THE MERGER CONTROL REVIEW

FOURTEENTH EDITION

Editor
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Published in the United Kingdom
by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
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www.thelawreviews.co.uk

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ISBN 978-1-80449-190-4

PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions such as Malaysia are continuing to consider imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, the international business community had a wake-up call when, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is imperative, therefore, that counsel develop a comprehensive plan before, or immediately upon, execution of an agreement concerning where and when to file a notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 25 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely developments.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers and nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard (China having consolidated its three antitrust agencies into one agency in 2018). Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany amended its law to ensure that it has the opportunity to review transactions in which, although the parties' turnovers do not reach the threshold, the value of the transaction is significant (e.g., social media, new economy, internet transactions). Other jurisdictions are also focused on ensuring that acquisitions involving smaller internet, online and data companies or, in other high-technology settings, a nascent competitor, do not escape review.

Newly adopted laws have tried to vest jurisdiction on these transactions by focusing on the 'value of the consideration' rather than turnover for acquisitions of nascent firms, particularly in the digital economy (e.g., in Austria and Germany). Some jurisdictions have also adopted a process to call in transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability to review and take action in non-reportable transactions (see discussion of *Google/Fitbit* in the International Merger Remedies and Japan chapters), and has developed guidelines for voluntary filings. Note that the actual monetary threshold levels can vary in specific jurisdictions over time. To provide the ability to review acquisitions of nascent but potentially important rivals, the European Commission (EC) has adopted potentially the most significant change in its rules: to use the referral process from Member States to vest jurisdiction in transactions that fall below its thresholds but that could have Community-wide significance. In one such matter, *Illumina/GRAIL*, the EC invited national competition authorities to request a referral of the transaction, even though it did not meet the review thresholds of the EU Merger Regulation or any national merger control rules (in fact, GRAIL had no sales at all in the European Union). At the time of writing, according to reports, the EC has since accepted Article 22 referral requests in three other cases (*Meta/Kustomer*, *Viasat/Inmarsat* and *Cochlear/Oticon Medical*), although in each of these the transaction triggered the national merger control thresholds in at least one EU Member State.

There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction; however, there are some that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be any effect on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there is similarly no 'local' effect required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a self-assessment of whether the transaction will meet certain levels and, if so, should notify the agency to avoid a potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa have been in connection with these considerations. Notably, the current leadership at the US antitrust authorities have similarly suggested that their mandate under the antitrust laws is broader than the traditional focus on consumers and consumer welfare to include impact on labour, diversity and other considerations. It is unclear at this point how this shift will affect enforcement decisions and judicial challenges. Although a growing number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, competition law provides that the government can prohibit a merger if it determines that the merger could potentially affect national security.

Some jurisdictions are exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands, where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing firm defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed owing to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even when the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriarche group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing. In 2021, Morocco similarly imposed a fine for failure to notify a transaction in excess of US$1 million.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for late notifications (e.g., Bosnia and Herzegovina, Indonesia and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

The United States and the EC both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as gun-jumping, even fining companies that are found to be in violation. For example, the EC imposed a €124.5 million fine on Altice and, in 2023, fined Illumina €432 million for its closing of the *Grail* transaction. Other jurisdictions have become increasingly aggressive in the imposition of fines. Brazil, for instance, issued its first gun-jumping fine in 2014 and later issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively

sensitive information before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority; however, in Canada – like the United States – the Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea, the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction; however, the KFTC continued its investigation as a post-consummation merger investigation and eventually obtained a consent order. This list of jurisdictions is illustrative rather than comprehensive and is consistent with the overarching concerns expressed above regarding catching transactions that may have fallen below the radar but are subsequently deemed problematic. In the same spirit, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, it fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based on the size of the transaction; however, some jurisdictions determine the fee after filing or provide different fees based on the complexity of the transaction.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the JFTC announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Even within the EC, there remain some jurisdictions that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria. Finally, some jurisdictions have developed a fast-track process for transactions that are unlikely to raise antitrust concerns (e.g., because the parties' combined shares of potential relevant markets are all below a certain threshold or because of the size of the transaction). China and the EC are two such regimes in which the adoption of this fast-track process can make a significant difference to the review period.

The role of third parties also varies across jurisdictions. In some (e.g., Japan), there is no explicit right of intervention by third parties but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal; the

Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In other jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was fined by the antitrust authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). In Hong Kong, the authority has six months post-consummation to challenge a transaction. Norway is also a bit unusual in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

In large cross-border transactions raising competition concerns, it is becoming the norm for the US, Canadian, Mexican, EC and UK authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's competition authority, which, in turn, has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the EC in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including, most recently, Peru and India. China has consulted with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of multi-jurisdictional cooperation is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the US Federal Trade Commission and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other

jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have raised the size threshold at which filings are mandated (e.g., Austria), others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an acquisition of control. Many of these jurisdictions, however, will include, as a reportable situation, the creation of joint control, negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or de facto control (e.g., Turkey), or a change from joint control to sole control (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which an interest of only 10 per cent or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use as the benchmark the effect that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has material influence (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers have also been the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an acquisition subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute, to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that structural remedies are preferable to behavioural conditions, a number of jurisdictions in the past few years have imposed a variety of behavioural remedies (e.g., China, the EC, France, Italy, Japan, the Netherlands, Norway, South Africa, Ukraine and Vietnam). This is particularly the case when non-compete or exclusive dealing relationships raise concerns (e.g., in Mexico and the United States). Some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico). Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers*

transaction, China's Ministry of Commerce remedy in *Glencore/Xstrata* and France's decision in the *Numericable/SFR* transaction). It is important to note, however, that one of the areas flagged for change by the new leadership at the US antitrust authorities is the willingness to consider behavioural remedies, or, for that matter, any remedies, rather than bringing enforcement actions to challenge the transaction itself.

In many of the key enforcement regimes (e.g., the United States, Canada, China and the United Kingdom), we are at a potentially transformational point in competition policy enforcement; however, this book should provide a useful starting point in navigating cross-border transactions in this changing enforcement environment.

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July 2023

Chapter 10

EUROPEAN UNION

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On 21 September 1990, the EC Merger Regulation entered into force,[2] introducing into EU competition law a legal framework for the systematic review of mergers, acquisitions and other forms of concentration. The EC Merger Regulation has been transformative, effecting significant and permanent change to EU competition law and practice. This chapter contains a short introduction to the principal provisions of the EC Merger Regulation and identifies certain of the most important developments in its recent application.

I INTRODUCTION

Adopted in 1989, the EC Merger Regulation contains the legal framework and principal provisions of EU merger control. It was designed to 'permit effective control of all concentrations in terms of their effect on the structure of competition in the Community and to be the only instrument applicable to such concentrations'.[3] Responsibility for the enforcement of the EC Merger Regulation rests with the Competition Commissioner, who oversees the European Commission's Directorate-General for Competition. Margrethe Vestager has served as Competition Commissioner since October 2014.

1 Nicholas Levy, Anita Magraner Oliver and Conor Opdebeeck-Wilson are attorneys at Cleary Gottlieb Steen & Hamilton LLP. The views expressed are personal, and all errors, omissions and opinions are the authors' own. The authors have drawn on material contained in various editions of Nicholas Levy and Christopher Cook, *European Merger Control Law* (Matthew Bender & Co).

2 The EC Merger Regulation was adopted in 1989 and came into force in 1990 – Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, 1990 O.J. L 257/13; with amendments introduced by Council Regulation 1310/97, 1997 O.J. L 180/1, corrigendum 1998 O.J. L40/17. In 2004, a revised and significantly recast version of the EC Merger Regulation came into force. Council Regulation (EC) No. 139/2004 of 20 January 2004, on the control of concentrations between undertakings, 2004 O.J. L 24/1.

3 EC Merger Regulation, Recital 6.

At the time the EC Merger Regulation was adopted, the Commission also adopted an Implementing Regulation,[4] which addresses procedural matters and, among other things, contains Form CO and Short Form CO, which are the forms prescribed for the notification of reportable transactions.[5] To facilitate understanding of the EC Merger Regulation and to provide transparency in its practice, application and interpretation, the Commission has adopted and kept updated a number of interpretative notices and guidelines that address a range of jurisdictional,[6] substantive[7] and procedural matters.[8]

In the years since adoption of the EC Merger Regulation, the Commission has emphasised the Regulation's 'fundamental objective of protecting consumers against the effects of monopoly power (higher prices, lower quality, lower production, less innovation)'[9]

4 Commission Regulation (EEC) No. 2367/90 on the notifications, time limits and hearings provided for in Council Regulation (EEC) No. 4064/89 on the control of concentrations between undertakings, 1990 O.J. L 219/5, as amended by Commission Regulation (EC) No. 3384/94, 1994 O.J. L 377/1 and Commission Regulation (EC) No. 447/98, 1998 O.J. L 61/1. In 2004, a revised text of the Implementing Regulation was adopted. Commission Regulation (EC) No. 802/2004 implementing Council Regulation (EC) No. 139/2004, 2004 O.J. L133/1, as amended by Commission Regulation (EC) No. 1033/2008, 2008 O.J. L 279/3 and Commission Implementing Regulation (EU) No. 1269/2013, 2013 O.J. L 336/1. In 2023, Commission Implementing Regulation (EU) No. 2023/914 implementing Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings and repealing Commission Regulation (EC) No. 802/2004, 2023 O.J. L 119/22, was adopted, repealing and replacing Commission Regulation (EC) No. 802/2004 (as amended).

5 Form CO relating to the notification of a concentration pursuant to Council Regulation (EC) No. 139/2004, 2023 O.J. L 119/22; and Short Form CO for the notification of a concentration pursuant to Council Regulation (EC) No. 139/2004, 2023 O.J. L 119/22.

6 The Consolidated Jurisdictional Notice provides guidance on jurisdictional issues concerning the scope of application of the EC Merger Regulation. Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No. 139/2004 on the control of concentrations between undertakings, 2008 O.J. C95/1.

7 The Commission Notice on the definition of the relevant market for purposes of Community competition law provides guidance on the Commission's approach to product and geographical market definition: 'Commission Notice on the definition of the relevant market for the purposes of Community competition law', 1997 O.J. C372/5. In 2004, the Commission adopted guidelines on the appraisal of horizontal mergers, which explain the analytical framework applied to the assessment of concentrations between competitors: 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings', 2004 O.J. C31/05. In November 2007, the Commission adopted guidelines on the appraisal of non-horizontal mergers, which explain the analytical framework applied to the assessment of concentrations involving companies active in vertical or related markets: 'Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings', 2008 O.J. C265/6.

8 The Commission Best Practices Guidelines on the conduct of merger control proceedings explain matters relevant to the day-to-day handling of merger cases and the Commission's relationship with the merging parties and interested third parties: 'DG Competition Best Practices on the conduct of EC merger control proceedings'.

9 XXXIst Report on Competition Policy (2001), Paragraph 252.

and has underlined the common features of EU and US merger control, in particular the protection of consumer welfare and the pursuit of economic efficiencies. Commissioner Margrethe Vestager has maintained the Commission's commitment to 'a strong competition culture [that] keep[s] protectionism at bay'[10] and withstands political pressure.[11] In the wake of the Commission's prohibition of the *Siemens/Alstom* transaction in 2019, Commissioner Vestager rejected calls for the Commission to take greater account of political considerations and industrial policy,[12] so as to permit the creation of European 'champions':[13]

> *Competition policy ensures that we have open and fair competition in the European Single Market. It keeps our companies on their toes. A company is not going to be competitive abroad if it does not have any competition at home. Unchallenged companies are not likely to be innovative, flexible or efficient . . . in the global market place.*[14]

In recent years, the regulatory landscape has become more complex and the enforcement environment less accommodating. Among other things, the Commission has intervened more frequently to challenge reportable concentrations, echoing calls from US politicians,[15]

10 Margrethe Vestager, 'Vestager vows to resist protectionism, antitrust politicization', mLex, 29 September 2014.

11 Margrethe Vestager, 'Independence is non-negotiable', Introductory remarks at the Chatham House Competition Policy Conference, London, 18 June 2015 ('Independence is simply non-negotiable. Because we know that our legitimacy, our credibility and – ultimately – the impact of our action depend on it. . . . Independence means enforcing the rules impartially without taking instructions from anyone').

12 German Federal Ministry for Economic Affairs and Energy, press release, 'Altmaier and Le Maire adopt joint Franco-German Manifesto on Industrial Policy' (19 February 2019). See, also, Areki Yaiche, 'EU competition rules should push for "industrial champions", Merkel and Macron say', mLex, 18 May 2020.

13 See Joaquín Almunia, 'Merger Review: Past Evolution and Future Prospects', 2 November 2012 (Commission press release SPEECH/12/773). See, also, Nicholas Levy, David R Little and Henry Mostyn, 'European champions – Why politics should stay out of EU merger control', *Concurrences*, No. 2-2019.

14 Margrethe Vestager, 'Statement by Commissioner Vestager on the proposed acquisition of Alstom by Siemens and the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland', 6 February 2019 (Commission press release STATEMENT/19/889).

15 See, e.g., Senator Elizabeth Warren, 'Reigniting Competition in the American Economy', Keynote Remarks at New America's Open Markets Program Event, 29 June 2016 ('competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere'); and Senator Elizabeth Warren, Center for American Progress Ideas Conference: Keynote Remarks, 16 May 2017 ('It's time for us to do what Teddy Roosevelt did – and pick up the antitrust stick again. Sure, that stick has collected some dust, but the laws are still on the books').

economists[16] and regulators[17] for less permissive enforcement.[18] As explained below, the Commission has also endeavoured to adapt its jurisdictional thresholds and its approach to market definition to better capture and analyse concentrations involving the world's leading digital platforms.

II YEAR IN REVIEW

In recent years, the Commission's application of the EC Merger Regulation has become more interventionist: several concentrations have been prohibited or abandoned in the face of objections, others have been subject to wide-ranging commitments, and the Commission has explored ways in which the EC Merger Regulation's jurisdictional scope might be expanded, applied theories of harm that had not been actively pursued for several years, enforced the EC Merger Regulation's procedural rules more rigorously, and routinely required up-front buyers in remedies cases. The following primary developments and trends can be observed.

As to the jurisdictional scope of the EC Merger Regulation, the Commission has in recent years weighed various proposals to capture 'killer acquisitions' (i.e., acquisitions by dominant companies of nascent competitors with small revenues but significant potential). In March 2021, in an effort to address concerns about competitively significant transactions that were escaping scrutiny in the European Union, the Commission published guidance on the scope of Article 22 of the EC Merger Regulation that, with immediate effect, encouraged national agencies to refer transactions to the Commission for review, even where the applicable national thresholds were not met.[19] Since the new guidance came into effect,

16 See, e.g., Joseph Stiglitz, 'Competition and Consumer Protection in the 21st Century', Keynote at New York University School of Law event – 'Antitrust and Developing and Emerging Economies: Coping with Nationalism, Building Inclusive Growth', 16 October 2018 ('there has been an increase in the market power and concentration of a few firms in industry after industry, leading to an increase in prices relative to costs (in mark-ups). This lowers the standard of living every bit as much as it lowers workers' wages'); Konstantin Medvedovsky, 'Hipster Antitrust – A Brief Fling or Something More?', Competition Policy International, April 2018; J Stiglitz, 'America Has a Monopoly Problem—and It's Huge', The Nation, 23 October 2017; and Carl Shapiro, 'Antitrust in a Time of Populism', *International Journal of Industrial Organization*, 24 October 2017.

17 See US Department of Justice (DOJ), 'Justice Department and Federal Trade Commission Seek to Strengthen Enforcement Against Illegal Mergers', 18 January 2022 (DOJ press release 22-39). See, also, Federal Trade Commission (FTC), 'Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement', 18 January 2022 (Docket No. FTC-2022-0003).

18 See 'Speech by EVP Vestager at the Fordham's 49th Annual Conference on International Antitrust Law and Policy "Antitrust for the digital age"', 16 September 2022 (Commission press release SPEECH/22/5590).

19 Communication from the Commission, 'Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases', Brussels, 26 March 2021, C/2021/1959 final; and Staff Working Document, Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control, SWD(2021) 66 final.

the Commission has accepted five referrals on this basis.[20] The Commission's decision to accept jurisdiction to review the first of these transactions (Illumina's proposed acquisition of Grail) was appealed to the General Court. In July 2022, the General Court dismissed Illumina's appeal, finding that, following a referral by one or more national competition agencies that lack jurisdiction to review a transaction under their respective national merger control rules, the Commission may take jurisdiction over transactions that threaten to have 'significant effects on the structure of competition in the European Union'.[21] Shortly after the judgment was handed down, Commissioner Vestager announced that the Commission had 'a few acquisitions within our sights, that might be relevant candidates' for referral.[22] As a further 'safety net', the Court of Justice confirmed in March 2023 that transactions that have escaped merger control under EU and national law may be subject to Article 102 of the Treaty on the Functioning of the European Union (TFEU).[23]

As to the application of the EC Merger Regulation to the world's leading digital platforms, the Council of the European Union adopted the Digital Markets Act (DMA) on 14 September 2022.[24] Companies that are subject to the DMA will be required to inform the Commission of intended transactions where 'the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data' regardless of whether they meet Commission or Member States' merger control thresholds.[25] This provision will allow the Commission and Member States to better identify concentrations that may be suitable candidates for referral under Article 22 of the EC Merger Regulation.[26]

As to its substantive appraisal, in 2022, the Commission proposed updating the Market Definition Notice for the first time since its adoption in 1997, to reflect the significant

20 See *Illumina/GRAIL*, Case COMP/M.10188, Commission decision of 19 April 2021 (full decision text not yet available); *Meta (formerly Facebook)/Kustomer*, Case COMP/M.10262, Commission decision of 12 May 2021; *Viasat/Inmarsat*, Case COMP/M.10807, Commission decision of 26 July 2022 (full decision text not yet available); *Cochlear/Oticon Medical*, Case COMP M.10966, Commission decision of 6 December 2022 (full decision text not yet available); and *Adobe/Figma*, Case COMP/M.11033, Commission decision of 14 February 2023 (full decision text not yet available). By contrast with the situation in *Illumina/Grail*, which did not trigger merger control thresholds in any Member State, the other four transactions each met national merger control thresholds in at least one Member State.

21 *Illumina v. Commission*, Case T-227/21 EU:T:2022:447 (pending appeal, *Illumina v. Commission* (Case C-611/22 P) and *GRAIL v. Commission* (C-625/22)).

22 Nicholas Hirst, 'Illumina ruling clears way for EU to seize more killer acquisitions, says Vestager', 15 July 2022, mLex.

23 *TowerCast v. Autorité de la concurrence*, Case C-449/21 EU:C:2023:207; and Court of Justice press release 46/23 of 16 March 2023.

24 Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, 2022 O.J. L 265/1.

25 Digital Markets Act (DMA), Article 14(1).

26 See ibid., Article 14(2), which requires companies subject to the DMA to provide a 'list of the Member States concerned by the concentration', and Article 14(4), under which the Commission will inform EU Member State agencies of information received pursuant to Article 14 of the DMA.

developments of the intervening years, particularly the emergence of digital markets and new ways of offering goods and services.[27] The proposed changes provide new or additional guidance on, among other things:

a the relevance of non-price parameters of competition, such as quality or the level of innovation;

b the forward-looking application of market definition, especially in markets that are expected to undergo structural transitions;

c market definition in digital markets, including multi-sided markets and digital eco-systems;

d market definition in innovation-intensive markets, clarifying how markets should be assessed where companies compete on innovation, including through pipeline products; and

e the type of evidence used to define markets, such as internal documents, and their probative value.

As to its enforcement practice, between 2021 and April 2023, the Commission prohibited two concentrations[28] and conditionally approved several others on the basis of far-reaching remedies.[29] The Commission also continued to examine conglomerate[30] and vertical[31] effects. In September 2022, the Commission for the first time prohibited a transaction solely on the basis of vertical effects.[32]

27 See 'Competition: Commission seeks feedback on draft revised Market Definition Notice', Commission press release IP/22/6528 of 8 November 2022.

28 *Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering*, Case COMP/M.9343, Commission decision of 13 January 2022; and *Illumina/GRAIL*, Case COMP/M.10188, Commission decision of 6 September 2022.

29 See, e.g., *Cargotec/Konecranes*, Case COMP/M.10078, Commission decision of 24 February 2022; *Ali Group/Welbilt*, Case COMP/M.10431, Commission decision of 17 June 2022; *Bouygues/Equans*, Case COMP/M.10575, Commission decision of 19 July 2022; *D'Ieteren/PHE*, Case COMP/M.10687, Commission decision of 2 August 2022; *Celanese/DuPont (Mobility & Materials Business)*, Case COMP/M.10721, Commission decision of 11 October 2022; *KPS/Real Alloy*, Case COMP/M.10702, Commission decision of 18 October 2022; *Philip Morris International/Swedish Match*, Case COMP/M.10792, Commission decision of 25 October 2022; *SalMar/NTS*, Case COMP/M.10699, Commission decision of 31 October 2022; *ALD/LeasePlan*, Case COMP/M.10638, Commission decision of 25 November 2022; *SIKA/MBCC Group*, Case COMP/M.10560, Commission decision of 8 February 2023; and *Meta (formerly Facebook)/Kustomer*, Case COMP/M.10262, Commission decision of 13 October 2022.

30 See, e.g., *Broadcom/VMware*, Case COMP/M.10806; and Commission press release IP/23/2146 of 12 April 2023.

31 See, e.g., *Microsoft/Activision Blizzard*, Case COMP/M.10646, Commission decision of 15 May 2023 (full decision text not yet available); and Commission press release IP/23/2705 of 15 May 2023.

32 *Illumina/GRAIL*, Case COMP/M.10188, Commission decision of 6 September 2022; see also 'Mergers: Commission prohibits acquisition of GRAIL by Illumina', Commission press release IP/22/5364 of 6 September 2022 (Commission was concerned that Illumina's acquisition of GRAIL, a US-based start-up specialising in early cancer detection tests, would give Illumina the ability and incentive to foreclose GRAIL's rivals from using Illumina's next-generation sequencing technology to develop early cancer detection tests).

As to factors that the Commission may consider in assessing reportable transactions, it has signalled a readiness to take positive account of a concentration's effects on sustainability.[33] In principle this may permit the Commission to consider the positive environmental effects of a transaction, for example in reducing carbon emissions or lower pollution, as a countervailing efficiency that could outweigh any adverse effect on competition that might otherwise result from the concentration in question.

As to international cooperation, since 1 January 2021, companies have had to contend with parallel reviews of transactions by the United Kingdom's Competition and Markets Authority (CMA). Although the Commission and the CMA have not signed a cooperation agreement as yet, they have cooperated in many cases and frequently request parties to provide confidentiality waivers to allow inter-agency cooperation. In a small number of cases, the Commission and the CMA have reached divergent conclusions. In early 2022, the Commission conditioned its approval of the *Cargotec/Konecranes* transaction on the divestment of a package of assets owned by each of the merging parties,[34] which the CMA subsequently rejected in a decision prohibiting the transaction.[35] In April 2023, the CMA prohibited Microsoft's proposed acquisition of Activision Blizzard,[36] which the Commission subsequently approved on the basis of a package of behavioural remedies that the CMA had rejected.[37] The divergence between the Commission's and CMA's assessments attracted extensive media attention[38] and caused the heads of both agencies to publicly defend their respective positions.[39]

33 See Margrethe Vestager, 'The Green Deal and competition policy,' 22 September 2020 (Commission press release SPEECH/20/2913); Margrethe Vestager, 'Competition policy in support of the Green Deal', 10 September 2021 (Commission press release SPEECH/21/7754). See, also, Maurits Dolmans, 'Sustainable Competition Policy', [2020] 5 – Competition Law and Policy Debate, pp. 5–6.

34 'Mergers: Commission clears the merger of Cargotec with Konecranes, subject to conditions', Commission press release IP/22/1329 of 24 February 2022.

35 Competition and Markets Authority (CMA), *Anticipated merger between Cargotec Corporation and Konecranes Plc*: *Final Report*, 31 March 2022.

36 CMA, *Anticipated acquisition by Microsoft of Activision Blizzard, Inc.*: *Final Report*, 26 April 2023. See CMA press release, 'Microsoft/Activision deal prevented to protect innovation and choice in cloud gaming', 26 April 2023 ('Microsoft's proposal contained a number of significant shortcomings connected with the growing and fast-moving nature of cloud gaming services').

37 *Microsoft/Activision Blizzard*, Case COMP/M.10646, Commission decision of 15 May 2023 (full decision text not yet available); and Commission press release IP/23/2705 of 15 May 2023 ('The commitments fully address the competition concerns identified by the Commission and represent a significant improvement for cloud gaming as compared to the current situation').

38 See, e.g., Javier Espinoza and Tim Bradshaw, 'EU clears Microsoft-Activision Blizzard deal despite UK's decision to block acquisition', *Financial Times*, 15 May 2023. See also Steffan Powell, 'Microsoft's Activision takeover approved by EU after UK veto', British Broadcasting Corporation15 May 2023, and Julie Masson, 'EU Microsoft/Activision Blizzard clearance puts UK merger divergence back into spotlight', Global Competition Review, 15 May 2023.

39 See Simon Zekaria, 'UK's block on Microsoft-Activision deal not at behest of other regulators, CMA chief says', mLex, 16 May 2023 ('Cardell [the CMA's chief executive] said while the EU merger regulator had "agreed" with the CMA that the deal "would give rise to competition concerns," it had taken a different view on the remedy proposed and chose to accept it. "They have reached their own view," she said. "We remain of the view that it wasn't appropriate to accept that remedy"'); and Margrethe Vestager, 'EVP Vestager keynote speech at the International Forum of the Studienvereinigung Kartellrecht: "Recent Developments in EU merger control"', 25 May 2023 (Commission press release SPEECH/23/2923) ('Where we diverged with the CMA was on remedies. We accepted a 10-year free license to consumers to

Finally, at EU and national level, various measures have been adopted, or are in the process of being adopted, to protect European companies from being acquired by undertakings that may raise national security concerns[40] and to address the effects of public subsidies on the Union's single market.[41] In respect of public subsidies, in December 2022, the Council of the European Union adopted the Foreign Subsidies Regulation,[42] which, subject to certain turnover and financial thresholds being met, requires the notification of concentrations to the Commission where one of the parties has received foreign financial contributions. The new rules – which will operate in parallel with the EC Merger Regulation – allow the Commission to consider whether foreign financial contributions constitute a subsidy that distorts competition in the European Union.

III THE MERGER CONTROL REGIME

The EC Merger Regulation is based on four main principles: (1) the exclusive competence of the Commission to review concentrations of EU dimension; (2) the mandatory notification of such concentrations; (3) the consistent application of market-oriented, competition-based criteria; and (4) the provision of legal certainty through timely decision-making. The principal provisions of the EC Merger Regulation are summarised below.

The EC Merger Regulation applies to concentrations (i.e., lasting changes in control). The concept of a concentration includes mergers, acquisitions and the formation of jointly controlled, autonomous, full-function joint ventures. The concept of control is defined as the possibility to exercise 'decisive influence'.

All concentrations that meet prescribed jurisdictional size tests are deemed to have EU dimension and, as such, are subject to mandatory notification under the EC Merger Regulation, irrespective of whether they have any effect in the European Union. The Commission has exclusive jurisdiction over such transactions (the one-stop-shop principle).

Concentrations that fall below the EC Merger Regulation's thresholds may be subject to national merger control rules. In addition, any Member State may ask the Commission to allow its national competition agency to review a concentration that has a European Union dimension. Parties to a concentration may petition the Commission to have a transaction that is reportable at the European Union level referred to one or more national competition agencies, or to have the Commission review a transaction that would ordinarily be subject to national merger control rules. One or more Member State agencies may also refer to the

allow them to stream all Activision games for which they have a license via any cloud service. And why did we do this instead of blocking the merger? Well, to us, this solution fully addressed our concerns. And on top of that, it had significant procompetitive effects.'). See also Jon Menon, 'Antitrust regulators' divergence on deals shouldn't be overstated', UK CMA's Raftery says', mLex, 25 May 2022.

40 As at February 2023, 18 of the 27 EU Member States had implemented domestic foreign direct investment (FDI) regimes. An overview of the national screening mechanisms currently in place is available at https://circabc.europa.eu/rest/download/7e72cdb4-65d4-4eb1-910b-bed119c45d47 (accessed 12 June 2023).

41 Commission Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market (COM(2021) 223 final).

42 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, 2022 O.J. L330/1.

Commission concentrations that would otherwise be subject to national competition rules and, under the Commission's new guidance, concentrations that do not meet any national thresholds at all.

The EC Merger Regulation contains deadlines for the Commission's review of reportable concentrations, although those deadlines have been progressively extended and, particularly in complex cases, the Commission often encourages merging parties to engage in lengthy pre-notification discussions and may stop the clock to secure more time. The large majority of concentrations are approved at the end of an initial 25-working-day review period (Phase I). If the Commission has serious doubts about a concentration's compatibility with EU competition rules, it opens an in-depth (Phase II) review that lasts 90 working days, extendable to 125 working days. Both periods may be extended in situations where commitments are offered to address competition concerns identified by the Commission. Absent a derogation, reportable concentrations may not be implemented until they have been approved and, in cases of breach, the Commission may take remedial action. Fines may also be imposed for failure to notify, late notifications and the provision of incorrect or misleading information.

The substantive test under the EC Merger Regulation is whether a concentration 'significantly impede[s] effective competition in the common market or in a substantial part of it . . . in particular as a result of the creation or strengthening of a dominant position'.[43] The Commission's appraisal under the EC Merger Regulation has two main elements: definition of the relevant market and competitive assessment of the concentration. The Commission generally focuses first on unilateral exercises of market power and then on whether a concentration may have coordinated effects arising from tacit collusion. Horizontal mergers (i.e., those involving firms that are active in the same market) have accounted for the large majority of challenged transactions, although the Commission has also examined (and, on occasion, has prohibited) concentrations that have had anticompetitive vertical or conglomerate effects.

The Commission is not empowered to exempt or authorise, on public interest or other grounds, concentrations that are considered incompatible with the common market; however, it may take positive account of efficiencies. The Commission may also condition its approval of transactions on undertakings or commitments offered by the merging parties.

An appraisal under Article 101 of the TFEU, which prohibits anticompetitive agreements, may also be warranted under the EC Merger Regulation in respect of full-function joint ventures that give rise to spill-over effects between their parent companies. Non-full-function joint ventures fall outside the EC Merger Regulation and may be subject to Article 101 or 102 of the TFEU, which prohibit anticompetitive agreements and abusive conduct by dominant companies, as well as national competition rules.

At the end of every investigation, the Commission publishes a reasoned decision (other than in cases that are subject to the simplified procedure[44]). The EC Merger Regulation has therefore produced a rich and extensive jurisprudence that provides guidance on a range of issues, including the competitive assessment of a wide variety of transactions affecting a broad array of product and geographical markets.

The Commission has also adopted a pragmatic, open and informal approach to the EC Merger Regulation's application. The Regulation provides opportunities for both merging

43 EC Merger Regulation at [5] and [26].

44 See https://competition-policy.ec.europa.eu/mergers/procedures_en#simplified-procedure (accessed 12 June 2023).

parties and third parties to be heard. The Commission encourages customers, competitors, suppliers and other interested parties to have an active role in the EU merger control process. In practice, third parties play an important part in EC merger proceedings and the Commission attaches considerable importance to their views.

The European Union has an administrative system of merger control, where the Commission investigates and adjudicates. Commission decisions are subject to judicial review by the EU courts, whose contribution to EU merger control has been significant, particularly in recent years, where several Commission decisions have been subject to far-reaching review.[45]

Between September 1990, when the EC Merger Regulation entered into force, and 31 December 2022, the Commission had rendered around 8,500 decisions, of which 7,783 (92 per cent) approved concentrations unconditionally in Phase I; 56 (less than 1 per cent) found the Regulation to be inapplicable; 348 (4 per cent) approved transactions subject to undertakings given in Phase I;[46] 63 (less than 1 per cent) approved transactions unconditionally during Phase II; and 143 (less than 2 per cent) approved concentrations subject to undertakings given in Phase II. As at 31 December 2022, the Commission had rendered 32 prohibition decisions,[47] representing less than 0.4 per cent of all notified

45 In addition to reviewing appeals of Commission decisions, the European Union courts have also issued a number of important judgments following preliminary references from national courts, most recently in *Austria Asphalt v. Bundeskartellanwalt*, Case C-248/16 EU:C:2017:643 (clarifying the circumstances in which the EC Merger Regulation applies to changes from joint to sole control) and *Ernst & Young*, Case C-633/16 EU:C:2018:371 (clarifying EU rules on gun-jumping).

46 Since 1 March 1998, the Commission has had explicit authority to condition decisions rendered at the end of the initial investigative period on commitments.

47 *Aerospatiale-Alenia/de Havilland*, Case IV/M.53, Commission decision of 2 October 2 1991; *MSG Media Service*, Case IV/M.469, Commission decision of 9 November 1994; *Nordic Satellite Distribution*, Case IV/M.490, Commission decision of 19 July 1995; *RTL/Veronica/Endemol*, Case IV/M.553, Commission decision of 20 September 1995; *Gencor/Lonrho*, Case IV/M.619, Commission decision of 24 April 1996; *Kesko/Tuko*, Case IV/M.784, Commission decision of 20 November 1996; *Saint-Gobain/Wacker-Chemie/NOM*, Case IV/M.774, Commission decision of 4 December 1996; *Blokker/Toys 'R' Us (II)*, Case IV/M.890, Commission decision of 26 June 1997; *Bertelsmann/Kirch/Premiere*, Case IV/M.993, Commission decision of 27 May 1998; *Deutsche Telekom/BetaResearch*, Case IV/M.1027, Commission decision of 27 May 1998; *Airtours/First Choice*, Case IV/M.1524, Commission decision of 22 September 1999; *Volvo/Scania*, Case COMP/M.1672, Commission decision of 14 March 2000; *MCI WorldCom/Sprint*, Case COMP/M.1741, Commission decision of 28 June 2000; *SCA/Metsä Tissue*, Case COMP/M.2097, Commission decision of 31 January 2001; *General Electric/Honeywell*, Case COMP/M.2220, Commission decision of 3 July 2001; *Schneider Electric/Legrand*, Case COMP/M.2283, Commission decision of 10 October 2001; *CVC/Lenzing*, Case COMP/M.2187, Commission decision of 17 October 2001; *Tetra Laval/Sidel*, Case COMP/M.2416, Commission decision of 30 October 2001; *ENI/EDP/GDP*, Case COMP/M.3440, Commission decision of 9 December 2004; *Ryanair/Aer Lingus*, Case COMP/M.4439, Commission decision of 27 June 2007; *Olympic/Aegean Airlines*, Case COMP/M.5830, Commission decision of 26 January 2011; *Deutsche Börse/NYSE Euronext*, Case COMP/M.6166, Commission decision of 1 February 2012; *UPS/TNT Express*, Case COMP/M.6570, Commission decision of 30 January 2013; *Ryanair/Aer Lingus (III)*, Case COMP/M.6663, Commission decision of 27 February 2013; *Hutchison 3G UK/Telefónica UK*, Case COMP/M.7612, Commission decision of 11 May 2016; *Deutsche Börse/London Stock Exchange Group*, Case COMP/M.7995, Commission decision of 29 March 2017; *Heidelbergcement/Schwenk/Cemex Hungary/Cemex Croatia*, Case COMP/M.7878, Commission decision of 5 April 2017;

concentrations, six of which have been overturned on appeal by the EU courts.[48] Around 240 notifications have been withdrawn, of which 53 were withdrawn following the opening of Phase II investigations, in many instances to avoid prohibition decisions. Thus, around 1 per cent of all transactions notified under the EC Merger Regulation have been either prohibited or abandoned in the course of Phase II. The Commission's 'challenge rate' is broadly comparable with those of other major jurisdictions.

IV OTHER STRATEGIC CONSIDERATIONS

During the past decade, the Commission has pursued various initiatives designed to increase coordination, facilitate convergence and avoid divergent outcomes with other agencies around the world. Perhaps the most important of these is an agreement between the European Union and the United States that was intended to promote cooperation between their respective competition agencies.[49] This agreement has led to high-level dialogue at political, senior management and academic level about convergence on jurisdictional, substantive and procedural issues.[50]

The last significant disagreement between the Commission and US agencies occurred in 2001 in connection with the *General Electric/Honeywell* transaction.[51] The US Department of Justice concluded that, subject to certain divestitures in those areas where the merging parties did compete, the transaction would not harm competition; however, the Commission,

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Wieland/Aurubis Rolled Products/Schwermetall, Case COMP/M.8900, Commission decision of 5 February 2019; *Siemens/Alstom*, Case COMP/M.8677, Commission decision of 6 February 2019; and *Tata Steel/ThyssenKrupp/JV*, Case COMP/M.8713, Commission decision of 11 June 2019; *Hyundai Heavy Industries Holdings/Daewoo Shipbuilding & Marine Engineering*, Case COMP/M.9343, Commission decision of 1 March 2022; and *Illumina/GRAIL*, Case COMP/M.10188, Commission decision of 6 September 2022.

48 *Airtours plc v. Commission* (*Airtours*), Case T-342/99 EU:T:2002:146; *Schneider Electric v. Commission* (*Schneider*), Case T310/01 EU:T:2002:254; *Tetra Laval v. Commission* (*Tetra Laval*), Joined Cases T-5/02 and T-80/02 EU:T:2002:264, upheld on appeal in *Commission v. Tetra Laval B.V.*, Case C-13/03 P EU:C:2005:88; *MCI v. Commission*, Case T310/00 EU:T:2004:275; *UPS*, Case T-194/13 EU:T:2017:144, upheld on appeal in *UPS CJ*, Case C-265/17P EU:C:2019:23; and *Three/O2*, Case T-399/16 EU:T:2020:217.

49 Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, 1995 O.J. L95/47.

50 See, e.g., Joaquín Almunia, former Competition Commissioner, 'Trends and Milestones in Competition Policy since 2010', AmCham EU's 31st Annual Competition Policy Conference, Brussels, 14 October 2014 (Commission press release SPEECH/14/689) (Commission disclosed it had 'cooperated with other agencies in around half of [its] past significant merger cases'). See also Margrethe Vestager, 'Merger review: Building a global community of practice', ICN Merger Workshop, Brussels, 24 September 2015 ('At present, the European Commission has some form of cooperation with non-EU agencies in more than half of all cases that involve remedies or require in-depth reviews – what we call "second phase"').

51 *General Electric/Honeywell*, Case COMP/M.2220, Commission decision of 3 July 2001. In 2000, Senators DeWine and Kohl had written to then Commissioner Monti, voicing concerns that the Commission's competition policy might discriminate against US companies and suggesting that the European Union might be influenced by 'pan-European protectionism rather than by sound competition policy'. Professor Monti dismissed the concerns as being 'wholly unfounded' and provided a breakdown of transactions challenged by the Commission, showing that, of the 13 concentrations that had been prohibited as at October 2000, only one had involved a US company.

prohibited the transaction, prompting criticism from US politicians and regulators.[52] This disagreement represented the most significant divergence between Commission and US regulators since *Boeing/McDonnell Douglas*.[53] Since then, the Commission and the US agencies have endeavoured to avoid similar disagreements, and the years following *General Electric/Honeywell* have been characterised by 'quiet and business-like cooperation'.[54]

Between 2017 and 2019, the *Tronox/Cristal* saga provided a salutary perspective on the complex challenges that can arise in transactions that raise issues on both sides of the Atlantic. In December 2017, the US Federal Trade Commission (FTC) sued to block the transaction shortly after the Hart-Scott-Rodino waiting period expired but did not seek a preliminary injunction as the Commission's review was ongoing (and so the deal could not yet close). In July 2018, *Tronox/Cristal* was cleared by the Commission, subject to commitments (including an up-front buyer requirement). Similar divestitures were reportedly offered to the FTC but an agreement was not reached. In December 2018, an administrative judge blocked the transaction in the United States based on a complaint by the FTC. Following a government shutdown that delayed the US process further, a consent agreement was finally reached with the FTC in April 2019, based on North American divestitures similar to those agreed one year earlier with the Commission.[55]

In practice, counsel and companies should assume that the Commission and US antitrust agencies, as a matter of course, will cooperate in investigating transactions subject to parallel review. Counsel and companies should ensure, therefore, that submissions made in different jurisdictions are consistent. Given the now inevitable production of documents in Europe, EU counsel should cooperate with US counsel in respect of document production in complex cases.

V OUTLOOK AND CONCLUSIONS

The Commission's application of the EC Merger Regulation is widely considered to have been a success. Although there will inevitably be legal and practical developments that shape its future application, including advances in forensic tools and economic modelling, the Regulation is an increasingly mature legal instrument. At least as importantly, Commission practice has developed to a point where counsel are generally able to predict with reasonable

52 A former senior US regulator characterised the divergent results as reflecting an 'absolutely fundamental disagreement' between the US and EU authorities (Charles A James, 'International Antitrust in the Bush Administration', Canadian Bar Association, Annual Fall Conference on Competition Law, Ottawa, Canada, 21 September 2001), while another described the Commission's decision as 'not strongly grounded in economic theory or empirical evidence' (William J Kolasky, 'US and EU Competition Policy: Cartels, Mergers, and Beyond, Council for the United States and Italy', 25 January 2002).

53 *Boeing/McDonnell Douglas*, Case IV/M.877, Commission decision of 30 July 1997.

54 Mario Monti, 'Convergence in EU–US Antitrust Policy Regarding Mergers and Acquisitions: An EU Perspective', UCLA Law First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions, Los Angeles, 28 February 2004 (Commission press release SPEECH/04/107). See, however, Pallavi Guniganti, 'US and EU converge on mergers but not unilateral conduct, enforcers say', Global Competition Review, 27 January 2017.

55 Pallavi Guniganti, 'Tronox appeases FTC with Cristal divestiture', Global Competition Review, 11 April 2019.

certainty the analytical framework that will be applied in any given case, the economic and other evidence that will likely be considered probative, the duration of the Commission's review and the probable outcome.

The challenges for the coming years will be to protect the Commission's independence from pressure to inject political oversight and industrial policy into merger control; to ensure that the certainty and predictability resulting from the EC Merger Regulation's bright-line jurisdictional thresholds and the established division of powers between the Commission and Member State agencies are not jeopardised by the referral mechanism provided for in the Commission's 2021 Guidance Paper;[56] to continue to identify ways in which the administrative burden placed on notifying parties can be reduced and thereby enable more transactions to be approved quickly; and to continue to render sensible, well-reasoned decisions substantiated by sound data and hard evidence.

The Commission will want to ensure that calls to intervene more often in respect of concentrations involving pharmaceutical companies and the world's leading digital platforms do not result in any dilution of the EC Merger Regulation's substantive test or lowering of the evidentiary bar prescribed by the EU courts. Finally, the covid-19 pandemic has affected many markets and many companies. In the coming years, the Commission may be confronted with transactions involving companies that were adversely affected by the pandemic. The challenge for the Commission will be to distinguish those markets that have experienced permanent structural change from those where the effects were temporary.

56 See footnote 19, above.