores – both in terms of consumer perception and product positioning. Independents set their commercial strategy at a local level (as, by definition, they only operate one or at most a few stores). Retail chains, on the other hand, set their competitive strategies (including prices, promotions, marketing campaigns and procurement) at national level. Moreover, retail chains benchmark themselves against other national chains and often target similar commercial areas. The market positioning and strategy of a chain typically does not significantly vary at local level. Therefore, for GrandVision and its main competitors (including EssilorLuxottica in Italy and the UK, where it had an optical retail presence) the conditions of competition are determined at national level. The Commission thus found it appropriate to assess retail

---

2 Case COMP/M.8394 Essilor/Luxottica; Commission decision of 1 March 2018
competition at national level, while taking into account local conditions where relevant.\(^3\)

A further reason for this approach was the finding that upstream suppliers’ terms of supply did not vary at the local level. Rather, procurement conditions were determined at national (or even wider) level. This meant that the impact of a potential foreclosure strategy by EssilorLuxottica, for example a decision to increase prices or restrict access to certain brands, could be expected to affect retailers across the country. In light of these circumstances, the Commission assessed EssilorLuxottica’s ability and incentive to engage in input foreclosure strategies, as well as the competitive impact that this may have, at national level.

An integrated approach to the impact on competition: a bird’s eye view

Due to the multitude of horizontal and vertical links in this case, the Commission’s assessment factored in the interplay between EssilorLuxottica’s role as the largest supplier, its existing wide footprint as a retailer, and GrandVision’s unique position as the largest retail chain in Europe. To capture the overall effects of a transaction in such circumstances, it is important to assess the impact of the various links on competition in an integrated manner. Indeed, limiting the assessment to a separate analysis of horizontal and vertical effects would otherwise have risked ignoring the mutually reinforcing impact of vertical and horizontal effects. This aspect of the case was particularly important for the combination of the parties’ operations in Italy – where the merger caused not only an important vertical link, but also a significant horizontal overlap downstream on account of EssilorLuxottica’s strong retail presence.

First, the transaction had a horizontal impact on the retail market. EssilorLuxottica and GrandVision operate some of the largest optical retail chains in Italy, with several hundred stores between them. Rival chains were substantially smaller. Instead, most of the remaining market was accounted for by independent retailers who, as described above, were far less significant in influencing the country-wide price competition between retail chains. The Commission’s investigation found that GrandVision’s stores in the context of the horizontal assessment, among other things the Commission took into account similarities in their stores’ geographic location at local level.

Second, input foreclosure would increase the competitive harm at retail level. The Commission’s investigation showed that EssilorLuxottica would have had the ability and incentive to target rival retailers with strategies aimed to reduce their competitiveness. This could have included withholding or delaying supplies of its eyewear, granting preferential access to the most in-demand models to GrandVision, or raising wholesale prices. The investigation showed that this would harm rivals and consumers. For example, it appeared highly likely that wholesale price increases would in large part be passed on to consumers, leading an appreciable portion of them to switch to the merged entity. The Commission therefore found that the merged entity had an incentive to raise rivals’ costs of distribution. While a vertical merger can in theory lead to efficiencies by eliminating double marginalisation, in this particular case the efficiencies were quantitatively calibrated by the Commission and found to be insufficient to offset the incentives of the merged entity to raise retail prices.

Finally, the risk of retail price increases was exacerbated by the ‘diagonal’ aspect of the transaction. EssilorLuxottica’s highly valued branded products were particularly prevalent in the large number of independent optical stores in Italy. This had a significant impact on GrandVision’s pricing incentives after the transaction. Pre-merger, if GrandVision lost a customer following a price increase, it would lose the profits on that sale entirely. Post-merger, however, if a customer turned away from a GrandVision store because it considers its prices too high, there would be a reasonable chance that the customer would purchase an EssilorLuxottica product in a rival store. Thus, the negative impact for GrandVision of losing a customer was dampened, since the “diagonal” link implied that it would have recaptured some lost retail sales by earning additional upstream margins. Since GrandVision is one of the largest retailers in Italy, this vertical effect was likely to be appreciable and exacerbated its incentive to increase retail prices increases following the merger.

The following figure illustrates the three effects described above:

---

\(^3\) E.g., when evaluating the closeness of competition of EssilorLuxottica’s and GrandVision’s stores in the context of the horizontal assessment, among other things the Commission took into account similarities in their stores’ geographic location at local level.

Ultimately, these three interlinked effects on the retail market pointed to the conclusion that a optical retail consumers in Italy would likely be significantly worse off after the merger. These vertical and horizontal effects risked occurring simultaneously and were therefore mutually reinforcing. In particular, the effect of losing horizontal competition between the two largest market players was amplified by the fact that GrandVision had even less incentive to compete due to the diagonal link (as it can recapture a significant portion of lost sales). Moreover, the natural incentive of rivals to follow price increases when competition is weakened was amplified in this case by the higher input costs they would likely have faced as a result of input foreclosure. The Commission therefore found that the transaction would have led to a significant impediment to effective competition not just from horizontal unilateral effects, diagonal effects and input foreclosure, but also as a cumulative result of these three effects.

To evaluate the overall incentive for post-merger price increases, the Commission also conducted a quantitative assessment of the interlinked effects described above. Specifically, the Commission calibrated the proportion of customers needed to switch to the parties' own stores or switching to an alternative eyewear brand within a store that is not subject to foreclosure. As noted above, however, this ability and incentive to raise prices to rival stores.

Second, the Commission analysed EssilorLuxottica’s incentives to raise the price of frames and sunglasses to rival retailers using the so-called vGUPPId (upstream) index. This analysis was relatively complicated in this case due to the possibility of input substitution upstream: when faced with a potential price increase of EssilorLuxottica frames or sunglasses in stores that are subject to foreclosure, consumers have the possibility of switching to the parties’ own stores or switching to an alternative eyewear brand within a store that is not subject to foreclosure. As a result, the Commission found that the conjunction of intra-brand and inter-brand competition reduced the merged entity’s ability and incentive to raise prices to rival stores.

To capture this possibility, the Commission presented vGUPPId results in terms of “critical intra-brand diversion ratios”. i.e., the Commission calibrated the proportion of customers needed to switch to the parties’ stores to render a 10% increase in the wholesale price of these products profitable. These ratios turned out to be particularly low for frames in several Member States: e.g., fewer than 1 in 10 customers would need to switch to make a 10% increase in the wholesale price of EssilorLuxottica frames profitable. This indicated that partial input foreclosure for frames would likely be a profitable strategy for the merged entity despite the fact that price increases would induce some customers to switch to a rival brand.

This conclusion was further substantiated by the numerous responses to a questionnaire that the Commission addressed to rival retailers. In this questionnaire, the Commission asked retailers to estimate the proportion of customers that would rather switch to a different store than to a different eyewear brand if the price of EssilorLuxottica’s products increased in their outlet. The estimates obtained from opticians turned out to be substantially larger than the critical diversion ratios needed for an incentive to raise prices. This provided additional support to the Commission’s competition concerns.

A sight for sore eyes: conclusion and remedies

In light of the foregoing, the Commission found that the transaction would significantly impede effective competition in Belgium and the Netherlands due to a risk of input foreclosure, and in Italy due to input foreclosure combined with the integrated horizontal and vertical effects described above. EssilorLuxottica proposed to remedy this “sight for sore eyes” by divesting a large number of retail stores in each of these countries. After careful evaluation, and ensuring that there are robust safeguards in place, the Commission concluded that this remedy would be sufficient to eliminate its concerns, as the remedy would considerably reduce the merged entity’s downstream footprint, thus limiting EssilorLuxottica’s incentive to engage in foreclosure strategies, while creating or strengthening a competing national optical retail chain in these countries.

5 The Commission received more than 4,300 responses.
Schwarz Group/Suez Waste Management Companies – a greener House of Orange

Simon Genevaz, Luis Moscoso del Prado, Pierre Pechoux, Eline Vanhollebeke

Introduction

On 14 April 2021, the Commission approved, with conditions, the acquisition by Schwarz Group ("Schwarz") of several waste management companies from Suez located in Germany, Luxembourg, the Netherlands and Poland (together, the “Suez target companies”). Schwarz owns the Lidl and Kaufland retail chains, as well as waste management companies, under its PreZero division. PreZero is active in Austria, Belgium, Germany, Italy, the Netherlands, Poland, Sweden and the US. Both Schwarz and the Suez target companies are active across the waste management chain and notably leaders in lightweight packaging ("LWP") sorting services in the Netherlands.

The case is particularly topical. In the context of the European Green Deal and the priority given to making EU economies more sustainable, the Commission has a role as a competition law enforcer to protect competition in markets involved in the circular economy. As a result, the Commission exercises strict scrutiny over mergers in key circular sectors, such as waste management.

On 4 February 2021, the Commission hosted a Conference on “Competition Policy Contributing to the European Green Deal”. A recent Policy Brief on Competition Policy in Support of Europe’s Green Ambition analyses the contributions and key takeaways of the event.1

With respect to merger control, the Brief emphasized that “[i]n its enforcement practice, the Commission already takes into account consumer preferences for sustainable products, either in market definition, to identify in and out-of-market constraints and/or in the competitive assessment as a parameter of differentiation which affects closeness of competition.” The Brief forecasts that these elements will become increasingly relevant as sustainability gains a central role in the characteristics of demand or the functioning of certain markets.

The Schwarz/Suez case illustrates this trend. In its decision, the Commission took into account environmental aspects and customer preference for sustainability services in order to define the relevant geographic market and to conduct its competitive assessment, making this case a perfect example of how the enforcement of merger control rules can also contribute to the Green Deal’s objective.

The Parties’ role in the recycling of lightweight packaging in the Netherlands

The waste management process comprises several stages, from the collection of different types of waste, to their sorting and treatment, to recover valuable waste fractions for sale as secondary raw material or for disposal (at incineration plants and landfill sites). The case concerned the management of LWP, a non-hazardous waste comprising plastics, aluminium, tinplate and other composites. The Parties were market leaders in the sorting of LWP2 in the Netherlands.

Collected LWP is brought to LWP sorting plants, where different LWP fractions are recovered. LWP sorting plants use different

---


2 LWP sorting consists in separating different types of LWP fractions (i.e., beverage cartons, polyethylene, polypropylene (“PP”), (iv) polyethylene terephthalate (“PET”), (v) polystyrene (“PS”), (vi) mixed plastics, (vii) residue (baled and fines), (viii) tin-plate, and (ix) aluminium.

The content of this article does not necessarily reflect the official position of the European Commission. Responsibility for the information and views expressed lies entirely with the authors.
techniques, such as optical or magnetic sorting, infrared technology and compressed air, to separate these fractions. The extracted materials are then compressed into bales, which are sold to recyclers.

The markets for the collection, sorting and recycling of LWP in the Netherlands are structured around specific regulatory requirements.

First, the demand for LWP sorting services in the Netherlands is organised under an ‘extended producer responsibility’ system whereby organisations to which producers and importers of packaged products – which are legally responsible for the prevention, collection and recycling of packaging waste – have delegated their responsibilities. Sorting services for the different areas are tendered out by these organisations through competitive processes in which the different sorting entities submit bids on the basis of the available capacity at their sorting plants.

Second, the European Union Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (the “Packaging Directive”) requires Member States to take necessary measures to ensure that systems are set up for the collection and recycling of packaging waste. It aims at harmonising national waste management measures and to reduce the impact of packaging and packaging waste on the environment. Notably, the Directive contains measures designed to promote the re-use, recycling and other alternatives to final disposal, including recycling targets. It thus requires that Member States take the necessary measures to ensure that at least 65% (by weight) of all packaging waste (50% for plastic) will be recycled by 31 December 2025. By 31 December 2030, this target will rise to 70% (55% for plastic). By 31 December 2025, 50% of LWP will be recycled by 31 December 2025. By 31 December 2030, this target will rise to 70% (55% for plastic).

The determination of the geographic scope of the market required a more detailed analysis. The geographic scope of a relevant market covers the area where conditions of competition are sufficiently homogeneous, in the sense that it “can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.”

When considering the geographic scope for the sorting of LWP collected in the Netherlands, the Notifying Party submitted that the market went beyond national borders, including portions of the territory of West Germany, where German-based companies sort Dutch LWP waste. It argued that LWP can easily be transported across borders for sorting due to low technical, economic and regulatory barriers. In its investigation, the Commission did find that one third of Dutch LWP was sorted in Germany in 2020. However, this did not suffice to support the Notifying Party’s argument that the relevant market was wider than national.

The Commission thus considered a national market. Although its conclusion rested on several elements, environmental factors played a key role in the Commission’s view.

Concretely, in its market investigation, the Commission found that demand for LWP sorting services was national. The sorting and recycling chains in the Netherlands are organised under a specific national regime, and the composition and traceability requirements of LWP in the Netherlands varied from those in force in other Member States. This resulted in some technical barriers for sorters based in neighbouring Member States to sort Dutch LWP. As a consequence, the Commission found that Dutch customers first turn to local capacity, while German sorters are used to adjust for Dutch capacity constraints and therefore serve the demand not served domestically, as illustrated by the fact that increases in capacity in Dutch plants over the last years had led to a decline in the LWP sent for sorting in Germany.

In particular, environmental factors played a significant role in explaining demand-side preference for domestic service suppliers. The Commission’s investigation showed that customers awarded tenders for LWP sorting based, *inter alia*, on the environmental costs associated to each bidder, with the intent of minimizing the service’s carbon footprint. Notably, in calls for tenders, bidders were frequently awarded qualitative points for ‘sustainable transport’. Vice versa, LWP sorters located too far away were often found to be penalised, through a correction of the price quoted or through negative points for quality. This was due to higher transport costs facing those service providers as a result of the larger distance, but also to environmental reasons related to increased CO₂ emissions associated with longer distances.

5 Commission Notice on the definition of the relevant market for the purposes of competition law, paragraph 8.
transport. In other instances, customers’ attention to the waste management sector’s circularity also transpired in the decisive criteria for awarding contracts. Thus, in an important 2019 tender, the Notifying party’s Dutch facility, a new plant that PreZero committed to build in Zwolle, was selected precisely due to the fact that “the new installation (in the Netherlands) creates clear added value for the circular economy.”4 Despite otherwise offering less attractive pricing. The Commission found that the fact that Schwarz decided to build a new plant in Zwolle to sort the Dutch LWP under this contract when it could have continued to sort Dutch LWP from its sorting plant in Germany was indicative of a clear advantage for sorting Dutch LWP in plants closer to the collection point. As a result, together with transport costs, technical and administrative barriers, environmental considerations were a significant factor to explain Dutch customers’ strong preference for Dutch sorters, while German ones only intervened when national capacity constraints were exceeded.

In conclusion, it was clear that LWP sorting customers made efforts to minimise the carbon footprint of the waste management chain, and this green aspect was one of the factors that the Commission relied on to define the relevant geographic market.

Although competition conditions thus did not appear homogenous outside of the Netherlands, the Commission recognized that certain German plants, located within an economically viable distance, received a large portion of Dutch volumes at the time of the decision. The Commission therefore considered that such plants exercised an "out-of-market" constraint that should not be ignored in the competitive assessment.

**Environmental factors and the competitive assessment**

Environmental aspects were also important features of the Commission’s competitive assessment.

In the Netherlands, the Parties’ combined position represented a 60-70% share of volume, the rest of the market being in the hands of three competitors, none of which held more than about 10-20% of the market. However, when taking into account LWP volumes sorted by German plants that handled Dutch waste, the Parties’ combined position fell to 30-40%.

The Commission assessed the intensity of competition attributable to German LWP sorters. This exercise aimed at understanding whether volume share estimates were truly representative of the prevailing competitive interactions, such that competition from German sorters would have sufficiently constrained the merger entity in the Netherlands after the Transaction. Green elements played a key role in this assessment.

The Parties owned the largest LWP sorting plants in the Netherlands, both centrally located around the most populated areas of the country. The Notifying Party nevertheless argued that German LWP sorters should be considered as competitors in the market with the same degree of intensity as the Parties did pre-merger or as any other Dutch player did.

However, the Commission ultimately concluded that the constraint posed by German LWP sorters cannot be considered comparable to the constraint that the Dutch LWP sorting plants of Schwarz and Suez exert on each other, or that other Dutch LWP sorters exert on Schwarz’s and Suez’s Dutch LWP sorting plants. Examining the degree of closeness of competition between different suppliers, the Commission found that, for Dutch customers, sending LWP for sorting to plants in Germany is not considered equivalent to resorting to a sorting plant in the Netherlands. This is not merely due to higher transport costs: Dutch customers, all of which are public or highly regulated private bodies attach great importance to disposing of waste in the least environmentally harmful manner available, and sending LWP to sites hundreds of kilometres away by truck generated higher CO2 emissions. As a result, while it was necessary for these customers to send LWP to Germany because of capacity constraints in the Netherlands, this was generally seen as the worst option. This also explained why the Notifying party, which held sorting capacity in Germany, nevertheless decided to build an LWP sorting plant in the Netherlands to sort Dutch LWP when it had capacity to do so in its German plant, and why the proportion of LWP sorted in Germany has been decreasing as new capacity has been built in the Netherlands in the last years.5

Therefore, although the Commission acknowledged that German sorters could and did compete for the sorting of Dutch LWP, they were perceived by customers as less efficient –both economically and environmentally – and thus less close to the Parties than they are to each other. Consequently, the Commission concluded that German sorters could not be deemed to compensate the loss of competition brought about by the transaction.

Moreover, the Commission found that the Parties’ combined spare capacity represented 70-80% of spare capacity of all Dutch plants. This would mean that, for any new contracts where the customers would prefer – for the reasons explained above – the LWP to be sorted in the Netherlands, the merged entity would become an unavoidable trading partner.

These factors significantly contributed to the Commission’s ultimate finding that the Transaction raised serious doubts as to its compatibility with the internal market.

---

4 Decision of 14 April 2021 in case M.10047 – Schwarz Group/Suez Waste Management Companies (“Decision in case M.10047”), at paragraph 62.

5 Decision in case M.10047, at paragraph 115.
Conclusion

In the end, the Transaction received a green light, after commitments were offered by Schwarz in the form of a divestment of the LWP sorting plant in Rotterdam originally owned by Suez. Consistent with the Commission's preference for structural commitments to remedy horizontal anticompetitive effects, the Notifying party’s commitment removed the entire overlap brought about by the Transaction in the Dutch market for LWP sorting services. Ultimately, the present case is not unprecedented as the Commission has had the opportunity to take environmental factors into account in its assessment. This is generally so when such factors translate into customer preferences and thereby affect the dynamics of competition. However, rarely has the Commission assessed environmental aspects so systematically as in Schwarz/Suez. The increasing role of environmental concerns and objectives should lead to the development of the Commission’s decisional practice in this area.

6 See, e.g., the Commission’s decision of 5 May 2015 in case M7292 – DEMB/Mondelez/Charger Opco, at paragraph 55 et seq.