Competition merger brief

Issue 3/2023 – December

In this issue:

Page 1: M.10506  
Parker/Meggitt – Applying the brakes on a merger for a safe landing

Page 4: M.10663  
Orange/VOO/Brutélé – Replacing one access-seeker by another

Page 8: M.10438  
MOL/OMV Slovenija – Fuel it first

Page 13: M.10433  
Vivendi/Lagardère – Headlines on competition in books and magazines in France

Page 17: M.10860  
Advent/Gfk – A well-researched structural fix for conglomerate issues

More briefs:

More 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, 2023
Reproduction is authorised provided the source is acknowledged.

KD-AL-23-003-EN-N
doi 10.2763/1030
ISSN 2363-2534
Parker/Meggitt: Applying the brakes on a merger for a safe landing

Pilar Cordoba Fernandez, Amine Mansour, Otmane Sbitri, Andreas Sowa

Introduction

On 11 April 2022, following a phase 1 investigation, the Commission conditionally cleared the acquisition of Meggitt by Parker (referred to below respectively as the ‘Transaction’ and the ‘Parties’). Parker, headquartered in the US, is active globally in the design, manufacture and supply of motion and control technologies and systems, and in the provision of precision engineered solutions for a variety of mobile, industrial and aerospace markets. Meggitt, headquartered in the UK, is active globally in the design, manufacture and supply of components and sub-systems for aerospace and defence markets, and selected energy applications.

The main overlap in the Parties’ activities identified during the investigation was that both Parties are active in the production and supply of aircraft wheels and brakes (‘AWB’) for a range of different aircraft types.

Following the investigation, the Commission had concerns that the Transaction, as initially notified, would further reduce the already limited number of suppliers of wheels and brakes for small general aviation aircraft, business jets, civil and military helicopters, and military fixed-wing drones. Despite generally small market share increments, the merged entity would have been further strengthened as the largest supplier in these markets. This would have impacted the prices of and innovation in these important components. Competitors generally have a smaller presence in the supply of wheels and brakes for these aircraft types and often do not offer all types of brakes.

To address the Commission’s concerns with respect to aircraft wheels and brakes, Parker committed to divest its entire AWB division. The commitments include the divestment of Parker’s plant in Ohio, US, and a range of provisions to ensure that a buyer can operate the business viably and independently from the merged entity. These commitments fully remove the overlaps in the design, manufacturing, and supply of AWB between Parker and Meggitt, globally. The commitments therefore ensure that the pre-Transaction level of competition is maintained in the markets where the Commission identified competition issues, thus preserving customer choice.

Therefore, the Commission concluded that the Transaction, as modified by the commitments, would no longer raise competition concerns.

Key issues

The appropriate product market definition and the appraisal of the competitive constraint exerted by players with small market shares were among the key issues of the investigation. The full-overlap divestiture offered by the Parties addressed the competition concerns.

Product market definition

AWB form part of aircraft landing gear. The aircraft main wheels and brakes tend to be designed and manufactured together, as the brake must efficiently utilise the available space within the wheel. In previous cases, the Commission considered a possible segmentation of AWB by aircraft types but left the exact product market definition open.

Given that AWB differ significantly depending on which aircraft type they are manufactured and used for, (such as commercial airliner, business jet, small general aviation aircraft, military jet), the Commission investigated whether separate markets exist for the manufacturing and supply of AWB by type of aircraft. As differences between AWB by aircraft type were also confirmed by market participants, in the Parties’ internal documents and third-party reports, the Commission concluded that a segmentation based on aircraft type is appropriate.

Further factors, in particular the engine type of the plane (jet, piston, or turboprop), the maximum take-off weight of the plane, and the material of the brake (carbon or steel) were considered to be relevant limitations to substitutability. The market definition

In a nutshell

On 11 April 2022, following a phase 1 investigation, the Commission conditionally cleared the acquisition of Meggitt by Parker.

The main overlap between the Parties was the production and supply of aircraft wheels and brakes. The Commission identified competition concerns due to the Parties’ large combined market position in the supply of aircraft wheels and brakes for a number of different aircraft types.

Parker committed to divest its aircraft wheels and brakes division, removing the
was left open with respect to these factors, but they were taken into account in the competitive assessment. For instance, the strong capabilities of Meggitt in carbon brakes were considered to enable it to increase its presence in AWB for large general aviation aircraft.

Separate markets were found with respect to AWB for military and civil fixed-wing planes (in particular UAVs and trainer aircraft). For helicopters however, such a segmentation by type of end users was left open, as these are often developed with a dual-use (military and civil) concept, and in any case competition concerns arose for AWB for both types of helicopters.

In line with Commission precedents related to aircraft component markets, the Commission defined the relevant geographic market as global.

**Competition concerns despite small increments**

With the exception of AWB for helicopters (80-90% combined market share with a 20-30% increment), the competition concerns identified by the Commission arose on markets where the Transaction led to the combination of a strong market leader with a smaller player, thus leading to a limited incremental increase of the leading player’s market share.

With respect to the AWB for general aviation market, the Parties’ combined market share was 40-50%, with an increment of 0-5%. In certain segments of this market (e.g., AWB for turboprop general aviation aircraft), the combined share would have been even larger. When considering AWB for business jets, the Parties’ combined market share was 60-70%, with an increment of 0-5%. With respect to AWB for military fixed-wing drones, it was 50-60% with an increment of 0-5%.

Despite the Transaction resulting in small market share additions, the Commission considered serious doubts to arise on these markets for the following reasons.

The AWB markets in question generally were highly concentrated with only a very limited number of rivals. In all of these markets, the merger would have resulted in the strengthening of the market leader and the removal of one of a very limited number of suppliers from the market. Customers’ already limited alternatives would therefore have been limited even further.

The resulting very large combined market share of the Parties and the very significant market concentration were also expressed in the respective Herfindahl-Hirschman Index (HHI) values. While pre-Transaction HHI values were already high (due to the generally concentrated nature of these markets), post-Transaction HHI values and HHI deltas were, despite the small market share increments, significantly above the thresholds for which the Commission considers it unlikely to find competition concerns (Horizontal Merger Guidelines, paragraph 19-21).

Further, the investigation found that the Parties competed in calls for tender and therefore exerted a direct competitive constraint on each other. While one of the Parties was only a minor player based on its market share, it nevertheless exerted a relevant constraint on the other (larger) party in specific customer tenders. Similarly, the Parties also considered each other internally as competitors (e.g., referring to the rival Party as one of the ‘top competitors’). Finally, in some markets the Party contributing the small increment has a strategy to expand its market presence, making it likely that absent the Transaction competition with the market-leading Party would increase in the future.

Therefore, the Commission in this case found that while in other cases the constraint exerted by a player with a small market share may be found to be limited, in the case at hand – which was characterised by highly concentrated markets – the removal of a smaller player would have led to a significant reduction in competition in some of the relevant markets, and thereby would have meaningfully limited the credible alternatives accessible to customers.

**Full-overlap divestiture**

In order to address the serious doubts raised by the Transaction, Parker proposed to divest its AWB division. The tangible assets included in the divestment business comprised in particular a production site located in Avon, Ohio, USA. In addition to provisions for the transfer of all relevant know-how, IP, R&D projects, and all relevant (AWB customer) contracts, the commitments offered by Parker also included the “Cleveland Wheels & Brakes” brand and a non-exclusive, royalty-free licence for the trademarks containing Parker group branding currently used by the AWB division for a transitional period of up to three years. This ensures that the purchaser of the divestment business can rely on the established Parker brand name for a transitional period in order to ensure customer retention.

An upfront buyer requirement ensured that the Transaction could not be implemented before the Commission approved a purchaser and the terms of sale. Specific purchaser requirements specified that the purchaser should be an existing manufacturer of aerospace components with experience of dealing with military and government customers.

The Commission found that the commitments were sufficient to eliminate its serious doubts, as they removed the entire overlap between the Parties’ activities. Furthermore, the divestment business was found to be viable and competitive, as it consisted of one of Parker’s pre-existing business units. Customers of Parker AWB also confirmed that they would continue to place orders with the divestment business. Finally, the purchaser criteria ensured that the divestment business would be run by an entity with experience in the industry – a criteria deemed of high importance by market participants.

Therefore, the Commission concluded that the Transaction as modified by the commitments would no longer raise competition concerns.

Following the conditional clearance decision, the Commission approved Kaman Corporation (‘Kaman’) as the purchaser of the divestment business. Kaman was considered to be independent of the Parties, and to have the financial resources, expertise, and
incentive to maintain and develop the divestment business. Kaman also had prior experience in the manufacture of aerospace components, which was a requirement set out in the commitments to be considered a suitable purchaser for this business.

The Commission cooperated with the US DoJ and the UK CMA throughout the investigation. Both authorities ultimately cleared the transaction subject to the divestment of Parker’s AWB division to Kaman.

**Conclusion**

The case demonstrates that competition concerns may arise in markets even when market share increments brought about by an acquisition remain small. Under certain market circumstances, such transactions may still significantly reduce competition and harm customers. This is particularly the case where few players are active on the relevant markets, concentration levels are high, one party has a very large pre-merger market share, and both parties compete head-to-head.
In a nutshell

The acquisition of VOO and Brutélé by Orange is the Commission’s latest in-depth investigation in the retail fixed telecom markets.

Since entering in 2016, Orange has exerted significant competitive pressure in the retail fixed internet and TV markets in the South of Belgium, despite being fully reliant on wholesale access to the fixed networks of VOO and Brutélé. With the transaction, this retail competitive dynamic would have been eliminated.

The commitment offered by Orange giving access to the acquired VOO and Brutélé fixed network to Telenet and the resulting entry of Telenet in the fixed telecom markets in the South of Belgium would replace the constraint exercised by Orange pre-transaction. It replaces an access seeker by an access seeker offsetting any loss of retail competition following the transaction.

Orange/VOO/Brutélé: Replacing one access-seeker by another

Luca Carmosino, Sean Memagh, Laurent Petit, Eline Vanhollebeke

Introduction

On 20 March 2023, following an in-depth investigation, the Commission conditionally approved the acquisition of VOO and Brutélé by Orange.

In this brief, we focus on some of the salient features of this case, notably the Commission’s findings as regards the geographic market, how the Commission’s assessed this “gap case”, the issue of potential entry and the targeted remedy that neatly fitted the case’s specificities.

1. Market structure and competitive landscape

In most Member States, retail telecommunications services can be provided to consumers through wired fixed networks or through wireless mobile networks.

Furthermore, retail operators can reach end-users either by relying on their own (fixed or mobile) network, or by gaining access to another operator’s network either on the basis of wholesale commercial terms or on the basis of access regulation imposed by national regulatory authorities where it exists. Retail operators providing telecommunications services on the basis of another operator’s (fixed or mobile) network are usually referred to as “access-seekers”.

In Belgium, on the mobile side, there are three existing network operators (Proximus, Orange and Telenet). Digi, a Romanian telecommunications group active in multiple Member States, was allocated some 5G spectrum reserved for a new entrant in an auction process run in 2022, which it can use to enter the market as a fourth mobile network operator. In addition, several operators, including VOO, are active as access-seekers and currently supply mobile services using the mobile network of one of the existing mobile network operators (“MNO”) on commercial terms.

In relation to fixed telecommunications services, Proximus is active through its own network across the whole of Belgium. Furthermore, there are regional networks: in the South of Belgium VOO and Brutélé are active with their own network, and in the North of Belgium Telenet provides services also on the basis of its own network. Accordingly, in the South of Belgium, there are two fixed networks: the network operated by Proximus and the network operated by VOO and Brutélé. Orange is an access-seeker for fixed telecoms services across Belgium, relying in the South on VOO’s and Brutélé’s network and in

---

1 While the spectrum was awarded to both Citymesh and Digi. Citymesh will focus on business segment whereas Digi will focus on the consumer segment, the latter being the focus of the Commission’s investigation in this case.
the North on Telenet's network. It enjoys this access on the basis of the existing access regulation imposed by the Belgian Telecommunications Regulator.2

The Parties are large players in these markets:

- In mobile telecommunications: Orange is the second largest mobile telecom provider in Belgium, behind Proximus, the historical incumbent, which will remain the largest mobile operator in Belgium post-transaction;
- In fixed telecommunications, depending on the exact product market considered (fixed internet or television), VOO and Brutélé are either the largest or second largest providers of fixed telecommunication services in the areas covered by their fixed networks, namely the South of Belgium, ahead of or behind Proximus. The Transaction does not affect VOO and Brutélé’s or Proximus’ ranking in the relevant markets. Orange is the largest access-seeker on fixed telecommunications networks in Belgium.

The main change brought about by this transaction is that it allows Orange, which operated its own mobile network throughout Belgium but was an access-seeker for fixed services before the Transaction, to become a fixed networks operator in the parts of Belgium where it would acquire VOO and Brutélé’s networks, i.e. the South of Belgium.

2. Geographic scope of the retail markets for fixed telecommunications services

The transaction raised competition concerns in the retail markets for fixed telecommunications services, in which both Orange, and VOO and Brutélé, serve customers. It did not raise concerns in the retail market for mobile telecommunications services.

In previous cases, the Commission generally found for Member States other than Belgium that the geographic scope of the retail markets for fixed telecommunications services are national in scope.3 Interestingly however, in this case the Commission found that this did not hold true.

Evidence from the merging parties' internal documents as well as the Belgian telecommunications regulator analyses of the Belgian market all depicted the relevant markets to be based on the footprint of each cable operator and showed that competition took place within those areas. In particular, customers living in those footprints and switching provider could only choose from providers active in the relevant footprint, as providers could technically not provide services outside of their footprint. Indeed, focusing specifically on the two cable network operators, which are VOO/Brutélé (the second largest retail fixed telecommunications provider in the South of Belgium) and Telenet (the largest retail fixed telecommunications provider in the North of Belgium), the Commission found that none of these operators provided retail fixed telecommunications services outside their cable footprint and that these operators do not advertise their services outside their footprint.

On this basis, the Commission found that, contrary to the situation in other Member States, the market conditions in Belgium were not homogenous on a national level. Rather, the relevant geographic scope on which competition occurs is narrower than national and corresponds to the cable footprint of each cable operator.

3. A 3-to-2 merger in the South of Belgium

This Transaction, which in essence amounts to a 3-to-2 merger in fixed telecommunications, would have significantly limited the ability of end-users to switch to alternative suppliers. Indeed, after the Transaction, the merged entity would have a high market share of around 40%, with non-negligible increments of more than 5, and even up to 20% depending on the market. The Parties’ market power was likely higher than suggested by their market shares alone, for two main reasons. First, the Parties' profit margins were high, indicating that they had pricing power. Second, the Parties were capturing an outsize proportion of churning customers, as measured by so called 'gross add shares',4 which, taken together with the high profit margins, led the Commission to conclude that the market shares alone materially underestimated the actual market power the merged entity would have. Additionally, consumers would be left with only one genuine alternative provider, Proximus,5 the largest operator.

As regards the Commission's assessment of unilateral effects, an important finding in the context of this 'gap case' related to closeness. The Commission’s assessment followed the Commission's Horizontal Merger Guidelines, as recently validated by the Court of Justice’s Grand Chamber in CK Telecoms,6 concluding that Orange and the targets, VOO and Brutélé were close competitors. To arrive at this conclusion, the Commission based itself on multiple sources of supportive evidence, including

---

2 See the Belgian Conference of Regulators of the Electronic Communications Sector’s decision of 29 June 2018 on the analysis of the broadband and television broadcasting markets.

3 For instance, see Commission decisions of 28 July 2021 in case M.10153 – Orange/Telekom Romania Communications; of 3 August 2016 in case M.7978 – Vodafone/Liberty Global/Dutch JV; of 20 September 2013 in case M.6990 – Vodafone/Kabel Deutschland; of 29 June 2010 in case M.5532 – Carphone Warehouse/Tiscali UK; of 9 January 2010 in case M.5730 – Telefónica/Hansenet Telekommunikation.

4 Gross addition market shares are based on the capacity of a given undertaking to attract customers. On this basis, a higher gross additions market share compared to an undertaking’s static market share is an indication of higher market power than suggested by the undertaking’s static market share.

5 Except for the market for the retail supply of fixed internet access services, Proximus would be the only operator an end-user could switch to. While there are some operators that rely on Proximus’ network to provide their retail fixed internet access services, these account for less than 2% of the overall market.

reports from the Belgian’s telecommunications regulator, diversion ratios (i.e., the proportion of switching between the parties compared to other operators), and implied market shares calculation.\(^7\)

In addition, the Commission’s decision included a finding that the Transaction would eliminate Orange as an important competitive force. In that context, it based itself not just on Orange’s prices but on a body of evidence, finding that Orange had more of an influence on the competitive process than its market share or similar measures would suggest. Indeed, the Commission found that Orange had been spurring competition and innovation on the fixed telecommunications markets since its entry in 2016\(^6\), and that the consistent year-on-year increase in Orange’s market share, even if it remained below 10% in some markets, was evidence of this important competitive force. The reading and assessment of this notion in this decision are consistent with the later clarifications by the Court of Justice’s Grand Chamber in CK Telecoms.\(^8\)

The Commission’s decision also included an assessment of coordinated effects, finding that the transaction may increase the likelihood of collusion between the remaining market participants in the South of Belgium due to the reduction in the number of market participants from 3 to 2. It considered that the Transaction would align the structure of the merged entity to that of Proximus, its main competitor, as both market participants would become both a mobile and fixed network operators following the transaction.

Because of these reasons, the Commission concluded that the transaction was likely to give rise to price increases and/or degradation of quality for end customers in the South of Belgium.

4. Entry by Telenet not likely

The wholesale market for fixed internet access is regulated in Belgium, and Orange was active in the North and South of Belgium in the retail fixed internet and TV markets, by relying on regulated wholesale access to Telenet’s and VOO/Brutélé’s respective fixed networks as it had no fixed network of its own.

The Parties argued that, following the transaction, Telenet would quickly enter the market in the South of Belgium based on regulated wholesale access, just as Orange did earlier, and that such entry would neutralise any potential negative impact of the transaction on competition at retail level.

Like Orange when it entered based on regulated access in 2016, Telenet also has its own mobile network, with which it provides mobile-only retail services across Belgium, albeit with a smaller mobile customer base in the South of Belgium than Orange had at the time of its entry. However, this customer base, combined with the fact that Telenet was an established player with a strong fixed and mobile retail business in the North of Belgium, led the Commission to conclude that, if indeed it were to enter the South of Belgium, such entry may be sufficient to deter and defeat any potential anti-competitive effects of the merger.

Ultimately however, in the absence of a remedy, the Commission considered that entry by Telenet following the transaction would not be either likely or timely.\(^10\) This is because:

- Telenet did not enter the South of Belgium with fixed services in the past, despite regulated wholesale access being in place for many years. Moreover, the future regulatory landscape was uncertain at the time of the Commission’s decision, with an approaching review scheduled at the expiration of the current regulatory cycle, at the end of 2023.
- Telenet itself indicated that it had examined the possibility of entering the market several times in the past but always ruled it out on profitability grounds. It also provided evidence that even following the transaction “entry without [a] remedy [...] remains commercially unattractive.”\(^11\)
- The finding that Telenet did not have the incentive to spontaneously enter the South of Belgium was further supported by the Commission’s market investigation, as well as by an internal document from the Parties.\(^12\)

The Commission similarly concluded that entry by Digi would not be likely, timely or sufficient. As mentioned, Digi had acquired mobile spectrum in 2022, with the stated goal of entering the Belgian retail mobile market, as well as the fixed internet market. However, Digi had no pre-existing customer base in Belgium (e.g. in a different market) and the Commission considered that its entry “would likely be too far in the future to address any potential concerns raised by the Transaction”,\(^13\) such as price increases, which may be felt quickly after a Transaction closes.

---

\(^7\) Implied market shares dynamically indicate how large the Parties’ market shares would have to be for them to give rise to the observed diversion ratios. See, T. Valletti and H. Zenger, “Mergers with Differentiated Products: Where Do We Stand?”, Review of Industrial Organization (2021) 58, page 179. The concept of implied market shares has also been used in other cases, including in Commission’s decisions of 21 December 2020 in case M.9739 – PSA/FCA; and, of 7 November 2018 in case M.8744 – Daimler/Car Sharing JV.

\(^8\) For example through the introduction of new and innovative offerings such as their Love Duo bundle, which included mobile and fixed internet services without requiring users to also take a TV subscription for the first time, and which was later replicated by rival operators.


\(^10\) Horizontal Merger Guidelines, paragraph 68 (“For entry to be considered a sufficient competitive constraint on the merging parties, it must be shown to be likely, timely and sufficient to deter or defeat any potential anti-competitive effects of the merger.”)


\(^12\) Orange/VOO/Brutélé, paragraphs 409 and 411.

\(^13\) Orange/VOO/Brutélé, paragraphs 429.
5. Remedies: replacing an access-seeker by an access-seeker

To address the Commission’s concerns, the Commission exceptionally accepted an access remedy, as it found that this was well-suited to the particularities of this case, namely that this remedy enabled the pre-transaction scenario to be neatly mirrored.

Notably, Orange committed to provide Telenet with access to the existing fixed network infrastructure of VOO and Brutélé for at least 10 years. For the first 5 years, Telenet will benefit from specific discounts. Furthermore, Telenet will also gain access to Orange’s future fibre network, which Orange plans to roll out in the coming years, and which the Commission considered necessary to ensure Telenet would remain competitive in the future by having access to equivalent new technologies. The remedy fits into and reflects principles applicable under the wider regulatory framework applicable in Belgium, including any relevant non-discrimination obligations.

Telenet, a subsidiary of Liberty Global, is one of the leading telecom operators in the North of Belgium. It is a reputable player with a proven track record on the fixed and mobile telecommunications markets. The conditions of access in the commitments thus pave the way for Telenet’s entry in the South of Belgium with sufficient certainty and in a sufficiently short timeframe.

Thus, in essence, the commitments in this case effectively replace Orange, an access seeker on the VOO and Brutélé fixed networks in the South of Belgium pre-Transaction, by Telenet, which will post-transaction be the new access seeker on those networks and the new third player in the South.

Conclusion

On this basis, the Commission concluded that the commitments fully address the competition concerns identified. The Commission therefore concluded that the proposed transaction, as modified by the commitments, would no longer raise competition concerns.

This decision is a rare example of a case where it was possible to remove horizontal competition concerns on the basis of quasi-structural access-based remedies, and this in view of the specific circumstances of the case, notably the fact that Orange relied wholly on wholesale access to the VOO/Brutélé network to provide its own services in the retail markets where the Parties overlapped. The remedy was thus designed to replace one access-seeker with another, thereby re-establishing the pre-merger market structure.

This decision also demonstrates that the Commission can and does intervene in horizontal merger cases that fall short of strengthening or creating a dominant position but nonetheless raise competition concerns (so-called ‘gap cases’). The approach it took in its decision with regard to the assessments of closeness and the removal of an important competitive force forms a clear example of interpretation in line with the Commission’s Horizontal Merger Guidelines and intended purpose of the EU Merger Regulation, as recently validated by the Grand Chamber of the Court of Justice of the EU in CK Telecoms.14

---

**MOL/OMV Slovenija: Fuel-it-First**

*Kieran Coleman, Anne Jussiaux, Gaëtan Lelièvre, Luis Moscosa and Joanna Piechucka*

**Introduction**

On 17 May 2023, the Commission conditionally approved the proposed acquisition of OMV Slovenija by MOL (the ‘Parties’) in Phase II (the ‘Transaction’). This case involved the acquisition of the 2\(^{nd}\) largest player (OMV Slovenija) by the 3\(^{rd}\) largest (MOL) in the B2C retail fuel market in Slovenia, in an oligopolistic market leaving only one significant competitor, Petrol.

The Commission found that in view of the market features and the Parties’ strength, the Transaction would lead to unilateral and coordinated effects on the market for the B2C retail fuel in Slovenia.

However, the Parties submitted a very comprehensive set of commitments, including divesting 39 fuel stations in Slovenia, together with a fix-it-first provision, designating Shell Group as the purchaser of the divested fuel stations, allowing for the Commission’s clearance.

**A peculiar regulatory and economic context**

The retail supply of motor fuel in Slovenia presents specific features, which impacted both the market definitions and the competition assessment.

First, the Slovenian retail fuel market underwent major changes with the full liberalisation of the market, which was gradually introduced between 2016 and October 2020. In March 2022, following Russia’s war of aggression against Ukraine, the Slovenian government reinstated price regulation. For many years, including during most of the investigation period, prices could not exceed a regulated cap. As the price regulation was national and left limited margin for fuel retailers, prices were set at a national level and were very similar across the different suppliers.

Second, the Slovenian retail fuel market is highly concentrated with a very limited number of players. Before the Transaction, only 3 competitors (Petrol, OMV Slovenija and MOL) held meaningful nation-wide networks with stations located both on- and off-motorways. Petrol was the incumbent in Slovenia, running the largest retail network with 313 fuel stations. OMV Slovenija, for its part, operated 119 stations, and MOL 53. Shell, the fourth operator in terms of volume, was present mostly on the B2B segment, with 8 stations dedicated to trucks. Altogether, the smaller competitors represented less than 10\% of the market.

**Market definitions in retail fuel**

For the retail fuel market, the key product market segmentations were between (i) B2B customers (those with fuel cards) and B2C customers, and (ii) on- and off-motorway stations. The Commission concluded that the geographic scope for all these segmentations is national (mainly because prices are generally set nationally). However, the Commission also noted that there are local elements of competition particularly as demand from drivers for fuel has a strong local component for B2C customers. Hence the Commission also analysed the impact of the Transaction on local level catchment areas.

**Unilateral effects**

Unilateral effects arise where, as a result of a merger, competition between the products of the merging firms is eliminated, allowing the merged entity to unilaterally exercise market power. To reach a conclusion on the unilateral effects of Transaction, the Commission conducted an assessment both at a national and a local level.
Navigating the assessment at the national level

OMV Slovenija and MOL overlapped significantly at the national level. The Commission found that the Transaction would eliminate the important competitive constraints that the Parties had exerted upon each other and reduce competitive pressure on the remaining competitors.

These findings first relied on the Parties’ combined position, which represented a 40-50% share of volume, with Petrol having a similar share. The new entity and Petrol would thus cover more than 90% of the market, with a very limited competitive fringe. In addition, the Commission considered the market share increment brought about by the merger to be significant (above 10 percentage points).

Second, upon examining the degree of closeness of competition between MOL and OMV Slovenija, the Commission found that the Parties were close competitors, together with Petrol. Specifically, the Parties’ networks overlapped to a very significant extent, they offered full-service stations, and they operated under well-known brands. Many internal documents of the Parties confirmed that they saw each other as close competitors.

Third, the Commission also evidenced that, pre-Transaction, MOL was exerting a significant competitive constraint on OMV Slovenija. During the Phase II investigation, the Commission concluded that MOL could not be considered a maverick in view of its pricing, as the price differences with OMV Slovenija and Petrol were very limited, even during the liberalisation period. However, this did not preclude MOL from exerting a significant competitive constraint on its rivals through various means. For example, the Commission found that MOL has been active in offering new products and services, such as premium diesel. In addition, MOL made significant investments to improve its network. This strategy was successful as MOL significantly increased the number of its stations (through external acquisitions and internal growth) as well as its brand awareness.

Fourth, the Commission also assessed the competitors’ likely reactions to the Transaction. In doing so, the Commission distinguished between Petrol and smaller competitors. The Commission found that whilst Petrol would remain a competitive force in the market, post-Transaction, Petrol would likely benefit from any price increase initiated by the new entity and therefore have a reduced incentive to compete compared to the (counterfactual) situation absent the Transaction. As regards the smaller competitors, the Commission’s investigation revealed that those competitors were too small to represent a sufficient competitive constraint, as they did not have nationwide coverage and were dependent on the Parties or on Petrol for their supplies.

As a result, the Commission found that the Transaction would lead to a significant impediment of effective competition on national retail fuel markets.

Refuelling the assessment at the local level

The Transaction would either create or reinforce a dominant position or significantly reduce the competitive constraints the Parties exerted on each other and on Petrol in several local areas.

Despite the fact that each player sets the prices of its network at the national level, with little-to-no deviation at station-level, competition also plays out at the local level as B2C drivers usually refuel in the vicinity of their homes or work. This was confirmed by the market investigation, in particular by the majority of the drivers, customers of MOL and OMV, who responded to the Commission’s short questionnaire. As a result, the proximity of competing fuel stations is a key determinant of each station’s sales success.

The Commission’s local assessment consisted of a supply-centric catchment area analysis and a ‘presence-based approach’ to compute local market shares (see Box 1 for more information). The Commission started its assessment by using thresholds to identify prima facie problematic areas, defined as catchment areas where the Parties’ joint local market shares were above 40% and where the merger led to a market share increase of at least 5 percentage points. The Commission identified 85 such ‘problematic areas’ out of a total of 147 areas around regular fuel stations of MOL and OMV Slovenija.

In addition, the Commission also evidenced that:

- in many of these areas, the Parties’ combined market share exceeded 50%, and the Transaction brought about a market share increment above 10 percentage points,
- in all catchment areas, the market structure was already highly concentrated, and the Transaction would lead to a significant increase of concentration,
- there generally was a limited number of competitors, the merger leading to a change from 3 to 2 retailers or 4 to 3; in instances where there were more retailers, the new entity together with Petrol held a much higher number of stations,
- the smaller competitors were often located at the fringe of the relevant catchment areas.

At a local level, the Commission considered that the market dynamics were similar to what could be observed at a national level. Locally, MOL, which operated well-equipped and recently refurbished stations, exerted a strong competitive constraint on OMV Slovenija and Petrol.

The identification of these 85 problematic areas was key for the discussion on commitments as the proposed remedies had to resolve all local issues identified by the catchment area analysis.

1 As explained earlier, retail fuel prices in Slovenia were regulated for many years and again in the aftermath of the energy crisis. During these periods, prices of the retailers were almost completely aligned.
Local assessment methodology

The unilateral effects assessment focused on a supply-centric catchment area analysis. Specifically, the analysis consisted in drawing isochrones around each of the Parties’ fuel stations (reference station), delimiting an area accessible within 15 minutes driving time. Local market shares were then computed based on a ‘presence-based approach’. This approach consisted of identifying alternative fuel stations located within the catchment areas that were assumed to compete with the reference fuel station. Importantly, to account for the relative size of each station, average volume sales per station, based on the average for the relevant retail brand, were used as weights in the local market share calculation.

In the course of the investigation, the Parties submitted economic papers proposing an alternative approach to local assessment. They developed a framework to incorporate multi-product (multiple fuel stations) and multi-customer (customers who are located at different locations) aspects of the assessment referred to as the ‘local upward pricing pressure’ framework. This framework provides an analysis of post-merger pricing incentives, if reasonable estimates of diversion ratios and mark-ups can be obtained for the merging firms. While not rejecting a customer-centric approach as a matter of principle, the Commission found that the Parties’ economic submissions in this regard were subject to a number of data and methodological issues that raised doubts about their reliability in this particular case.

Ultimately, the case relied on a simple yet robust approach to catchment area analysis based on a supply-centric presence-based approach to calculating local market shares. This analysis is consistent with Commission precedents.²

Transparency fueling coordination

Coordinated effects arise where a merger increases the probability that, post-merger, merging parties and their competitors will be able to successfully coordinate their behaviour in an anti-competitive way.

The Commission focused its analysis on the characteristics of the retail market in Slovenia and the behaviour of market participants pre-merger to assess how these factors could facilitate any post-merger coordination between MOL and Petrol. The Commission thus analysed the ability of MOL and Petrol post-merger to reach terms of coordination and whether this coordination would be sustainable, i.e., whether:

- there are credible deterrent mechanisms to punish any deviations,
- there are outsiders which could jeopardise the coordination.³

Last, the Commission looked at how the Transaction would affect the incentives of market participants to coordinate.

Ability to reach the terms of coordination / transparency

The main factors analysed by the decision were: the highly concentrated nature of the market post-merger, with only two significant players – the new entity and Petrol – representing more than 90% of the market, the relative stability of the conditions of supply and demand, the homogeneous nature of the product, with a limited degree of differentiation and innovation, and the maturity high transparency of the market.

The Commission also considered that price regulation – which was in place at the date of the decision – was only a temporary measure, and that therefore the effects of the Transaction should be assessed against a scenario of free pricing, as was already in place before Russia’s war of aggression against Ukraine.

As to transparency, the Commission noted that Slovenian law required retailers to publish their prices in real time on an official website, per product and per station, which allowed competitors and consumers to react almost immediately to any price changes.

The Commission also assessed whether the Parties would be able, post-Transaction, to reach the terms of coordination in view of the market participants’ past behaviour. In this respect, the Commission noted that the retailers’ past pricing patterns made any price changes very predictable and coordination extremely simple. First, unlike other neighbouring markets, in Slovenia, the retail market had very limited price points: most retailers applied only two totem prices (prices on digital display at station entrances) for their main grade products (off- and on-motorways), without any local differentiation. Second, price changes were also very limited, once, or twice per week. Third, the pricing structure was also very simple: during the liberalisation period retailers were applying the same price formula which had been imposed during the period of price regulation, thus relying on wholesale prices and certain recognised costs, only increasing the retail margin. Price changes, in sum, were not only easy to compare and monitor, but also to predict.

This resulted in very consistent price alignment during the liberalisation period. The Commission analysed the three major retailers’ pricing evolution during that timeframe and observed that, despite price regulation having been lifted, their retail prices remained essentially identical, undergoing the same or very

³ These conditions were formulated for the first time in the judgment of the Court of First Instance (now General Court) of 6 June 2002 in Case T-342/99, Airtours v Commission.

² Cases M.9014 PKN Orlen/Grupa Lotos (Commission decision of 14 July 2020) and M.7603 Statoil Fuel and Retail/Dansk Fuels (Commission decision of 23 March 2016).
similar price changes. As a result, the average (absolute) pricing difference (for main grade products) among Petrol, OMV and MOL during the liberalisation period remained below EUR 0.5 cent. Furthermore, the Parties’ internal documents showed the existence of instructions to adjust prices to ensure a consistent alignment among the main competitors. Finally, the three retailers’ margins increased considerably during this period.

Despite these circumstances, the Commission did not conclude that anti-competitive coordination had taken place already pre-merger. On the contrary, retailers’ profit margins in Slovenia were still below those in neighbouring countries, and the increase observed during the liberalisation could very well be explained by the artificially low margin levels set by price regulation during a prolonged time period. In any case, the Commission concluded that the market structure and the past price alignment showed that the retail fuel market was fertile territory for anti-competitive price coordination in the future.

Deterrent mechanisms / reaction from outsiders

The Commission argued that timely and effective retaliation could take place in case of deviation from coordination. Given the market’s transparency and the very limited price points to monitor, any deviation by a fuel retailer could almost instantaneously be detected and punished by the other player by engaging in a price war, via low prices or offering aggressive discounts at national level. Thus, any gains from deviation would very likely be short-lived. Furthermore, post-merger, the number of local areas where MOL and Petrol would interact directly would increase significantly, leaving more room for retaliation also at local level.

Finally, the investigation confirmed that any reaction by actual or potential competitors that could jeopardise any coordination was very unlikely.

Merger specificity

Importantly, the Commission did not conclude that there had been coordination in the past, since there were other market circumstances, besides coordination, which could have facilitated the observed profit margin increases (in particular the artificially low margins imposed by price regulation in the past). However, the Commission found that the Transaction could increase the likelihood of coordination post-merger between Petrol and the merged entity due to several factors.

These factors are, namely, the reduction in the number of market players (from three to two) and the removal of MOL as an important competitive constraint. As highlighted in the unilateral effects analysis, even though there had been price alignments between the main operators in the past, MOL still remained an important non-price competitor, for instance in terms of organic growth or new products and services, due to its relatively smaller size, which means its increase in size due to the merger would have likely had a negative impact on its incentives to compete as aggressively post-merger. Moreover, the Commission found that the merger would considerably increase the symmetry between MOL and Petrol both at national and local level, as well as the transparency in the market, as it would further simplify the ability to monitor prices.

Efficiencies not demonstrated

MOL submitted that the Transaction would result in pro-competitive outcomes stemming from the refurbishment of its Croatian refinery.

However, the Commission found it unlikely that the impact of these ongoing investments could be thought of as purely merger specific. In particular, MOL explained that its investment in the Rijeka refinery in Croatia, which would lead to an increase in diesel and gasoline production, was decided prior to the Transaction.

Overall, the Commission considered that the Notifying Party failed to meet the required test to show the existence of sufficient efficiencies stemming from the Transaction. In particular, the Commission found that most of the claimed synergies were likely not merger-specific, not sufficiently verifiable, and not sufficiently shown to be passed on to the consumers. In any event, in the absence of remedies, the synergies would likely not have been large enough to offset the Transaction’s horizontal effects.

Fix-it-first remedy package

Given the breadth of the competition concerns identified by the Commission, the case required an extensive remedy package for a clearance to be considered. The remedy consisted of divesting 39 stations.

First, the remedy package solved all competition issues identified at the local level. As one divested fuel station impacted the Parties’ shares in all catchment areas that intersected with it, the number of divested stations was smaller than the number of the problematic areas.

Second, the commitments’ implementation led to the entry of a significant third player on the national market in Slovenia, able to act as a strong competitive force, and capable of exerting significant competitive pressure on the new entity and restore the constraint lost as a result of the merger. From a geographical perspective, the commitments represent good coverage of Slovenia’s population and distribution of stations across different demographic areas (cities, towns and suburbs, rural areas) similar to MOL’s post-Transaction coverage. Therefore, as the remedy taker will replace MOL as the third competitive force in the market, the Commission considered that the risk of coordination would not significantly increase post-Transaction.

---

4 Horizontal Merger Guidelines, paragraphs 76-88.
Third, the Parties included a “fix-it-first” provision in the remedy package, already designating Shell as the remedy taker for the entire divestment package. As Shell is an industrial investor, with a well-known brand, successfully operating fuel station networks in many countries, and already present on the Slovenian market with one B2C and eight trucks-only fuel stations, the Commission cleared both the Transaction, as modified by the commitments, and Shell as a suitable purchaser in its decision.

Conclusion

Overall, the case addressed several interesting issues. First, it provided a sophisticated local catchment area analysis to help the assessment of the Transaction’s unilateral effects. Second, the case also relied on an in-depth assessment of coordinated effects through the identification of industry characteristics that make it more prone to collusion\(^5\). Based on its assessment, the Commission concluded that, in the absence of remedies, the transaction would likely give rise to coordinated effects. The present decision shows that coordinated effects not only require careful consideration, but that they may also play a critical role in the merger remedy’s assessment.

Vivendi/Lagardère\(^1\): Headlines on competition in books and magazines in France

Jennifer Boudet, Jean-Christophe Mauger, Lauriane Mons, Camille Quideau, Céline Rizzoli and Otmane Sbitri

The transaction. A media consolidation

The transaction involved the acquisition of Lagardère by Vivendi, a company controlled by the Bolloré group. Vivendi and Lagardère are two of the largest and most influential multi-media groups (press, TV, cinema, radio)\(^2\) based in France. Vivendi’s stated goal with this transaction was to create a large European group of international scope in media, content, and communications, able to compete with global players.\(^3\)

Following an in-depth investigation, the Commission concluded that the combination of Vivendi and Lagardère would have harmed competition in the book publishing and press magazines markets. To alleviate the Commission’s concerns, Vivendi offered a substantial remedy package consisting in the full divestment of (i) Vivendi’s publishing arm Editis, and (ii) their celebrity press magazine Gala.

This brief focuses on some of the key issues, namely the general competitive dynamics at play in the French-speaking book value-chain (Chapter 1.), the proposed remedies and, more particularly the reasons for which the Commission rejected the initially proposed public listing (Chapter 2.), as well as the challenges of assessing impact on competition for highly differentiated products as is the case of press magazines (Chapter 3.).

Chapter 1. How does the book industry work? Finding a strengthened position throughout the book value-chain

A key feature of the value-chain in the French-speaking book sector is the strong interdependence between its different relevant markets. The value-chain encompasses numerous markets, from the acquisition of authors’ publishing rights by book publishers, to the marketing and distribution of books, and their sale by publishers to retailers, and by retailers to consumers.

The French-speaking book sector is characterized by a specific regulatory framework that aims at preserving cultural diversity and protecting small and middle-sized booksellers.\(^4\)

In a nutshell

On 9 June 2023, the Commission approved under conditions the proposed acquisition of Lagardère by Vivendi, two of the largest French multi-media groups, and leading book publishers.

The Commission grasped the competitive dynamics at play in the French-speaking book value-chain and assessed the merger’s effects on the differentiated press magazines market.

By rejecting the initially proposed remedies in book publishing, the Commission reiterated the fundamental principles of its remedy policy.

Ultimately, adequate solutions were found to preserve competition.

---

\(^1\) Case M.10433 – Vivendi/Lagardère. More information is be available on the Commission’s competition website, in the Commission’s public case register under the case number M.10433.

\(^2\) The transaction also triggered the review, by the French media regulator ARCOM, of the change of control over Lagardère radios, following Vivendi’s proposal for a new structure to guarantee the radios’ independence under current Lagardère CEO, Arnaud Lagardère. The ARCOM approved this scheme on 26 October 2023. For the purposes of its assessment of the transaction, the Commission considered radios as an integral part of the transfer of Lagardère to Vivendi.

\(^3\) On 25 July 2023, the Commission opened a formal investigation to determine whether, when acquiring Lagardère, Vivendi breached the notification requirement and “standstill obligation” set out in the EU Merger Regulation, as well as the conditions and obligations attached to the Commission’s decision to clear the Vivendi/Lagardère transaction. This investigation, which is to date still ongoing, is separate from the merger review procedure, which is the focus of the present article.

\(^4\) France is characterized by many independent book retailers, including very small points of sale.

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.
single retail price for books, enabling all actors of the book value-chain - including small, independent ones - to compete successfully. Furthermore, book publishing is often presented as a "prototype industry", whose profitability relies on a very limited number of successful books generating 80% of the financial revenues of the industry.

In the present case, while Vivendi, Lagardère and their largest competitors were active throughout the value-chain, most competitors were only present at the top and bottom of the chain, i.e., the acquisition of authors' publishing rights and the sale of books to retailers. The marketing and distribution of books, which are in the middle of the value-chain, require significant financial and human resources and are only carried out by a limited number of players (five) on the market (including Vivendi and Lagardère). This leads to smaller competitors being dependent on the largest players for all or part of their marketing and distribution needs. Yet, the marketing and distribution of books are crucial services for the publisher's access to retailers and, therefore, for the success of a book.

The Commission's investigation thus confirmed that the different levels of the book value-chain are largely interdependent, and that the combination of Vivendi's and Lagardère's positions at various markets of the book value-chain would therefore have had repercussions on other markets. In this context, in accordance with paragraph 36 of the Horizontal Merger Guidelines, the Commission considered that the distinct relevant markets constituting the book value-chain should not be considered in isolation but rather in an interdependent manner. Ultimately, by taking market interdependence into account in its assessment of the horizontal effects for each relevant market located at the various levels of the value-chain, the Commission found that it was likely to give Vivendi and Lagardère the capacity to control or influence the supply and/or resources necessary for publishing activities upstream, and commercialisation possibilities downstream.

Paragraph 36 of the Horizontal Merger Guidelines enables the Commission to take into account the competitive advantages that the merged entity has over rivals and that impede the latter (individually or collectively) from constraining the merged entity from "increasing[ing] prices or tak[ing] other actions detrimental to competition". In this case, the Commission considers whether the merged entity would have the "ability and incentive to make the expansion of smaller firms and potential competitors more difficult or otherwise restrict the ability of rival firms to compete."

In 2022, the Court of Justice of the EU confirmed the Commission's approach consisting in considering non-horizontal effects in its horizontal analysis of the effects of the operation, based on the principles described in paragraph 36.  

Relying on the approach confirmed by the General Court, the Commission considered that the increased presence resulting from the combination of Vivendi and Lagardère on each of the three overall markets concerned played a role in reinforcing its position on each of the other two overall markets of the book value-chain. For example, an increased presence on the marketing and distribution markets was considered by the Commission as a strengthening factor of its presence on the market for (i) the acquisition of publishing rights (for example, by enabling the merged entity to use its benefits from the marketing and distribution activities to increase the advance value paid to (best-selling) authors) and (ii) the sale of books (for example, by gaining access to key commercial/financial information from the competing publishers marketed/distributed by the merged entity).

Finally, in addition to concerns related to the markets' interdependence, market participants raised concerns about the Parties being large and influential multi-media groups (including press, TV, cinema, radio, advertising, etc.). The merged entity would have been able to attract more best-selling authors, thereby depriving other publishers from the revenue streams from best-sellers and thus harming them by increasing barriers to entry and development. This has also been considered as a strengthening factor of the Parties' presence in the different relevant markets.

---

5 France, Belgium, and Luxembourg regulate the public price of books, whether through legislative provisions or through inter-professional agreements.
6 Approximately 200 books per year.
7 At all levels of the book value-chain Vivendi and Lagardère are generally the number 1 (Hachette, Lagardère) and 2 (Editis, Vivendi) players, ahead of the family-owned family group Madrigall. For example, Vivendi's and Lagardère's combined market shares was (i) at least 40% on the primary markets for publishing rights (hard cover books) of general literature and children's books and approximately 60% on the secondary market for French-language publishing rights (paperbacks), (ii) between 59% and 89% in relation to marketing and close to 70% in relation to distribution, for all markets and segments concerned and (iii) above 40% (up to 99%) on over half of the markets considered for the sale of books to retailers.
8 Notably Madrigall and Meda-Participations.
9 There are approximately 6,500 publishers in France, with a wide diversity of profiles and offerings.
10 In particular, the Commission gathered extensive information and feedback from numerous market participants, including authors, publishers, and book retailers.
13 Each of the overall markets for the purchasing of publishing rights, the marketing and distribution of books to retailers and the sale of books to retailers are segmented in a significant number of markets and segments.
14 Resulting in depriving competitors of bestselling authors and, therefore, jeopardising their financial equilibrium, which could, in turn, damage the entire book chain-value and cultural diversity.
15 Such advantage is linked to advertising and promotion opportunities as well as to development potential for authors (book adaptation into films or series, invitation to television or radio talks, conferences, etc.).
Chapter 2. Can a remedy package be listed on the Stock Exchange? Determining appropriate book publishing remedies

Where the Commission identifies competition concerns, companies may undertake to modify the transaction to remove such concerns, by submitting commitments. In assessing whether the proposed commitments will alleviate these concerns, the Commission considers all relevant factors, including the type, scale, and scope of the proposed commitments with reference to the structure and the particular characteristics of the market, including the position of the merging companies and actors on the market.

To alleviate the Commission’s concerns in book publishing, Vivendi put forward various versions of a remedy package which raised a number of questions related to the effectiveness, suitability and viability of remedy packages offered by companies in the course of a merger review procedure.

First, Vivendi announced its intention to divest Editis, its book publishing subsidiary. In principle, the scope of such a divestment appears sufficient to address the concerns identified by the Commission, as it covers the full overlap.

However, initial commitment submissions raised issues with respect to the divestment modalities. On 28 July 2022, Vivendi offered to sell Editis via a distribution and stock market listing. More specifically, as a result of this proposal, Editis would have been listed on the Euronext Paris stock exchange and its shares subsequently distributed to Vivendi’s existing shareholders (the “Distribution and stock market listing” mechanism). This would have resulted in Bolloré group’s 29.5% stake in Editis being sold directly to a “reference shareholder” who would have had to be approved by the Commission. The Commission considered that the commitments were not comprehensive and effective as required by the Commission notice on remedies due to the structure of the distribution and stock market listing scheme. Compared to a 100 % divestment of Editis’ capital to a suitable purchaser, the distribution and stock market listing process is more complex and entails execution risks with uncertainties, notably on the lasting nature of the control of the buyer of the block. In addition, the Commission identified risks and uncertainties linked to the reduction of the incentives to develop Editis, the reduction of Editis’ capacity to expand, the ability to preserve Editis’ value and the independence towards Vivendi and Bolloré. This was mainly due to the limited stake held by the shareholder that would have been approved by the Commission, the presence of other shareholders and the potential changes in ownership over the remaining floating part of Editis’ capital, as in each of the proposed structures, the purchaser remained a minority shareholder. In that regard, such a divestment was not equivalent in effect to a transfer of 100% of Editis’ capital to a suitable purchaser.

In an attempt to replicate the guarantees provided by a 100% divestment to a single buyer, Vivendi subsequently proposed to introduce governance mechanisms which the Commission considered would make the transaction even more complex. The Commission noted that, aside from the added complexity, the implementation would have required several choices to be made by Vivendi, as regards the listing venue, the definition of the company’s legal status and articles of association and the conditions of distribution. This means that Vivendi would have had the possibility to decide for Editis, its future main competitor, on crucial governance arrangements.

The Commission communicated its preliminary assessment rejecting this remedy in its Statement of Objections. On 5 April 2023, Vivendi submitted commitments based on the divestment of 100% of the capital of Editis to a suitable purchaser thus alleviating the risks arising from the cotation-distribution scheme. The Commission carried out a consultation with authors, booksellers, publishers, trade unions and potential buyers. On the basis of this consultation and the Commission’s analysis, and following adjustments made by Vivendi, the Commission accepted those commitments considering that they removed any significant impediment to effective competition in the publishing markets.

Chapter 3. What’s a celebrity magazine? Defining and assessing the press market markets

Relevant product and geographic markets serve to identify the scope within which the market power of the company resulting from the concentration must be assessed. When presenting relevant product and geographic markets, companies willing to merge must submit, in addition to any product and geographic market definitions they consider relevant, all plausible alternative product and geographic market definitions.

In the area of press magazines, the transaction involved the combination of three magazines that covered, at least partially, celebrity news: Vivendi’s Gala and Voici, and Lagardère’s Paris Match. In this regard, the investigation highlighted differences

16 In order to render the Transaction compatible with the internal market, the Notifying Party submitted different sets of commitments covering the book publishing market on 15 December 2022, 14 February 2023, 5 April 2023 and 28 April 2023.

17 Vivendi also considered an alternative, combining Bolloré’s and the undistributed share owned by Vivendi of 7.6 %, which would have allowed the reference shareholder to acquire 37.01 % stake raising the stake to 37.06% of Editis. The listing would thus have been made on Euronext Growth as threshold for the mandatory public bid on is set 50 % of the capital or voting rights, against 30 % of the capital or of the voting rights on Euronext Paris’s regulated market.


19 While the transaction was also widely commented in relation to its impact on the change of control over several other media such as radio or weekly newspapers, the Commission notes that, under the
in the treatment of celebrity news. While Voici was found to almost exclusively feature celebrity-related topics, with a particular emphasis on gossips and scoops, Gala and Paris Match presented a hybrid editorial line, with a focus on celebrity topics on the one hand, and on other topics, on the other hand, such as topics typically associated with women’s magazines (for Gala) or general and political information (for Paris Match).

The differentiated nature of the product at stake, namely celebrity magazines, made the definition of the boundaries of a relevant product market less relevant and the assessment of the degree of closeness and intensity of the competition existing between the various magazines crucial in the Commission’s competitive analysis and, ultimately, in the identification of competition concerns.

The Commission acknowledged the products’ differentiated nature. In line with Vivendi’s arguments, the Commission considered, as a first step, a competitive space encompassing a continuum of products. Building on this dynamic approach, the Commission identified, as a second step, a body of evidence pointing to a product market for press magazines dealing with celebrity news, on which product substitution was likely to occur.

For this exercise, the Commission relied on the information provided by Vivendi, empirical evidence, as well as feedback from competing press magazines and readers. More concretely, the body of evidence consisted of (i) feedback collected from a wide number of players ranging from magazines purely dealing with general and political news, to celebrity magazines exclusively featuring gossip and paparazzi pictures, as well as readers of these magazines, (ii) analysis of a full year of Paris Match, Gala and Voici covers, (iii) pricing data, (iv) seasonal sales data, and (v) Vivendi’s and Lagardère’s internal documents.

This approach allowed the Commission to adequately account for the hybrid nature of both Paris Match and Gala, on the one hand, and to identify a market reflecting the competitive dynamics at play, on the other hand. On this basis, the Commission concluded that, while having a different editorial line focusing both on celebrity and on general, political and cultural information, Paris Match was competing within the same market as Vivendi’s publications.

To further address Vivendi’s argument alleging the absence of competition between Paris Match and Gala and Voici, the Commission carried out a detailed analysis of the closeness of competition existing between Vivendi’s and Lagardère’s magazines. This analysis confirmed that they are close competitors and even highlighted the fact that in light of their common hybrid positioning, Paris Match competed head-to-head with Vivendi’s main celebrity magazine, Gala. In this respect, Vivendi’s and Lagardère’s internal documents disclosed that Paris Match and Gala methodically tracked each other’s behaviours on the market. The analysis of the magazines’ covers of one full year confirmed these findings, by shedding light on the significant commonality of topics and pictures displayed on the covers of Paris match and Gala.

The above-mentioned analyses, among others, paved the way to the identification of competition concerns linked to the combination of Vivendi’s and Lagardère’s press publications in the present case, and ultimately led to the offering by Vivendi of the divestment of its magazine, Gala.

Epilogue. Cutting a long story short

On 9 June 2023, the European Commission approved, under the EU Merger Regulation, the proposed acquisition of Lagardère by Vivendi. The Commission’s decision was conditional upon full compliance with the commitments offered by Vivendi, and the Commission subsequently approved the proposed buyers for each of Edits and Gala on 31 October and 8 November 2023, respectively.

As pointed out by the Commission’s Executive Vice-President in charge of competition policy, Margrethe Vestager: “We need to make sure that the book publishing and press markets remain competitive and diversified, to foster a plurality of ideas and opinions.” By maintaining competition in books and magazines after carrying out a detailed assessment of the impact of the Transaction and adequate commitments, the Commission sought to preserve these objectives by using fully and effectively its merger control tools.

21 As Voici was found to be a more distant competitor of Paris Match, the sole divestment of Gala, the closest alternative to Paris Match in terms of price, positioning and editorial line, was considered as adequately alleviating the Commission’s concerns with respect to celebrity press magazines.

22 Purchaser approval decision of Groupe CMI as a suitable buyer of Edits in Commission decision of 31 October 2023 in M.10433 – Vivendi/Lagardère.

23 Purchaser approval decision of Groupe Figaro as a suitable buyer of Gala in Commission decision of 8 November 2023 in M.10433 – Vivendi/Lagardère.
Advent/GfK: a well-researched structural fix for conglomerate issues

Fotios Filios-Metentzidis, Ana Ghinea, Andras Nagy, François Terranova

Introduction

On 4 July 2023, the Commission conditionally cleared the acquisition of GfK by NielsenIQ, ultimately controlled by Advent (the ‘Transaction’). GfK and NielsenIQ are referred to as the ‘Parties’ - are both active in the provision of market research services.

Market research services

Manufacturers and retailers of consumer goods use market research data to (i) monitor sales and performance, and (ii) take a range of strategic decisions, including launching new products, entering new markets, and running promotional campaigns etc.

Within market research services, it is possible to distinguish retail measurement services (‘RMS’), consumer panel services (‘CPS’) and customised market research services (‘CMR’), which provide different types of market insights:

- RMS entails (i) the tracking of consumer purchases at the point of sale as well as the cleaning, processing, and coding of that data; and (ii) the delivery of the resulting data and statistics to manufacturers and retailers of consumer goods. RMS aims to answer the question ‘what is being sold?’;

- CPS involves the continuous tracking of purchases made by a representative consumer panel, and the analysis of the data obtained from those consumers, in order to provide information on consumption behaviour and trends. CPS aims to answer the question ‘who is buying what?’;

- CMR is market research that is carried out on an ad hoc or project-by-project basis in order to understand the reasons for specific consumer behaviours. CMR aims to answer the question ‘why are purchases made?’.

The Commission’s market investigation confirmed that market research services should be segmented into separate markets for RMS, CPS and CMR. This is mainly due to the different nature of these services and the fact that competitive conditions for their supply are very different.

In addition, the Commission considered that RMS for fast-moving consumer goods (‘FMCG RMS’) and non-fast moving consumer goods (‘NFMCG RMS’) belong to separate markets. FMCG RMS and NFMCG RMS rely on point-of-sale data provided by different retailers and are procured by customer groups that are to a large extent different.

The Commission also concluded that the markets for these services are national in scope. Indeed, inputs for RMS, CPS and CMR are country-specific and cannot be substituted by inputs from other countries, due to differences in consumer behaviour between different Member States. Moreover, market conditions can vary materially across EEA Member States.

Horizontal concerns

The Parties’ activities were largely complementary and horizontally affected markets arose only with respect to the provision of CPS in Germany and Italy, where the Parties were the only two active suppliers. In view of the lack of credible entry from alternative CPS providers, the Commission concluded that the Transaction would raise serious doubts as to its compatibility with the internal market since it would lead to the creation of a CPS monopoly in those two countries.

---

Footnote:

1 Case M.10860, Advent/GfK.

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.
**Vertical concerns**

As part of its investigation, the Commission assessed whether NielsenIQ would, post-Transaction, have the ability and the incentives to stop supplying CPS data to Circana (previously called IRI), NielsenIQ’s only competitor for the provision of FMCG RMS.\(^2\) The Commission further investigated the overall effects on competition such a foreclosure strategy by NielsenIQ would have.

The investigation indicated that one of the key distinctive features of an RMS provider is the breadth of the retailers and products covered by its data collection as sales coverage drives (i) the reliability of the data and (ii) the likelihood of having statistically relevant observations for less frequently purchased products. While many large supermarket chains – the main sales channel for FMCG – cooperate with market research companies, discounters do so only to a limited extent or not at all.

The Commission’s investigation further revealed that the coverage of sales made by discounters is an important parameter when customers choose their FMCG RMS provider, as discounters make-up a large part of the retail market. FMCG RMS providers therefore use a range of tools to estimate the sales of ‘non-cooperating’ discounters. Circana estimates the sales of discounters on the basis of CPS data that it sources from GfK and Kantar.

**Ability to foreclose**

In Germany and Italy, NielsenIQ and GfK are the only providers of CPS data, while GfK is the sole provider in the Netherlands. Post-transaction, NielsenIQ would therefore have the ability to foreclose Circana from accessing CPS data in those Member States where it is NielsenIQ’s sole competitor.

The Commission also reviewed potential alternative methods to estimate the sales of discounters, other than CPS data, or to collect such data. The Commission contacted some discounters to understand their policy as regards the sharing of their point-of-sale data with FMCG RMS providers in the short- to medium-term. It concluded that Circana would not be in a position to revert to credible alternative methods to estimate discounters’ sales, or to get direct access to discounters’ sales data in a timely or sufficient manner if NielsenIQ stopped to supply it with CPS data.

**Incentives to foreclose**

The Commission concluded that NielsenIQ would have an incentive to discontinue CPS supplies to Circana, as it could achieve gains on the market for FMCG RMS that would materially exceed the loss in revenue resulting from the lack of CPS sales.

---

\(^2\) NielsenIQ noted during the merger control proceeding that a third player, IQVIA, is also present in FMCG RMS within the EEA, however the pre-notification market investigation indicated that IQVIA is a specialized player in the health sector and does not compete with NielsenIQ.

The Commission further assessed whether there would be factors that would deter NielsenIQ from stopping the supply of CPS data to Circana post-Transaction. In particular, the Commission examined the various data exchanges between NielsenIQ and Circana overall (in particular in the US and the UK) to determine whether NielsenIQ would be deterred from discontinuing its supply of CPS data to Circana due to its reliance on data provided by Circana. The Commission concluded that NielsenIQ may still find it profitable to engage in a foreclosure strategy towards Circana.

**Overall effects on competition**

The Commission’s investigation revealed that, should NielsenIQ stop supplying CPS data, Circana’s ability to compete with NielsenIQ in the FMCG RMS market would be significantly impaired. Indeed, in Italy, Germany and the Netherlands, discounters represent a sizeable share of total FMCG sales and are a growing sales channel. Furthermore, the majority of FMCG RMS customers responding to the market investigation indicated that they would be less likely to source FMCG RMS from Circana post-Transaction in case its coverage of discounters would be materially reduced or in case it was unable to cover the sales of discounters.

The Commission concluded that this would likely put Circana at a competitive disadvantage and limit its ability to win and retain FMCG RMS customers. The potential competitive harm was all the more serious considering that Circana is NielsenIQ’s only competitor for FMCG RMS in the EEA.

**Conglomerate concerns**

The Commission further assessed whether post-Transaction NielsenIQ would have the ability and the incentive to leverage its market position in the FMCG RMS and CPS markets to foreclose competitors from access, in particular, to large multinational customers.

The Commission assessed in particular whether NielsenIQ would post-Transaction be in a position to:

a. leverage its monopoly position in CPS in 14 member states, including some of the largest markets such as Germany and Italy, in order to foreclose its sole competitor (Kantar) in the CPS markets in Denmark, France, Portugal and Spain;

b. bundle FMCG RMS and CPS within or across the member states, in order to foreclose its competitors (Circana and Kantar) in the markets for CPS and FMCG RMS in Denmark, Germany, Greece, Italy, the Netherlands, Portugal and Spain.

Moreover, the Commission investigated the overall effects on competition that such foreclosure strategies by NielsenIQ would have.
Large multinational customers purchase a range of RMS and CPS services throughout the EEA in several national markets and represent a key customer group as they represent a sizeable share of the overall demand for market research services.

Considering that RMS and CPS providers have a large fixed-cost base, the ability to retain such ‘key accounts’ is essential to maintain the viability and competitiveness of their businesses.

**Ability to foreclose**

NielsenIQ is the leading supplier of FMCG RMS and through the Transaction, it would also become the main supplier of CPS in the EEA. NielsenIQ has a monopoly position in the FMCG RMS markets in Denmark, Norway, Portugal, and Sweden and is by far the leading market player in 14 other Member States. GfK was the only supplier of CPS in 11 EEA Member States, and it held a leading position in Denmark and Germany. Moreover, GfK’s only competitor in the CPS markets in Italy and in Germany was NielsenIQ. As a result, the Transaction would have led to a monopoly in these two Member States.

The Transaction would have allowed NielsenIQ to leverage its strong market position in the FMCG RMS and CPS markets to foreclose its competitors and reduce their sales in the markets in which they are active and compete with NielsenIQ. Indeed, NielsenIQ would have been the only supplier of FMCG RMS and CPS in a large number of Member States, including some of the main markets in the EEA. Post-transaction NielsenIQ would have had the ability to increase the prices for the markets in which it has no competition if sold on an individual basis to incentivise the sale of bundles of countries and products, including markets where it faces competition.

Large multinational customers would have been particularly exposed to such leveraging strategies. As they purchase market research data throughout the EEA, these customers value the uniformity and comparability of the data they receive from market research services providers which would only be provided by NielsenIQ for the main markets in the EEA.

**Incentives to foreclose**

The Commission concluded that NielsenIQ would have an incentive post-Transaction to engage in such leveraging strategies, as they would likely allow it to capture part of its competitors’ sales to large multinational companies.

Notably, the sales captured from rivals by NielsenIQ would have been significant. The market investigation showed that it is essential for large multinational customers to obtain RMS and CPS in a harmonised manner throughout the EEA countries where they are active. Post-Transaction, NielsenIQ would have been the only player active in CPS with presence in each of the 4 largest markets in the EEA, namely France, Germany, Italy, and Spain.

In addition, NielsenIQ would have been able to capture further demand from such customers to the detriment of Circana and Kantar, NielsenIQ’s main competitors in the FMCG RMS and CPS markets, respectively. At the same time, the risk of NielsenIQ incurring losses through the implementation of such leveraging strategies would be limited, due to NielsenIQ’s monopoly positions in several EEA Member States.

**Overall effect on competition**

Deploying such leveraging strategies would likely have allowed NielsenIQ to capture a significant part of the sales of FMCG RMS and CPS to large multinational customers throughout the EEA. Over time, NielsenIQ’s competitors, deprived of the revenue generated from sales to large multinational companies, might have had to retreat from certain EEA Member States or potentially from the EEA. This would have resulted in less choice, less innovation, and higher prices for customers.

**The remedies**

To address the Commission’s concerns, NielsenIQ offered to divest the global CPS business of GfK, excluding Russia, to a purchaser with proven experience in the market research sector. GfK’s limited business in Russia was excluded from the perimeter of the remedy package to avoid regulatory complications that could have delayed the divestiture process. For the purchaser, the remedy package included the benefit of certain transitional administrative services offered by NielsenIQ for a defined period of time.

Overall, the structural commitments offered by NielsenIQ were sufficient to fully address the competition concerns identified by the Commission. The divestment of GfK’s CPS business ensures that the market leader in CPS in the EEA will continue to actively compete with NielsenIQ in Germany and Italy. Moreover, by ensuring that GfK’s CPS business will remain independent from NielsenIQ, the commitments ensure that an independent supplier of CPS, that can cooperate with other market participants, remains in the EEA. Lastly, the commitments ensure that NielsenIQ will not be able to foreclose rivals by leveraging its combined offering of FMCG RMS and CPS to a greater extent than it does today.

**Conclusion**

As a general rule, in Phase I conditional clearances, the Commission encourages the merging parties to initiate remedy negotiations as early as possible. This is because the procedure allows for very limited time for the Commission to both conduct a merger investigation and assess remedy proposals. As a result, in order to be remediable, competition concerns must be straightforward, and the proposed remedy clear-cut.

This case illustrates that more complex competition concerns, such as on the conglomerate effects of the present transaction, can still be properly addressed in Phase I. This requires that the Commission’s standard of clear-cut, structural remedies that address the competition concerns beyond doubt, is upheld.