International Roundup

Ulrich Klumpp and Donata Beck*

1. During the past months, competition authorities around the world were engaged in a number of **truly global mergers** among market leaders. In most of these cases **structural remedies** have been the key measure to gain approval, as was the case in *Ball/Rexam*, *NXP/Freescale*, and *Teva/Allergan*. Clearance in the *Halliburton/Baker Hughes* take-over is sure to depend on divestments as well. Where the parties were reluctant to offer divestments, the proposed transactions proved difficult to gain merger clearance as was the case with *Staples/Office Depot* and *Brookfield/Asciano*.

2. A local focus had to be applied by **European competition authorities** in a number of interesting **supermarket tie-ups** that involved a series of different **procedural issues**, including the ministerial approval of a merger by the German Federal Minister of Economics and Technology in the German *EDEKA/Tengelmann* merger and referrals in *Royal Ahold/Delhaize Group* and the *Netto Limited* case.

3. **Brazil's** competition authority CADE provided a crystal-clear answer to the question of whether the suspension obligation can be circumvented by entering into **carve-out agreements**: CADE imposed a record fine on the parties involved in the *Technicolor/Cisco* merger for gun-jumping.

4. **Considerable fines** have also been imposed on parties that failed to comply with commitments they had undertaken in order to gain merger control approval by the regulator in **Spain** and the **Czech Republic**.

5. Competition authorities in the **UK and South Africa** looked into the question of when an **asset deal constitutes a notifiable concentration**.

* Dr. Ulrich Klumpp is Partner and Dr. Donata Beck is Associate Partner in the Antitrust and Merger Control practice of OPPENLÄNDER Rechtsanwälte Partnerschaft mbB, Stuttgart, Germany.

6. Finally, some recent changes in **merger control regulation** in Ukraine, India, Canada, Brazil, Lithuania, Turkey, South Africa, Namibia, and the ASEAN countries will be discussed.

1. Significant Merger Cases around the World

On January 15, 2016, the **European Commission** approved **Ball's acquisition of Rexam** subject to structural remedies. These two companies are the largest beverage can manufacturers in the European Economic Area (EEA) and also worldwide. The Commission concluded that, absent the remedies offered by the parties, the acquisition would have eliminated an important competitor and reduced the choice of suitable suppliers in an already concentrated market.[1] Therefore, Ball committed to sell substantial assets early in the review process. The divestment concerns most of Ball's metal beverage packaging activities in Europe, as well as two of Rexam's can-body plants. Sold together to a single, experienced competitor, the Commission is confident that the divestment will create a strong competitor in the European market.[2] In **Brazil,** the parties received conditional clearance from the **Administrative Counsel for Economic Defence (CADE)** on December 9, 2015. Ball agreed to sell two of its plants in Brazil to an independent buyer. The merger is also under review by the **Federal Trade Commission** (FTC), where the case team intends to approve the deal, again, subject to sales.[3]

The pharmaceutical industry faces the formation of the world's biggest drug maker should the USD 160 billion **acquisition of Pfizer by Allergan** announced in November 2015 be approved. The deal structure by which the smaller, Dublin-based Allergan buys Pfizer is rooted in Pfizer's attempt to effectively relocate its headquarters overseas in order to exploit Ireland's

[1] European Commission, "Mergers: Commission Approves Ball's Acquisition of Rexam, Subject to Conditions" (January 15, 2016), online: http://europa.eu/rapid/press-release_IP-16-80_en.htm.

[2] *Ibid.*

[3] Dafydd Nelson, "Ball Wins EU Clearance to Buy Rexam (update*)", *MLex* (Jan. 15, 2016), online: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=757637&siteid=190&rdir=1.

favorable corporate tax regime. The merger will be notifiable to competition authorities in numerous jurisdictions. One may assume that the deal will not be waved through without substantial remedies.

Another transaction involving **Allergan** is **Israel**-based **Teva** proposed acquisition of Allergan's generic drug unit. The concentration will strengthen Teva's global leadership in the generic pharmaceuticals market and in the manufacturing of off-patent drugs. The deal has already been approved unconditionally in Brazil. The European Commission cleared the case on March 10, 2016 subject to the commitment to divest the great majority of Allergan Generics' business in the UK and Ireland[4]. Notification with the FTC is pending. Approval from the FTC is expected to depend on divestment commitments, too, as staff of both the FTC and the European Commission claimed on an ABA conference in October 2015 that **remedies** offered in the context of mergers in the pharmaceutical industry **should "almost always" be structural**.[5]

China's Ministry of Commerce (**MOFCOM**) was satisfied with **behavioral remedies** offered by **Nokia** to support its proposed acquisition of Alcatel-Lucent. MOFCOM assumed the merger would put Nokia in a position to use its standard-essential-patents (SEPs) to exclude or restrict competition on the affected market of access equipment for wireless internet, core network equipment, and the network infrastructure service market. MOFCOM accepted Nokia's commitment to continue to abide by FRAND rules with regard to SEPs and further commitments regarding the prohibition and transfer of SEPs. MOFCOM itself will supervise fulfillment of the commitments.

[4] European Commission, "Mergers: Commission Approves Acquisition of Allergen Generics by Teva, Subject to Conditions" (March 10, 2016), online: http://europa.eu/rapid/press-release_IP-16-727_en.htm.

[5] Mark Briggs, "Teva Offers Commitments to European Commission", *Global Competition Review* (February 22, 2016), online: http://globalcompetitionreview.com/news/article/40550/teva-offers-commitments-european-commission/

Shortly thereafter, **MOFCOM** cleared **NXP Semiconductor's** acquisition of **Freescale Semiconductor**, subject to **structural conditions**. For the first time in three years MOFCOM granted conditional approval on November 27, 2015, based on the condition that the parties divest business that would cause negative effects on competition in the relevant markets. Among other commitments, MOFCOM accepted NXP's offer to divest its radio frequency power transistor business.[6] This decision is well in line with the conditional approvals granted by the **European Commission** on September 27, 2015[7], by the **South Korean Fair Trade Commission** (KFTC) on November 23, 2015 and by the **FTC** on November 25, 2015.[8] Each of the three competition authorities had insisted on divestment commitments regarding NXP's radio frequency power transistor business.

However, the **review process** before MOFCOM, initiated on April 3, 2015, was lengthy and required a **second filing**. On September 11, 2015 MOFCOM extended the review period with the consent of NXP. When the extension period neared expiry, NXP requested withdrawal of its filing. On November 10, 2015 MOFCOM initiated a fresh review of the parties' second filing. Finally, the deal was quickly approved by MOFCOM after only 17 days of review.[9]

---

[6] Michael Gu, "Commentary on MOFCOM's Conditional Approval of NXP's Acquisition of Freescale", *China Law Vision* (January 5, 2016), online: http://www.chinalawvision.com/2016/01/articles/competitionantitrust-law-of-th/commentary-on-mofcoms-conditional-approval-of-nxps-acquisition-of-freescale/.

[7] European Commission, "Mergers: Commission Approves NXP's Acquisition of Freescale, Subject to Conditions" (September 17, 2015), online: http://europa.eu/rapid/press-release_IP-15-5674_en.htm.

[8] Federal Trade Commission, "FTC Requires NXP Semiconductors N.V. to Divest RF Power Amplifier Assess as a Condition of Acquiring Freescale Semiconductor Ltd." (November 25, 2015), online: https://www.ftc.gov/news-events/press-releases/2015/11/ftc-requires-nxp-semiconductors-nv-divest-rf-power-amplifier.

[9] AnJie Law Firm, "MOFCOM Conditionally Approves NXP's Acquisition of Freescale", *Lexology* (February 11, 2016), online: http://www.lexology.com/library/detail.aspx?g=796945e1-3d3d-454b-8e42-fb663ff69926.

Sixteen months after the announcement in November 2014, the **Halliburton take-over of Baker Hughes** is still under review in the **US, the EU, Brazil, China and Australia**. The deal faces profound opposition from competitors and customers around the world. Halliburton already offered divestments in the US and the EU to ease competition concerns. The US Department of Justice and the Commission have each judged a first divestment-package to be inadequate to override competition concerns. New obstacles may arise in China where the three national oil-giants depend on Halliburton's and Baker Hughes's technological expertise and equipment. **Chinese competition law** explicitly allows the inclusion of "national economic development interests," opening the door for the **enforcement of industrial policy objectives**. The government might request that the parties allow its Chinese rivals access to knowledge and equipment in order to receive merger clearance. The deal is quickly approaching the April 30 deadline set by the parties for optional withdrawal from the merger.

In **Australia**, the take-over of **Asciano** has taken a new twist. The Australian Competition and Consumer Commission had declined to clear the proposed vertical integration of the Australian freight logistics company Asciano into a consortium led by Brookfield, a Canadian asset manager operating rail network infrastructure across Western Australia. **Long-term behavioral commitments** submitted by the **Brookfield** consortium were **not accepted** by the Australian competition enforcer. In November 2015, another consortium led by the Australian **logistics operator Qube** proposed to acquire all issued shares in Asciano and offered commitments. Before the ACCC had finalized its assessment of the Qube-transaction the two consortia proposed a third model to the ACCC under which both consortia would acquire all shares in Asciano together. It remains to be seen how the two consortia intend to clear the ACCC's competition concerns over the vertical and horizontal implications of this last proposition.

Lacking an offer of substantial structural remedies, the proposed merger between the two largest office supply companies, **Staples** and **Office Depot,** is still under review by the **FTC** and **the Canadian Competition Bureau**. The Competition Bureau had concluded that the merger would "significantly harm competition in the office products delivery business in Canada".[10] In the light of Staples almost doubling its market share to approximately 80%, and in absence of a viable and effective remedy offer, the Bureau sought to block the merger. By that time, Staples had already offered a substantial divestiture package to the **European Commission** that eventually removed the Commission's concerns. After close coordination among the Bureau, the FTC and the European Commission, the Canadian regulator and the FTC each challenged the merger on December 7, 2015. In a response filed with the Bureau on January 22, 2016 Staples has not offered commitments, but alleged that the Canadian Competition Bureau fundamentally misunderstood and mischaracterized the office product industry. Staples argued that barriers to entry or expansion in the relevant market were low. Accordingly, traditional office suppliers already faced strong competition from several large and sophisticated non-traditional suppliers, namely from Amazon. The conclusions drawn by the European Commission, however, are well in line with those of the Canadian Bureau. The Commission also found barriers to enter the relevant market to be high and refused to consider online commerce companies as competitors. Following an in-depth review, the European Commission has signed off on the merger subject to profound divestment conditions on February 10, 2016. The parties undertook the selling of Office Depot's European contract distribution business and its entire business in Sweden.[11]

[10] Competition Bureau, "Competition Bureau Challenges a Merger between Canada's Two Largest Office Supply Companies" (December 7, 2015), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04012.html.

[11] European Commission, "Mergers: Commission Approves Staples' Acquisition of Office Depot, Subject to Conditions" (February 10, 2016), online: http://europa.eu/rapid/press-release_IP-16-278_en.htm.

2. Supermarket tie-ups keep regulators in Europe busy

One of the rare cases where **politics trump competition** concerns can be observed in **Germany**, where the Federal Minister of Economic Affairs and Energy authorized the acquisition of 451 Kaiser's Tengelmann stores (KT) by the leading supermarket chain in Germany, the Edeka group (Edeka). The acquisition was prohibited by the Federal Cartel Office (FCO) in March 2015, as it would limit choice for local customers and the possibilities for them to switch to another retailer in several highly concentrated regional markets. The FCO also feared that elimination of KT as an important competitor would give the remaining competitors greater leeway for rising prices in future. In addition, according to the FCO's assessment, the merger would lead to further concentration in the food procurement market, and therefore significantly impede effective competition.[12] Besides filing an appeal against the FCO's decision with the Higher Regional Court in Düsseldorf, Edeka and KT applied for a so-called **ministerial authorization**, which was granted by a decision of Minister Gabriel on March 17, 2016.

Under German merger control law, according to Sec. 42 ARC (Act against Restraints of Competition), the Federal Minister of Economics and Technology has the possibility to authorize a concentration prohibited by the FCO if, in that particular case, the restraint of competition resulting from the concentration is outweighed by advantages to the economy as a whole, or if the concentration is justified by an overriding public interest. However, authorization cannot be granted if the restraint of competition were to jeopardize the market-based economic system.

If the parties to a concentration apply for the Minister's authorization, the Minister must, prior to his decision, hear the Monopolies Commission. However,

[12] FCO, Case Summary, "Prohibition of acquisition of Kaiser's Tengelmann outlets by Edeka" (July 6, 2015), online: http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Fusionskontrolle/2015/B2-96-14.pdf.

the Monopolies Commission's statement is not binding for the Minister. The political instrument of the ministerial authorization, which is designed as an exception from the FCO's assessment based on competition aspects, comes into play only in rare cases. In the more than 40 years of German merger control, only 21 applications for a Minister's authorization were made, and only eight were granted.

In the Edeka/KT case, the parties argued that the merger would **safeguard 16,000 workplaces** and therefore the negative effects on competition would be outweighed by advantages to the economy as a whole. This argument met with criticism as cuts in jobs usually are part of the synergies intended by the parties. In addition, there were potential alternative buyer scenarios on the table that would have avoided at least some of the negative effects on competition. Although the Monopolies Commission recommended not to grant the permission, the German Minister for Economic Affairs finally gave the go-ahead for this transaction subject to strict conditions imposed in order to secure jobs. A competitor, Rewe, already announced that it would appeal the ministerial authorization in court, and the chairman of the Monopolies Commission, protesting against the decision of the Minister, announced that he would step down.

Another interesting supermarket case concerned the merger of Dutch supermarket giant Royal Ahold and Belgium based grocery chain Delhaize Group. The merger was approved by the Belgium competition authority subject to remedies on March 15, 2016. Having a strong impact on several local and regional markets in Belgium, the transaction was **referred from the European Commission to the Belgian competition** authority.

If a transaction meets the thresholds for the applicability of the European Merger Regulation (EUMR), Article 4 (4) EUMR opens the possibility for the parties to a concentration to inform the Commission prior to notification, by means of a so called reasoned submission, that the concentration may

significantly affect competition in a market within a EU member state which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by this member state.[13]

The Commission, in its referral decision[14], explained that the merger of the two supermarket chains would lead to a combined market share of more than 30 % in several local markets with an increase by the transaction of 5 %, and to a combined market share of more than 50 % in some other local areas in Belgium. Therefore, it did not come as a surprise that the parties offered commitments to divest a number of their stores in Belgium.

The transaction is also being reviewed in an in-depth investigation by the US FTC, as both companies make a big portion of their sales in the US and compete along the east coast. In the meantime, the green light was given in the Republic of Serbia and the Republic of Montenegro.[15]

While referrals to the national competition authority in supermarket cases seem to be standard procedure in Europe, **unprecedented is a referral** to the **UK** watchdog concerning the acquisition of three grocery stores from Co-operative Group Limited by the supermarket chain Netto Limited. The referral decision by the Commission taken in late 2015 comes as a surprise as the transaction was **already cleared by the Competition and Markets Authority (CMA)** in August 2015. However, the parties later realized that the transaction fell under the EU Merger Regulation (EUMR), and therefore lacked the necessary **approval by the competent authority**. In order to save the merger from being annulled and

[13] See also Commission Notice on Case Referral in respect of concentrations, OJ C 56/2, March 5, 2005, paras 17 et seq., online: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(01)&from=EN.

[14] Commission, Decision of October 22, 2015, COMP/M.7702 – Koninklijke Ahold / Delhaize Group, online: http://ec.europa.eu/competition/mergers/cases/decisions/m7702_105_3.pdf.

[15] See Ahold, US Prospectus, p. 9, 97, 147, online: http://www.delhaizegroup.com/Portals/0/Documents/AholdDelhaize/Ahold_US_Prospectus_E.pdf

sanctioned by the Commission, Netto initiated another merger control proceeding by asking for a referral to the CMA as foreseen in Article 4 (4) EUMR.

The Commission decided to refer the case to the CMA, which in the end cleared the acquisition for a second time.[16] The outcome of the new proceeding is not surprising, as the CMA had approved the merger just some months ago. However, the event is nonetheless interesting as it emphasizes the importance of the often complicated turnover calculation in the context of the applicability of merger control regimes. The clearance decision by the incompetent authority is worthless. If the parties fail to identify the applicable merger control law, this can even result in serious fines and the nullity of the transaction. According to Article 14 (2) EUMR, the Commission can impose fines of up to 10 % of the group turnover in case the parties fail to notify a concentration prior to its implementation. Furthermore, the validity of a transaction in breach of the suspension obligation under Article 7 (1) EUMR, according to Article 7 (4) EUMR, will depend on a subsequent clearance or referral decision by the Commission.

One may wonder which merger control regime applies once the case is referred by the Commission to the national merger control authority. Article 4 (4) EUMR provides that, if the Commission decides to refer the entire case, no notification shall be made pursuant to EUMR and national competition law shall apply.[17] However, keeping in mind the German Edeka/KT case, the question remains whether non-competition related factors can be taken into account in the assessment by the relevant antitrust authority, if the case was referred to the national authority from the Commission. Some authors argue that a ministerial authorization as granted by the German Federal Minister for Economic Affairs in

[16] See CMA, Netto/Co-operative (3 Stores) Merger Inquiry, Decision of February 25, 2016, available at: https://www.gov.uk/cma-cases/netto-co-operative-3-stores-merger-inquiry#cma-clearance-decision.

[17] See also Commission Notice on Case Referral in respect of concentrations, OJ C 56/2, March 5, 2005, paras 49 et seq., online: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005XC0305(01)&from=EN.

the Edeka/KT case would not be possible in a referral scenario, because Article 9 (8) EUMR, which shall apply on Article 4 (4) referrals, provides that the member state take only the measures strictly necessary to safeguard or restore effective competition on the market concerned.

Further supermarket mergers concerning the acquisition of grocery stores belonging to the bankrupt grocery chain Zielpunkt were notified in **Austria**. While the acquisition of 11 stores by Hofer KG and the acquisition of 7 stores by dennree Naturkost was unconditionally approved by the Federal Competition Authority (FCA) in January 2016, the acquisition of 30 outlets by Rewe and 28 outlets by SPAR was cleared only subject to substantive commitments offered by the parties.[18]

3. Does a carve-out provide a viable work-around for a suspension obligation?

The **Brazilian** CADE took a harsh stand against the practice of carving-out parts of an international deal as means of excluding or mitigating the penalty for gun jumping. **CADE imposed a record fine of BRL 30 million** (approx. USD 7.5 million) on Technicolor and Cisco for violation of the suspensory obligation provided for in Brazilian antitrust legislation.[19]

Technicolor had announced its take-over of Cisco's TV set-top box business for about USD 600 million in July 2015. After successfully having conducted merger control review in several jurisdictions (Canada, USA, the Netherlands and Ukraine) the parties closed their deal in November 2015. At this point of time, CADE had already received the parties' notification, but had not

[18] FCA, Press Release (January 18, 2016), online: http://www.bwb.gv.at/Aktuell/Seiten/Zusammenschlussverfahren-in-causa-Zielpunkt---Fortbestand-von-90-ehemaligen-Zielpunkt-Filialen-gesichert.aspx.

[19] Under Article 88 12.529/2011 CADE may impose fines of up to BRL 60 million (approx. USD 15 million). Previous fines for gun jumping imposed by CADE had not surpassed BRL 3 million.

concluded its analysis. CADE was informed of the closing only three days after it had itself taken notice of it by a press release of the companies.

The parties argued consumption of the merger outside Brazil would not have any competitive effects in Brazil due to a carve-out agreement that would keep competitive conditions in Brazil preserved. CADE rejected this argument because of the limited effectiveness of carve-out agreements, especially with respect to the exchange of sensitive information between competitors. In line with the practice of – among others – the FTC, the Canadian Competition Bureau, the European Commission and the German FCO, CADE stressed the difficulty to monitor compliance with the parties' hold-separate obligations. CADE and the parties settled the dispute by entering into a so-called Merger Control Agreement.

Unlike CADE, **Argentina's** Antitrust Tribunal is known to accept hold-separate agreements and carve-out agreements as sufficient means of securing the suspensory obligation during the extraordinary lengthy merger control review process in Argentina.

4. Non fulfillment of commitments may lead to serious fines

Again in the field of supermarket mergers, in the **Czech Republic**, a district court on January 15, 2016 confirmed a fine imposed on the German Rewe group **for not fulfilling commitments** agreed upon in the context of the Rewe/Plus Discount merger.[20] Back in 2008, Rewe, in order to eliminate competition concerns expressed by the Czech Republic's Office for the Protection of Competition, offered to sell certain stores in the regions where the merger between Rewe-owned Billa and Penny supermarkets with the Plus supermarkets would have led to a distortion of competition. The sale was promised to be implemented within one year after the issuance of the clearance decision. After postponing the deadline several times, the Czech authority in 2010 opened

[20] Mark Briggs, "Czech court upholds failure to comply fine", *Global Competition Review* (January 18, 2016), online: http://globalcompetitionreview.com/news/article/40332/czech-court-upholds-failure-comply-fine/.

administrative proceedings for failure to comply with the commitments, and in 2013, a **fine was imposed** on Rewe.

Equally, in **Spain**, the National Markets and Competition Commission (CNCM) imposed a 2.8 million Euro fine on Altresmedia for non-compliance with commitments made in the context of a media merger. Spanish media group Altresmedia in 2012 notified the acquisition of the TV channel La Sexta with the then competent authority, the former National Competition Commission (CNC). The transaction was given the green light by CNC subject to certain conditions. The remedies offered by the parties included **an obligation not to offer bundles of advertising** for different channels under control of Altresmedia.

After opening an investigation in May 2015, the CNMC came to the conclusion that Altresmedia failed to comply with the commitments as it had bundled advertisements and therefore limited free choice for its customers. Under Spanish law, non-compliance with commitments made to secure merger clearance is a **serious infringement** which can be sanctioned with fines amounting to up to 10 % of the turnover of the company in breach of law.[21]

It is not the first time that the Spanish Regulator imposed several million Euro fines for breaching commitments. Again in the TV sector, TV group Mediaset recently was fined three times for non-compliance with commitments made in order to ensure merger control clearance.[22] One of these fines imposed on Mediaset was subject to an **appeal brought to the Spanish Supreme Court**. The Supreme Court confirmed the imposition of a fine for non-compliance with their commitments, but **ordered recalculation** of the amount to be paid in order to

[21] CNCM, Press Release (November 18, 2015) online: http://www.cnmc.es/CNMC/Prensa/TabId/254/ArtMID/6629/ArticleID/1531/La-CNMC-sanciona-con-28-millones-de-euros-a-Atresmedia-por-incumplir-las-condiciones-de-la-fusi243n-de-Antena-3-y-La-Sexta.aspx.

[22] CNCM, Press Release (September 18, 2015), online: http://www.cnmc.es/CNMC/Prensa/TabId/254/ArtMID/6629/ArticleID/1434/La-CNMC-sanciona-a-Mediaset-con-3-millones-de-euros-por-incumplir-los-compromisos-de-la-concentraci243n-TelecincoCuatro.aspx.

meet the principle of proportionality of the fine.[23] The Supreme Court instructed the lower court that the fine, which amounted to 3.6 million Euro, should be reduced to no more than 1.8 million Euro.

5. When does an asset transfers constitute a merger?

Both in the **UK** and in **South Africa**, the authorities looked into the question of whether a transfer of assets constitutes a merger with the consequence that the deal – subject to meeting the relevant thresholds – has to be notified.

In December 2015, the first appeal on the merger provisions of **the UK Enterprise Act 2002** reached the **Supreme Court**. The case concerned the acquisition of the assets of SeaFrance, which had formerly operated a ferry service between Dover (UK) and Calais (France) by Group Eurotunnel SA (GET), and Société Coopérative de Production SeaFrance SA (SCOP). At the time of the acquisition in 2013, SeaFrance was in liquidation. GET will hold the channel tunnel concession until 2086.

The Competition Commission, UK's former competition authority, considered the acquisition to be a merger under the Enterprise Act 2002, and prohibited GET from operating any service from Dover using the passenger ships acquired from SeaFrance for a period of ten years. GET and SCOP challenged the decision before the Competition Appeal Tribunal on the basis that they had acquired bare assets as opposed to an "enterprise", because **SeaFrance had entered liquidation, its services had ceased, and most of its employees had been made redundant**. The Competition Commission, however, maintained its stance stressing the continuity of SeaFrance's business post acquisition. It argued that in particular, SeaFrance's ships (specially designed for the particular route), the trademarks and a significant number of the former crew persisted.

[23] Tribunal Supremo, Press Release And Judgement of September 21, 2015, online: http://www.poderjudicial.es/cgpj/en/Judiciary/Supreme-Court/Pressroom/Press-Archive/El-Tribunal-Supremo-ordena-a-Competencia-que-recalcule-la-multa-de-3-600-000-euros-impuesta-a-Mediaset.

Upon challenges by GET and SCOP, the Court of Appeal held that no merger had occurred as the former SeaFrance crew had not directly been transferred to GET/SCOP, but had been made redundant before. The Supreme Court[24] held this to be an **"unduly formal approach"** that failed to assess the impact of the asset deal on the competitive structure of the market. A hiatus of the activities transferred was relevant, but not decisive for economic continuity.[25] Where there is such a hiatus, the Supreme Court held, it was necessary to consider whether

(i) what is acquired is something more than could have been acquired by going into the market and buying factors of production, and

(ii) the "extra" is attributable to the fact that the assets were previously employed in the activities of the target enterprise.[26]

In **South Africa**, the Competition Tribunal had to decide whether MulitChoice, a pay-TV provider, had merged with SABC, South Africa's public broadcaster, by gaining control of SABC's archived programs. The two companies had entered into a cooperation agreement, allowing MultiChoice to access SABC's archive and to broadcast two of SABC's channels on its own network. The Competition Tribunal held that antitrust policy becomes concerned only when transferred assets represent a measurable and relatively permanent **transfer of market share or productive capacity** from one firm to another. In its ruling dated February 11, 2016 the Tribunal concluded that **possession of an archive** neither constitutes productive capacity that could be thought of as a business nor does it convey a market share.

[24] The leading judgment of the Supreme Court was given by Lord Sumption, with whom Lords Neuberger, Clarke, Reed and Hodge agreed.

[25] Brick Court Chambers, "Supreme Court Defines Limits of Merger Control" (December 16, 2015), online: http://www.brickcourt.co.uk/news/detail/supreme-court-defines-limits-of-merger-control.

[26] *Ibid.*

6. Recent Changes in the Applicable Merger Control Rules

In **Ukraine**, a **new merger control regime**, more in line with EU standards, has been adopted by parliament in January. The new law provides for **significantly higher thresholds** than the previous, thus reducing the number of notifiable mergers. Under the new law the obligation to notify only applies if either

(i) the combined asset value or turnover of the merging companies exceeds € 30 million and the Ukrainian assets or turnover of each of at least two parties exceed € 4 million, or

(ii) one company has assets or turnover of more than € 8 million in Ukraine, and one other party to the transaction has a value of more than € 150 million worldwide (even if this party is not active in Ukraine).

The new law also introduces a **simplified procedure** for small transactions or mergers with only one party active in Ukraine. The new regulation is indistinct on the question of whether the seller's assets and revenues continue to be included in the calculation. Clarity might be delivered in the **new procedural guidelines** that shall be presented soon. The new law will yet have to be executed and published. It is expected to come into force by the end of April 2016.[27]

India's Ministry of Corporate Affairs has introduced **higher thresholds** for the de minims target based **filing exemption** in March. The obligation to notify a transaction does not apply if the target has either Indian assets of less than 3.5 billion rupees (approximately USD 52 million) or Indian turnover of less than 10 billion rupees (approximately USD 150). This will presumably **reduce the number of notifiable transactions**. As under the previous exemption regime, the exemptions does **not apply to deals structured as mergers or amalgamations**,

[27] For more information see Mark Briggs, "Ukraine updates its competition laws", *Global Competition Review* (January 29, 2016), online: http://globalcompetitionreview.com/news/article/40418/ukraine-updates-its-competition-laws/.

but only to transactions structured as acquisition of shares, voting rights or assets. The new thresholds are already in force for a term of five years.

The **Canadian** Competition Bureau announced that the pre-merger notification "transaction-size" **threshold for 2016** increased to CAD $87 million, from the 2015 threshold of CAD $86 million. This increase took effect on February 6, 2016.

Lithuanian Competition Council issued **new merger guidelines** that came into force January 1, 2016.[28] The guidelines provide inter alia more clarity on how to identify the notifying parties, the correct calculation of turnover, and on the procedure for the submission of commitments.

In **Turkey,** new information requirements for merger control notifications have been introduced and entered into effect on February 13, 2016

Brazilian merger **filing fees** have been increased from BRL 45,000 to BRL 85,000 as of January 1, 2016.

South-African and **Namibian** Competition Commissions signed a Memorandum of Understanding providing a framework for close **cooperation** of the two competition authorities.[29]

The **ASEAN countries** are working towards implementing their newly established competition laws.

[28] For more information see Competition Council of the Republic of Lithuania, Press Release (January 5, 2016), online: http://www.kt.gov.lt/index.php?show=news_view&pr_id=1750.

[29] For more information see Competition Commission of South Africa, Press Release (November 11, 2015), online: http://www.compcom.co.za/wp-content/uploads/2015/01/Competition-Commission-of-South-Africa-Signs-Landmark-MoU-with-the-Namibian-Competition.pdf.